

## Interests, Powers and Mere Equities in Modern Land Law

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Abstract:

*English land registration law is a work in progress. There remain important unresolved issues concerning the conceptual building blocks used in the Land Registration Act 2002. This article focusses on rights to correct the land register. It considers the place of such rights in the ordering of estates, interests, rights and equities; and makes proposals about the characteristics of these rights so as to produce an integrated, coherent regime which combines the blunt rule for the passing of property with a sophisticated remedial regime for its recovery. Having analysed the right to rectify, it concludes that the right to rectify shares such similarities with the 'mere equity' that this classification makes sense in explaining the current law. In terms of policy, however, this classification is inappropriate and reform is required. Potential options for such reform are considered.*

Keywords: land registration, mere equities

### **1. Introduction**

The right to rectify the register occupies an uneasy position in the English land registration system. The system is designed to provide simplicity and certainty through a catalogue of rules about the passing of proprietary estates and interests in land, coupled with rules about their respective priorities. Enjoying a challenging relationship with those rules, the right to rectify, in certain circumstances, enables the restitution of rights that have been lost by a mistaken change to the register. Dissecting the right to rectify is important, not only practically in the application of statutory rules about title and priorities, but also conceptually in the understanding how the rules of property and restitution interact. This article therefore asks the central and seemingly simple question: what is the right to rectify?<sup>1</sup>

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<sup>1</sup> Resolving this question is a significant contribution to the on-going debate regarding mistake, rectification and indemnity. See Martin Dixon, 'What Sort of Land Registration System?' [2002] Conv 349; Elizabeth Cooke, 'Land Registration: Void and Voidable Titles – a Discussion of the Scottish Law Commission's Paper' [2004] Conv 482; Elizabeth Cooke, 'The Register's Guarantee of Title' [2013] Conv 344; Simon Cooper, 'Regulating Fallibility in Registered Land Titles' (2013) 72 CLJ 341; Martin Dixon, 'A Not So Conclusive Title Register?' (2013) 129 LQR 320; Martin Dixon, 'The Past, the Present, and the Future of Land Registration' [2013] Conv 463; Amy Goymour, 'Mistaken Registrations of Land: Exploding the Myth of "Title by Registration"' (2013) 72 CLJ 617; Emma Lees, 'Title by Registration – Rectification, Indemnity and Mistake and the Land Registration Act 2002' (2013) 76 MLR 62; Emma Lees, '*Richall Holdings v Fitzwilliam: Malory v Cheshire Homes* and the LRA 2002' (2013) 76 MLR 924; Emma Lees, 'State Guaranteed Title: The Land Registration Act 2002', in Ann Apers et al. (eds) *Property Law Perspectives III* (Cambridge, Intersentia, 2013); Emma Lees, 'Indemnity and the Land Registration Act 2002' (2014) 73 CLJ 25; Simon Cooper, 'Resolving Title Conflicts in Registered Land' (2015) 131 LQR 108; Emma Lees 'Rectification of the Register – Prospective or Retrospective?'

The status of this right is far from clear in a number of important aspects. Clarification is required in relation to: the grounds which generate the right; its incidents; and its position in the hierarchy of rights in land. The answers proposed here, based on the existing state of legislation and case law, are not without significant challenges and the article consequently also addresses what the law ought to be.

The status of the right to rectify is a particularly pressing issue. Although recent cases testify that the classification of its status can have a direct practical bearing on outcome, the case law is not consistent. First, there are several different characterisations of the restitutionary rights to alter that are generated by registration pursuant to a void or voidable disposition. Second, the courts have displayed ambivalence towards the differentiation of void and voidable titles. Third, there is an unresolved inconsistency in the application of competing priority regimes. Furthermore, whilst the legislative provisions have a bearing and impose certain parameters, they do not provide an exhaustive or unequivocal response.

The Law Commission has recently published a consultation paper which recognises the uncertain nature of the right to rectify.<sup>2</sup> It provisionally proposes to eliminate a single manifestation of this problem by eliminating one possible priority rule, but without positively specifying the applicable priority rule nor explaining the nature of the right.<sup>3</sup> It does not, therefore, strike at the root of the issue and would permit current practical problems to continue unresolved. A more comprehensive approach is required. This article seeks to provide that comprehensive examination of the nature of the right to rectify, and thus provide a basis for informing judicial decision making, or, ideally, for the enactment of a tailored provision that brings greater clarity to the ordering of property rights in the Land Registration Act.

The article will begin, in Part 2, by presenting the statutory framework for re-vesting title. In Part 3, we examine the nature of the right to rectify as it may be asserted against the recipient who takes over proprietorship directly in succession to the claimant. Part 4 addresses certain further issues that are contingent on the nature of the right to rectify. In Part 5, we turn to the enforceability of the right to rectify against remote recipients. We examine the various options for best classifying the right to rectify given the current state of the case law. Part 6 then considers proposals for reform, evaluating the solutions for *in rem* effect of the right to rectify.

## 2. The Legislative Response to Vesting without Valid Consent

The registration system has the difficult task of balancing the need for confidence in acquisition with the need for a recovery mechanism in case a change to the register causes a deprivation of property without consent. The Land Registration Act 2002 (LRA) takes a rigid approach to vesting by registration in section 58, a provision which ensures that property passes regardless of any defects in the underlying

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(2015) 78 MLR 361; Simon Cooper, 'Registered Title and the Assurance of Reliability' in *Modern Studies in Property Law* (Vol 8, Hart Publishing 2015); Emma Lees, 'Registration Make-Believe and Forgery – Swift 1st v Chief Land Registrar' (2015) 131 LQR 515; Simon Cooper, 'Removing Title Blemishes as a Function of Registration' in Arkadiusz Wudarski (ed.), *Functions of Land Registers in a European Comparative Law Perspective* (Duncker Humblot 2016); and Emma Lees, 'The Public Face of the Register: Confidence in the Land Registration Act 2002', in Arkadiusz Wudarski (ed.), *Functions of Land Registers in a European Comparative Law Perspective* (Duncker Humblot 2016).

<sup>2</sup> Law Commission, 'Updating the Land Registration Act 2002' Law Com. C.P.227 (2016), [13.83-87].

<sup>3</sup> *ibid.*, [13.87].

transfer, and even in the total absence of a transfer.<sup>4</sup> The unrelenting rule of vesting by registration has its effects ameliorated through the recognition of some unregistered interests, claims to reverse a registered entry, and a state compensation scheme. But the allocation of title is only one dimension of the legal relations between the former owner and the new acquirer, and it is blunt and relatively uninformative. It must be supplemented by a further branch of law which adds a second dimension: the sophisticated and fact-sensitive statutory rules by which title can be reallocated under the judicial power to reverse a register entry. This branch of law secures to the claimant a right to a gain received by the defendant<sup>5</sup> or a right to the reversal of the defendant's enrichment<sup>6</sup> and may appropriately be labelled as restitutionary. It is these restitutionary proprietary claims which demand attention as an integral component in the working of the system of allocating entitlements in land.

Restitution of property rights thus lost is obtained by means of the statutory proceedings to alter the register which embody the doctrine of 'rectification' and a particular subset of the doctrine of 'updating' following rescission. They are found in Schedule 4 of the LRA which authorises the court or the registrar to order a change to the register for three reasons: (a) to correct a mistake; (b) to bring the register up to date; and (c) to give effect to any estate, right or interest excepted from the effect of registration. Where a change under (a) prejudicially affects the title of a registered proprietor, the change is labelled 'rectification' which is the key criterion that secures eligibility for state compensation. Of these categories, we are concerned with (a) and (b).

The ground for rectification is the correction of a mistake. This article will proceed on the basis that mistake occurs in the case of a registration without any valid underlying mandate to procure such a registration.<sup>7</sup> Accordingly it arises where the current proprietor failed to obtain a good disposition (valid consent in proper form) from a person having power to transfer (sufficient title, capacity and authority) or a good entitlement by operation of law. If the jurisdiction to rectify is made out, the court may order reversal of the entry, leaving the mistakenly-registered proprietor to claim state compensation: if, instead, the court declines rectification as a matter of discretion, it is the former proprietor who will be eligible for state compensation.

The legal consequences of a registration pursuant to a void transfer, or indeed where there is no putative transfer at all (as in cases of pure registry error), differ significantly from those applying to transfers that are merely voidable. Although the LRA does not elaborate on the class of events which fall within the 'updating' head of alteration, the Law Commission<sup>8</sup> envisioned that a register entry pursuant to a voidable transfer would not be mistaken in itself but would become out of date insofar as it failed to reflect the new state of affairs once the transfer was set aside. The proceedings for changing the register entry are therefore 'updating' in nature, and

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<sup>4</sup> It thus applies even in the case of fraud, unlike typical Torrens systems. Torrens systems tend to differ in that there is a broader protection of acquirers which may extend to certain unjust enrichment actions.

