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# RESOLVING TITLE CONFLICTS IN REGISTERED LAND

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## A. INTRODUCTION

For vast areas of the world, registration of title is the cornerstone of land marketability. The English registration system and its offspring, as well as the widespread Torrens systems, were designed specifically to give comfort to prospective purchasers of land by controlling the flow of information relevant to determining title.<sup>1</sup> They create incentives for owners to enter title information onto the register, give publicity to the registered information, validate the content of the register and suppress the relevance of much unregistered material in favour of the purchaser.<sup>2</sup> The intended result is that market transacting should be stimulated by the lure held out to the prospective purchaser: an otherwise defective title becomes good when the purchaser is entered as new proprietor. A prominent feature of the English model of land registration is that it does not take this idea of indefeasible registered title to extremes. Although it vests title in a person by the act of registration, the title may be recalled through the provisions for rectification of the register in the event of mistake.<sup>3</sup>

The role of rectification in resolving title conflicts has become the object of heightened scrutiny, particularly as increasing attention is paid to land title fraud, an event which engages the rectification power under the English model regardless of whether the registered proprietor is implicated in the fraud. The orthodox position is that the policy of protecting purchasers, which is the very foundation of land registration, demands that a purchaser's title be secure against any rectification claims stemming from defects that were not disclosed by the register at the time of purchase. Consistently with this account, the prevailing interpretative model for the Land Registration Act 2002 (which contains no explicit statutory prohibition on rectifying against purchasers of mistaken titles) would fully immunise remote purchasers from the claims of a displaced former owner and would deny any role for rectification in resolving the title conflict.

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<sup>1</sup> "Second Report of the Commissioners Appointed to Inquire into the Law of England respecting Real Property" (1830, H.C.P. xi.1) p.18; "Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land" (1857, c.2215) p.8; "Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act" (1870, c.20) para.64.

<sup>2</sup> D. Baird & T. Jackson, "Information, Uncertainty and the Transfer of Property" (1984) 13 J.L.S. 299; D. Baird "Notice Filing and the Problem of Ostensible Ownership" (1983) 12 J.L.S. 53 at 62-4; T.J. Miceli et al., "Title Systems and Land Values" (2002) 45 J.L.E. 565; B. Arrunada & N. Garoupa, "The Choice of Titling System in Land" (2005) 48 J.L.E. 709.

<sup>3</sup> See Land Transfer Act 1897 s.7(2); replaced by Land Registration Act 1925 ss.82 and 83; now Land Registration Act 2002 Sch.4.

Recently, however, this position has been called into question. Case law has confirmed that the rectification power can be exercised against remote purchasers.<sup>4</sup> Within the context of a registration system motivated solely by the need to protect purchasers from title flaws, it is for some a source of astonishment that there should be any judicial ambivalence towards the demands of purchaser protection. Nevertheless, this article supports the case law development in opposing the preponderance of practitioner works and academic literature, and puts forward the argument, at first glance counter-intuitive, that registered land titles should be made less secure by an expansive interpretation of the rectification power. It recommends that a former proprietor who has been wrongly ousted by a mistaken register change should not necessarily have his claim guillotined upon the intervention of a purchaser but should be given a forum in which to put his case for recovery.

The article demonstrates that the case for and against purchaser protection is more complex than the standard account of land registration would suggest and that the expansive reading of the rectification power has been dismissed too readily. It examines the criteria which could influence the policy decision on how best to resolve the tension between preserving vested rights and protecting purchasers in registered land title disputes. The context of registration presents the opportunity to reconsider the traditional bases for resolving title conflicts. Employing insights from law and economics and theories of justice, the article considers how title conflict rules could be programmed by efficiency goals and their impact on the market. It proposes that the special environment of title registration, with its capacity for mistaken allocation, justifies using the dispute resolution framework of rectification, unique among title conflict rules in its highly discretionary character, even to the prejudice of a purchaser. This would answer the pressing controversy hanging over the true interpretation of the rectification provision, and would offer a more sensitive and subtle relationship between the calls for durability of property and the protection of purchasers' expectations.

## **B. CONTEMPORARY DEBATE OVER MISTAKEN ENTRIES**

The Land Registration Act 2002 declares that the court may order alteration of the register for the purpose of correcting a mistake.<sup>5</sup> There are no comprehensive definitions of mistake and correction,<sup>6</sup> prompting two interpretative options which may be identified as the pre-eminent contenders for resolving the conundrum of whether rectification jurisdiction is exercisable against third parties. The first option proposes that the register cannot be rectified to the prejudice of an innocent purchaser who takes a disposition from a mistakenly-entered proprietor; instead, the purchaser retains ownership, and the original owner whose title was impaired by the mistake is able to claim indemnity. At the enactment of the Land Registration Act 2002 this was the dominant perspective and it has not encountered significant scholarly opposition. This article rejects it in favour of the second option, which proposes that the register

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<sup>4</sup> Notably *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] EWLandRA 2009/1459; see also *Gold Harp Properties Ltd v MacLeod* [2014] EWCA Civ 1084. For a full case review, revealing the lack of consensus, see E. Lees, "Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002" (2013) 75 M.L.R. 62.

<sup>5</sup> Land Registration Act 2002 Sch.4 para.2(1)(a). The terms are set out below. A similar power is given to the registrar in para.5(a).

<sup>6</sup> Except that for the purpose of indemnity, mistake includes "anything mistakenly omitted": Land Registration Act 2002 Sch.8 para.11(1).

may be rectified to the prejudice of the innocent purchaser taking from the mistakenly-entered proprietor; the original owner may be restored to the register and the purchaser would then receive indemnity. This solution is under-represented in the academic literature and will be advanced here.<sup>7</sup>

At first glance the statutory rectification power appears to be unconstrained, but one set of relevant provisions - which is understood by many commentators to have a critical role in implicitly controlling its remit - comprises the rules about statutory vesting and owner's powers. Section 58 of the Act declares that entering a person in the register as proprietor of a legal estate has the effect of statutorily vesting the estate in him and section 23 gives that proprietor the power to make a disposition of the estate. It could be observed that the aim of the two sections is to allocate interests in registered land, and that they have nothing to do with the question of whether those interests are liable to be taken away at some point in the future by rectification, but the prevailing view in the literature has been that sections 58 and 23 do indeed influence rectification. It is typically argued that once a proprietor is mistakenly entered, a disposition under the statutory owner's powers will cleanse the register of the taint of mistake because the donee takes title by virtue of statutory authority, and, having been sanctified by statute, there can be no basis for challenging the title through rectification.<sup>8</sup> In this way the rectification power is curtailed by a process of interpretation by reference to the idea of statutory empowerment. The perceived advantage of this limit to the scope of rectification is that it comprehensively protects from rectification any registered successor to the land who is one step removed from the mistake, and it thus makes the register an entirely reliable source of information for a prospective purchaser.

Despite the attractiveness of the basic statutory empowerment theory and its ability to fortify titles by obliterating mistakes, it requires a little finesse in order to avert a potential danger to the original owner. The danger is that the statutory empowerment idea might be interpreted as interfering with the state compensation scheme under the indemnity clause. Indemnity is awarded wherever a person suffers loss by reason of (a) rectification, or (b) an unrectified mistake whose correction would involve rectification.<sup>9</sup> The dual limbs of the indemnity clause are both founded upon the event of mistake, in the former limb by reference to "rectification" which presupposes a mistake<sup>10</sup>, and in the latter limb by express mention. This correlation between rectification and indemnity is important in controlling the statutory empowerment theory. If, for example, the original owner's estate is mistakenly registered to RP1, who exercises statutory owner's powers by transferring to RP2, then the absence of any mistake in entering RP2 means that his title cannot be rectified. But the absence of mistake would equally appear to preclude any claim to indemnity,<sup>11</sup> thus the original owner's rights would have evaporated without compensation in an entirely unacceptable deprivation of property. The statutory

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<sup>7</sup> See also A. Nair, "Morality and the Mirror" in S. Bright (ed.), *Modern Studies in Property Law* (Hart, 2011), p.268.

<sup>8</sup> D.J. Hayton, *Registered Land* 3rd edn (Sweet & Maxwell, 1981), p.180; E.J. Cooke, *The New Law of Land Registration* (Hart, 2003), pp.125-127; D. Fox, "Forgery and Alteration of the Register under the Land Registration Act 2002" chapter 2 in E.J. Cooke (ed), *Modern Studies in Property Law* (Hart, 2005), p.29; E.J. Cooke, *Land Law* 2nd edn (OUP, 2012), p.68; E. Lees (above, footnote 4) at 73.

<sup>9</sup> Land Registration Act 2002 Sch.8 para.1(1)(a), (b).

<sup>10</sup> Land Registration Act 2002 Sch.8 para.11(2)(a).

<sup>11</sup> This assumes "mistake" to be interpreted consistently in the alteration and indemnity clauses; to allocate different meanings would be undesirable in contexts so intertwined in subject matter.

empowerment theory consequently appears to be antithetical to the scheme of compensation. This appears to put the interpreter on the prongs of Morton's fork - one could either acknowledge that RP1's disposition was validated by the statutory owner's powers and thereby deprive the original owner of both land and compensation, or one could admit indemnity and thereby imply that the owner's powers had no real effect in cleansing a mistake. Either way, the interpreter would seem to be mangling some plain words of the statute.

