

REGULATING FALLIBILITY IN REGISTERED LAND TITLES

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ABSTRACT. *This paper explores the circumstances in which a change in the land register should be stigmatised as a mistake and thereby introduce the discretionary power to correct it. Recognising the importance of clarifying the concept of mistake, due to its role in controlling the reliability of the register, the paper reviews and rejects various possible determinants for mistake. It proposes an account of mistake which rests on a set of rigid legal constructs about entitlement and registration and which pays respect to various traditional attributes of property.*

KEYWORDS: *Land, title, registration, indefeasibility, reliability, correction, mistake*

INTRODUCTION

When in 1887 Lord Halsbury proposed a statutory provision that conferred a judicial power to alter the land register, even to the prejudice of otherwise secure registered property rights, it laid the foundation for a legislative scheme for alteration that has remained controversial ever since.¹ The provision passed through various incarnations² until reaching its current expression in which the discretionary power to correct is triggered by the key event of “mistake”.³ It is this concept which now takes first place in determining whether the land register is susceptible to correction.

As the criterion which controls the power to correct the land register, it regulates the extent of fallibility in registered titles, with recent

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¹ Hansard HL Deb. vol. 313 cols. 27–28 (3 March 1887), proposing Land Transfer Bill 1887, cl.16(1). The first statutory embodiment occurred in Land Transfer Act 1897, s.7(2).

² Later models commenced with a presumption that the land would be restored to the owner, with an overriding proviso permitting discretionary reversal of the rule on “special cause” or “special circumstances” being shown: see Lord Halsbury’s Land Transfer Bill 1888 (February draft), cl.53(1), and Lord Herschell’s Land Transfer Bill 1893, cl.3, respectively. See ‘Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners’ (1911, Cd. 5483), para. 31, leading to Law of Property Act 1922, s.174(1), and Land Registration Act 1925, s.82(1).

³ Land Registration Act 2002, Schedule 4, paras. 2(1)(a), 5(a) (hereafter “L.R.A. 2002”).

case law even going as far as challenging the title of an innocent purchaser for value who became registered as proprietor. If used in this way, the concept of mistake would curtail the characteristics which are normally regarded as uniquely indicative of property rights: security, durability, persistence. Mistake has consequently become important in giving effect to the contemporary values which justify and constrain property rights in registered land. Furthermore, because mistake describes the extent to which the state administration is willing to cut down the durability of property rights to pursue the public interest objectives of registration, mistake represents one pivotal point in describing how land rules integrate with the constitutional scheme for the protection of possessions.⁴ The loss of property following correction of a mistake is not, however, altogether without redress. When the registration of a proprietor involved a mistake and caused a former owner to lose property rights, the unsuccessful party in the correction proceedings will be entitled to statutory indemnity. But property scholarship has long recognised that some property rights will have personal significance far beyond their market value in monetary terms.⁵ The concept of mistake and its relationship with indemnity is therefore the platform for addressing the extent to which land should serve social values beyond a mere abstract repository of wealth that is interchangeable with its cash equivalent.

The concept of mistake also influences the effective attainment of the policy goal of supporting the land market. To permit the correction of mistakes in the land register, albeit with indemnity, is to create an element of unreliability for proprietors which may tend to undermine faith in the register. This should be a concern to prospective purchasers, which may ultimately diminish market confidence in the register as an information source, leading to costly reliance on other sources of reassurance, altering the behaviour of conveyancers, and raising questions over the proper allocation of the costs generated by such disruption to market behaviour. The discretionary power dictated by the criterion of mistake therefore has a counterproductive effect on what is generally understood as the *raison d'être* of registration systems. Because of this it has not been accepted in the traditional Torrens systems of registration found in Australia and Canada;⁶ there is, however, contemporary discussion over its possible introduction there as one

⁴ J. McLean (ed.) *Property and the Constitution* (Oxford 1999); G. Alexander and E. Penalver (ed.) *Property and Community* (Oxford 2010); G. Alexander, "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell L.R. 745.

⁵ M. Radin, *Reinterpreting Property* (Chicago 1996); E. Penalver, "Land Virtues" (2009) 94 Cornell L.R. 821.

⁶ Subject to very limited powers to correct clerical errors: *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd.* [1984] 2 N.Z.L.R. 704, *Thomas v Johnson* [1997] UKPC 65. For a rare exception, see Métis Settlements Land Registry Regulation (Alberta), s.34(3).

way to ameliorate the rigours of the inviolable rule of title by registration that can lead to hard cases and questionable judicial efforts to counteract its effects.⁷

Given these important matters that hinge on the meaning of mistake, this paper seeks to advance the understanding of mistake. It explores the circumstances and events which should determine whether any particular change to the register is regarded as falling within the concept of mistake. Part I isolates the specific subcategory of mistake that will be scrutinised. Part II considers whether mistake could remain an amorphous concept, capable reacting to any form of disappointed proprietary expectations, before ultimately rejecting that characterisation. Part III then proposes and reviews various contenders for a formula that could inject a degree of determinacy into mistake, discussing how each might subvert values of property law or hinder the attainment of relevant policy objectives. Part IV proposes a basis for mistake which rests on a set of rigid legal constructs about entitlement and registration. The proposed theory's interaction with various settled and controversial aspects of the land system is investigated, and its ability to handle external pressures is assessed.

I. DEFINING TERMS: THE CONTEXTUAL VARIETY AND FUNCTIONAL DIVERSITY OF MISTAKE

The power to correct depends upon the presence of a "mistake". The same word is regrettably used elsewhere in the statute for very different purposes. In particular, it forms the basis for jurisdiction to correct the register of cautions against first registration,⁸ to correct the register of title,⁹ to award indemnity in an assortment of diverse enumerated instances,¹⁰ and to enable the registrar to correct an application or accompanying document.¹¹ Because of the disparity in function and context, no useful definition of mistake can link together all of the occasions on which mistake is indiscriminately employed as the criterion for redress. The inquiry to be carried out by this paper requires

⁷ G.W. Hinde, "Indefeasibility of Title since *Frazer v Walker*" in G.W. Hinde (ed.) *The New Zealand Torrens System Centennial Essays* (Wellington 1971) pp. 75-6; A. Mason, "Indefeasibility – Logic or Legend?" in D. Grinlinton (ed.) *Torrens in the Twenty-First Century* (Wellington 2003), p. 19; P. O'Connor, "Registration of Invalid Dispositions" in E. Cooke (ed.) *Modern Studies in Property Law: Volume III* (Oxford 2005) p. 63; Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton 1990), p. 25; E. Toomey, "Fraud and Forgery in the 1990s?" (1994) 5 *Canterbury L.R.* 424. The rule's excesses are limited by statutory exceptions to indefeasibility and the so-called "in personam exception": *Frazer v Walker* [1967] 1 A.C. 569, 585. Cf. rejection of discretionary correction in Scotland: Scottish Law Commission, *Report on Land Registration Law* Com. 222 (Edinburgh 2010), Part 39, Recommendation 82.

⁸ L.R.A. 2002, ss. 20(1)(a), 21(1)(a).

⁹ L.R.A. 2002, Schedule 4, paras. 2(1)(a), 5(a).

¹⁰ L.R.A. 2002, Schedule 8, para. 1(1)(a)-(g).

¹¹ L.R.A. 2002, Schedule 10, para. 6(e); Land Registration Rules 2003, SI 2003/1417, r.130.

the various statutory references to mistake to be dissected and allocated amongst separate categories according to their concept and purpose, discarding those which are irrelevant. The only usage relevant to this paper is the correction of mistakes relating to the register of titles. The species of mistake being investigated in this paper therefore covers a congruent subject matter: it defines the precondition for correction,¹² along with the first and second limbs of indemnity entitlement which are dependent on that correction jurisdiction.¹³ Even within these confines, however, mistake lacks an obvious core meaning. The published preparatory materials illustrate its application rather than explain its content and it is left undefined in the statute, apart from a limited and unenlightening provision relating to compensation.¹⁴ The following parts will offer guidance on its meaning.

II. MISTAKE AS AN OPEN-TEXTURED EVALUATIVE STANDARD

The correction scheme could be envisaged as allowing register entries to be upset by reference not to a fixed rule but an evaluative standard responding to an outcome which the court regards as sufficiently egregious. That is how the concepts of fraud, unconscionability or culpable neglect are often used in law, and mistake could be added to that catalogue of standards in order to refer the correction power to an individualised context-dependent value judgment. By this route the correction power could establish a broadly-based standard controlled by human or institutional expectations about title, which might include assessment of the distributive fairness resulting from amending or preserving a register entry.