<sup>5</sup> Peter Birks, *Unjust Enrichment* (2nd ed, OUP 2004) 1.

<sup>6</sup> Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 26 examining cl.1(2) of the Restatement.

<sup>7</sup> However, the term mistake is not defined in the legislation, apart from a limited and unenlightening provision restricted to indemnity: Land Registration Act 2002 (LRA 2002), sch 8, para 11(1). For further discussion of this problem see Cooper, 'Regulating Fallibility in Registered Land Titles' (n 1); Lees, 'Title by Registration' (n 1).

<sup>8</sup> Law Commission and HM Land Registry, 'Land Registration for the Twenty-First Century' Law Com. 271 (2001), [10.7(1)], note 23.

come without any entitlements to state compensation. The nature of the rights which arise in these circumstances will now be examined.

### 3. Nature of the Right to Rectify as against the Immediate Recipient

The statutory rules governing rectification explain concisely the effects of finding that the relevant grounds of recovery exist: the court may then order the registrar to rectify the register<sup>9</sup> and the registrar comes under a duty to make the rectification.<sup>10</sup> But the statute does not describe the attributes of the applicant's right from the moment of its origin until the implementation of the court order.. In exploring the nature of the right to rectify, valuable inferences can be drawn from the right to rescind, whose nature has been thoroughly examined and whose incorporation into registered land through the updating power is accepted. This section will therefore begin with a brief, preliminary discussion of the right to rescind and its implementation through an updating alteration of the register.

#### A: The Right to Rescind

Putting the rules of registered land temporarily to one side, if a conveyance of unregistered land is tainted by impaired consent, then although it is subject to the power to set it aside, it undoubtedly passes the legal estate. That is true of a transfer made pursuant to a contractual obligation but it remains unconfirmed whether the same analysis extends to conveyances not pursuant to a contractual obligation.<sup>11</sup> Haecker, however, has put forward a forceful case for applying the same effect beyond contract cases to all cases of impaired consent conveyances, and argues that the impairment leads not to a trust springing up in favour of the transferor but merely a power to call back.<sup>12</sup>

First, she argues, such an interest is justified neither by the maxim that 'equity regards as done that which ought to be done', nor by an *a fortiori* argument from presumed resulting trusts. Secondly, the 'power model' avoids the problematic concurrence of an entitlement to impose personal liability alongside a vested proprietary right. Thirdly, the change of position defence, which is not easily applied in defeasance of vested proprietary interests, is facilitated under the power model through conditions on its exercise. In addition to these conceptual advantages, Haecker adds a practical advantage: exercising the power would involve communication with the defendant and thus avoid imposing any liability as constructive trustee while he remained unaware of the impairment.<sup>13</sup> In unregistered

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<sup>9</sup> LRA 2002, sch 4, para 2(1).

<sup>10</sup> LRA 2002, sch 4, para 2(2).

<sup>11</sup> As, for example, where there is a gift, or a conveyance made under a misapprehension over the existence of a contractual duty to perform, such as where a bank executes a discharge of mortgage wrongly believing the debt to have been paid: *Garwood v Bank of Scotland plc* [2013] EWHC 415 (Ch), [2013] BPIR 450; *NRAM Plc v Evans* [2015] EWHC 1543, [2015] 2 P & CR DG18.

<sup>12</sup> Birke Haecker, 'Proprietary restitution after impaired consent transfers' (2009) 68 CLJ 324. See also Sarah Worthington, 'The Proprietary Consequences of Rescission' (2002) 10 RLR 28; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [108]–[120]; *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] Ch 520 [44], [80].

<sup>13</sup> The further practical advantage that a wider class of bona fide purchasers would receive protection from the claimant's rights under the rule in *Phillips v Phillips* (1861) 4 De GF & J 208; 45 ER 1164 is irrelevant to registered land (see Haecker, 'Proprietary Restitution' (n 12) 351). It must be noted that Haecker acknowledges the special context of land and particularly registered land: Haecker, 'Proprietary Restitution' (n 12) n 7 and 108. On the unsuitability of the trust analysis, see

land, therefore, there are sound justifications for the view that a conveyance tainted by impaired consent, whether or not there is an underlying contract, does not give rise to an interest in land vesting in the transferor but only a power to recover.

The power theory is equally capable of application to registered land. That the property passes to a transferee despite the transferor's impaired consent is bolstered by section 58 of the LRA which vests title by virtue of registration. The power to rescind nevertheless applies to registered land, and, once exercised through the judicial order setting aside the transfer, the transferor may seek the appropriate alteration of the register through the updating provision.<sup>14</sup>

In one exceptional case, however, it was held that, following a defective transfer of registered land, the claimant possessed not a mere power but a full immediate equitable interest under a trust. In *Collings v Lee*,<sup>15</sup> a case of fraudulent misrepresentation, the Court of Appeal held that the claimant possessed a trust interest and was thus able to rely on priority rules to enforce the interest against a remote acquirer.<sup>16</sup> The decision was given *ex tempore* on summary judgment and identifying the ground on which the court established the trust is not simple.<sup>17</sup> As we discuss below, the approach taken in the more recent case of *Swift*<sup>18</sup>, although it relates to rectification rather than rescission, suggests that the trust approach is wrong. Consequently, the response of an immediate trust interest in *Collings* ought not be considered a universal template for the rights ensuing from a voidable transfer of registered land.<sup>19</sup>

If it is to survive, the decision in *Collings* must be narrowly confined to cause the least offence to the approach in *Swift*. We propose that this be achieved through an interpretation of *Collings* that the beneficial interest was attributable to the transferee's wrongdoing rather than the impairment of the transferors' consent. This is hinted at by the court's words: '[t]he first defendant having acted as he did, the plain

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Charles Harpum, 'Registered Land: A Law Unto Itself?' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (OUP 2003) ch 9. The Privy Council had recognised this long ago: *Assets Co. Ltd v Mere Roihi* [1905] AC 176 (PC), 204-5 *per* Lord Lindley: 'if the alleged cestui que trust is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a cestui que trust is to destroy all benefit from registration. Here the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent'. See also *Swift 1<sup>st</sup> v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602.

<sup>14</sup> It has not been determined in registered land whether an order setting aside has the effect of creating a trust interest in the transferor and, if so, whether that interest is a precondition for the jurisdiction to update.

<sup>15</sup> [2001] 2 All ER 332 (COA).

<sup>16</sup> *ibid* [17]. It was said that, '...even where the transfer is obtained by fraudulent misrepresentation, the transferor nevertheless intends that the whole legal and beneficial ownership in the property shall pass to the transferee. But that was not this case. Mr and Mrs Collings did not intend to transfer the property to the first defendant and they did not intend to transfer it for no consideration. The first defendant acquired the property without their knowledge and consent and in breach of his fiduciary duty to them'.

<sup>17</sup> The possibility of explaining the case as fundamental mistake as to counterparty has been raised: Haecker, 'Proprietary Restitution' (n 12) n 87. That, however, may not do justice to the registration rules, as the vesting effect of section 58 applies regardless of the degree of impairment to consent. Impairments recognised as blocking transfer of legal title in unregistered land, such as fundamental mistake as to counterparty or as to subject matter or nature of the transaction, have no special status in registered land.

<sup>18</sup> *Swift* (n 13).

<sup>19</sup> For the same reasons, registered land should refuse to accept that a beneficial interest could be vested in a transferor by rescission out of court.

fact is that no court of equity could allow him to assert a beneficial interest in the property as against Mr and Mrs Collings'.<sup>20</sup> There were two potential wrongs on the facts: breach of fiduciary duty by the transferee who acted as the transferors' agent<sup>21</sup> and the wrong of deception. These circumstances would satisfy the general conditions necessary for the imposition of a trust: namely, the transferee came under a legal duty to the transferor on account of his wrongdoing, and that duty pertained to a specific right held by the transferee. Upholding the *Collings* decision on this ground would displace the power model, but only in the specific case of a wrong committed by the transferee. Outside of wrongdoing, the power model should continue with full operation and unaffected by such matters as the ground for consent impairment, the degree of impairment, and whether the impairment is recognised in law or equity.

## B: The Right to Rectify

The section above showed how the right to rescind a registered transfer is best understood as a power unless there is wrongdoing. It set the foundation to develop a similar analysis in relation to the right to rectify the register following a void transfer where a former owner's right to rectify comes into competition with the new proprietor's title under section 58. Because the operation of section 58 does not differentiate between voidable and void transfers, the competition must be resolved in the same way and for the same reasons as for the right to rescind, by recognising, at least in the absence of a wrong, that the right to rectify does not equate to an immediate trust interest.