In response to this crisis, two alternative interpretations of a rather more advanced nature have sprung up. Both of them manage to ensure that the deprivation of property is compensated by indemnity, while avoiding conflict with the rules of statutory vesting and owner's powers. Under the first proposed interpretation, the indemnity provision is the centre of attention. It proceeds on the basis that the existence of a mistake is cleansed by the exercise of owner's powers, and the rectification power cannot be asserted against the disponee RP2, which will be termed the "truncated rectification" model. Although this model dictates that there is no new mistake in entering RP2, it could be proposed that the old mistake in entering RP1 was the ultimate cause of the loss to the original owner, and indemnity is available for the loss due to that old mistake.<sup>12</sup> According to the second interpretation, however, it is the rectification provision which should be the focus of attention. It proposes that, although the owner's powers solution holds there is no mistake in entering RP2, the entry of RP1 was a mistake, and it is that old mistake which can be corrected by allowing rectification against RP2.<sup>13</sup> Because the alteration to the register in these circumstances would be regarded as correcting a mistake, it would lead to the availability of indemnity. In this model of rectification, the long arm of the law of rectification reaches beyond the mistaken entry of RP1 to allow correction of the registered title of RP2 and all subsequent registered proprietors. This will be described as the "long-arm" rectification model.

Those are the two rival candidates for the interpretation of the Act. Their point of divergence lies in their effect on RP2, the innocent purchaser. The truncated rectification model gives RP2 perfect immunity, whereas the long-arm rectification model subjects RP2 to the risk of a discretionary deletion from the register. The case for preferring the truncated rectification model has been made on interpretative grounds.<sup>14</sup> This article will now examine the drawbacks of that model before advancing the policy grounds for preferring the long-arm rectification model.

### C. THE POVERTY OF TRUNCATED RECTIFICATION

It was noted above that the rules of statutory vesting and owner's powers have been understood to dictate not only how proprietary interests are allocated in registered land, but also whether those interests are susceptible to rectification. This section will identify the disadvantages of that approach.

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<sup>12</sup> See *Stewart v Lancashire Mortgage Corporation* [2010] EWLandRA 2009/0086, at [71], [78].

<sup>13</sup> See *Ajibade v Bank of Scotland* [2008] EWLandRA 2006/0163, *Barclays Bank plc v Guy (No. 2)* [2010] EWCA Civ 1396; [2011] 1 W.L.R. 681, *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] EWLandRA 2009/1459. Contrast *Racoon Ltd v Turnbull* [1997] A.C. 158 at 165 where a mistaken entry did not justify the correction of a non-mistaken entry; opposed in Law Commission "Land Registration for the Twenty-First Century: A Consultative Document" (Law Com. No. 254, 1998) para.8.45.

<sup>14</sup> E. Lees (above, footnote 4) at 80-82.

Before the advent of title registration, English property law had developed a wide range of rules to resolve the dispute between owners and putative acquirers, from the rule of *nemo dat*, to the rules of equity's darling, trustee notification, postponement for estoppel, and others. Title disputes were resolved by reference to one or more of these factors: the type of interest held by the owner, the degree of care exercised by the owner, the extent of warning to others, the type of interest taken by the acquirer, the acquirer's good faith, mental state, carefulness, method of acquisition, payment of consideration. The use of all these factors builds up a picture of impressive sophistication in the traditional means for resolving disputes over the allocation of property rights. The tension between the owner and acquirer is resolved by examining a complex of features pertaining to both sides, discriminating between them by inquiring into their respective holdings, fault, care, notice, and so on.

In striking contrast, the rule that title vests by the sole fact of registration necessarily precludes any appraisal whatsoever of the relative merits of the parties or the context of their dispute. The truncated rectification model would extend this approach by employing it to determine the outcome of rectification proceedings against successors to a mistakenly-entered proprietor. It would therefore be worryingly indifferent not only to the relative positions of the protagonists themselves<sup>15</sup>, but also to all the factors that, throughout the development of English property law, have decided the balance between owners and acquirers. In relation to the proprietor defending rectification proceedings, it would be irrelevant whether he took by gift or sale; possession of the land would have no role; there would be no inquiry into notice or knowledge or mental state. Nor could attention be paid to the attributes of the former owner, whose status, good faith, state of knowledge, type of interest, behaviour, carefulness or carelessness, need and hardship, would all be ignored. It would create the most blunt tool imaginable for allocating ownership. This is the poverty of the truncated rectification model. It lacks the sophistication to achieve a satisfactory resolution of rectification disputes: it is unrefined, it is unable to respond to context or complexity, it is detached from reality, it allocates property rights without meaningful assessment of the circumstances of either the new proprietor or the dispossessed original owner. The deficiency is all the more profound when both parties are hapless victims of a cunning fraud, a mutual oversight, or a registry error, when an examination of individual circumstances is needed the most.

If the application of statutory vesting and owner's powers are to be rejected as devices for controlling the ambit of rectification, it remains to query the true purposes of those provisions. They can be despatched briskly by reference to the historical material. First, the role of the owner's powers section<sup>16</sup> was originally a confirmatory statement of the types of disposals of the legal estate that the proprietor had the capacity to make, at a time when it was necessary to pre-empt debate over the nature of the rights conferred by registration.<sup>17</sup> It was emphatically confirmed in *A.-G. v Odell*<sup>18</sup> that the Land Transfer Act 1897 contained nothing to imply that the owner's powers also determined the limits of rectification: Vaughan-Williams and Cozens-

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<sup>15</sup> The common law's focus on the nature of the historic defect, and indifference to the litigants' positions, was the basis of the monumental critique of priorities in E. Durfee, "Priorities" (1959) 57 Mich. L.R. 459 and 685.

<sup>16</sup> First enacted in Land Transfer Act 1875 s.29; reworked in Land Registration Act 1925 s.18; now Land Registration Act 2002 s.23.

<sup>17</sup> C.F. Brickdale & J.S. Stewart-Wallace, *The Land Registration Act 1925* 4th edn (Stevens, 1939), p.21.

<sup>18</sup> *A.-G. v Odell* [1906] 2 Ch. 47.

Hardy L.J. observed that, following registration of a proprietor pursuant to a void transfer, any onward disposition would give the registered successor a title that was liable to be reversed by rectification.<sup>19</sup> That was explicitly accepted by the Royal Commission whose report was the foundation of the Land Registration Act 1925.<sup>20</sup>

Secondly, the original role of the statutory vesting clause<sup>21</sup>, too, is tolerably clear. Its purpose was not merely to give a good root of title to a prospective purchaser, since the clause did more than confer just a power to dispose and actually put the legal estate in the registered proprietor for the time being. It was a conscious response to doubts about the location of the legal estate in registered land<sup>22</sup>, designed to clarify the status of the proprietor vis-à-vis others interested in the land in order to solve practical problems pertaining to merger, privity of estate, dependent rights, relief from forfeiture, capacity to receive grants, entitlements under settlements, and so on.<sup>23</sup> The statutory vesting rule was intended to locate the estate; it was not intended to resolve title conflicts between an owner and acquirer or to answer questions of rectification.

#### D. THE RICHNESS OF LONG-ARM RECTIFICATION

The truncated rectification model would preclude the original owner from recovering the land by rectification proceedings once a mistakenly-entered registered proprietor had made a disposal. It would create a rule that the new acquirer takes all, leaving the former owner to indemnity, without regard to their relative positions. The criticism might be defended by pointing out the availability of indemnity, but that is not accepted here. The idea that land is to be equated with its market value, or indeed any level of monetary substitute, has never entirely dominated property thinking and modern legal developments suggest we are receding from its high water mark. It is, for example, an axiom of human rights that full compensation does not prevent a governmental expropriation from being arbitrary, but must also be strictly justified by public interest.<sup>24</sup> The resurgent critical legal scholarship on “place” has also argued for attentiveness to the physical setting of land as the material basis for human activity and as a concept invested with social meaning, rather than as an abstract, bureaucratic representation of the land as mere spatial volume.<sup>25</sup> Both of these forces suggest that

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<sup>19</sup> *A.-G. v Odell* [1906] 2 Ch. 47 at 72-73 and 82 respectively.

<sup>20</sup> “Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners” (1911, Cd. 5483) para.54, acknowledging that a successor to the mistakenly-entered proprietor was amenable to rectification and would receive compensation.

<sup>21</sup> First enacted in Law of Property Act 1922 s.170(3); consolidated in Land Registration Act 1925 s.69(1); now Land Registration Act 2002 s.58.

<sup>22</sup> H.W. Marigold & B.L. Cherry, *The Land Transfer Acts* (Sweet & Maxwell, 1899) pp.37-38 pre-empting *Capital & Counties Bank Ltd v Rhodes* [1903] 1 Ch. 631 which confirmed the existence of off-register legal estates.