Using this type of standard would achieve an open-ended concept offering substantial room for the exercise of discretion in defining and applying the values to be embodied in the correction power. It would have the capacity to respond to myriad individual factual contexts and would prevent unjust outcomes from slipping through the net. There is certainly a strong tradition in equity of emphasising responsiveness to individual circumstances and the supervision of morality through *ad hoc* decision making with little reliance on precedent for issues of application. It would require no great leap to extend this tradition to determining proprietary relief in correction claims by constructing suitable standards relating to expectations and fairness.

Fashioning mistake out of those criteria might secure the desirable result of penalising the unmeritorious and rewarding the deserving, and in isolation it might initially appear to be a viable method for

¹² L.R.A. 2002, Schedule 4, paras. 2(1)(a) and 5(a).

¹³ L.R.A. 2002, Schedule 8, paras. 1(1)(a) and (b).

¹⁴ L.R.A. 2002, Schedule 8, para. 11(1).

explaining mistake. But once located in the context of land registration, it can easily be perceived as failing to integrate within the structure of the registration scheme and as detracting from statutory policy objectives. It would lead to the startling result that registered land titles could be upset even more readily than unregistered land titles (although indemnity would allay the most serious concerns). This formula is also objectionable for creating an entirely indeterminate concept whose content could not be guided by reference to existing and analogous legal doctrine.¹⁵ Because registration involves a unique statutory system, there is no obvious web of existing principles into which registration must integrate; any analogues from common law are of limited value since the registry's status as a novel bureaucratic intermediary introduces novel issues that have no counterpart in common law.

An evaluative standard would incur all the disadvantages of vagueness in property definition that generate inefficient wastefulness, and so comes under the critical eye of law and economics scholarship.¹⁶ It would diminish the predictability of case outcomes and decrease the out-of-court settlement rate, thus raising the total costs of dispute resolution in challenging and upholding titles after acquisition. The emphasis on individualised attention under the standard would exacerbate costs by placing a premium on fact finding that tends to inhibit summary disposal at the interlocutory stage. The anticipation of such costs could have a chilling effect on land acquisition and investment behaviour, and those who are averse to disputes might be deterred from land dealings due to the dangers created by the unpredictable standard. Taking further levels of professional input in an effort to assess, detect or mitigate the risk of an adverse correction claim might add to transaction costs and indirectly lead to market drag.

The use of a vague value standard to dictate the scope of correction power would often be a poor method for resolving entitlements where the disputed allocation of title occurred fortuitously without communication or dealings between the parties. In these circumstances it is ineffective as a means to discriminate between rival claimants.¹⁷ In disputes between immediate transferors and transferees, a behavioural standard is entirely appropriate and is the basis for much of equity's

¹⁵ See R.J. Smith, "Rectification of Registered Titles" (1993) 109 L.Q.R. 187, 190, discussing *Norwich and Peterborough Building Society v Steed* [1993] Ch. 116.

¹⁶ W.M. Landes, "An Economic Analysis of the Courts" (1971) 14 *Journal of Law and Economics* 61; I. Erlich and R.A. Posner, "An Economic Analysis of Legal Rulemaking" (1974) 3 *J.L.S.* 257, 265; D. Baird and T. Jackson, "Information, Uncertainty, and the Transfer of Property" (1984) 13 *J.L.S.* 299; C. Rose, "Crystals and Mud in Property Law" (1987-8) 40 *Stan L.R.* 577, 591; L. Kaplow, "Rules Versus Standards: an Economic Analysis" (1992) 42 *Duke L.J.* 557, 595-7.

¹⁷ M. Mautner, "The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties" (1991) 90 *Mich LR* 95, 99; C. Rotherham, 'Proprietary Remedies in Context' (Hart, 2002, Oxford) pp. 74, 129; E. Durfee, "Priorities" (1959) 57 *Mich. L.R.* 459 and "Priorities II" (1959) 57 *Mich. L.R.* 685.

regulation through conscience, typified by the reversal of transactions when one party has taken advantage of the other's vulnerability. But when it comes to the person who has acquired property through a registry error not of one party's making, or to a person who is at one remove from a challenged transaction, the use of a value standard is inapt to differentiate between rival claimants of equal innocence and the loss would presumably have to be left where it fell. This approach would neglect the opportunity to create rules having any instrumental effect in promoting behaviour changes that could advance the policy objectives of land registration.

On the other hand, the correction power could instead be controlled by a clearly defined and hard edged rule. The quality of predictability inherent in such a rule would avert potential costs of policing and enforcing property claims, it would allow better forecasting of the occasions for correction and ensure improved information about risk, thus removing a potential deterrent to entering the land market. It is for these reasons that this paper rejects an unstructured evaluative standard and proposes that the criterion defining mistake ought to conform to typical registration rules in exhibiting a high degree of determinacy.

III. CONTENDERS FOR THE DETERMINANT OF MISTAKE

Introduction: Freestanding and Referential Methods for Correction

Rejecting a value-based standard for the correction power leaves a definitional void. One hypothesis to plug the gap is a test which asks if the register indicates that rights are located where they do not actually exist. This might be termed a "monojural" approach as the presence of a correctable mistake would be determined by the freestanding set of property rules which prescribes the location of title in registered land. It would allow a correctable mistake to be found where, for example, a notice on the register turned out to be unsupported by an underlying entitlement to the property right claimed, or where a general boundary was inaccurately recorded. Although this test displays an abstract coherence, it must fail as a candidate for the correction criterion on grounds of policy as it is unable to act upon registered titles which are fortified by the doctrine of statutory vesting through registration.¹⁸ The validity of these titles is due to the very fact of registration, so the test would always yield a negative result for correction jurisdiction.¹⁹ If statutory vesting were to preclude the correction power then the special

¹⁸ L.R.A. 2002, ss. 11, 12 (first registration); Land Registration Act 2002, s. 58 (subsequent proprietors).

¹⁹ "It is not logically possible to describe the register itself as mistaken": G. Hill *et al.*, *The Land Registration Act 2002* (London 2005), para. 14.11.

provisions about rectification would become redundant,²⁰ and the law would effectively be restored to its unsatisfactory nineteenth century position when rectification was not possible against registered estates.²¹ That cannot be an acceptable conclusion because all registered titles, apparently even those acquired by fraud,²² would gain from its indiscriminate protection.²³

Any viable theory for regulating the correction power must sanction the alteration of all titles, even those fortified by statutory vesting. This compels the conclusion that the determinant for the correction power must be sought in a “bijural” solution which requires consideration of two sets of rules: an initial determination of the location of rights according to the current state of the register, followed by a secondary review according to another set of rules for the purpose of comparison.²⁴ The following sections will look at possible candidates for such a referential method.

A. Unregistered Land Rules as the Comparator

One possible bijural solution would be to introduce the correction power wherever there is a discrepancy between the allocation of rights according to the register and the distribution of rights according to the property rules of unregistered land. Selecting the unregistered land rules of property priority as the external standard for comparison would provide a set of well-documented rules possessing internal coherence and would promote consistency between outcomes in registered and unregistered land. It would ease the transition from the old system to the new, for whenever the principles of registration would postpone an interest, that fact alone would establish mistake and lead to either correction or indemnity. Its transplantation into mistake would therefore ensure that no rightholder would be worse off by the

²⁰ Rectification is correction which prejudicially affects the title of a registered proprietor: L.R.A. 2002, Schedule 4, para. 1.

²¹ ss.95, 96, 98 Land Transfer Act 1875. The principle was comprehensively denigrated by ‘Report from the Select Committee of the House of Commons on Land Titles and Transfer’ (1879, HCP xi) 1. For its abandonment, see J.S. Anderson ‘Lawyers and the Making of English Land Law 1832–1940’ (1992, OUP, Oxford) pp. 176–180.

²² But see *Malory Enterprises Ltd. v Cheshire Homes (UK) Ltd.* [2002] EWCA Civ 151 at [65]. Torrens systems, conversely, deny vesting in cases of fraud: E. Cooke and P. O’Connor, ‘Purchaser Liability to Third Parties in the English Land Registration System’ (2004) 120 L.Q.R. 640.

²³ Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century* Law Com. 271 (London 2001), para. 3.47(1), states that the rights of an adverse possessor out of occupation at first registration of another would not create mistake “because [the proprietor] is not bound by [the squatter’s] rights.” But first registration merely engages statutory vesting and freedom from incumbrances, and it would be a monojurial fallacy to treat these doctrines alone as displacing the correction power.

²⁴ See P. O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’ (2009) 13 Edin L.R. 194.

introduction of the registration system,²⁵ on the assumption that compensation is an adequate substitute.