That no trust arises was confirmed by the Court of Appeal in *Swift 1st Ltd v Chief Land Registrar*<sup>22</sup> which held that that the earlier case of *Malory Enterprises Ltd v Cheshire Homes*<sup>23</sup> (which had held that a trust would arise following a void conveyance which nevertheless resulted in registration<sup>24</sup>) was 'decided *per incuriam* in so far as the court held that the innocent victim of a forged disposition acquired only the legal estate and not the beneficial ownership of the property'.<sup>25</sup> However, the decision in *Swift* did not confront directly the case of the forger's own registration. Rather, it concerned an imposter who had never been registered.<sup>26</sup> The question of the status of the registered forger therefore remains outstanding. Might the registered forger be denied any property rights (other than the power to transfer onwards as confirmed by section 58 together with the owners' powers provisions) by some tacit fraud exception to registration?<sup>27</sup> Precedent is unhelpful here, but two clues about the

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<sup>20</sup> *Collings v Lee* (n 15) [13]. A further alternative justification for the decision is that it involved a statutory co-ownership trust that was not overreached and thus bound the immediate and remote acquirers: Richard Nolan, 'Fraud, trusts and equities' (2001) 60 CLJ 477.

<sup>21</sup> Andrew Burrows, *The Law of Restitution* (3rd ed, OUP 2011) 172, n 23.

<sup>22</sup> *Swift* (n 13).

<sup>23</sup> [2002] EWCA Civ 151, [2002] Ch 216.

<sup>24</sup> *ibid* [65] per Arden LJ, with whom Clarke and Schiemann LJJ concurred.

<sup>25</sup> *Swift* (n 13) [42] per Patten LJ with whom Moore-Bick and Tomlinson LJJ agreed.

<sup>26</sup> It concerned a dispute over indemnity, not the status of the right to rectify, on which any of its comments could be treated as obiter dicta; but the judgment clearly relies on the interaction of the status of the right with the availability of indemnity and thus it is thought they are better regarded as an integral part of the essential chain of reasoning.

<sup>27</sup> The position was formerly clouded by Land Registration Act 1925, s 114, which declared that fraudulent transfers remained void notwithstanding registration. Its conflict with other sections was symptomatic of the unsatisfactory way the 1925 statute failed to transition consistently from the deferred indefeasibility scheme of the Land Transfer Act 1897 to the immediate indefeasibility scheme put forward in policy reforms at the turn of the century. A scheme of deferred

legislative intent are to be found within the schemes for rectification and indemnity. Both contain clauses which bar relief (either by way of an indemnity claim or resisting rectification) to a defendant who contributed by his own fraud either to the register error or to the loss.<sup>28</sup> Such rules presuppose that rectification is the means by which the legal estate is to be restored to the former owner, for only then would it be necessary to bar the relief otherwise available to the defendant. The legislation proceeds on an assumption that the legal estate passes to the registered forger and that no trust arises. This provides a strong justification for concluding that the analysis in *Swift* applies also to cases where the forger becomes registered proprietor.

There is also the logical argument *a fortiori* from voidable transfers to be considered. Assuming *Collings v Lee* to be correctly decided (so that a claimant acquires an interest under a trust when the new proprietor has obtained the legal estate by wrongdoing in cases of impaired consent), then must not the same result occur in circumstances when the only difference is that the consent was entirely absent? A greater flaw in consent, it may be argued, should not lead to a lesser form of relief. Such an argument exerts a powerful influence but ultimately it ignores the differentiation brought about by the statute. Voidable transfers are clearly segregated from void transfers and have differing legal effects.<sup>29</sup> The two are not sufficiently analogous to demand application of the logical inference from voidable transfers to void transfers by the *a fortiori* argument.

Furthermore, the two regimes could be aligned by overruling *Collings v Lee*, so that where the legal estate has vested in a new proprietor, equitable title could never be ‘retained’ on grounds of absent or impaired consent. That certainly would have support in policy arguments favouring the simplicity and certainty of property rights in a registration scheme and it would sit comfortably with the approach of the Court of Appeal in *Swift*. The weakness of this approach is that it may not satisfy the desire to strip a wrongdoer of his gains. While a regime with such a trust might provide the claimant with satisfactory reparation for loss through re-vesting or indemnity at market value for loss of the land, along with indemnity for damage to the land during the defendant’s tenure as proprietor and consequential losses<sup>30</sup>, there is no guarantee that registrar’s recoupment action against the defendant<sup>31</sup> would strip all the gains he made at the claimant’s expense. The imposition of a trust, on the other hand, would supply the basis for recovery. If we accept the stripping of gains as desirable, then the policy arguments over the trust do not lie all in one direction.

Given the absence of a categorical answer to the issue in the exceptional case of wrongdoing, the remainder of the article will acknowledge the possibility of entrenchment of *Collings v Lee* in cases of wrongdoing, but will proceed generally upon the ‘power’ theory of the right to rectify. It therefore rejects the view that the right to rectify generates an immediate interest in the land. That conclusion coincides with the Law Commission’s conviction that the right to rectify is not ‘proprietary’, if that denotes the status of a full interest in land rather than some lesser right having *in rem* effect.<sup>32</sup> We do not, however, agree with the arguments relied on by the Law

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indefeasibility could allow radically different effects for proprietary restitution: see Birke Haecker, ‘Causality and Abstraction in the Common Law’ in Matthew Harding and Elise Bant (eds), *Exploring Private Law* (CUP 2010) 208, n 43, arguing that the legal estate could revert as between the claimant and defendant immediately upon setting aside without awaiting rectification.

<sup>28</sup> LRA 2002, sch 4, para 3(2)(a) and sch 8, para 5(1)(a).

<sup>29</sup> In particular, the right to an indemnity.

<sup>30</sup> LRA 2002, sch 8, para 1.

<sup>31</sup> LRA 2002, sch 8, para 10.

<sup>32</sup> Law Commission, ‘Updating the Land Registration Act 2002’ (n 2), [13.84].

Commission to support its conviction, which include the assertion that a right to rectify could not be sold and thus could not be accepted as proprietary since the transmissibility of the right to rectify is not restricted in the manner suggested.<sup>33</sup> Nevertheless, the conclusion that the right to rectify is less than an interest is convincingly justified by the power analysis presented above.

### C: Classification and Description

It is possible now to refine the language used to describe the process of re-establishing entitlements on the register following a mistaken change to the register. It is clear, when considering ‘the right to rectify the register’, that this shorthand is misleading.

First, when referring to a ‘right’ to rectify, there is no entitlement as of right.<sup>34</sup> Rather, following a mistake on the register, the register *may* be rectified.<sup>35</sup> This ‘right’ to rectify must be understood as a right to seek the intervention of the court, but not to a particular outcome. Until the court has actually ordered rectification, the claimant’s right is not an immediate proprietary interest in the land.<sup>36</sup> It carries no entitlement to sue in trespass, for example. The label of ‘right’, considering the absence of a corresponding duty, is therefore misleading. Its nature is better described as a ‘power’ which embraces a ‘change in a given legal relation’ resulting from ‘some superadded fact or group of facts which are under the volitional control of one or more human beings’.<sup>37</sup>

Secondly, the difficulty in allocating the ‘right to rectify’ to an established category of rights is exacerbated by the issue of standing. It is without question that any such power must be available to the former proprietor. But the LRA does not specifically restrict who can apply for the register to be rectified. It is not limited to the person whose interest in land was prejudiced by the mistake. As the Court of Appeal held in *Walker v Burton*:

[T]here is no legal requirement to claim an interest in the registered land where the application is to the registrar for the alteration of the register as a matter of public law... Anyone could object to the registration of the Fell without asserting a better title to it, or any title to it.<sup>38</sup>

Thus, in *Walker v Burton* itself the application was brought not by the former owner of the land, but by neighbours aggrieved by the behaviour of the mistakenly registered proprietors. All persons having an interest, broadly understood as a factual

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<sup>33</sup> *Rossetti Ltd v Thresher Wines Ltd* REF/2008/0633.

<sup>34</sup> LRA 2002, sch 4, paragraph 2(1) and paragraph 5.

<sup>35</sup> That much is evident from the ‘exceptional circumstances test’ and from the indemnity provisions of LRA 2002, sch 8 para 1, which assume that when there is a mistaken registration there are two possible outcomes: either indemnity will be awarded to the new proprietor (if rectification granted) or to the former proprietor (if declined).

<sup>36</sup> Peter Millett, ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399, 416: ‘[p]ending rescission the transferee has the whole legal and beneficial interest in the property’; and *Barclays Bank plc v. Boulter* [1999] 4 All ER 513, 518. On the controversy over backdating of orders to set aside and its potential impact on property, see Janet O’Sullivan, ‘Rescission as a self-help remedy: a critical analysis’ [2000] CLJ 509, 540-542.