<sup>23</sup> “Royal Commission on the Land Transfer Acts: Minutes of Evidence” (1911, Cd. 5483) paras.30, 10546, 10550, 10557, 4429 and 4441 respectively. It might also aid the allocation of social and environmental responsibilities: M. Raff, *Private Property and Environmental Responsibility* (Kluwer, 2003), pp.275-8.

<sup>24</sup> *Ying v Governor in Council* [1997] 3 L.R.C. 101 (Privy Council) and *Kelo v City of London* (2005) 545 U.S. 469 (US Supreme Court); K. Gray, “Human Property Rights: The Politics of Expropriation” (2005) 16 Stellenbosch L.R. 398; A. van der Walt, “Housing Rights in the Intersection between Expropriation and Eviction Law” chapter 4 in L. Fox & J.A. Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate, 2011), p.44.

<sup>25</sup> E.g. N. Blomley, D. Delaney & R. Ford (ed.), *The Legal Geographies Reader* (Wiley, 2000); J. Holder & C. Harrison, *Law and Geography* (OUP, 2002).

law recognises the importance of land rights as constitutive of unique and important social values. To respect those values, the adjudication of rectification claims should involve an individualised assessment of the relative positions of owner and acquirer.

There is an alternative interpretative theory which avoids reliance on the blunt instrument of statutory vesting and owner's powers: the model of long-arm jurisdiction to rectify. This holds that where a person was entered by mistake, it is possible to rectify not only against that person, but also against any registered successors. Because of its examination of the positions of the parties, the long-arm rectification model is to be preferred. It is not an automatic response in favour of owner or acquirer, nor an entirely open-ended discretion, but introduces a sophisticated set of structured provisions designed to examine the merits on both sides, beginning with a presumptive protection for the successor who has taken possession of the land without fraud or carelessness. The relevant rectification rules are as follows:

- “1 In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—
  - (a) involves the correction of a mistake, and
  - (b) prejudicially affects the title of a registered proprietor.
- 2 (1) The court may make an order for alteration of the register for the purpose of—
  - (a) correcting a mistake,
  - (b) bringing the register up to date, or
  - (c) giving effect to any estate, right or interest excepted from the effect of registration.(2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.
- 3 (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.
  - (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—
    - (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
    - (b) it would for any other reason be unjust for the alteration not to be made.
  - (3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.”<sup>26</sup>

These rectification provisions examine an impressive array of factors in the balance between owner and acquirer, in direct opposition to the truncated rectification model that is foreordained to prefer the record of entitlements shown in the register without any inquiry into its practical impact. The provisions have regard to two fairly tightly-

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<sup>26</sup> Land Registration Act 2002 Sch.4.

drawn factors affecting the acquirer: whether the defendant proprietor has taken possession, and, if so, any dishonest conduct and failure of care on his part. They also have regard to two classes of roving discretionary factors: whether it would be unjust not to alter, and whether there are exceptional circumstances justifying a decision not to alter. The latter classes are important in ensuring that the rectification process will accommodate the circumstances not only of the acquirer but also of the ousted owner. Under the long-arm rectification model, this package of provisions would provide the ideal responsiveness to external conditions that could temper the outcome of disputes to the human experience of those directly involved and affected. It would meet the contention of critical legal scholars that legal doctrine ought to reflect the reality of the relationship between people and land. Its only potential weakness, which will be analysed below, is the extent of its conflict with a policy of facilitating market transactions.

## **E. MARKET POLICY AND TRUNCATED RECTIFICATION**

The truncated rectification model's outstanding appeal lies in its protection of market participants. No buyer need be concerned about the risk of loss due to the potential existence of an inchoate rectification claim enforceable against the seller. Any other model of rectification which could allow the claim to be enforced against the buyer would create an incentive for a risk-averse buyer to avoid buying land altogether, or to undertake precautions in the form of insurance or expensive investigative searches to uncover any lurking inchoate rectification claims. There may be some discomfort over the social equity of imposing those expenses on buyers, but it is thought that this is not a significant factor; after all, buyers already pay conveyancers and surveyors to ensure they will be informed about the property. The more powerful argument is that the problem lies not in the taking of precautions in itself, rather it is these two justifications: (i) the cost of those precautions might be so high that it deters prospective buyers from buying, thus failing to achieve effective use of land by society as land it might stay with the current owner even though there is another who values the property more highly; and (ii) the total cost of those precautions by all prospective buyers added together could exceed the harm caused if they bought without taking special precautions and let the occasional successful rectification action run its course. While the individual costs may be acceptable to any one prospective buyer of a particular parcel, the costs are not borne exclusively by the successful buyer: there would be a wasteful use of society's resources if the search costs of prospective buyers - including all unsuccessful bidders in respect of all marketed properties - mount up rapidly and out of all proportion to the occasional loss averted.<sup>27</sup>

In the interests of facilitating market transfer it is expedient to protect the expectations of the buyer and to cheapen the costs associated with acquisition. Truncated rectification would certainly enhance the effectiveness of the register in providing a single destination for reliable title information: it would facilitate smooth operation of the land market and ensure that land passes to the hands of the person who can best exploit it, maximising the value to society of this limited resource, and helping owners to access the wealth tied up in illiquid assets. Despite these

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<sup>27</sup> This calculus is put forward in S.E. Sterk, "Property Rules, Liability Rules, and Uncertainty about Property Rights" (2008) 106 Mich. L.R. 1285 (measurement costs); T.W. Merrill & H.E. Smith, "Optimal Standardization in the Law of Property" (2000) 110 Yale L.J. 1 at 31 (costs associated with new property forms).

advantages that might be expected from limiting rectification, the following paragraphs will show weaknesses in the use of the truncated rectification model as a device to bolster the land market.

The first weakness of the truncated rectification model is that it is not accurately targeted towards the support of the market. Its has the dire result of dispossessing a registered owner, but this sacrifice will not necessarily serve the purpose of supporting a market purchase. Because it relies on statutory vesting and the exercise of the owners powers, it protects all recipients, including donees, and is therefore over-inclusive.<sup>28</sup> Even if legislative reforms were to restrict the benefit of the truncated rectification model to market purchasers, it would remain quite unsuited to the diversity in their requirements and aspirations. Some acquirers will be eager to gain rights in that and only that parcel of land. Other acquirers will not care greatly whether their rights are protected by enforcement against the land *in specie* or against a ring-fenced fund; for example, the bank lender or institutional landlord whose mortgage or reversion is intended solely for wealth extraction. The truncated rectification model would give them an unnecessary degree of protection beyond the level dictated by their needs. This might have a further indirect effect. It might raise concerns in the mind of someone who is contemplating buying registered land. He may have the intelligence to foresee that, when he becomes registered, his land rights could in the future be diminished by the mistaken entry of a registered mortgagee; that the mortgage might be sold on to another bank; and that he would then have no rectification claim in which to air the issue of the relative hardship as between himself and the bank. That alone might have the propensity to create a counterproductive influence on those planning to enter the land market.

The final weakness of the truncated rectification model is one that goes beyond pointing out a limitations and could deal a fatal blow. Despite removing the risk of rectification claim behind the root of title, it might actually fail to make any substantial changes in the behaviour of buyers, in which case it would yield no savings in cost, time or effort. The reasons for this lack of impact will be explained below. Here it need only be noted that if that contention is made out, the traditional justification for adopting the truncated rectification model would be entirely undermined.

## F. APPRAISING THE RECTIFICATION MODELS

The preceding sections showed that the truncated rectification model exhibits merit in its capacity to prevent the waste of resources associated with investigations behind the register, albeit with certain limitations and a lack of close tailoring to the land market. This section will now take an economic efficiency perspective and use it as the framework for closer appraisal of the rectification models.

The law and economics school provides a framework that can be applied to the evaluation of the legal rules governing property disputes.<sup>29</sup> The overarching precept is

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<sup>28</sup> There may of course be non-market values which support donee protection: M. Harding & R. Hickey, "Equity and the Value of Gifts" (2014) 8 *Journal of Equity* 1.

<sup>29</sup> M. Mautner, "The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties" (1991) 90 *Mich. L.R.* 95 at 99; C. Rotherham, *Proprietary Remedies in Context* (Hart, 2002), pp.74, 129; H. Dagan, "Codification, Coherence, and Priority Conflicts" in K. Siehr & R. Zimmerman, *The Draft Civil Code for Israel in Comparative Perspective* (Mohr Siebeck, 2008), pp.161-165. For a different emphasis, see B. Medina, "Augmenting the Value of Ownership by Protecting It Only Partially" (2003) 19 *J.L.E.O.* 343.

that, unless there are paramount reasons not to, the law should avoid squandering limited resources. In a choice between alternative legal rules about access to resources, all other things being equal, the law should therefore prefer the rule which leads to the maximum aggregate gain, or, where there is a nett loss, the rule which causes the lowest aggregate loss. Four criteria, originating in Calabresi's analysis of tort law, are proposed for the purpose of minimising the sources of wastefulness.<sup>30</sup> The competing models of rectification should be assessed against these criteria which are explored under the following subheadings.