The use of the unregistered land rules for comparison was accepted by Commonwealth commentators and was found in at least one correction provision of the former English statute.²⁶ But when it was apparently used in English case law interpreting the former generic correction power, commentators immediately reacted with warnings that subjugating the registered land priority rules to a discretionary correction power based on rules of unregistered land would fail to give due protection to the innocent acquirer of a registered interest and would undermine confidence in the land market.²⁷ That traditional argument against the unregistered land comparator stems from a desire to protect every person who acquires a title that is already tainted by mistake. But this paper contends that such a policy is over-inclusive and that the balance between an ousted owner and an acquirer who is one step removed from a mistake should be managed with greater sensitivity.²⁸ If the registration of the acquirer were instead classed as mistake, this would introduce the necessary responsiveness through the remaining preconditions to correction: the rectification bar (dependent on possession),²⁹ its provisos (addressing fraud, care, causation and unjust outcomes),³⁰ and finally the exercise of discretion. Although this potential for correction might have a deterrent effect on prospective purchasers, that would be substantially offset by indemnity.

For those reasons, this paper rejects one traditional argument for dismissing the unregistered land rules as the bijural standard for the correction power. But there remain other valid arguments which justify

²⁵ Recognised in *Report of the Commissioners to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land* (1857, c. 2215), paras. 26, 30, 57, 86. This is achieved in Torrens systems by the use of an unregistered land comparison to determine indemnity: R. Stein, "The Torrens System Assurance Fund in New South Wales" (1981) 55 A.L.J. 150, 151. On account of indemnity being capped in cases of fraudulent transfer in Hong Kong, recent reforms have proposed realignment with unregistered land by awarding right holders an entitlement to mandatory rectification: "Consultation on the Amendments to the Land Titles Ordinance" (Hong Kong, 2008, HK Land Registry) para.24. See also the correction rule which apparently converges with the unregistered land rule of *nemo dat* in Belize where no indemnity is provided by statute: *Quinto v Santiago Castillo Ltd.* [2009] UKPC 15.

²⁶ Land Registration Act 1925, s. 82(1)(g). For the Commonwealth commentary, see, e.g. D.J. Whalan, *The Torrens System in Australia* (Sydney 1982), p. 345; T.W. Mapp, *Torrens' Elusive Title* (Edmonton 1978), p. 165.

²⁷ E.g. D.C. Jackson, "Security of Title in Registered Land" (1978) 94 L.Q.R. 239; D.J. Hayton, *Registered Land* 3rd ed. (London 1981), p. 168. The comparison was arguably suggested by comments in *Orakpo v Manson Investments Ltd.* [1977] 1 All E.R. 666 and *Norwich and Peterborough Building Society v Steed* [1993] Ch. 116 as explained in R.J. Smith, "Rectification of Registered Titles" (1993) 109 L.Q.R. 187, 189. Except for the subordination of unprotected interests, general law rules nevertheless formed the basis for correction reforms in Law Commission, *Third Report on Land Registration* Law Com. 158 (London 1987), para. 3.34.

²⁸ See M. Harding and R. Hickey, "Bijural Ambiguity and Values in Land Registration Systems" in S. Bright (ed.), *Modern Studies in Property Law: Volume VI* (Oxford, 2011), p. 281.

²⁹ L.R.A. 2002, Schedule 4, para. 3(2).

³⁰ L.R.A. 2002, Schedule 4, para. 3(2)(a), (b).

dismissing the unregistered land priority rules. One argument comes from the costs of administering that system: delay and expense are possible as familiarity with the unregistered rules recedes into history, and there is likely to be wastage in resolving disputes over whether a particular unregistered land rule is incorporated or whether it ought to be disapplied in order to acknowledge the legal institutions of registered land.³¹ A further argument against the unregistered land comparator is that it would preserve a distinction between the binding power of legal and equitable interests. In a competition with a purchaser, unregistered priority rules usually depend on whether the interest was legal or equitable: the correction power would therefore hang on this distinction which is not easy to justify when formal documentation has been drafted, lodged for registration and publicised on the register.

The comparison with unregistered land is also undesirable because it perpetuates old habits. So long as correction can be relied on as a safety net, the registration system loses the capacity to change behaviour among the participants. This is particularly important because the unregistered land rules travel far beyond priority disputes between rightholders and purchasers.³² It is easily overlooked that the discrepancy between registered and unregistered land rules might relate not only to priorities but any aspects of property, including the composition of the *numerus clausus*, the physical matter to be governed by real property law, the capacity of persons to hold and dispose interests, the circumstances of original acquisition, the events which transfer title, and so on. Many common law rules on these matters are reformed by registration systems to pursue the objectives of land registration by direct means or indirectly through simplification of titles and dealings.³³

Finally, it cannot be appropriate for correction to be dictated by a common law rule that has been pointedly extirpated from the registration system. The success of the registered land system rests on its ability to persuade participants to abide by the new registration ethic: creating only the simple permitted interests, using the stereotyped

³¹ Law Commission, *Land Registration for the Twenty-First Century* Law Com. 254 (London 1998), para. 8.38; Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* Discussion Paper 125 (Edinburgh 2004), para. 5.19. Torrens system reforms have proposed eliminating all comparison with unregistered land rules for compensation: Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton 1990), p. 29; Land Law Review Committee of the Northern Territory *Guarantee of Torrens Title in the Northern Territory* (Darwin 1990) pp. 3–4. See L.A. McCrimmon, “Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change” (1993) 67 A.L.J. 904, 915–6.

³² A. Nair, “Morality and the Mirror” in S. Bright (ed.), *Modern Studies in Property Law* (Oxford 2011), p. 268.

³³ Directly pursued by the rule of statutory vesting and the rectification bar: Land Registration Act 2002, s. 58 and para. 3(2), Schedule 4, respectively. Indirect simplification by the curb on adverse possession (L.R.A. 2002, Schedule 6, para. 5), the erasure of unregistered chancel repair liability (The Land Registration Act 2002 (Transitional Provisions) (No.2) Order 2003, SI 2003/1953), and the proscription of mortgages by demise (L.R.A. 2002, s. 32(1)(a)).

forms, protecting priority through entry on the register, taking the proper degree of care to discover others' rights and preserve one's own rights, and so on. Harking back to the unregistered land rules at every opportunity to gain correction or indemnity would hardly stimulate the necessary change in culture and behaviour.

Collectively, these reasons militate against a correction power defined by reference to the unregistered land rules. Abandoning the unregistered property standard does, however, require one important compromise: any alternative method of determining mistake necessarily falls short of the ideal of compensating any deprivation of property rights caused by the functioning of the registration system that would not occur in unregistered land. It belies the slogan that a right-holder will be no worse off in registered land.³⁴ But that is of limited importance once registration has proved its social utility and taken root in participants' consciousness. At that point the transitional comparison ceases to be such a pressing concern as operational simplicity, consistency and effectiveness.

B. Procedural Default as the Determinant

A comparison with unregistered land rules is only one of the possible bijural solutions that could define the determinant of the correction power. One putative theory of correction which escapes the problems associated with the unregistered land comparison is the test of procedural default by the registry.³⁵ Correction jurisdiction could be determined by asking whether, in changing in the register, the registrar breached a legal duty or exercised a discretion unlawfully. The fact that the act might have been effective to vest and divest title must be disregarded, as procedural default would be concerned only with fulfilling the necessary routines and not with the underlying rights.

Even though there are many instances when applying the concept of procedural default as the determinant for correction might happen to yield an entirely unexceptionable outcome, it must not be taken as the determinant for mistake. If procedural default were taken as the exclusive determinant, scenarios can be foreseen in which an interest could be lost without compensation. Defining mistake by procedural default alone carries the corollary that no correction is possible if the registrar has followed protocol and made an *intra vires* exercise of a discretionary power, even though a valid interest might thereby be

³⁴ See the corresponding concerns over limiting indemnity through contributory negligence, which has no counterpart in unregistered land: A.E. Wallace and C.A.C. MacDonald, "A New Era in Torrens Title in Queensland" (1994) 68 A.L.J. 675, 680.

³⁵ A tangential reference concerning indemnity suggests that procedural default was refuted in Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century Law Com.* 271 (London 2001), para. 10.31(1).

expunged from the register. This result cannot be countenanced because, on the assumed absence of mistake, it would necessarily follow that indemnity would also be absent, leaving an uncompensated destruction of property rights.³⁶ This causes irreconcilable conflict with land registration's long-standing ethos of compensation,³⁷ and runs counter to the constitutional protection for property.³⁸ The concept of procedural default must be rejected as the basis for correction because of its potential to create this risk of uncompensated deprivation.