<sup>37</sup> Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16, 44. This categorisation of the rights to set aside a conveyance is accepted in unjust enrichment writings. See Peter Birks, *Introduction to the Law of Restitution*, (Clarendon Press, 1989) 66; Haecker, ‘Proprietary Restitution’ (n 12) 339-340.

<sup>38</sup> [2013] EWCA Civ 1128, [2014] 1 P & CR 9 [31].



concern rather than some legal right, can apply for the register to be rectified,<sup>39</sup> but it would be inappropriate to equate their position with the position of the person whose private interest in land was prejudiced by the mistake and who would be restored if the rectification claim were successful. The existence of a mistaken registration will mean, inevitably, that there will be different classes of applicant. The class with which we are concerned here comprises those who will directly benefit from any change made to the register as a matter of private law, not those who simply seek rectification in the exercise of a general civic right as members of the public.

For present purposes, in consequence, the nature of a former owner's entitlement to rectify the register against a new proprietor, who acquired otherwise than by a wrong against the former owner, is accurately characterised as a private law power to vest an interest in oneself conditional on the court's discretion.

#### **4. Immediate Recipients: Further Issues**

We now turn to further issues affecting the immediate recipient: personal liability in unjust enrichment; proprietary liability in respect of exchange substitutes; and interim profits.

##### **A: Personal Liability**

The preceding part established the pure proprietary consequences of defective titles as between former owner and new registered proprietor. This part now queries the possibility of personal restitutionary relief. The conventional elements of a *prima facie* action in unjust enrichment appear to be made out in the void transfer cases. There is enrichment of the new proprietor, without basis, at the expense of the former owner. It is the very fact of passing legal title to the new proprietor by registration which constitutes the enrichment and necessitates the expanded role for restitution. The principal question remaining is how to determine whether the relief takes personal or proprietary form. This article does not provide a resolution drawn from general principles of unjust enrichment, but instead offers an answer in the particular context of the LRA.

We argue that the common law rules, including those relating to potential personal liability in unjust enrichment, do not apply to void transfers regulated by the LRA's rectification provisions. The statute is designed to afford the claimant a right to seek proprietary re-vesting in rectification proceedings, or indemnity in lieu. Nevertheless, there may be reasons for a claimant preferring to bring a damages action. The claimant might rather have the cash than the return of the land, might prefer to avoid embarking on that litigation if he foresees no prospect of success in rectification proceedings, might hope for greater returns in unjust enrichment through disgorgement of interim profits, or might anticipate that statutory indemnity would be reduced on account of his lack of proper care when common law damages in unjust enrichment would not be.<sup>40</sup>

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<sup>39</sup> See also *Roberts v Trustees of Brierfield Mosque* REF/2007/0865 (trespassers permitted to challenge proprietor's application); *Mann v Dingley* REF/2010/0582 (claimant having locus standi whether or not her rival claim succeeded); *Chapman v Godinn Properties Ltd* [2005] EWCA Civ 941 (claimant with no rival claim able to establish mistaken registration of defendant but rectification declined as a matter of discretion).

<sup>40</sup> Contrast LRA 2002, sch 8, para 5(1)(b) (lack of care reduces indemnity), with *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24 (lack of care irrelevant to damages).

However, personal actions in unjust enrichment brought for those motives should not be permitted to intrude into registered land.<sup>41</sup> They would stultify the statutory protection for acquirers.<sup>42</sup> The protective regime already caters for the distribution of entitlements, according to which the defendant either keeps the land or relinquishes it in exchange for indemnity which will be measured by market value along with consequential losses. This ensures that entry as proprietor in the register will enable the proprietor to retain the wealth represented by the land.<sup>43</sup> That policy would be subverted if a common law personal action could strip the proprietor of the wealth inhering in the land.

One counter-argument is that this analysis could allow a new proprietor to retain the wealth inhering in the land even when he was at fault. Suppose a person becomes proprietor by inaccurately stating facts in an affidavit supporting his application to become registered by adverse possession. The former owner will be able to seek re-vesting rectification and the defendant will find his indemnity reduced according to his responsibility for the loss. If he had been able to sell onwards before the former owner took any steps, then according to the analysis here there would no basis for any claim against him for the value of the proceeds, because assuming the former owner received indemnity, the facts would not support any recoupment claim of the registrar against the defendant. This enrichment effect is not, however, sufficient to displace the analysis presented above. While it may suggest that the recoupment provisions ought to be adjusted to meet the case,<sup>44</sup> the burden of an occasional over-compensation from the widely spread indemnity fund subscriptions cannot justify a general liability in unjust enrichment that would mean the demise of register reliability.

## B: Proprietary Liability in Respect of Exchange Substitutes

Following on from the point concerning the proceeds of sale in the defendant's hands, could there be a proprietary claim against them? Certainly, if the claimant had an interest under a trust in the land arising as a result of the defendant's wrongdoing then it would be remarkable to reach any conclusion other than that the proceeds were held on trust as the traceable substitute. But if, as proposed earlier, there is a mere

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<sup>41</sup> A possible exception to this is cases of improper behaviour (including knowing receipt). Personal liability was assumed in Law Commission, 'Land Registration for the Twenty-First Century: A Consultative Document', Law Com. No.254, 1998, para 3.48. Case law has not determined the point. See *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30; M. Conaglen & A. Goymour, 'Knowing Receipt and Registered Land' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010); Martin Dixon, 'Knowing Receipt, Constructive Trusts and Registered Title' [2012] Conv 439; Nicholas Hopkins, 'Recipient Liability in the Privy Council' [2013] Conv 61.

<sup>42</sup> There remain in Australia certain registration systems of the old model which permit a personal damages action, but the action in each case is created and tightly regulated by the express statutory terms: e.g. Tasmania Land Titles Act 1980, s 152; Western Australia Transfer of Land Act 1893, s 201; ACT Land Titles Act 1925, s 154; and South Australia Real Property Act 1886, s 203.

<sup>43</sup> Of course there may be reservations over the desirability of a policy which makes the register reliable in favour of the party who looks at his own entry after taking the defective transfer, where the arguments are nowhere near as compelling as those in favour of third parties who look at the vendor's entry to inform their decision to proceed with an acquisition: see Simon Cooper, 'Registered Title and the Assurance of Reliability' in *Modern Studies in Property Law* (Vol 8, Hart Publishing 2015).

<sup>44</sup> Contrast the Scottish position under Land Registration etc (Scotland) Act 2012, s 111(5), whereby applicants for registration owe to the registrar an independent duty of reasonable care to ensure the application does not lead to register inaccuracies.

conditional power to re-vest through the right to rectify, then there is no authoritative precedent. The question is the setting for important contributions to restitution literature.<sup>45</sup> Again, however, the great controversy can be avoided because the same negative answer as earlier is provided by the statutory context of registered land. Proprietary tracing into the proceeds would return the value to the claimant without state compensation for the defendant. It would bypass the defendant's protected entitlement to the wealth assured by the land register, and consequently it must be resisted on the ground that it is implicitly excluded by the Act.

### C: Interim Profits

For interim profits made by the defendant's use of the land during his period as registered proprietor, could the claimant bring an action to recover their value or obtain proprietary relief in respect of them? Once more, the answer is that all such claims, personal or proprietary, must be implicitly excluded, subject to a caveat where the defendant has committed a wrong of a type that permits disgorgement damages. The statutory policy of upholding of the reliability of the register, even in favour of the person who takes under the defective disposition, requires that the registered proprietor must be able to retain the fruits of ownership generated while he is proprietor. There may be common law actions that would otherwise have allowed such claims: in unregistered land, it is conceivable that a constructive trust imposed at rescission of a voidable disposition has backdated effect so as to enable the claim to interim profits.<sup>46</sup> But such liability cannot be translated into registered land because it would simply be incompatible with the statutory scheme that determines the balance of entitlements.

## 5. Enforceability against Remote Recipients

The previous sections canvassed issues concerning the nature of the right to rectify in disputes between a former owner and the immediate recipient of registered title to the land. This section will now address the question of priorities: against whom other than the direct recipient may the right be asserted (or, more accurately, the power exercised) and under what conditions? It will be seen that for this purpose the recent case law makes no fewer than three categorisations of the right to rectify.