### *1. Facilitating Market Transfer*

The first criterion is that, if there is supply and demand, the proposed legal rule should not jeopardise the market's allocation through consensual sale and purchase.<sup>31</sup> The market is the mechanism by which property should end up in the hands of the buyer who values it more highly than the seller. If the market functions well, then the best legal rule is then one that does not interfere with the market's operation. In particular, the proposed legal rule should not be one which raises barriers to market entry, such as encouraging purchasers to incur high transaction costs, lest the person who values the land most highly be deterred from entering the market.

To assess the possible effects in relation to title conflicts, it is necessary to divide the study into the dealings before and after the register mistake has been detected. Before the mistake is detected, bargaining between the parties to allocate entitlement would be inconceivable. A property owner patently cannot afford to seek out and bargain with all people who might become registered transferees following a mistake, nor could buyers do the same with all people who might have been mistakenly deleted from the register. In these circumstances, the prospect of consensual arrangements is nil, there is no relevant market to be prejudiced, and the prospect of proposed legal rule adding to transaction costs is purely hypothetical. With the absence of any functioning market, the first criterion offers no assistance in selecting the best rule for resolving title conflicts.

On the other hand, after the mistake has been detected, the parties will have come to each other's attention, the parties are likely to be only two in number, and they need not be concerned about future dealings with one another.<sup>32</sup> These circumstances tend to indicate that the costs of transacting with one another should be low, and so the economic criterion suggests that the legal rule should be that which facilitates a negotiated settlement between them. That would require the legal rule to impart maximum clarity in how entitlements are allocated<sup>33</sup>, and the discretionary component in long-arm rectification represents a failure in that regard. A degree of predictability could be injected into rectification once the applicable standards are fleshed out with precedent and principle: if, for example, one claimant would obviously suffer a significantly greater loss than the other upon losing the land, then the outcome may be clear and therefore facilitate a settlement. Nevertheless, even if the legal outcome could be predicted, the event of register error creates a classic

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<sup>30</sup> G. Calabresi, *The Cost of Accidents* (Yale University Press, 1970), ch.3.

<sup>31</sup> G. Calabresi, "Transaction Costs, Resource Allocation and Liability Rules" (1968) 11 J.L.E. 67 at 68.

<sup>32</sup> M. Mautner, "The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties" (1991) 90 Mich. L.R. 95 at 108.

<sup>33</sup> T.W. Merrill, "Trespass, Nuisance and the Costs of Determining Property Rights" (1985) 14 J.L.S.13.

environment for market failure. Assuming the claimant would find any alternative plot to be unsatisfactory, whoever holds the legal title to the disputed land is a monopolist supplier and the lack of competition will mean that the market will not be an efficient mechanism to transfer to the person who values it most.<sup>34</sup>

With the prospects of a negotiated transfer being thwarted, whether one envisages bargaining before or after the error is detected, the efficient allocation of the disputed land cannot conveniently be left to the market. In these conditions, first criterion is redundant and the legal system should not take a *laissez-faire* attitude but instead a legal rule should be instituted which directly dictates the allocation. To aid in selecting the best legal rule to allocate the property compulsorily, there are further prescriptive criteria to avoid wastefulness.

## *2. Minimising Overall Loss after Dispute has Arisen*

The second criterion is that the proposed legal rule for solving title conflicts should not exacerbate the total waste caused to society, once the dispute has arisen, by taking the property away from someone who wants it more and distributing it to someone who wants it less.<sup>35</sup> Instead, the property should be allocated to the person who would suffer the greater loss from dispossession, and in that way the total value to society will be saved from unnecessary depletion.

This is the supreme virtue of the long-arm rectification model. Its sensitivity to a wide range of factors (particularly possession) not only has the merit of responsiveness but is also the foundation for its claim to economic efficiency. Where the market fails, economics scholarship conventionally concludes that the legal system should fashion a rule which directly allocates the land in a way that mimics whatever settlement the parties would have reached had there been no impediments to accessing a competitive market.<sup>36</sup> That attempt to second-guess the market outcome would involve venturing an opinion on which of the two parties would have valued the land more highly.<sup>37</sup> Long-arm rectification achieves the environment necessary for that decision as the breadth of statutory factors in resolving the rectification claim provides the court with the opportunity to make a reasonable assessment of which party values the property most highly and who should therefore end up with it. That reckoning constitutes the attraction of the long-arm rectification model. If one party were desperate to keep the land and the other indifferent to receiving its value as compensation, then the proper result is obvious and there should be no question of a contrariwise allocation that would cause greater suffering and wastefulness. No catastrophic loss should be inflicted on a desperate owner in order to give the land to an indifferent acquirer. That is the primary motivation for preferring long-arm rectification.

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<sup>34</sup> The Coase Theorem postulates a market reaching efficient equilibrium on the assumption, falsified in these conditions, that transaction costs are nil: R. Coase, "The Problem of Social Cost" (1960) 3 J.L.E. 1. On the monopoly situation between owner and acquirer exacerbating costs see R. Cooter, "The Cost of Coase" (1982) 11 J.L.S. 1 at 23.

<sup>35</sup> The second tort sub-goal from G. Calabresi, *The Cost of Accidents* (Yale University Press, 1970), p.27. The primary mechanism by which this is achieved is through indemnity, which passes the bulk of the loss from the victim to the indemnity fund contributors.

<sup>36</sup> R. Posner, *Economic Analysis of Law* 8th edn (Kluwer, 2011), p.66.

<sup>37</sup> This refers to the value attached by each party and not their ability to pay. The latter is ruled out because the parties' personal willingness to pay would depend on their personal net worth: R. Posner, *Economic Analysis of Law* 8th edn (Kluwer, 2011), p.19.

In direct opposition to that approach, the truncated rectification model would do nothing to assist the assessment of the parties' respective losses. The truncated rectification model cannot examine the things which enhance land's unique value to people, such as the development of attachments to the land, the build up of human networks, the feeling of being ensconced in place. Consequently, if the original owner had long-standing connections with the property and its locale, whereas the incoming new proprietor has as yet developed none, the truncated rectification model would favour the wrong party in allocating the land to the person who probably attaches the lower value to it. This demonstrated by the typical fraud involving a forger, RP1, promptly mortgaging the property so that the competition is between an ousted owner and a commercial lender (RP2) holding a registered charge over the property. In such circumstances, there might be no loss at all to the lender beyond what can be adequately compensated by indemnity and so the truncated rectification model would inefficiently protect the wrong party. In contrast, the long-arm rectification model would create the environment for airing these concerns and introducing the assessment of relative effects, much like the defence of hardship in relation to equitable remedies.

There are two further economic criteria that should be employed in the appraisal of the proposed legal rule. They will be examined under the following subheadings. The long-arm rectification model does not perform well against these other criteria, but it will be submitted that they are of lesser importance. They will be explained in order to draw out the inefficiencies of the long-arm rectification model.

### *3. Reducing the Costs of Court Resolution after Dispute has Arisen*

The third prescriptive criterion in avoiding wastefulness is that the proposed legal rule should minimise the costs associated with its implementation.<sup>38</sup> The truncated rectification model certainly wins here as it is based on a test of the two very visible events of registration and disposition which are sharply defined and lend themselves to simple proof. The long-arm rectification model compares unfavourably because it involves greater complexity, there are words of variable meaning ("possession", "unjust", "proper care"), and the test of "exceptional circumstances" makes it necessary to probe the unique factual context. As broad judgmental standards rather than mechanical rules, the court must fill in the content of the standard before being able to apply it to the facts in question: it requires the court to address what nature of circumstances ought in the context to be acceptable for the purpose before deciding whether there are facts which meet that contextualised definition.<sup>39</sup> This characteristic inevitably generates extra cost in resolving disputes, but it must be remembered that the existence of rectifiable mistake is a rare event, so the heightened cost of rule administration with long-arm rectification is a factor of minor social importance; and also that the approved legal fees in unravelling the entitlements will be reimbursed through indemnity, so the cost is widely diffused through society.<sup>40</sup>

This article takes the view that the long-arm rectification power should be exercised for the primary objective of minimising the harm to the losing party. It

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<sup>38</sup> The third tort sub-goal from G. Calabresi, *The Cost of Accidents* (Yale University Press, 1970), p.28.

<sup>39</sup> See D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L.R. 1685; W. Merrill, "Trespass, Nuisance and the Costs of Determining Property Rights" (1985) 14 J.L.S. 13.

<sup>40</sup> Land Registration Act 2002 Sch.8 para.3.

follows that in rectification proceedings the court's goal is to make an assessment of the value of the land to the respective parties. This purpose will colour the interpretation of the "exceptional circumstances" test and may also infiltrate the other broad phrases. Gaining information about the parties' respective values will be an inevitable source of costs in the proceedings but need not be prohibitive. While the parties could not lead speculative and unreliable evidence of how greatly they value the land, there are convenient shortcuts which could stand in as proxies for direct measurement; they might include the determination of which party is in occupation, which party has adapted the land to his needs, which has a sentimental connection, which could find a replacement elsewhere, which relies on the location and unique factors of the land, and many others. The court need not put a monetary figure on these subjective values since the court is not seeking to make a damages award: its task is merely to identify which of the parties attaches the relatively higher value and that involves no impractical calculation of absolute values.<sup>41</sup>

#### *4. Encouraging Loss Prevention before Dispute Arises*

The fourth criterion is that the proposed legal rule should not allocate the property to the person who could have most cheaply prevented the dispute from materialising, thereby encouraging actors to take care in future.<sup>42</sup> Its potential application to mistaken entries is of limited value because there is so little that can reasonably be expected in the way of standard precautionary behaviour.