In *Baxter v Mannion*,³⁹ a case of utmost importance to the security of registered titles, the Court of Appeal rejected procedural default as the criterion for mistake. Baxter claimed adverse possession and applied for registration as proprietor in place of Mannion. He supported his claim with a statutory declaration which contained factual inaccuracies about the continuity and extent of his possession, yet the registry concluded that everything appeared in order and served the requisite notice on Mannion, inviting him to contest the claim. The time limit expired before Mannion took action and Baxter was accordingly registered on the strength of his statutory declaration. When Mannion sought rectification, Baxter argued that there had been no mistake as the registry had acted properly in reaching its decision on the material before it. The Court of Appeal rejected the argument, holding that the concept of correctable mistake was not to be restricted to "a mistake through some official error in the course of examination of the application."⁴⁰ It expressly acknowledged that restricting mistake to procedural default would prevent Mannion recovering the land or compensation.

The rejection of procedural default followed from the risk of deprivation without compensation. It hinged on the relationship between correction and indemnity, both of which in the English system are activated by the criterion of a mistake whose correction would prejudicially affect the title of a registered proprietor. But, it is submitted, procedural default would remain an unsatisfactory blueprint for correction even if indemnity were made available.⁴¹ Reliance on the registrar's procedural default would deflect attention away from the parties' own rights, status or behaviour. The rules of common law and equity about transaction validity and property priority, which implement a sophisticated balance of moral values and utilitarian

³⁶ L.R.A. 2002, Schedule 8, para. 1(1)(a), (b).

³⁷ Originating in Land Transfer Act 1897, s. 7(2).

³⁸ Human Rights Act 1998, Schedule 1, First Protocol, Art. 1.

³⁹ *Baxter v Mannion* [2011] EWCA Civ 120.

⁴⁰ *Ibid.* at [25]. See also *Khalifa Holdings Aktiengesellschaft v Way* [2010] EWLandRA 2008/1438.

⁴¹ Consider a hypothetical model where correction is determined by procedural default, but indemnity is available wherever rights cease to be enforceable by the unauthorised registration of another.

agendas, would all be discarded at a stroke. This would be especially unsatisfactory in the English registration model which readily confers title through a crude principle of statutory vesting that does nothing to pinpoint the class of acquirers who merit protection; a fraudster, for example, should not obtain unimpeachable title simply because of his skill in outwitting the registry's processes.

The discussion of procedural default up to this point has assumed that the register is changed to reallocate rights in a way that is not supported by an underlying entitlement. For completeness it must be recognised that a distinct analysis must be applied to a species of procedural default that occurs in another scenario: when a change in the register due to procedural default is nevertheless supported by an underlying entitlement. The typical example is a valid disposition which the registry accepts in breach of a regulation about the probative sufficiency of application documents. This is illustrated by the assumed facts of *Fatemi-Ardakani v Taher*⁴² in which the registry had accepted a transfer that had been executed by the donee of a valid power of attorney but had neglected to demand the power of attorney itself as required by the rules.⁴³ It was held that despite the procedural error there was no mistake.⁴⁴ The decision was correct in finding that the lack of supporting documentation to prove the matter to the registry does not comprise mistake. A mere omission from the applicant's bundle should not offer one party an entirely adventitious opportunity to invoke correction and resile from a valid disposition or impeach a valid transmission by operation of law. In more general terms, procedural default by the registry should never constitute a basis for correction where the expression of rights on the register is in accordance with a supporting entitlement.⁴⁵ That principle should extend beyond cases of an application's probative sufficiency to all cases of procedural default which do not alter property rights, such as the failure to serve statutory notices.⁴⁶

The preceding paragraphs have demonstrated that procedural default is neither necessary nor sufficient to introduce the correction power. There are occasions when a procedural default is integral to the event that deprives someone of an entitlement which ought to be

⁴² *Fatemi-Ardakani v Taher* [2007] EWLandRA 2006/1313.

⁴³ Land Registration Rules 1925, r. 82 at the time; now replaced by Land Registration Rules 2003, SI 2003/1417, r. 61.

⁴⁴ *Fatemi-Ardakani v Taher* [2007] EWLandRA 2006/1313, at para. [37].

⁴⁵ That approach might, however, run into problems over due process. If a claimant applies to become proprietor by operation of law, the registry sends a warning letter to the proprietor at the wrong address, and the claimant is registered, the ousted proprietor must then disprove the validity of the new proprietor's registration, perhaps many years afterwards when evidence is no longer available.

⁴⁶ The conditional obiter dictum to the contrary in *Khalifa Holdings Aktiengesellschaft v Way* [2010] EWLandRA 2008/1438, at para. [13], is wrong on this analysis.

redressed, but there may be other occasions when there is procedural default yet no deprivation of entitlement which requires redress.⁴⁷ Equally, there may be no procedural default yet a deprivation of entitlement which ought to be redressed.⁴⁸ To avoid the unnecessary multiplication of conceptual entities, it is a simple step to excise all reference to procedural default, exposing an underlying concept of substantive entitlement which accounts for the availability of the correction power. One possible form of substantive entitlement for determining mistake will be considered in the next section.

C. Departure from the Interest Preceding the Register Change

Care must be taken in identifying the type of substantive entitlement which is to rebut the accusation of an unsupported change in the register that constitutes a mistake. There is patently no basis for correcting when the register is changed to match the allocation of proprietary interests held immediately prior to the change in the register. But that is not to say that the reverse is true: correction should not be permitted merely because the register is changed in a manner that does not match the allocation of proprietary interests immediately prior to the change. The absurdity of that proposition can be observed in the simplest example of a transfer for value of registered land. When the registered proprietor of a legal estate executes a transfer, all legal proprietary effect of the instrument is sterilised pending its registration,⁴⁹ leaving the transferee with personal rights and at best an equitable interest in the land.⁵⁰ From the moment of taking delivery of the transfer, the transferee has only an equitable right, yet is entitled to convert it into a legal right by registering. It would be an intolerable impediment to the free transfer of land if the registration amounted to a correctable mistake merely because beforehand the purchaser had held only an equitable interest, or, as a purchaser under the e-conveyancing regime or a donee, had held no interest at all.⁵¹

Despite the absurdity, there is one ambiguous case which could be read as consistent with the correction power being engaged where a register change departs from the preceding interest. *Khan v Rehman*⁵² involved several disputed houses, including No.114 and No.75. The proprietor purported to execute a legal charge over No.114, but the apparent signature of the attesting witness was not genuine, presumed to have been forged by the chargee, and it thus failed to constitute a

⁴⁷ E.g. *Fatemi-Ardakani v Taheri* [2007] EWLandRA 2006/1313.

⁴⁸ E.g. *Baxter v Mannion* [2011] EWCA Civ 120.

⁴⁹ L.R.A. 2002, s. 27(1).

⁵⁰ *Walsh v Lonsdale* (1882) 21 Ch. D. 9, *Lysaght v Edwards* (1876) 2 Ch. D. 399.

⁵¹ Land Registration Act 2002, s. 93(2).

⁵² *Khan v Rehman* [2007] EWHC 439.

deed.⁵³ It could give the chargee equitable rights only, yet was processed by the registry according to its tenor. The court ordered rectification of the register to downgrade the entry from a legal charge to an equitable charge. The dispute in relation to No.75 concerned a transfer of the registered fee simple, which was defective for the same reason, and was likewise held to pass only an equitable fee simple. When the transferee was registered as proprietor with the legal estate, however, it was decided that rectification would not be ordered. Although the statutory underpinning for these parts of the decision was not fully explained, the tone of the judgment suggests that the correction power was accepted but that discretion was exercised in favour of preserving the entry. The brevity of analysis in the judgment leaves open various possible deductions about how the court perceived the determinant of the correction power. The finding of mistake could be attributed to the fact that the applicant held equitable interests preceding registration but was registered with legal interests. Insofar as the case invites that analysis, it must be rejected.

One exception exists to the principle that correction should not come into play merely because of a discrepancy between the quality of interests held by an applicant before and after the change in the register. The registration statute differentiates applications for first registration from applications to register a subsequent disposition: first registration extends to legal estates only.⁵⁴ In *Sainsbury's Supermarkets Ltd. v Olympia Homes Ltd.*,⁵⁵ it was conceded with the court's support that a correctable mistake occurs if the status of first registered proprietor is accorded to a person who previously possessed only an equitable interest.⁵⁶ It is submitted that the approved concession was rightly made and that registering Olympia as proprietor of the legal estate did engage the correction power. However, it will be argued below that the mistake arose not merely because of a discrepancy between Olympia's rights before and after registration, but because Olympia's entitlement was insufficient to authorise the register entry. The mistake lay in the unwarranted register change; the discrepancy between interests held before and after registration was not the origin of the mistake but an incidental effect of it.