Referring to the right to rectify as 'property' and 'proprietary' is unhelpful in this part because it brings the danger of conflating two ideas—its status as an interest as opposed to a power, and its *in rem* reach against persons who were not privy to its creation. The first question simply asks whether or not it gives an immediate interest and we have already put forward the power analysis in rebuttal. That enables the next part of the article to devote attention to the second question which inquires into the reach of the right to rectify as against strangers, and so the phrase *in rem* will be used. The right to rectify can certainly be regarded as having *in rem* quality insofar as it may lead to a new registered proprietor becoming bound by a pre-existing claim affecting the land, but the more contentious question is whether its reach is regulated

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<sup>45</sup> For full review, see Birke Haecker, *Consequences of Impaired Consent Transactions* (Hart Publishing 2013), 289-294.

<sup>46</sup> Worthington, 'The Proprietary Consequences of Rescission' (n 12) 62-3.

by its own *sui generis* provision, by the priority rules of sections 29-30 LRA 2002, or by some other system.<sup>47</sup>

#### A: Regulation as *Sui Generis* Right?

The first and simplest option is that the capacity of the right to rectify to affect third parties is governed by its own bespoke rules that determine its availability and which have no general application to other rights and powers in land. The provisions establishing the right to rectify are found in Schedule 4, and they may serve this regulating function.

This option has been taken in some recent case law which concludes that following a mistaken registration, rectification is available against all successors because either their titles involve a mistake or their reversal is necessary in order to make full correction. This is apparent from *Gold Harp*<sup>48</sup> in which the Court of Appeal held that the right to rectify arising from the mistaken deletion of a lease could be exercised as against a later registered leaseholder who was an innocent purchaser without value. It confirms that the right to rectify operates *in rem* and is not cut off by the 'owners' powers' rules which protect a disponee taking from a registered proprietor.<sup>49</sup> The independent force of the right to rectify is also evident from a decision of the adjudicator, *Knights Construction (March) Ltd v Roberto Mac Ltd*,<sup>50</sup> in which it was held that the right to rectify arising on the erroneous inclusion of disputed land in the title of another proprietor could be exercised as against a later registered proprietor who was an innocent purchaser for value. This decision not only confirms that the right to rectify is unaffected by the 'owners' powers' rules, but goes further and necessitates the conclusion that its reach is not cut short by the priority rules of sections 29-30 that would otherwise have given immunity to a registered transferee for value. The two cases offer powerful support for the argument that the right to rectify enjoys a universal persistence against all later acquirers and therefore enjoys a special status within the land registration scheme.

#### B: Regulation as an 'Interest'?

This *sui generis* approach is not, however, the only option apparent from the case law. The second approach to the *in rem* effect of the right to rectify rests on the priority rules of general application in the LRA and treats the right to rectify as an 'interest' within the meaning of section 29 and 30 for this purpose. The basic rule establishes priority according to the chronological order of creation of competing rights.<sup>51</sup> The special reversal rules of sections 29 and 30, however, protect transferees for value by postponing the earlier right as against a later registered transferee, lessee or chargee for value unless it is protected by entry on the register or falls within the list of overriding interests.<sup>52</sup> If these provisions apply to the right to rectify, then it would

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<sup>47</sup> See Elizabeth Cooke, *The New Law of Land Registration* (Hart Publishing 2003) 120-121, 127; David Fox 'Forgery and Alteration of the Register under the Land Registration Act 2002' in E Cooke *Modern Studies in Property Law* (Hart Publishing, 2005) 30-31 (considering regulation through the exercise of owners powers under LRA 2002, ss 23, 26)

<sup>48</sup> *Gold Harp Properties Ltd v MacLeod* [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

<sup>49</sup> LRA 2002, ss 23, 26.

<sup>50</sup> [2011] EWLandRA 2009/1459.

<sup>51</sup> LRA 2002, s 28.

<sup>52</sup> LRA 2002, ss 29(2)(a) and 29(3)(a).

undoubtedly be a right *in rem* capable of affecting some later acquirers and not others. Again, however, this interpretation remains in doubt.

In *Gold Harp*,<sup>53</sup> Underhill LJ doubted the argument that the case would turn solely on the question whether the new proprietor had given consideration.<sup>54</sup> That corresponds to a doubt that the status of the right to rectify was to be governed by the priority rules of sections 28-30. Instead, the question was to be decided on the basis of schedule 4, paragraph 8, LRA 2002 suggesting the *sui generis* approach above. Likewise, the Court of Appeal in *Collings v Lee* recognised that there was a ‘powerful argument’ in support of the view that the right to rectify could not be governed by the rules of sections 28-30.<sup>55</sup> In contrast, Patten LJ in *Swift*<sup>56</sup> held that the right was capable of being an overriding interest,<sup>57</sup> leading to the inference that the *in rem* effect of the right to rectify could be governed by the priority rules of sections 28-30. None of the judgments dwelt at length on the issue, and they are unlikely to foreclose further argument..

They are not the only cases relevant to the potential categorisation of the right to rectify as a matter falling within sections 28-30. In *Malory*, a case decided under the LRA 1925, there was support for the view that the right to rectify was capable of being an overriding interest and thus binding according to the old priority rules<sup>58</sup>; and this was extended to the LRA 2002 itself in a decision before the Adjudicator.<sup>59</sup> These cases therefore provide further momentum in the flow of cases that would classify the right to rectify as a right *in rem* which will be cut off only when the transferee protection rules in sections 29-30 apply. Various other cases also recognised that the power to rescind a disposition<sup>60</sup> and the power to rectify a document<sup>61</sup> could be overriding interests, but, although they dealt with powers, they are unhelpful in the present context as they dealt with equitable claims and not register mistakes which engaged the statutory power of rectification.

The lack of clarity as to the applicability of sections 28-30 requires closer examination of the legislation. The priority rules of sections 28-30 of the LRA apply to ‘an interest affecting a registered estate or charge’.<sup>62</sup> To fall within the priority rules, the right to rectify must be an ‘interest’ for the purposes of these sections. However, there is no *direct* answer within the legislation as to what is meant by

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<sup>53</sup> *Gold Harp* (n 48).

<sup>54</sup> *ibid* [34].

<sup>55</sup> *Collings v Lee* (n 15).

<sup>56</sup> *Swift* (n 13).

<sup>57</sup> *ibid* [51] per Patten LJ. In this respect it follows *Malory* (n 23) despite rejecting its view that a non-consensual transmission of title automatically generates a beneficial interest.

<sup>58</sup> Land Registration Act 1925, s 20(1).

<sup>59</sup> *Crawley v Gudipati* REF/2008/0602, REF/2009/0047 & REF/2009/0052 (further decision, 21 Jan 2010) [12], following *Malory* (n 23). The decision was expressed to be one of rectification, yet the action for reversing title acquired by undue influence is not properly regarded as within the concept of ‘mistake’ and should instead have been adjudicated through updating.

<sup>60</sup> *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, [2010] 2 EGLR 55; *Bank of Scotland v Hussain* [2008] EWHC 1669 and [2010] EWHC 2812.

<sup>61</sup> *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch. 183 (applying the well-known dictum of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247-1248); *Nurdin and Peacock plc v DB Ramsden and Co. Ltd* [1999] 1 EGLR 119 (Ch) 124-126; *Goodyear v Willis* [1999] EGCS 32; *Bradbury Investments Ltd v Hicklane Properties Ltd* (Unreported, 7 June 2007, Ch) [83] (upheld [2008] EWCA Civ 691, [2009] 1 P & CR 2); *Sahota v RR Leisureways Ltd* [2010] EWHC 3114, [76]. See Susan Pascoe, ‘Purchasers of Leases: Beware Landlord’s Rights of Rectification Under Section 70(1)(g) of the Land Registration Act 1925’ [1999] Conv 421.

<sup>62</sup> LRA 2002, ss 28(1), 29(1), 30(1).

‘interest’. It is stated that ‘references to an interest affecting an estate or charge are to an adverse right affecting the title to the estate or charge’,<sup>63</sup> but this simply transfers the ambiguity to ‘adverse right’. There are occasions when it was felt necessary to specify expressly that interests are to include certain matters that might be construed as powers, such as ‘claims’<sup>64</sup> and pending land actions.<sup>65</sup> Whether these reflect a wider conception of ‘interest’ or, conversely, that the interpretative principle *expressio unius exclusio alterius* should prevent the recognition of any other powers, such as the right to rectify, remains unclear from the legislative text.