The truncated rectification model would automatically protect RP2 from mistake and put the onus entirely on the original owner to protect himself from that risk. The model therefore has the potential to create incentives for the owner to incur the costs of trying to safeguard his position against mistake, which would create an undesirable waste of resources insofar as those costs, when aggregated, could exceed the total harm which they stave off.<sup>43</sup> From the original owner's perspective, there are some measures that could feasibly be taken to avoid mistakes arising from fraud. Formerly, this could have been done by safeguarding the land certificate which was essential for the registration of most new transactions.<sup>44</sup> More recently, protection has been made available to non-occupying owners by lodging a restriction which blocks dealings unless the owner's lawyer confirms the veracity of the signature on the dealing.<sup>45</sup> There could also be some basic anti-mistake measures, such as extra vigilance in completing the registration forms and supplementary papers, or by regularly checking the register for unauthorised entries.<sup>46</sup> In general, however, there is little that offers a comprehensive safeguard at small cost. These represent problems

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<sup>41</sup> Cf. L. Kaplow & S. Shavell, "Property Rules versus Liability Rules: An Economic Analysis" (1996) 109 Harv. L.R. 713.

<sup>42</sup> The first tort sub-goal from G. Calabresi, *The Cost of Accidents* (Yale University Press, 1970), ch.7; S. Levmore, "Variety and Uniformity in the Treatment of the Good Faith Purchaser" (1987) 16 J.L.S. 43 at 47 (applied to property priorities).

<sup>43</sup> S. Levmore, "Variety and Uniformity in the Treatment of the Good Faith Purchaser" (1987) 16 J.L.S. 43 at 46; L. Kaplow & S. Shavell, "Property Rules versus Liability Rules: An Economic Analysis" (1996) 109 Harv. L.R. 713 at 768.

<sup>44</sup> Land Registration Act 1925 s.64.

<sup>45</sup> Land Registry Restriction in Form RQ (request for a restriction by owner(s) not living at the property).

<sup>46</sup> Unhelpful in a fraud scenario where there may be no opportunity to detect the mistake: e.g. a single priority search preceding the lodgement of the composite purchase and mortgage, as in *Ajibade v Bank of Scotland* [2008] EWLandRA 2006/0163.

for the truncated rectification model: the original owner is left with the inefficient choices of taking elaborate safeguards of doubtful utility, or of running the risk of automatic loss.<sup>47</sup>

The long-arm rectification model, in contrast, invokes the broad judgmental standards mentioned above. The traditional explanations for the role of standards in property law are that the uncertainty they bring can be useful in discouraging parties from sailing too close to the wind, that they promote useful moral reflection, and discourage harmful behaviour that is ostensibly permitted.<sup>48</sup> But those justifications have limited scope for application in the context of rectification against remote purchasers where there is little opportunity for reprehensible or virtuous behaviour. What the use of these standards could potentially introduce, however, is the opportunity for the court to set appropriate levels of care for owners' and acquirers' precautions.<sup>49</sup> That would ensure that the economic criterion of loss prevention could be embedded in the adjudicative processes of rectification.

Despite the apparent opportunity for long-arm rectification to promote efficient loss prevention within that restricted compass, it comes with a potentially heavy cost burden. First, due to the lack of certainty over the outcome of any future rectification proceedings, it creates the incentive for the owner to incur the cost of forestalling mistakes, or at to least detect and remedy them before a remote purchaser becomes registered. Secondly, the same uncertainty creates the incentive for the purchaser to incur the cost of detecting or forestalling mistakes.<sup>50</sup> If he knows the register can be reversed, then the buyer may be discouraged to some degree from proceeding with a proposed acquisition. This effect is particularly pronounced in land dealings as opposed to other low-value commonplace items. For consumers, their land often represents a major fraction of their wealth, it comes with immense transaction costs, acquisitions occurs only a few occasions in a lifetime, and consumers are reputedly ill-equipped to handle low probability risks such as that of rectification.<sup>51</sup> In these circumstances, the risk of title loss through rectification could instead represent the risk of a single catastrophic loss of which an individual should be extremely cautious, and which cannot be factored into price for a purchaser who is unable to play the percentages and spread the risk over a large number of acquisitions. The long-arm rectification model therefore seems to carry a significant risk to purchasers which might stimulate costly precautions.

Taken in isolation, this head of cost is not especially informative. The crucial question in social efficiency terms is whether the costs associated with precautionary behaviour and the adjudication of rectification disputes would be worth the gains achieved from having the flexibility to resolve those disputes in a way that allocates the land in the least harmful manner. That is the decisive issue for the regime of long-arm rectification. Merrill has explained great swathes of property doctrine by posing the equation in these terms: where transaction costs are high, as with title conflicts

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<sup>47</sup> The greater risk of loss for the original owner under the truncated rectification model would create a relative inefficiency when compared to long-arm rectification only if the owner were risk averse and paid a price to reflect that risk aversion.

<sup>48</sup> J.W. Singer, "The Rule of Reason in Property Law" (2013) 46 U.C. Davis L.R. 1369 at 1374.

<sup>49</sup> S.E. Sterk, "Property Rules, Liability Rules, and Uncertainty about Property Rights" (2008) 106 Mich. L.R. 1285 (tailoring search standards to a social efficiency criterion).

<sup>50</sup> Scottish Law Commission, "Discussion Paper on Land Registration: Void and Voidable Titles" (Scot. Law Com. D.P. No.125, 2004) para.4.43.

<sup>51</sup> A. Tversky & D. Kahneman, "Judgment Under Uncertainty" (1974) 185 Science 1124; D. Kahneman, *Thinking Fast and Slow* (Penguin, 2012), especially chapters 11 and 16 on cognitive biases.

between remote parties, then “the economically efficient choice will depend on a comparison of two variables: the increase in entitlement-determination costs entailed by a shift from a mechanical rule to a judgmental rule versus the potential efficiency gains from allowing the court ... to exercise discretion in resolving the dispute...”<sup>52</sup> Applied to rectification, it requires an assessment of whether (1) the extra expenditure on searching, safeguarding and adjudicating which accompany the long-arm rectification model will be offset by (2) the gain available from efficiently allocating the land between the parties in a fact-sensitive manner through rectification proceedings. If the result is positive, then the long arm rectification model is preferable to truncated rectification from an economic standpoint: it is on the whole worth getting the right result even though it may be a little more troublesome to apply, a little more costly to predict, and prompts some precautionary measures. Whether it is likely to manage this task can only be answered once the level of search costs have been reviewed. It is that topic to which we now turn.

## G. LONG-ARM RECTIFICATION AND MARKET BEHAVIOUR

Merrill’s economic calculus described in the previous paragraph has been built upon by Sterk to demonstrate that, in the related sphere of measuring property attributes, the aggregate costs collectively incurred by all purchasers or investors might exceed the benefits derived from improved information (such as accurate boundary surveys to avoid the risk of trespass).<sup>53</sup> The information gained will be of value to the individual buyer who pays for the survey, and the decision to pay indicates that the value of survey is worth its cost to that individual. Depending on the context, however, the total cost to all prospective purchasers, including unsuccessful bidders, in obtaining that information might be greater than the benefit gained by doing so. Under those conditions, the practice of information gathering would be inefficient from society’s perspective. It follows that, all other things being equal, the legal rules ought to be adjusted so that the incentive for such excessive measurement is removed. That finding is instructive for the assessment of the rectification models, where the attribute which the purchaser might want to measure is the register’s susceptibility to rectification after acquisition.

Proponents of the truncated rectification model argue that it is necessary to ensure that purchasers are confident in the information they gather from the register; the long-arm rectification model is suspected to remove that confidence and encourage buyers to make excessive inquiries and investigations or take other precautionary measures.<sup>54</sup> For example, buyers might seek to unearth previous transfer documents to ensure that they had not been mistranscribed onto the register, they might check previous transfers for validity of signatures, they might verify that old dealings had been *intra vires*, or they might seek to confirm any other aspects of procedural and substantive compliance with property disposition rules. If it could be

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<sup>52</sup> T.W. Merrill, “Trespass, Nuisance and the Costs of Determining Property Rights” (1985) 14 J.L.S.13 at 26 (explaining nuisance, the *ad coelum* principle, waste, discharge of covenants, expropriation limits: T.W. Merrill & H.E. Smith, “Optimal Standardization in the Law of Property” (2000) 110 Yale L.J. 1 (explaining the *numerus clausus*).

<sup>53</sup> S.E. Sterk, “Property Rules, Liability Rules, and Uncertainty about Property Rights” (2008) 106 Mich. L.R. 1285.