Mistake cannot be characterised as a discrepancy between a disponent's interest before and after registration. Nevertheless, the correction power must somehow be connected to some form of substantive entitlement in order to avoid the conclusion that the law is unable to

⁵³ Law of Property (Miscellaneous Provisions) Act 1989, ss. 1(2)(b), 1(3)(a).

⁵⁴ L.R.A. 2002, s. 2.

⁵⁵ *Sainsbury's Supermarkets Ltd. v Olympia Homes Ltd.* [2005] EWHC 1235, [2006] 1 P. and C.R. 17.

⁵⁶ *Ibid.* at para. [84]. Olympia purchased from a creditor holding a vesting order which permitted a sale of the equitable interest only.

distinguish between the titles of a fraudster and an innocent purchaser. The nature of that entitlement will be developed in the following section.

IV. MANDATE AS THE PROPOSED FORMULA FOR MISTAKE

Introduction: Mistake as the Absence of Supporting Entitlement

Having rejected an evaluative standard and various rigid legal formulae as potential determinants for mistake, it remains to describe a satisfactory, principled basis for invoking the correction power. Certain restrictions are implicit from the previous sections. Firstly, mistake should depend upon the entitlements of the parties themselves, rather than the registry operations, in order to escape the problems of procedural default. Secondly, this entitlement must refer to a system of rules other than statutory vesting to avoid the monojural fallacy. Thirdly, the requirement of promoting autonomy in transfers dictates that the mistake must not be equated to a departure from the interest preceding the change in the register.

Within these parameters, it may be postulated that a correctable mistake occurs whenever a change is made to a register but nobody was entitled to procure that change at the moment when it was made. This summary formulation captures the essence of the theory proposed in this paper but requires further clarification in order to explain how it applies to various factual situations and an assessment of the extent to which it can offer a universal solution. The following sections will examine aspects of the test in detail and how it would deal with specific problems.

A. The Mandate Supporting a Change in the Register

The entitlement should take account of all manner of rights recognised by the registered system as conferring eligibility to apply for a register change, typically an existing proprietary interest, but also extending to rights whose proprietary effect is suppressed pending registration.⁵⁷ In this paper an entitlement of this type will be termed a “mandate”. It is proposed that when the register is changed without the authority of such a mandate that a correctable mistake occurs.

The source of the mandate could originate in either of two forms: consensual disposition or transmission by operation of law. For consensual dispositions, it is necessary to prescribe the criteria for a valid disposition and the defects that would impeach an ostensible mandate.

⁵⁷ It therefore includes entitlements which might lack proprietary status in unregistered land, such as restrictions on dealings, rights of pre-emption and inchoate estoppels: L.R.A. 2002, ss. 40, 115, 116 respectively.

It is submitted that the relevant disposition must possess the attributes of both substantial and formal validity. Substantial validity is presupposed because the registration system embodies no general policy of altering the substantive criteria for property rights. Its primary function is the statutory re-ordering of priorities by rules that are bolted onto general property law and, except for a limited range of policy-driven reforms for the registration system,⁵⁸ the property rules of unregistered land should continue to supply all the tests for validity: whether the disposition meets the *numerus clausus* of property rights, whether those rights exist in a subject matter that conforms to the definition of land, whether there is a capable grantor and grantee, whether there has been true consent to dispose, and so on.⁵⁹

While it should be beyond dispute that a disposition's lack of substantial validity leads to a mistake when entered in the register, the same cannot be asserted so confidently in respect of formal validity. It is not immediately obvious that a mistake should be inferred from every deviation from formality rules. Assuming, for example, that a putative grantor expresses the will to make a grant, has the capacity to do so, and the grantee ultimately procures a corresponding entry on the register, should it really matter that the grant was not manifested in the form required by the rules? Property law has traditionally relied heavily on formalities to implement a variety of policy objectives: they alert the grantor to the instrument's legal effect, protect the grantor from external pressures, prompt the clarification of terms, evidence the grant, and so on.⁶⁰ These functions are also relevant to registered land dealings and should not be thwarted just because the grantee happens to have been entered on the register. Entries made pursuant to a putative grant lacking formal validity should therefore be liable to correction.

The link between formal validity and the correction power was seen in *Khan v Rehman*,⁶¹ noted earlier, where the absence of a genuine attesting signature prevented each contested instrument from being a

⁵⁸ See, for example, the elevation of rights of pre-emption and mere equities into fully binding interests; the phasing out of binding status for unregistered chancel repair rights and manorial rights; the suppression of proprietary effect during the e-conveyancing registration gap: L.R.A. 2002, ss. 115, 116, 117, 27, respectively.

⁵⁹ For absence of consent as a ground for mistake, see *Barclays Bank plc v Guy* [2008] EWCA Civ 452 (forged transfer) and *Iqbal v Najeib* [2011] EWLandRA 2009/1234 (revoked power of attorney). The proper treatment of dispositions voidable for overborne consent remains unclear. A further problem over consent is created by Land Registration Act 2002, Schedule 5, para. 8, which deems certain unauthorised transactions to be authorised. If the deeming operates for all purposes, it establishes a statutory mandate leaving the former owner with neither correction nor indemnity. A preferable balance might be to admit the discretionary correction power, reserving indemnity for the loser; but this would be possible under the mandate theory only if the statutory deeming were for limited conveyancing purposes during the pre-registration stages and could later be falsified in correction proceedings.

⁶⁰ L. Fuller, "Consideration and Form" (1941) 41 Columbia L.R. 799 and P. Critchley, "Taking Formalities Seriously" in S. Bright and J. Dewar (eds.) *Land Law Themes and Perspectives* (Oxford 1998), ch. 20.

⁶¹ *Khan v Rehman* [2007] EWHC 439.

deed. It was held that there was a correctable mistake when the defective instrument was registered. The judgment achieved the correct result but ellipsed the intermediate logical step that explained why a deed was necessary. The judgment could be understood as relying on the formality rules for unregistered land and thus introducing the censured common law comparison into the grounds for mistake; better to have specified that the absence of a deed in each case was a failure to meet the statutory formality requirements for registrable dispositions.⁶² When the ambiguity is removed in this way, the outcome can be explained exclusively by registered land concepts and supports mistake being founded on the absence of a formally valid mandate.

Where a change in the register has not been authorised by a consensual disposition, it might alternatively be sustained by a mandate arising by operation of law. That this source of entitlement precludes the correction power is already implicit from the case law. Adverse possession claimants who managed to secure registration without actually having taken adverse possession for the requisite period have been held open to correction;⁶³ and where a husband managed to secure a matrimonial home notice against a property which was not the matrimonial home, there was power to correct.⁶⁴ The position has been expressed succinctly: “A registration obtained by a person not entitled to apply for it would be mistaken.”⁶⁵

In principle, the concept of mandate also applies to first registration: a correctable mistake will have occurred if, on the first compilation of a register, there is an entry which was not supported by a valid mandate. In applying the concept of mandate to first registration, however, there is one significant caveat: the rules applicable to determine the validity of the entitlement are not the rules applicable to dispositions of registered land, but are instead the rules applicable to unregistered land except to the extent that they have been displaced by statutory requirements for first registration.⁶⁶ If the ultimate registered entry is out of kilter with this entitlement, as when it confers too much land, then a correctable mistake will have occurred.⁶⁷ The mistake might equally occur by the registry awarding rights of a different quality, as when an applicant holding only equitable rights is registered

⁶² This full chain of reasoning was explained in *Lewis v Sharpheale* [2011] EWLandRA 2010/0855 at paras. [4]-[9]. The formalities for transfers are as for deeds: Land Registration Rules 2003, SI 2003/1417, r. 206(3) and Sched. 9. Legal charges in form CH1 must be executed as deeds.

⁶³ *Thompson v Hatherton Marina Ltd.* [2007] EWLandRA 2004/0765, *Baxter v Mannion* [2011] EWCA Civ 120, *Khalifa Holdings Aktiengesellschaft v Way* [2010] EWLandRA 2008/1438, *Mann v Dingley* [2011] EWLandRA 2010/0582.

⁶⁴ *Clapich v Shah* [2003] EWHC 2423.

⁶⁵ *Baxter v Mannion* [2011] EWCA Civ 120 at para. [24].

⁶⁶ R.J. Smith, “Land Registration: Reform At Last?” in P. Jackson and D. Wilde (eds.) *The Reform of Property Law* (Aldershot 1997) p.143.