Without statutory guidance or definitive case law under the LRA 2002, it is necessary to look further afield. The term ‘interest’ should be interpreted to include the standard canon of proprietary rights in section 1 of the Law of Property Act 1925 in order to meet the axiom that the two Acts must be read in line with one another. But while the Law of Property Act refers to powers, it lists them independently of the references to interests and thus does not support their inclusion within that term. Case law goes significantly further. The traditional view is that, in at least some circumstances, a power to acquire an interest is not itself an ‘interest’. The discrepancy is made clear in numerous judgments which use the term ‘equity’ to describe a power in the absence of an interest. *Phillips v Phillips*,<sup>66</sup> for example, referred to ‘circumstances that give rise to an equity as distinguished from an equitable estate - as for example, an equity to set aside a deed for fraud, or to correct it for mistake’<sup>67</sup> and it was held that the applicable priority rule differed between them. The case was mentioned in *Cave v Cave*,<sup>68</sup> which concluded that ‘the interest of the Plaintiff in this case is an equitable interest, and not merely an equity like the equity to set aside a deed’.<sup>69</sup> The same judge reinforced the distinction in a famous passage from *Re Armstrong*<sup>70</sup>:

No two ideas can well be more distinct the one from the other than those of “property” and “power”.... A “power” is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property.<sup>71</sup>

Following these cases, the statutory term ‘interest’ should normally be regarded as excluding powers to acquire property. But that principle is not universal. The cases have not spoken with one voice<sup>72</sup> leading Thomas to admit that ‘this fundamental

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<sup>63</sup> LRA 2002, s 132(3)(b).

<sup>64</sup> In the special case of Crown interests, ‘interest’ refers to ‘any estate, interest or charge in or over land and any right or claim in relation to land’: LRA 2002, s 83(2).

<sup>65</sup> LRA 2002, s 87(1).

<sup>66</sup> (1861) 4 De G F & J 208; 45 ER 1164.

<sup>67</sup> *ibid* 218; 1167 *per* Lord Westbury LC (*obiter*).

<sup>68</sup> *Cave v Cave* (1880) 15 Ch D 639.

<sup>69</sup> *ibid* 649 *per* Fry J.

<sup>70</sup> *Re Armstrong* (1886) 17 QBD 521 (power of appointment was not ‘separate property’ within the meaning of the Married Women’s Property Act 1882).

<sup>71</sup> *ibid* 531 *per* Fry LJ, referring to a general power of appointment.

<sup>72</sup> *Stump v Gaby* (1852) 2 De G M & G 623, 630; 42 ER 1015, 1018 *per* Lord St Leonards LC: ‘[W]hat then is the interest of a party in an estate which he has conveyed to his attorney under circumstances which would give a right in this Court to have the conveyance set aside? In the view of this Court he remains the owner, subject to the repayment of the money which has been advanced by the attorney, and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate...’ *Allcard v Skinner* (1887) 36 Ch D 145, 172 *per* Cotton LJ: the transferor can recover disposition tainted by undue influence ‘on the ground that it was a property the beneficial interest in which she had never effectually parted with’. See also *Latec Investments*

distinction between the concepts of power and property has not been preserved in all contexts and for all purposes'.<sup>73</sup> The extension of the statutory 'interest' to the right to rectify is simply beset with difficulty that cannot be resolved satisfactorily by interpretative means within the four corners of the statute or by reliance on statutes *in pari materia*.

### C: Regulation as a 'Mere Equity'?

It is necessary therefore to consider a third option for explaining the *in rem* effect of a right to rectify: the rules relating to the 'mere equity'. Section 116 of the LRA declares that 'a mere equity has effect from the time the equity arises as an interest capable of binding successors in title'. Categorising the right to rectify as a mere equity would therefore bring it within the statutory definition of 'interest' in section 29-30, bypassing the difficulties discussed immediately above, and providing an explanation for the case law in section B. There is no decision which decisively accepts that the right to rectify may come within the concept of mere equity. Yet there are cases in which overtures can be detected. *Crawley v Gudipati*<sup>74</sup> issued a 'preliminary view' that the right to rectify was a mere equity falling within section 116.<sup>75</sup> In further proceedings,<sup>76</sup> it was held that that the right to rectify, as an 'interest', was controlled by the priority rule of section 30<sup>77</sup> and that the claimant's right to rectify was protected as an overriding interest,<sup>78</sup> but the reference to section 116 was dropped. For that reason, and also for the reason that the decision rested on two very different grounds of defect which were not subjected to separate legal analysis (flawed attestation and undue influence, the latter not generating a right to rectify), the judgment is of limited value.

*Proudlove v Wood*<sup>79</sup> offers the strongest indication of the conceptualisation of the right to rectify as a mere equity. Proudlove, the registered proprietor, had signed a transfer that was void for *non est factum*. The transferee, Wood, became registered and the land was again transferred onwards by him, eventually reaching the Deacons. Counsel contended that the right to alter the register was a mere equity within section 116, it prevailed against third parties generally, and could not be resisted by the defendants who had become registered when the claimant was in actual occupation so that his mere equity gained overriding status.<sup>80</sup> The court appeared to accept this reasoning. Insofar as that forms the *ratio*, the case is authority for the right to rectify as mere equity. But there are serious qualifications to be made. First, the court did not explicitly hold that the right to rectify was a 'mere equity' within section 116, although that may be a fair reading of the judicial intention. Second, the relevance of the comments on the right's status as an overriding interest coming within the section 29-30 priority rules is complicated by the court's decision that the registration of the

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*Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 (High Court of Australia) (power to set aside fraudulent mortgage sale): 'where a grantor is entitled to set aside a conveyance for fraud he has, in every sense of the term, an equitable interest in the subject land...' at para 7 *per* Taylor J.

<sup>73</sup> G. Thomas 'Powers' 2nd ed. (2012, OUP) para.1.06. See *TMSF v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] 4 All ER 704 (power to revoke trust).

<sup>74</sup> *Crawley v Gudipati* (n 59) (12th Nov 2009).

<sup>75</sup> *ibid* [81]-[82].

<sup>76</sup> *ibid* (21st Jan 2010).

<sup>77</sup> *ibid* [9].

<sup>78</sup> *ibid* [12]-[15].

<sup>79</sup> *Proudlove v Wood* [2011] PLSCS 206.

<sup>80</sup> *ibid* [16].

Deacons was a rectifiable mistake. The court cautiously declined to address the crucial issue of what the proper result might have been had there not been the overlap of mistake and overriding interest.<sup>81</sup>

The dominant, albeit unsettled, position appears therefore to be that the right to rectify is indeed liable to be postponed under sections 29-30 following a registrable transaction completed by registration, but that the route by which this is achieved is unclear: as an interest or as a mere equity thus treated as an interest thanks to section 116? To examine the merits of these contested approaches, it is necessary to engage with the concept of the 'mere equity'. This has been described by one writer as a "grey and murky fog, consistent in depth of colour, the boundaries hazy and ill-defined".<sup>82</sup> Nevertheless, the classification of the right to rectify as a 'mere equity' does have certain advantages over the approach of classifying it directly as an interest under section 29-30, not least the fact that certain rights which undoubtedly do fall into the 'mere equity' class (including a right to rectify a document) share certain features with the right to rectify the register. The common features include: being discretionary in application; comprising a power; being equitable; having prospective effect. To dismiss the 'mere equity' approach out of hand would therefore be to ignore a potentially more suitable route than that of treating the right to rectify as a substantive interest.

Snell defines the mere equity as follows:

[A] mere equity is an inchoate right binding on specific property. In functional terms, to say that a person has a "mere equity" in relation to property means that the property is susceptible to an equitable proprietary claim if and when the claimant elects to enforce it. The claimant must person some further legal act to cause his claim to crystallise as an equitable interest.<sup>83</sup>

Thus, the key features of the mere equity are that it is a means by which another right in land may be acquired; it does not itself give an equitable interest in land but is in its nature a power. This neatly encapsulates the key features of the right considered here. Furthermore, 'mere equities' do not only arise from equitable jurisdictions. The label 'mere equity' may initially appear inappropriate for statutory powers, but the rights which fall into this category are not necessarily the progeny of equity - for example, the right to rescind for duress recognised at common law. Concluding that the right to rectify is a 'mere equity' is not the end of the argument, however. Section 116 was intended to be declaratory of the law prior to the enactment of the Act and, as such, relies upon the existence of two categories of mere equity: mere equities with *in rem* effect, and mere equities which do not have such effect.<sup>84</sup> The distinction between these two categories of mere equity (those with and without *in rem* effect) relies on whether the mere equity in question is ancillary to an estate in land. That the term 'mere equities' can cover a range of rights, both with and without the ability to bind remote recipients, perhaps explains some of the judicial vacillation but does not undermine the argument that the features of the right to rectify align

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<sup>81</sup> *ibid* [27], [28].

<sup>82</sup> Ann Everton, 'Equitable Interests and Equities' (1976) 40 Conv (NS) 209; cited in Mark Pawlowski and James Brown, 'Mere Equities and Third Parties in Leasehold Law' (2010) 14 Landlord and Tenant Law Review 100, 100.

<sup>83</sup> John McGhee, *Snell's Equity*, (33<sup>rd</sup> ed, Sweet & Maxwell 2015) [2-006].