<sup>54</sup> For post-acquisition precautions, such as taking possession, see R.J. Smith, “Land Registration Reform” [1987] Conv. 334 at 341-2; Scottish Law Commission, “Discussion Paper on Land Registration: Void and Voidable Titles” (Scot. Law Com. D.P. No.125, 2004) para.4.23; *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 at [44].

shown that purchasers would not actually pursue these hypothetical roving searches, then it would entirely take the wind out of the sails of that argument in favour of truncated rectification. The following paragraphs will examine how the context of land registration creates an environment in which purchasers are unlikely to engage in the feared roving searches.

### *1. Magnitude of Potential Loss*

Under a system of long-arm rectification, a purchaser who anticipates the possibility of future loss by rectification might feel inclined to make searches into past mistakes to allay his concerns. But if his fears materialise, it must be remembered that the loss will be offset by state indemnity. An awareness of this compensation source should diminish the purchaser's keenness to undertake roving searches. Contractual warranties have been portrayed as one of the ways in which markets rein in any incentives to pursue excessive information gathering,<sup>55</sup> and it is only a short extension to see indemnity taking their place in registered land. Where the potential for loss is covered by compensation in this way, the most cost-effective route might be for neither party to take protective measures, leaving the buyer simply to await an adverse claim and then call for compensation. That would limit any suppressive effect on land prices as they would no longer need to be discounted to reflect either the risk of losing the land by rectification or the costs of searches.

The effectiveness of indemnity in this role depends on the extent to which purchasers regard it as such a satisfactory substitute for the land that they will be disinclined to search. This turns on the availability of indemnity. It is withdrawn in certain cases, such as mines and minerals<sup>56</sup>, and here searching or other precautionary behaviour must be expected. Its availability is also compromised where the claimant has demonstrated lack of proper care<sup>57</sup>; but it is inconceivable that this would be applied by the court so as to require a buyer to undertake roving searches where no suspicion of mistake had been aroused and thereby defeat the aim of a guaranteed register. The quantification of indemnity will also control its effect on behaviour. The benchmark for quantification is set by the market value assuming the information about the root of title that was displayed by the register at the time of purchase to be true. This means that when a particular purchaser attaches no special value to the land beyond its market value, there will be full compensation: that purchaser will be no worse off by the existence of long-arm rectification and there will be no incentive to incur expenditure on roving searches. This equation of the subjective value with the market value may hold true for some acquirers, such as mortgagees, but for others it will be quite unrealistic. Owners rapidly become attached to their property so that their subjective value surpasses market value, the so-called "endowment effect."<sup>58</sup> It can be especially pronounced over land, where immense uplift in subjective value can follow from its unique location, attributes and function. In these circumstances, indemnity falls short, leaving a gap between the owner's subjective value and the

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<sup>55</sup> Y. Barzel, "Measurement Costs and the Organization of Markets" (1982) 25 J.L.E. 27 at 32-34; V.P. Goldberg, "The Gold Ring Problem" (1997) 47 U. Toronto L.J. 469 at 484.

<sup>56</sup> Land Registration Act 2002 Sch.8 para.2.

<sup>57</sup> Land Registration Act 2002 Sch.8 para.5.

<sup>58</sup> E. Hoffman & M.L. Spitzer, "Willingness to Pay vs Willingness to Accept" (1993) 71 Wash. U.L.Q. 59; R. Posner, *Economic Analysis of Law* 8th edn (Kluwer, 2011), pp.22-23.

market value. It is the potential for this “compensation gap” which, in terms of efficiency, constitutes the most serious imperfection of the indemnity system.<sup>59</sup>

The compensation gap is the crucial factor in appraising the interaction of the long-arm rectification model with the policy of supporting land markets. If every buyer expected to be fully satisfied with market value indemnity, there would be no roving searches into past mistakes as indemnity would erase all harm from rectification. Even if buyers would not be entirely satisfied by indemnity, the magnitude of their loss on rectification would be reduced so substantially by it that any desire to embark on roving searches would be very much attenuated. Furthermore, even where a compensation gap is anticipated, its significance is limited because of the discretionary nature of rectification. While risk-averse buyers may find the process of predicting the width of the compensation gap at the moment of purchase to be highly speculative and err on the side of pessimism, the discretionary system incorporates a measure of self-regulation: the greater the compensation gap, the less willing the court will be to order rectification. To take the extreme, buyers intending to move into a new home might predict a rapid attachment reflected in a substantial subjective value beyond indemnity, but it would be almost inconceivable in these circumstances that the rectification power would be exercised to displace them. The magnitude of compensation gap therefore tends to be kept within bounds by the responsive nature of rectification.

## 2. Probability of Loss Eventuating

Under a regime of long-arm rectification it is conjectured that the incidence of rectifications claims would remain low and with it the probability of suffering the compensation gap. The combined vigilance of the land registry and conveyancers tends to suppress the incidence of mistake<sup>60</sup> and, where the frequency of the compensation gap materialising is low, purchasers are less likely to undertake roving searches behind the register. That inference does depend on the assumption that there is a stochastic distribution of register mistake; if, on the other hand, there exist hot spots of high risk which can be identified by central bodies, disseminated to acquirers, and linked to observable traits, then specific precautionary investigations may become worthwhile.

Statistical data on rectification claims are not published but in the most recent annual report from the registry there were 1019 indemnity claims, a substantial proportion of which were recorded under subheadings that are not likely to relate to rectification. In the same period the registry processed over 22 million applications and entered almost 4 million registrations.<sup>61</sup> The low ratio of claims to transactions suggests such a slim risk of a compensation gap materialising that each purchaser might understandably regard it as insufficient to justify precautionary searches.<sup>62</sup>

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<sup>59</sup> J.L. Knetsch & T.E. Borcharding, “Expropriation of Private Property and the Basis for Compensation” (1979) 29 U. Toronto L.J. 237 (compensation gap in compulsory purchase). Further inefficiency might arise from “demoralization costs”: F. Michelman, “Property, Utility and Fairness” (1967) 80 Harv. L.R. 1165 at 1214.

<sup>60</sup> The regulator imposes anti-fraud measures on conveyancers, e.g., S.R.A. Warning Notices on Bogus Law Firms and Identity Theft (2012) and Money Laundering (2009).

<sup>61</sup> *The Land Registry Annual Report and Accounts 2012-13* (T.S.O., 2013) p.41 and Appendix A.

<sup>62</sup> One unsatisfactory aspect of long-arm rectification is that claims would not be terminated by delay as the limitation period for the recovery of land does not apply to rectification: *Parshall v Hackney* [2013] EWCA Civ 240. Reform to cut off stale long-arm rectification claims should be considered.

### 3. Practicality and Effectiveness of Precautions

The roving searches that have been predicted under a regime of long-arm rectification are such as would be designed to uncover whether any current entries in the register could be reversed by someone who had been mistakenly displaced. A registered buyer will normally be well equipped to spot any mistakes arising for the first time on his registration because they will not match his contractual expectations, but it will be extraordinarily difficult to plan a comprehensive system of searches that could detect mistakes arising at an earlier point. Some varieties of mistake might offer greater potential for discovery than others: the registry may hold the underlying application forms which may be inspected to confirm the genuineness of signatures; plans for neighbouring parcels might be inspected for overlapping entitlements; application forms might be perused in the search for possible mistranscription onto the register. But even these will not suffice because the buyer's title might be affected not only by mistakes lying in the chain of title transfers, but also mistaken entries elsewhere, as in the case of conflicting registers. The variety and range of sources of mistake is overwhelming.

The extent of precautionary searches would be quite open-ended. They envisage inquiries to people who may hold no systematic records of relevant information and who have no standard application process. The likelihood of a response may be low, particularly where respondents have no public duty to supply the information. The anticipated timeliness of the responses to the search inquiries will also be a limiting factor, as the type of information being sought is not likely to be forthcoming from non-statutory bodies or private individuals to any timetable. The information turned up by a particular search inquiry would not be determinative but likely to be qualified, vague and inconclusive. Except in the uncommon case where the answer generates an estoppel, or in the rarest case where it is from a source that is validated by law, it would always invite further correspondence and further verification. The cost associated with this manner of inquiry would be prohibitive.

The results yielded by these roving searches could never rule out an undetected mistake and would ultimately be limited only by the funds supplied by the prospective buyer. It has been suggested that buyers would tailor their searching to their individual requirements: "a rational individual would measure the property rights until the marginal costs of additional measurement equal the marginal benefits."<sup>63</sup> Certainly, if armed with data of the commonest and most easily detectable mistakes, then buyers might plausibly develop a strategy of pursuing those targeted searches that yield a good ratio between cost and benefit - and indeed it might then be appropriate to exclude them from the protective mantle of rectification and indemnity.<sup>64</sup> But in reality those data are not forthcoming and without that knowledge there is no meaningful basis for deciding the efficient cut-off point in search costs. Without the buyer being able to calculate the rate at which his expenditure is reducing the probability of rectification risk, it is difficult to imagine any serious commitment to these searches.

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<sup>63</sup> T.W. Merrill & H.E. Smith, "Optimal Standardization in the Law of Property" (2000) 110 Yale L.J. 1 at 25-6. See also S.E. Sterk, "Property Rules, Liability Rules, and Uncertainty about Property Rights" (2008) 106 Mich. L.R. 1285 at 1289-90.