⁶⁷ *Mann v Dingley* [2011] EWL&RA 2010/0582.

with legal rights. This occurred in *Sainsbury's Supermarkets Ltd. v Olympia Homes Ltd.*⁶⁸ where the court's recognition of a correctable mistake should have been attributed to the absence of any entitlement to procure the entry of legal rights.

B. Mandate and the Adjudication of Rights

Prior to the decision in *Baxter v Mannion*,⁶⁹ the editors of Megarry and Wade had already put forward a description of mistake along lines which rejected procedural default and instead anchored mistake in substantive entitlement.⁷⁰ Their latest formula is as follows:

It is suggested therefore that there will be a mistake whenever the registrar would have done something different had he known the true facts at the time at which he made or deleted the entry, as by:

- (a) making an entry in the register that he would not have made or would not have made in the form in which it was made;
- (b) deleting an entry which he would not have deleted; or
- (c) failing to make an entry in the register which he would otherwise have made.⁷¹

The crucial qualification in this extract is the opening allusion to the state of knowledge of the registrar. By assuming a hypothetical omniscient registrar who is aware of the true entitlements, the test sidesteps any question about the propriety of a particular registrar's procedures. Despite presenting the test in procedural vocabulary, it looks exclusively at the underlying substantive entitlement. The hypothetical omniscient registrar is thus neither more nor less than an anthropomorphic cypher for determining whether or not a change in the register was mandated by an entitlement to procure that change.

Condensing the idea of entitlement into the hypothetical registrar test gives a convenient rule of thumb, but its danger is that it does not explore the interaction between the entities responsible for pronouncing on property rights: registrars, adjudicators and courts. It does not prescribe how one should respond to an order from another competent authority. If, for example, the adjudicator commits an error of fact or law in reaching a decision, it is not clear whether the omniscient registrar has the capacity to detect that error and so render the entry

⁶⁸ *Sainsbury's Supermarkets Ltd. v Olympia Homes Ltd.* [2005] EWHC 1235, [2006] 1 P. and C.R. 17.

⁶⁹ *Baxter v Mannion* [2011] EWCA Civ 120.

⁷⁰ C. Harpum, S. Bridge, M. Dixon, *Megarry and Wade: The Law of Real Property* 7th ed. (London 2008), para. 7-133.

⁷¹ C. Harpum, S. Bridge, M. Dixon, *Megarry and Wade: The Law of Real Property* 8th ed. (London 2012), para. 7-133. The important revision is the inclusion of omissions.

mistaken. The issue is not far-fetched; it has been held that a register entry is liable to correction even though it had been entered by the registrar on the order of the adjudicator following a binding determination of rights. In *Totton and Eling Town Council v Caunter*⁷² the adjudicator found that the Caunters had been in adverse possession, the registrar entered them as the owners of the land, and on appeal to court the council was held to be entitled to the land. The court ordered the registrar to de-register the Caunters, and the issue arose as to how this should be achieved. The judge commented:

I am told and I accept that procedurally the way forward is for me to make an order for the alteration of the register for the purpose of correcting it pursuant to para. 2 of schedule 4 of the 2002 Act. This is a correction in effect simply to reverse the impact of the decision which has been successfully appealed.⁷³

The decision can be envisaged in the terms of the hypothetical registrar test: the quality of omniscience would ensure that a hypothetical registrar would have been aware of the flaw in the adjudicator's decision, thus establishing the mistake and enabling it to be put right through correction.

The use of the mistake to undermine a judgment would require a highly artificial exercise in dealing with the consequences of finding that correction power exists. First, although correction is supposedly discretionary, it is inconceivable that a higher court's reversal of a lower court's decision would not lead to the corresponding reversal of the entry if no third parties have intervened. Secondly, the rectification bar should also be a dead letter and not permitted to stultify the higher court's judgment.⁷⁴ Thirdly, the failure to seek a stay of the lower court's order should demonstrate a lack of care that forfeits protection. Fourthly, there is little reason to provide indemnity to a party simply because of the temporary entry of a flawed judgment that is reversed, where no third party has relied on the register. By requiring that the correction jurisdiction be stripped of four distinguishing features – discretion, unavailability against proprietors in possession, conditional dependence on care, and associated indemnity – it may be argued that correction is being commandeered for processes that rightly belong to other limbs of alteration. This is strikingly evident when judgments are successively reversed and reinstated on appeal, and

⁷² *Totton and Eling Town Council v Caunter* [2008] EWHC 3630. See also *Re De Leeuw* [1922] 2 Ch 540 in which an uncontested judicial order of foreclosure in favour of a mortgagee (who thereupon became registered proprietor), did not prevent the beneficiaries claiming under the mortgagor from succeeding in a collateral challenge in rectification proceedings to delete the entry when it was shown that the mortgage had been made fraudulently.

⁷³ *Ibid.* at para. [43].

⁷⁴ L.R.A. 2002, Schedule 4, para. 3(2).

the entry's "mistakenness" is seen to fluctuate. This characteristic indicates that the status of the entry is being governed by new occurrences outside the register. Giving effect to new events should be implemented through a power which is dedicated to that purpose, the better candidate being the head of alteration which exists to "bring the register up to date."⁷⁵

With the reversal of judgments on appeal removed from the domain of correction, and the decision in *Totton and Eling Town Council v Caunter*⁷⁶ cashiered, the potential discomfort over the hypothetical omniscient registrar test would vanish. It would afford a neat compendium of mistake principles provided that it is made clear that the hypothetical registrar's capacity to detect flaws in orders of the adjudicator and court is either suppressed entirely, or else subordinated to his duty to comply with them.⁷⁷ The clearer formula of mandate would avoid any entanglement with the issue.

C. Mandate and the Race to Register

Discussion of the mandate theory now turns to cases in which the register has been changed and the basis for challenge is not that the applicant's entry was unsupported, but rather that at the time of entry there was another outstanding claimant holding an unregistered right. These cases are important in evaluating the mandate theory as the response to that challenge determines whether correction prevails over the fundamental principle that an unregistered right is deferred to a duly registered estate acquired for value.⁷⁸

Analysis is assisted by separating out the two distinct phases occurring before and after the disputed registration, termed preliminary and postliminary respectively. The preliminary phase continues while the land remains in the hands of the person who suffered the creation of the unregistered right, or comes to an assignee against whom the right is enforceable notwithstanding its omission from the register. During this phase, the absence of an entry does not detract from the holder's ability to assert it and its entry should be allowed in order to assure its future priority over purchasers and promote the comprehensiveness of the register.⁷⁹ That is not to imply that its entry should necessarily be channelled through the correction power. There are other suitable

⁷⁵ L.R.A. 2002, Schedule 4, para. 2(1)(b).

⁷⁶ *Totton and Eling Town Council v Caunter* [2008] EWHC 3630.

⁷⁷ L.R.A. 2002, s. 112.

⁷⁸ Land Registration Act 2002, ss. 29, 30. Priority protection extends to leases though they are not registrable dispositions: Land Registration Act 2002, s. 29(4).

⁷⁹ Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century Law Com. 271* (London 2001), para. 1.5.

vehicles, including the simple submission of the relevant instrument or, where this is impractical, the use of the updating head of alteration,⁸⁰ or the other miscellaneous methods for entry.⁸¹

Once the land has passed to a person who is protected by the priority rules against enforcement of the unregistered right, the post-liminary phase is entered and the omitted right should be incapable of entry by any means. As between rightholder and purchaser, the balance is already struck by the priority rules of the registration system. Immediately prior to the entry of either right, the two rival rights co-exist as relative entitlements.⁸² Each, taken in isolation, would provide the mandate for entry on the register and so whichever rightholder wins the race to the registry, the registered entry will be free from mistake.⁸³ Even if the race were won by the second donee, thus reversing priority, that consequence is the proper reward for the applicant's diligence and the proper penalty for the tardy rightholder's failure to warn purchasers.⁸⁴ No safety net should be provided through the correction power.⁸⁵ In this way the concept of mandate operates in conformity with the parameters set by the principle that rights must be protected on pain of subordination to subsequent purchasers.⁸⁶

Very different policy considerations are relevant where one of two rival claimants gets on the register at first registration. The mandate principle would ensure that a correctable mistake occurs if at first registration a rightholder were awarded lesser rights than those previously held, or if the registry were to award no rights at all by vesting an absolute title to the estate in another and thereby destroying the omitted right unless saved as a protected interest.⁸⁷ This may be surprising given that the first proprietor, by definition, could not have

⁸⁰ L.R.A. 2002, Schedule 4, para. 2(1)(b). Its scope is not entirely clear and there are hints of a wider function of entering binding rights: Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century* Law Com. 271 (London 2001), para. 10.7(2); M.P. Thompson, *Modern Land Law* 4th ed. (Oxford 2009), p. 156.