<sup>84</sup> This distinction is clear from *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL), 1238 *per* Lord Upjohn: 'I myself cannot see how it is possible for a 'mere equity' to bind a purchaser unless such an equity is ancillary to or dependent upon an equitable estate or interest in the land'.



closely with the definition of mere equity. As a result, it is possible to explain why the right to rectify, which would not otherwise fall comfortably within the statutory concept of ‘interest’ in section 29-30, is treated as being governed by these provisions. The best explanation of the current approach by the courts is that explicitly or implicitly they are treating the right to rectify as a mere equity. Nevertheless, we argue below that as a matter of law reform, a fresh provision explaining the nature of the right to rectify is preferable to relying on categorisation as a mere equity.

## 6. Rethinking the Ordering of Rights

### Prologue: the Law Commission provisional proposal

The Law Commission’s recent consultation paper seeks responses to its provisional proposal that ‘the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being an overriding interest’.<sup>85</sup> This would certainly have the advantage of eliminating the argument that a right to rectify, supported by actual occupation, could bind a successor and block the successor’s indemnity claim on the ground that it was the overriding interest and not the register correction which caused the successor’s loss. But this would do nothing to clarify the nature of the right, it would not positively resolve which priority rule applies to the right, and it would leave untouched other practical difficulties.

Moreover, the proposed reform might introduce a danger of muddying the waters further. The new provision would imply that the right to rectify remains within sections 28-30 (except for overriding interests) but without explaining why. Our contention is that the better approach to reform would be to fix the underlying issues by explicit enactment of a bespoke provision concerning the nature and *in rem* effect of the right to rectify. To provide a foundation for future coherence in the right to rectify, whether through legislative clarification or judicial exposition, it will be necessary to understand the proper place of the right to rectify within the ordering of estates, interests, rights, powers, and mere equities, and their allocation amongst the priority institutions.

#### A: Harmonising transferees’ protection from mere equities and rights to rectify

It was established above that there is a high degree of correspondence between the right to rectify and the traditional constituents of the mere equity class. Indeed, we argued that classifying the right to rectify as a subset of mere equity represents the best way to account for the dominant case law trend. However, with a view to possible reform, we argue that the ideal way to conceptualise the right to rectify is not to rely on categorisation by family resemblance.<sup>86</sup>

Using a polythetic classification, as opposed to necessary and sufficient conditions, to decide what amounts to a ‘mere equity’ would introduce significant indeterminacy. That approach is unsatisfactory here because the capacity to bind third parties is at stake. So, while we argued above that the ‘mere equity’ analysis offers the best route for describing and bringing coherence to the past case law, we also argue that a superior system could be achieved through legislative reform.

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<sup>85</sup> Law Commission, ‘Updating the Land Registration Act 2002’ (n 2), [13.80].

<sup>86</sup> Ludwig Wittgenstein, *Philosophical Investigations* (1953), recognising multiple attributes common between members although not a single universal and defining feature shared by all.

We propose that what is required is a straightforward, explicit rule that declares the constituent content and priority status of the right to rectify, rather than separating these issues so that the characteristics of the right are taken from one area of property law and its priority rules from another. This introduces the reform option of a bespoke provision which clarifies the nature of the right and its *in rem* reach. The issue is whether the right to rectify should be available in principle against all successors (which has been considered elsewhere<sup>87</sup>) or whether it should be deferred to a transferee for value, and in the latter case whether the new provision should simply declare that the transferee protection rules of sections 29-30 apply to rights to rectify as well as other established ‘interests’. Even though that approach would confirm the trend seen in the current case law, there are multiple reasons to be wary of it.

First, bringing the right to rectify under the control of sections 29-30 would require consideration of the interaction with indemnity. The Law Commission suggests that when the right affects a transferee by virtue of being an overriding interest, the transferee will be denied indemnity.<sup>88</sup> The basis for this is an assumption that the right to rectify - a discretionary claim accompanied by indemnity - undergoes metamorphosis in the event of a transfer so as to become a non-discretionary entitlement unaccompanied by indemnity. However, we argue that protection should merely prevent the new registered proprietor from raising the defence of transferee for value. It should not qualitatively enhance the claimant’s relief or remove indemnity.<sup>89</sup> For sections 29-30 to be a satisfactory vehicle for the right to rectify, this issue must be resolved and it must be resolved alike whether protection occurs through actual occupation or entry on the register.

Second, any requirement to protect the right to rectify by a register entry so as to avoid deferral under sections 29-30 would represent a significant advance beyond the current duties on property owners. Owners are currently expected to lodge their expressly-created interests for registration promptly after acquisition but to introduce a requirement that rights to rectify be registered in order to bind successors would demand registration at a time when there is no transaction being handled by the owner’s lawyer, and it implies that property owners should consider themselves under a practical responsibility to monitor the register and be on guard for mistaken deletion of their rights so that prompt steps may be taken.

Third, if a transferee protection rule replicating sections 29-30 were adopted, this would presuppose that the right to rectify could suitably be protected in the same manner as an interest through actual occupation or a notice on the register. It may appear desirable to allow a claimant to lodge a unilateral notice to protect his position and warn transferees of a heightened risk of alteration,<sup>90</sup> yet there would be doubtful consequences. It would discriminate against litigants seeking rectification without a rival claim of their own, and would have the potential to perpetuate conflicting claims to title on the register. In addition, applying these protective mechanisms would undermine the policy that interests protected by actual occupation should be readily

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<sup>87</sup> Cooper, ‘Resolving Title Conflicts in Registered Land’ (n 1).

<sup>88</sup> Law Commission, ‘Updating the Land Registration Act 2002’ (n 2), [13.60-63].

<sup>89</sup> That is implicit in *Proudlove v Wood* (n 79) [29]. We therefore disagree with Patrick Milne, ‘Guarantee of Title and Void Dispositions’ [2015] Conv 356, 363 that overriding status connotes loss of discretion and indemnity.

<sup>90</sup> It appears to have been allowed by the registry: *Barclays Bank plc v Guy* [2008] EWCA Civ 452, [2008] 2 EGLR 74 and *Barclays Bank plc v Guy (No. 2)* [2010] EWCA Civ 1396, [2011] 1 WLR 681, and its delayed lodgement by the solicitors was reviewed at length in the action against the solicitors in *Guy v Pannone LLP* [2009] EWCA Civ 30, [2009] 7 EG 90 (CS).

discoverable through inquiry. Having already made a disposition under circumstances of impairment, the occupier may be unable to formulate a simple response to a purchaser's inquiry, yet this conflicts with the policy that the inquiries must be capable of generating a clear conclusion so as to avoid deterring purchasers by enmeshing them in speculation over the nature of adverse claims.<sup>91</sup>

Fourth, the extension of sections 29-30 to the right to rectify would create a fundamental deviation between the protection afforded by proprietorship registration and notice entry. Where a claimant has been mistakenly deleted as proprietor yet remains in actual occupation, the extension of sections 29-30 would ensure that any new proprietor could not raise a plea of protected transferee. But the opposite result would follow where the claimant had lodged a notice that was mistakenly deleted, as section 29(3) prohibits the claim to an overriding interest in these circumstances. While this effect of the section was intended at the time of enactment in order to reduce overriding interests,<sup>92</sup> its discriminatory effect was not discussed. Claimants in actual occupation who have suffered from mistaken deletion of a notice rather than a proprietorship entry seemingly merit equal protection; and remote purchasers that fail to make enquiry of an actual occupier who had protected by notice rather than proprietorship entry seemingly merit equal penalty.<sup>93</sup>

Whilst there appears an acceptable policy choice between the preservation of the right to rectify as against all comers and cutting it short as against transferees for value, in the latter case adjustments would have to be made to ensure a transparent and integrated regime. Neither the Law Commission's suggestion of excluding rights to rectify from overriding status, nor the explicit inclusion of rights to rectify within section 29-30, would achieve that.

## B: Integrating void and voidable transactions

An alternative reform option could be a unitary provision for altering the register that would amalgamate the rules for defective consent dealings through updating and correcting, thereby unifying void and voidable titles.