<sup>64</sup> See T.W. Mapp, *Torrens' Elusive Title* (ALRII, 1978), p.132; B. Arrunada, "Property Titling and Conveyancing" ch.12 in K. Ayotte & H. Smith, *Research Handbook on the Economics of Property Law* (Edward Elgar, 2011), pp. 237-56.

The suppression of information sources has been regarded as a market tool to curtail the cost to society of excessive information-gathering.<sup>65</sup> It is submitted that the registered land market offers another example of this practice. The lack of any sound basis for inquiries into register mistakes should deter buyers from racking up fruitless expenditure on fragmented, inconclusive and protracted investigations. This suppression of information outside the register should not be a source of anxiety so long as the land registry maintains a strict quality control regime, and it should come as no surprise that in former times the buyer of registered land was prohibited by statute from raising matters of the register's accuracy with the seller.<sup>66</sup> The whole spectacle of a buyer's endless, roving searches into the possibility of mistake, though no particular suspicion of it had been raised, involves fantastic impracticalities at every turn and is unimaginable that clients would willingly instruct conveyancers to undertake this type of work. That seems to have been borne out in practice, as discussed in the next subheading.

#### *4. Reactions to Comparable Title Perils*

When assessing likely responses to the risks attending long-arm rectification, it is instructive to look at the experience of analogous perils to a buyer's title - those which affect the security with which property will be enjoyed, arise from factual events prior to acquisition, endanger all land, and are of low frequency. Buyers are already subjected to various such risks which are not routinely investigated. For example, all buyers are subjected to the risk of expropriation through a compulsory purchase order, which, like a rectification claim, might have been set in train by an event occurring prior to purchase. Like rectification, it comes with a compensation scheme under which the quantification may not reflect subjective value. Like the search for register mistakes, searches of the information sources are not guaranteed and therefore cannot conclusively prove that there are no plans in the offing to make a CPO.<sup>67</sup> Nevertheless, conveyancers only make a limited standard search with the local authority and seller<sup>68</sup>, which may reveal no information on the matter; and if the results are negative there will conventionally be no further pursuit of CPO information. Another comparable source of title loss comes from the fact that all buyers of registered land are subject to the risk of a mistaken double allocation of rights. The statutory vesting rule, which puts ownership in one registered proprietor, causes mayhem when another register simultaneously puts it in a different person.<sup>69</sup> Although it can be inferred from comments in one Privy Council opinion that conveyancers might be expected to cross-check duplicate register entries,<sup>70</sup> roving

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<sup>65</sup> Y. Barzel, "Measurement Costs and the Organization of Markets" (1982) 25 J.L.E. 27; V.P. Goldberg, "The Gold Ring Problem" (1997) 47 U. Toronto L.J. 469 at 493.

<sup>66</sup> Land Transfer Act 1897 s.16 stipulated that no abstract of title other than the land certificate and liberty to inspect the register could be demanded by the purchaser's conveyancer.

<sup>67</sup> The local authority must maintain a register of local land charges, which include specific subsets of CPO, but "in general compulsory purchase orders do not appear to be registrable": C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property* 8th edn (Sweet & Maxwell, 2012), para.8-110.

<sup>68</sup> Local land charges search on Form LLC1 (requisition for search) with local authority enquiries on Form CON 29 (2007 ed), question 3.11; enquiry to vendor on Law Society Conveyancing Protocol Form TA6, question 3.1 and City of London Law Society Certificate of Title Questionnaire (7th ed, 2012) question 20.

<sup>69</sup> *Parshall v Hackney* [2013] EWCA Civ 240.

<sup>70</sup> *Racoon Ltd v Turnbull* [1997] A.C. 158 at 166-7; S. Cooper, "Indefeasibility of Title in the British Dependent Territories" (1995) 20 W.I.L.J. 22 at 28.

searches for this type of problem are not recommended professional practice.<sup>71</sup> The risk of title loss by rectification, even to the prejudice of a remote purchaser, is therefore already present in contemporary landownership, yet it has not inspired precautionary behaviour.

Adding long-arm rectification to the inventory of perils would amplify the likelihood of title risk materialising, but whether it is likely to induce a widespread practice of the roving searches must remain doubtful. The feared roving searches do not occur in respect of CPOs or double registrations; nor did they happen under the registered land legislation applicable between 1925 and 2002, when at least one form of long-arm rectification undoubtedly existed<sup>72</sup> and the profession foresaw the existence of other forms.<sup>73</sup>

## 5. *Synthesis*

Drawing these observations together, it is suggested that under the long-arm rectification model, purchasers would, on the whole, be willing to run the risk of the compensation gap without demanding costly, roving searches. Imagine the response when a conveyancer asks a client, “Should I bill you for open-ended, uncapped costs for the purpose of doing inconclusive checks, most of which would be duplicating work already done by other lawyers and by the land registry, in order to save you from a highly unlikely risk, for which you already have a full market-value statutory insurance policy?” The question need only be posed in these terms for the answer to be obvious. If prospective buyers under a regime of long-arm rectification would not actually engage in undesirable roving searches for mistakes, nor be altogether deterred from land purchases, then the primary economic argument against long-arm rectification falls away. With that obstacle removed, the criterion of minimising losses after the event should take centre stage, and on that score the long-arm rectification model is far superior in terms of efficiency and, as will be suggested in the following section, justice.

## H. FAIRNESS IN PROPERTY RULES

The framework for assessing the rectification models was crafted from the criteria of economic efficiency which are driven solely by the utilitarian policy of maximising for society the value inhering in resources. The economic approach provides a convenient tool to help think about the advantages and disadvantages as measured in rough and ready terms through its concept of subjective value, but ultimately it is concerned with the nett gains overall to society collectively. Its weakness is that it is not deflected from its mission to maximise even when it concentrates serious losses on one particular individual, as that harm is accounted for in the value calculation. All but the most inhuman economist perceives shortcomings in this analysis. It requires that a sacrifice of any magnitude may be extracted from a person if it is justified by the social maximisation of resources. Few would agree that it could be right for

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<sup>71</sup> Absent from F. Silverman et al., *Conveyancing Handbook* 20th edn (Law Society, 2013), Part D2.

<sup>72</sup> Land Registration Act 1925 s.82(1)(g).

<sup>73</sup> Land Registration Act 1925 s.82(1)(h). See *Argyle Building Society v Hammond* (1985) 49 P.&C.R. 148; *Norwich & Peterborough Building Society v Steed* [1993] Ch. 116 at 132-3; *Pinto v Lim* [2005] EWHC 630. D. Cavill et al., *Ruoff & Roper: Registered Conveyancing* (Sweet & Maxwell, Looseleaf, R.60), para.46.030.

society to use rectification to forcibly evict a person from their land and sever all their links to the local community - no matter how much public money might be handed over to that individual in compensation - just because a register error has led to the registration of a neighbouring mansion owner who covets the view over the disputed land and greatly prefers its unoccupied state. This concern could be met by an alternative approach which is not trammelled by single-minded wealth maximisation.<sup>74</sup>

Various theories of justice could be used to prescribe the choice of rectification models. Retributive justice theory, for example, would concentrate on the allocation of responsibility for causing the loss and seek to punish selfish decision making when one party creates an obvious risk of social harm;<sup>75</sup> if it has any place in private law, it could be put to use in title conflict resolution by relying on behavioural standards to hold owners and acquirers accountable. Its focus, however, is exclusively on care for the interests of others, and, where this factor is unhelpful, such as the context of owner and acquirer each behaving equally carefully, or being so remote that they should not be expected to accommodate one another's interests, then it can offer no solution to title conflicts. A preferable alternative would be some theory of justice which requires a fuller comparative assessment of the parties ranging over a broader spectrum of factors than those implicated in retribution. One such theory engages the idea of distributive justice which seeks to identify principles that help society formulate a basis for allocating resource entitlements. To protect interests from being sacrificed to the greater social good, Rawls postulated two normative principles of justice: first, that there are certain irreducible rights to fundamental social goods, and secondly that social and economic inequalities would be acceptable only if they were attached to positions open to all under equality of opportunity, and were of the greatest benefit to the least-advantaged members of society.<sup>76</sup> It is the latter point, the 'maximin criterion', which maximizes the minimum benefit to those who have the lowest allocation of welfare resources, that could be taken as the guide for distributive justice in property rules, its merit lying in its curtailment of the inequalities that might follow from unrestrained pursuit of aggregate economic welfare.

Although those principles were put forward for setting up the structure of social institutions and not to resolve isolated contests over distribution<sup>77</sup>, the maximin criterion can be adapted to the purpose of selecting between rival property rules. As between the two rectification models discussed in this paper, it prefers that which achieves the better outcome for the least well-off. Subsequent literature has developed an intermediate 'prioritarian' position which appoints some limited degree of

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<sup>74</sup> Or by constitutional protection for fundamental rights: R. Posner, "Wealth Maximisation Revisited" (1985) 2 *Journal of Law, Ethics and Public Policy* 85 at 103-4. In England, there may be issues of home or privacy under the Human Rights Act 1998 for which some protection may be imparted through overriding interests: Land Registration Act 2002 Sch.3 para.2.