⁸¹ E.g. the recording of defects in title under L.R.A. 2002, s. 64, and the registrar's entry of restrictions *ex proprio motu* under L.R.A. 2002, s. 42.

⁸² See D. Fox, "Relativity of Title at Law and in Equity" [2006] C.L.J. 330, 351–361; A. Clarke and P. Kohler *Property Law: Commentary and Materials* (Cambridge 2005), pp. 394–5.

⁸³ Unprotected interests should not constitute a correctable mistake: D.C. Jackson, "Registration of Land Interests – The English Version" (1972) 88 L.Q.R. 93, 131; R.J. Smith, "Rectification and Minor Interests" (1976) 92 L.Q.R. 338, 342; D.J. Hayton, *Registered Land* 3rd ed. (London 1981), pp. 168, 170.

⁸⁴ See M.J. Dixon, "Proprietary Rights and Rectifying the Effect of Non-Registration" [2005] Conv. 447, 455.

⁸⁵ Oblique support for excluding these omissions from correction appears in Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century* Law Com. 271 (London 2001), para. 10.7(1); see also M.P. Thompson, *Modern Land Law* 4th ed. (Oxford 2009), p. 155. Previous reform proposals had confronted the question directly: see Law Commission, *Land Registration: Third Paper* Law Com. W.P. 45 (London 1972), paras. 73 and 87, Law Commission *Third Report on Land Registration* Law Com. 158 (London 1987), paras. 3.6 and 3.9; R.J. Smith, "Land Registration Reform" [1987] Conv. 334, 342.

⁸⁶ L.R.A. 2002, ss. 29, 30.

⁸⁷ L.R.A. 2002, s. 11(3), (4), (5). See e.g. *Rossetti Ltd. v Thresher Wines Acquisitions Ltd.* (HMLR Adjudicator, REF/2008/0633).

relied on the register when purchasing and does not have a particularly compelling call to security in the title so conferred, while the unregistered rightholder may have been quite unaware of first registration and the need to protect his position. The balance between the sanctity of property rights and the aspirations of the first proprietor would therefore be poorly struck if it destroyed the omitted right without hope of its resurrection through the alteration power. It invites the inference that the purpose of first registration, as emphasised by the inquisitorial processes undertaken, should be seen as the assembling of a comprehensive record which, within the resource constraints of registry operations, discovers all existing interests affecting the title. Under the English model, any omitted rights ought to be capable of being reinstated at a later date.⁸⁸

The mandate theory proposed by this paper, however, is unsuited to that task. It seeks a supporting entitlement which justifies the entry made, but it does not require proof that the entitlement is free from adverse claims, which would be a necessity for achieving the total capture of rights at first registration. An applicant for first registration might be able to show title to a legal fee simple, yet if an equitable easement,⁸⁹ for example, were omitted from the initial compilation, that alone would not establish a mistake under the mandate theory. If omitted rights at first registration could not be processed through other mechanisms and were forced into the correction regime, the mandate theory would be unable to handle them appropriately. A special subsidiary formula for mistake would be required to constitute the necessary triggering event for correction jurisdiction. That can be seen not as a flaw of the mandate theory but a confirmation of its integrity and an indication of the contextual differentiation required to pursue a plurality of registration policies.

D. Mandate and Successors

The greatest challenge for any theory of correction is its treatment of the successor when a registered proprietor (RP1), who is mistakenly entered without valid mandate, then makes a registered disposition in favour of a successor (RP2). In preparing the registration statute,

⁸⁸ In *Sainsbury's Supermarkets Ltd. v Olympia Homes Ltd.* [2005] EWHC 1235, [2006] 1 P. and C.R. 17 the omission from first registration was effectively treated as mistake; the option bound the applicant as a matter of property not privity and would have suffered destruction through the vesting effect of first registration. The same generosity in reinstating might not be true for overseas systems which establish procedural mechanisms to ensure that all rightholders are warned, offered due opportunity to present claims, but then foreclosed in the interests of finality: S.R. Simpson, *Land Law and Registration* (Cambridge 1976) p. 179.

⁸⁹ Assuming an equitable easement which is binding on the applicant for first registration because either it was created by him, or it was recorded under the Land Charges Act 1972 before he acquired the land, or it was not so recorded but he was outside the class of protected purchaser. Cf. *Horrill v Cooper* (1999) 78 P and CR 336, *Freer v Unwins Ltd* [1976] Ch 288.

the artful drafter avoided prejudging whether the title of RP2 might be corrected and there are no direct indicators in the alteration or indemnity provisions of the parliamentary intent. One possible interpretation of the provision is that the entry of RP2 should not be regarded as a mistake.⁹⁰ This argument rests on the foundation that, although the entry of RP1 amounted to a mistake, by virtue of his registration he nevertheless possessed the legal estate and owner's powers of disposition, so that the subsequent disposition, being sanctioned by the statutory empowerment, enjoys full validity and its registration cannot be a mistake.⁹¹

This paper has already criticised the use of any bijural comparator which would give successors universal immunity against correction claims, and those criticisms apply equally to attaining the same result via the statutory empowerment solution. In particular, it is submitted that a rule as blunt as the statutory empowerment solution, which can expropriate a registered rightholder in favour of, say, a fraudster's donee, will not strike the right balance. The sacrifice extracted from the dispossessed rightholder may, on any measurement, be grossly disproportionate to the weak justifications for protecting particular classes of recipient. The statutory empowerment solution does have the merit of simplicity, but it comes with crass indifference to the many varieties of transferee. The adjustment between rightholders and remote successors should be more finely tuned to their respective needs and merits. This could be achieved by admitting the existence of mistake and thereby resolving the dispute through the subtle and discriminating rules about possession, consideration, fraud, care, causation, and justness which are engaged even before reaching the exercise of discretion to correct.⁹² That approach would also escape a serious deficiency associated with the statutory empowerment solution which leaves the owner with an impractically short-lived opportunity to discover the fraud by RP1 and take protective or remedial steps before RP1 hastily sells on or mortgages the property.

The prospect of correction against remote successors would collide with grand axioms attributed to registration which encapsulate its mission to protect registered transferees from unprotected interests.⁹³

⁹⁰ Initially confirmed in *Barclays Bank plc v Guy* [2008] EWCA Civ 452 and *Stewart v Lancashire Mortgage Corporation* [2010] EWLandRA 2009/0086, before rejection in *Knights Construction (March) Ltd. v Roberto Mac Ltd.* [2011] EWLandRA 2009/1459.

⁹¹ L.R.A. 2002, ss. 23-26 as explained by E.J. Cooke, *The New Law of Land Registration* (Oxford 2003), p. 129; E.J. Cooke, *Land Law* 2nd ed. (Oxford 2012), p. 68. For an assessment of purchaser protection, see G. Ferris, "Making Sense of Section 26 of the Land Registration Act 2002" in E. Cooke (ed.), *Modern Studies in Property Law Volume II* (Oxford 2003), p. 101.

⁹² L.R.A. 2002, Schedule 4, para. 3(2).

⁹³ The "negative warranty" and "curtain principle": E.J. Cooke, *The New Law of Land Registration* (Oxford 2003), p. 128; E.J. Cooke, "Land Registration: Void and Voidable Titles" [2004] Conv. 482, 484, 486.

But it is not obvious that transferee protection should operate in an unqualified fashion, indeed it has always been the position that different levels of protection are dispensed to different participants by different doctrines: statutory vesting applies to all registered proprietors, freedom from unprotected incumbrances applies to registered disponees for value, presumptive immunity from correction applies to those in possession. In the face of this diversity, it would take the inductive process a step too far to elevate the specific priority rule for never-registered interests into a universal precept that should regulate correction claims against all transferees. At most, protection should be limited to transferees who pay value, but that limitation is not feasible under the statutory empowerment solution.⁹⁴

Whatever views may be held on the optimal balance between owners and remote successors, there are insidious problems that would accompany the statutory empowerment solution. These problems arise due to the statutory indemnity being linked to mistake.⁹⁵ If RP2's entry is to be held free from mistake, the unpalatable result appears to be that the dispossessed owner obtains neither reinstatement nor compensation.⁹⁶ The absence of compensation would breach the constitutional guarantee of possessions⁹⁷ and an owner would be even worse off than in unregistered land, where legal title is protected against all comers. It is, however, possible to envision an interpretation of the registration statute which confers indemnity on the ousted owner without having to treat the entry of RP2 as a mistake: this is achieved by construing the historic entry of RP1 as the mistake which introduces indemnity.⁹⁸ That approach would be compatible with the statutory empowerment solution and would yield compensation, but still suffers the objection that due process in expropriating the rightholder is not satisfied by compensation alone but demands a balanced assessment of the rule's purpose and proportionality. Compliance with that model of due process must be doubtful given that the statutory empowerment solution confers indiscriminate protection on all registered disponees.