Despite their separate doctrinal treatment in current law, void and voidable titles have much in common when applied to registered land, and the courts have already been cautious to avoid ruling out the possibility that voidable transactions

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<sup>91</sup> *National Provincial Bank Ltd v Ainsworth* (n 61) 1234, 1238. Nevertheless, it was accepted in principle that a power to rescind could have fallen within the former Land Registration Act 1925, s 70(1)(g): *Bank of Scotland v Hussain* [2008] EWHC 1669 and [2010] EWHC 2812. A right to rectify an instrument was also an overriding interest under s 70(1)(g): *Nurdin and Peacock plc v DB Ramsden and Co. Ltd* [1999] 1 EGLR 119 (Ch) 124-126; *Goodyear v Willis* [1999] EGCS 32; *Bradbury Investments Ltd v Hicklane Properties Ltd* (Unreported, 7 June 2007, Ch) [83] (upheld [2008] EWCA Civ 691, [2009] 1 P & CR 2); *Sahota v RR Leisureways Ltd* [2010] EWHC 3114, [76]. See Susan Pascoe, 'Purchasers of Leases: Beware Landlord's Rights of Rectification Under Section 70(1)(g) of the Land Registration Act 1925' [1999] Conv 421. This problem is, however, of limited significance as typical conveyancing practice is not to inquire into the nature of family occupiers' rights but simply to seek a waiver. Furthermore, the recent decision in *Mortgage Express v Lambert* [2016] EWCA Civ 555 suggests that in any case rights to rectify, if indeed mere equities or some kind of *sui generis* proprietary interest, would be susceptible to overreaching on transactions involving two trustees.

<sup>92</sup> Law Commission & HM Land Registry, 'Land Registration for the Twenty-First Century' (n 8) [5.12].

<sup>93</sup> This argument would vanish if the right to rectify were precluded from overriding interest status as provisionally proposed in Law Commission, 'Updating the Land Registration Act 2002' (n 2), [13.80].

might come under the rectification power.<sup>94</sup> Both involve defective consent. Both are effective to vest title upon registration. Both require an election and proceedings by the victim in order to recover. Both require a court order to secure recovery. Both have prospective effect that excludes any interim liability for the defendant's consumption and disposal. The similarities prompt inquiry as to whether in registered land the two types of defective consent should be regulated alike. Doing so would have the benefits of simplicity and of enhancing register reliability for those taking under a voidable transaction.<sup>95</sup> It would also offer a convenient loss-spreading system through indemnity.<sup>96</sup>

Currently, the statutory differentiation of void and voidable titles through their means of reversal—rectifying and updating respectively—causes undesirable deviation in their third party effects. One example occurs where the immediate recipient under a defective consent transfer makes an onward gift to a donee who takes possession. If void, and thus falling under the right to rectify, the donee will be presumptively immune from attack. If voidable, the donee will be bound by the mere equity and the register will be updated upon setting aside the transaction. The claim would fall within updating as it would do no more than publicise the existing entitlement. It would not be regulated by the concept of mistake because on the present view that requires a register change which at the time of the change was not supported by a valid mandate in the form of either a property interest or an entitlement which would be a proprietary interest but for the suspensive effect of the LRA pending registration.<sup>97</sup> On that view, to register the person in whom property vests subject to a liability to rescission is to register the right person, and is no mistake. If rescission subsequently occurs through the order setting aside, then that new event creates the foundation for registering or updating, but it cannot support a claim that the proprietor was erroneously registered at the time of entry.<sup>98</sup> In consequence, the lesser impairment to consent gives the more powerful right.

Another charge is that the current differentiation of void and voidable titles also leads to results that are logical but repellent. For instance, the immediate recipient under a transaction procured by his own undue influence who sells onwards is able to keep the sale proceeds,<sup>99</sup> while the remote purchaser is burdened with the loss if he failed to detect the victim in occupation. In that case, the overbearing influencer, who is the immediate cause of loss, makes a profit from his actions and forces the unconnected remote purchaser to suffer the loss of title.<sup>100</sup> In terms of indemnity it creates a dubious distinction. For the voidable title, the remote purchaser would be ineligible for indemnity, but it would in principle be available to the remote purchaser acquiring a void title.<sup>101</sup>

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<sup>94</sup> *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594, [31], 'I would reserve my position'; *Garwood v Bank of Scotland plc* (n 11) [72], 'I do not have to decide this issue'.

<sup>95</sup> LRA 2002, sch 4, para 3(2).

<sup>96</sup> Subject to finding the political will to increase the burden on the indemnity fund.

<sup>97</sup> See Cooper, 'Regulating Fallibility' (n 1).

<sup>98</sup> See n 8.

<sup>99</sup> The traditional understanding, at least in England, is that undue influence is not a wrong and does not permit tracing.

<sup>100</sup> The first purchaser is likely when selling to exclude any contractual liability to the second purchaser: Law Society, Standard Conditions of Sale (5th ed), cl.3.1.2(b). There may be liability where the transferee conceals by misrepresentation the transferor's occupation from the remote purchaser (*Vale v Armstrong* [2004] EWHC 1160, [2004] 24 EG 148 (CS)).

<sup>101</sup> LRA 2002, sch 8, para 5, subject to possible deduction for lack of care, which is especially likely now that the rights of actual occupiers are binding only if the occupation was 'obvious on a reasonably careful inspection': LRA 2002, sch 3, para 2(c)(i).

Those arguments collectively have force but they are not sufficient to justify assimilation. They overlook two important attributes of voidable titles. First, a voidable transaction may possess two dimensions: a transfer of property and an assumption of personal obligations. The traditional rule for voidable transactions is that setting aside is necessary not only for the purpose of establishing the basis for recovery of the property but also to ensure that any remaining personal obligations are terminated. The rectification power affects only the proprietary entitlements on the register and is unable to affect continuing obligations which need to be rescinded. Bringing the regulation of voidable transactions within the rectification power would be inadequate to achieve this.

Second, all voidable transactions for value will require the mutual unwinding of dealings unless the transferee's performance is entirely executory. Rules exist to protect the position of the immediate transferee in the event that the property is reclaimed, recognising that the transferee's participation in bringing about the transferor's defect in consent may have been innocent. The protection is achieved by imposing terms in the judgment setting aside so as to secure counter-restitution. To bring voidable titles within the rectification power would bypass this process. It would thus deny the transferee security because case law has indicated that rectification, or the discretionary refusal of rectification, cannot be ordered on terms,<sup>102</sup> thus leaving the transferee no greater relief than if the transaction had been void.<sup>103</sup>

Redirecting voidable transfers into the rectification power is not the answer if we are to retain a system which provides for the termination of personal obligations and pre-emptive counter-restitution. Even though it is undesirable to amalgamate procedures in relation to void and voidable transactions, there remains scope for equalising specific aspects of their effects. In particular, the differing consequences for discretion and indemnity could be ironed out through targeted minor reforms, in each case making the judicial discretion subject to the proprietor in possession rule and allowing indemnity in principle. Such minor alterations, coupled with an explicit bespoke provision dealing with the right to rectify, prescribing its nature and priority, represent the best solution to the current confusion.

## 7. Conclusion

This article has demonstrated, through a review of the current mixed case law, that the right to rectify and its current application to immediate recipients is best understood as in the nature of a power, giving rise not to an interest in land, but an ability to call on the help of the court to invoke its discretionary authority to confer such an interest. The conclusion was reached by considering not only the right to rectify following a void transaction, but looking, by analogy, at the right to rescind and update the register following a voidable transaction. As against remote recipients, it became clear that whilst the courts in general seem to favour the right being capable of having an *in rem* effect, what is less clear is the basis of this effect, be it as a *sui generis* right capable of assertion against all remote recipients, as an interest dealt with under sections 29-30 in its own right, or as a 'mere equity' dealt with under section 116 and

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<sup>102</sup> *Kingsalton Ltd v. Thames Water Developments Ltd* [2001] EWCA Civ 20, [2002] 1 P & CR 15, [31], [35] and [46], followed in *Malory* (n 23) [79]. Undertakings volunteered by a party may, however, influence the court's exercise of discretion.

<sup>103</sup> An independent personal action in unjust enrichment and possibly a lien for the purchase price: *Hughes v Macpherson* (1999) 78 P & CR D26 (COA).

therefore susceptible to losing priority on the basis of sections 29-30. Despite the courts' inconsistency on this question, our analysis has shown that the mere equity route is the best way in which the current case law can be explained, relying on the similarities between the right to rectify and existing mere equities.

This approach is not satisfactory as a matter of policy, however, because it rests the nature of the right to rectify on the ill-defined mere equity, it couples the right to rectify to unsuitable priority rules, and is insensitive to the special role of the right to rectify within the land registration system. The solution is not to amalgamate the rectification and updating powers, nor to bring the right to rectify within the priority rules of section 29-30. To address the problem, we advocate measures which will strike at the root cause of the problems and go far beyond the Law Commission's provisional proposal to excise the overriding interest characterisation. We recommend the enactment of a bespoke provision which identifies precisely how the right to rectify fits within the structures of land registration: that requires a statutory resolution of the nature of the right and declaration of its *in rem* reach. The current conceptual confusion produces a picture of inconsistency: in a system designed to promote clarity and ease of transaction, this confusion ought to be rectified at the first possible opportunity.