<sup>75</sup> On retributive justice, see R. Posner, "Retribution and Related Concepts of Punishment" (1980) 9 *J.L.S.* 71; J.G. Murphy, *Retribution Reconsidered* (Springer, 1992).

<sup>76</sup> On distributive justice, see Aristotle, *Nicomachean Ethics* Book V, section 3; J. Rawls, *A Theory of Justice* (Belknap, 1971), pp.61, 152; criticised for its deviation from maximisation of total welfare: K. Arrow. "Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice" (1973) 70 *Journal of Philosophy* 245 and J. Harsanyi, "Can the Maximin Principle Serve as the Basis for Morality?" (1975) 69 *American Political Science Review* 594.

<sup>77</sup> J. Rawls, *A Theory of Justice* (Belknap, 1971), p.88.

preference for the less well-off.<sup>78</sup> The truncated rectification model fares poorly when adjudged against these criteria, as its fixed rule based only on the facts of registration and dispositive powers would preclude any opportunity to address who is the less well-off amongst the disputing parties. In contrast, the broad judgmental standards involved in the long-arm rectification model are far better suited to that assessment. Generally speaking, the poorer party will be less able than the wealthier party to negotiate the purchase of satisfactory substitute land and will suffer the greater adverse impact from the compensation gap. The less well-off party will consequently be the person who values the land more highly according to the economic calculus. In the environment created by long-arm rectification, the pursuit of efficiency accordingly tends to converge with the quality of distributive fairness through the maximin criterion.<sup>79</sup> It remains possible to envisage extreme cases in which the convergence will not hold true, as where efficiency would demand a sacrifice from the less well-off party, but the importance of long-arm rectification is that it at least introduces the capacity to implement one or both of these goals. This feature is entirely absent from truncated rectification.

The long-arm rectification model permits an assessment of distributive fairness in adjudicating disputes, but the disadvantage of shifting entitlements on this basis lies in its interruption of the stability associated with property. If property rights are too readily demoted to compensation rights against the indemnity fund, then they deviate from their roots in natural law theory and cease to implement their teleological utilitarian functions in fulfilling expectations.<sup>80</sup> The long-arm rectification model will dash one party's expectations by denying their claim to ownership, but it should not be perceived as entirely destabilising the concept of property in registered land. There is no formula to define the optimal measure of stability, but Epstein has proposed indicative factors which are, on the whole, present in the long-arm rectification model.<sup>81</sup> The loss of title under that model could occur only within the tight parameters of statutory 'mistake', whose occurrence is sporadic, rare and unpredictable; it does not sanction expropriation at the hands of an invader who arrogates ownership, but only assesses claims after an inadvertent collision of interests; and finally, it is hedged about with institutional safeguards, being administered by impartial tribunals according to settled rules of procedural fairness. These constraints should quell any doubts about introducing excessive instability into registered land rights, implying that the long-arm model is the more just and the less invasive of the two rectification models.

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<sup>78</sup> For post-Rawlsian development of egalitarianism and prioritarianism see: H. Frankfurt, "Equality as a Moral Idea" (1987) 98 *Ethics* 21; E. Anderson, "What is the Point of Equality?" (1999) 109 *Ethics* 287; J.S. Dryzek, B. Honig & A. Phillips, *Oxford Handbook of Political Theory* (OUP, 2006), parts I and VI; S. Freeman, *Cambridge Companion to Rawls* (CUP, 2003); R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000).

<sup>79</sup> Where the two broadly coincide under a particular property rule, support is naturally at its strongest: A. Bell & G. Parchomovsky, "Pliability Rules" (2002) 101 *Mich. L.R.* 1 at 68; J.W. Singer, "The Rule of Reason in Property Law" (2013) 46 *U.C. Davis L.R.* 1369 at 1424; M. Mautner, "The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties" (1991) 90 *Mich. L.R.* 95 at 103; S. Munzer, *A Theory of Property* (CUP, 1990), ch.9.

<sup>80</sup> C. Rose, "Property and Expropriation: Themes and Variations in American Law" (2000) 1 *Utah L.R.* 1 at 2; C. Rose, "Property as the Keystone Right?" (1996) 71 *Notre Dame L.R.* 329 at 330-1 (reviewing expectations in property).

<sup>81</sup> R.A. Epstein, "A Clear View of the Cathedral: The Dominance of Property Rules" (1997) 106 *Yale L.J.* 2091 at 2095, 2111-4.

## CONCLUSION

The technical focus of this article concerns the two leading interpretations of the rectification power which have different implications for purchaser protection. The development of land registration might have been dominated by a policy of enhancing purchaser protection, but that does not mean the maximal level of purchaser protection is necessarily the optimal level.<sup>82</sup> title conflicts need not be answered in every instance by a rule preferring the purchaser. The circumstances of mistaken registration provide an example of conditions in which there is good reason for reinstating the former owner's rights and where enforcing them against a purchaser might not cause a serious detrimental impact on the individual or on the market. This article has examined whether market participants are likely to increase searches to forestall rectification claims, and has answered no. In the light of that conclusion, the inflexible pro-purchaser stance of the truncated rectification model becomes unnecessary on efficiency grounds. The preferable approach following a mistaken register entry is the more discerning adjudicative process afforded by the long-arm rectification model which offers a discretionary outcome that minimises the harmful fallout caused by mistake. It may come at a small cost - the expense of rectification proceedings that are unlikely to be settled out of court and perhaps a marginal decrease in land value stemming from the small risk of title loss - but it avoids a fixed purchaser protection rule which might perversely take the land from a party who cherishes its uniqueness in order to reallocate it to a party who regards it only as a characterless repository of wealth.

The narrow point on the rectification power falls within the broader setting of security of registered land titles. Any property regime must choose between security of owners and security of purchasers, either protecting owners against the risk of loss to a future acquirer or protecting purchasers against the risk of failure to acquire the anticipated rights: it cannot do both.<sup>83</sup> The task for property law is to contain that risk and allocate it appropriately. In the event of mistake, the elaborate rules of rectification provide a sophisticated and individualised response which could be used to allocate risk in the least harmful way and, coupled with indemnity, spread the loss widely. The long-arm rectification model reduces the level of security for purchasers but the corresponding advantage is that every purchaser will gain the protection of a rectification hearing in the event of a future mistake. Far from being the purchaser's dread, the long-arm rectification model holds at least some appeal to all those involved in land dealings - current owners and future purchasers alike - because it offers an agreeable solution for all mistakes, whenever occurring. Each party will have the advantage of raising their attachments to the land in the rectification proceedings as a reason for retaining or recovering title.

The idea of security being affected by the discretionary element of rectification raises the tension between predictability and adaptability in property law. The long-arm rectification model would inevitably impair an acquirer's expectations of secure holding. But property should also respect other important values. Recent scholarship emphasises the importance of adaptability as a characteristic of property law. Opposing the traditional argument that only unassailable property rights can spur

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<sup>82</sup> See B. McFarlane, *The Structure of Property Law* (Hart, 2008), p.480.

<sup>83</sup> "Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act" (1870, c.20), Minutes of Evidence, p.791 (E.P. Wolstenholme); T.W. Mapp, *Torrens' Elusive Title* (ALRII, 1978).

land improvement and economic usage, it has been suggested that the appropriate inducement to invest in land can be offered by a property system which, far from bestowing crystal-clear perpetual entitlements, gives its reassurance to those concerned about title risk by holding out the prospect of future legal adaptability and a fair hearing in response to crisis.<sup>84</sup> This perspective recognises that predictability of outcome must cede to the competing aspiration of responsiveness when unexpected events occur, allowing a more sophisticated and individualised process of adjudication. Long-arm rectification embodies that compromise. It guarantees that title conflicts will be met not by inflexible purchaser protection based on chronological order of acquisition, but by a fact-sensitive evaluation of both parties' positions.

Finally, it remains to consider whether the conclusions drawn in respect of rectification claims might apply more generally to other forms of title conflict. The context of mistake is unique: it is a category of event which is not necessarily connected to the parties or attributable to their carelessness but may flow from such adventitious events as a registry clerk's touch of the wrong button; it is not easy to detect; it is backed up by indemnity; it does not obtrude into the property system to such an extent that it destabilises titles and damages market confidence. These factors are unlikely to be found in other contexts where the registration apparatus and state indemnity are absent. The prescription of adaptability and responsiveness is therefore likely to be unsuited for adjudicating other sources of title conflict. In contrast, however, the economic framework used in assessing rectification has relevance to the resolution of all title conflicts. In setting property rules, it should always be appropriate to consider whether the gains from allocating the land in the least harmful manner are sufficient to justify the costs of rather unpredictable decision making and any consequential precautionary behaviour; yet the evaluation of social efficiency is only one factor among many others and is likely to rank well down on the scale of considerations in legal systems which observe a long tradition of plural values in property.

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<sup>84</sup> N.M. Davidson, "Property's Morale" (2011) 110 Mich. L.R. 437 at 477; J.W. Singer, "The Rule of Reason in Property Law" (2013) 46 U.C. Davis L.R. 1369 at 1381; C. Rose, "Property and Expropriation: Themes and Variations in American Law" (2000) Utah L.R. 1 at 13.