⁹⁴ *Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners* (1911, Cd. 5483), para. 80.

⁹⁵ L.R.A. 2002, Schedule 8, para. 1(1)(a), (b).

⁹⁶ *Ajibade v Bank of Scotland* [2008] EWLandRA 2006/0163, at para. [11], *Stewart v Lancashire Mortgage Corporation* [2010] EWLandRA 2009/0086, at para. [68], and *Knights Construction (March) Ltd. v Roberto Mac Ltd.* [2011] EWLandRA 2009/1459, paras. [61], [131]. It was anticipated by B. McFarlane, N. Hopkins and S. Nield, *Land Law: Text, Cases and Materials* (Oxford 2009), p. 534.

⁹⁷ Human Rights Act 1998, Schedule 1, First Protocol, Art.1. The need for compatibility was appreciated in, amongst others, *Kingsalton Ltd. v Thames Water Developments Ltd.* [2001] EWCA Civ 20 at paras. [30] and [45], *Knights Construction (March) Ltd. v Roberto Mac Ltd.* [2011] EWLandRA 2009/1459, at para. [61], and pre-empted by H. Potter, *The Principles and Practice of Conveyancing under the Land Registration Act 1925* (London 1934) p. 298, footnote (p).

⁹⁸ *Stewart v Lancashire Mortgage Corporation* [2010] EWLandRA 2009/0086, at paras. [71], [78].

Two other routes might be proposed which allow correction against the remote registered successor while supplying indemnity to the loser.⁹⁹ The first route proposes that registering the remote successor constitutes a mistake in itself. By establishing the mistake, this analysis has the advantage of ensuring that indemnity will be forthcoming. It would, however, require mistake to encompass an entry even though it had been made pursuant to a valid mandate derived from the statutory empowerment solution. That approach would demand a re-conceptualisation of the basis for the correction power. It would have to rely on something other than a supporting mandate as the determinant for mistake. It would leave options that have already been discarded, such as the use of procedural default or an evaluative standard. The first route therefore does not offer an acceptable account of the correction power.

The second route to rectification of a successor's title with indemnity proposes that mistake is curtailed by the statutory empowerment solution, but takes an expansive view of the consequential relief. It holds that the mistaken entry of RP1 introduces correction jurisdiction, and that the entry of RP2, although itself cleansed of mistake, may nevertheless be corrected to provide relief from the earlier mistake.¹⁰⁰ This route might be described as the "long-arm" jurisdiction to correct as its reach extends beyond the original mistaken entry to all derivative dispositions. Long-arm correction does not of course resolve the underlying policy tension between the relative protection of owners and acquirers but simply deflects the debate away from the triggering event of "mistake" and onto the remedial scope of "correction". But in doing so, it brings a quadruple benefit: it preserves the universal and coherent framework for mistake offered by the mandate theory, it admits correction against registered successors, it guarantees indemnity for the loser, and it avoids classifying the correction claim as a traditional property right whose priority might be assured as an overriding interest.¹⁰¹

⁹⁹ See *Barclays Bank plc v Guy (No. 2)* [2010] EWCA Civ 1396, [2011] 1 W.L.R. 681, at para. [35].

¹⁰⁰ It has recently been accepted in a stream of case law: *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, *Paton v Todd* [2012] EWHC 1248.

¹⁰¹ See *Malory Enterprises Ltd. v Cheshire Homes (UK) Ltd.* [2002] Ch. 216, *Crawley v Gudipati* [2010] EWLandRA 2008/0602, at para. [12]. D. Fox, "Forgery and Alteration of the Register under the Land Registration Act 2002" in E.J. Cooke (ed.), *Modern Studies in Property Law* (Oxford 2005), pp. 30-31; D. Sheehan, "Rights to Rectify the Land Register as Interests in Land" (2003) 119 L.Q.R. 31; C. Harpum, "Registered Land – A Law Unto Itself?" in J. Getzler, *Rationalizing Property, Equity and Trusts* (Oxford 2003), pp. 198, 201.

V. CONCLUSION

This paper set out to penetrate the mystery of mistake. It has put forward a principled basis for understanding a concept whose content has been obscured by the apparently open-ended statutory term in which it is expressed. The proposed structured formula for mistake effectively amounts to an algorithm for ordering the inquiries to be made when mistake is in issue: Has there been a register change? Did that register change appear to confer greater rights than were contemporaneously justified by any supporting entitlement? Would that entitlement have been eligible for entry in the register if it had been lodged by the rightholder in a formal application? Did the entitlement pass the tests for substantive and formal validity necessary for a right of the intended type? Positive answers to all of these would establish mistake.

By identifying a set of rigid and exhaustive components for determining mistake, the proposed formula furnishes the predictability that tends to promote confidence in the property market. Comprehensive attainment of the ideal of predictability in the concept of mistake is yet to be confirmed, however, as this paper is restricted in its scope to mistakes by changing the register, and has not answered the remaining controversial question of the potential for mistake by bare omission. Predictability alone is of course not the sole criterion for an acceptable correction power. The jurisdiction to correct mistake must not jeopardise those principles of property which ought to apply to unregistered and registered land alike. The mandate theory of mistake pays respect to various such principles. In particular, because the mandate theory depends on substantial and formal validity, it cannot stray outside the closed list of property rights, it cannot nullify the protective functions of formality rules, and it cannot alter the rules for dispositive intent which ensure autonomy over transactions. Most importantly, this account of mistake ensures that the classic attribute of durability in property rights is preserved: any proprietary entitlement which is conferred by a disposition recognised by the general law, and which is protected as an overriding interest or as a register entry, is assured of perpetual security (whether through correction or indemnity). It confirms that, in the absence of fault, registered rights are guaranteed against loss caused through a change in the register which involves either improper deletion or the entry of incompatible rights.

Mistake should also be assessed by the extent to which it is antagonistic towards the policy goals of registration. The mandate theory encounters a couple of complications in harmonising with potential goals. One such complication relates to title at first registration: assuming, somewhat controversially, that first registration should not preclude the insertion of interests omitted by oversight, it appears that

the mandate theory does not allow mistake to be employed for this purpose – although there may be alternative mechanisms for securing entry. The second complication relates to remote successors. The primary goal of English registration was to improve the purchaser's lot, and this would be weakened by the mandate theory with long-arm correction that would permit correction against successors. Nevertheless, this paper has argued for that result. In the contest between a purchaser and an earlier rightholder who never registered nor received the protection of overriding status, the mandate theory accepts that the purchaser always prevails; but when the contest is a successor versus an earlier rightholder who did register, yet was removed without mandate, this paper argued that any response based on a rigid rule of universal priority or subordination is undesirable. Enlisting the correction power to resolve the dispute would allow a preferable legal solution that is tailored to the relative positions of the disputing parties themselves.

Mistake must not be analysed in the abstract. It is pervasively conditioned by its statutory context. First, the event of mistake dictates not only the availability of correction but also the indemnity which is crucial in securing human rights compatibility. The concept of mistake must therefore flex to accommodate the needs of the indemnity clause. It is the impetus for compensation which should be instrumental in guiding the interrelationship of mistake, procedural default, long-arm correction, and the status of remote successors. Secondly, mistake should also respond to the existence of the other mechanisms which serve related or overlapping policies. It is only one of several conditions for alteration of the register, and the territory occupied by the other heads of alteration must be acknowledged in order to regulate their respective boundaries. Thirdly, mistake might also be susceptible to pressures arising from judicial decisions which find alternative mechanisms to detract from the register, such as finding broad generic powers to intervene, imposing *in personam* liabilities, or reinterpreting the scope of registered rights.¹⁰² Fourthly, the concept of mistake interacts with the rule of statutory vesting which confers protection on all registered proprietors without differentiation. The inability of the vesting rule to distinguish the meritorious from unmeritorious indicates the desirability of a liberal regime for correction which possesses the sophistication to undertake a more sensitive assessment of competing property claims. It is mistake that introduces this element of contextual balance and can be seen as imparting a limited moral dimension to registered property. Blandishments about the discretionary nature of

¹⁰² *Chief Land Registrar v Franks* [2011] EWCA Civ 772, *Cherry Tree Investments Ltd. v Landmain Ltd.* [2012] EWCA Civ 736.

correction and its capacity to achieve individualised justice must not, however, obscure the point that they should prevail only within rigid jurisdictional constraints. It is the purpose of the paper to show that mistake should be and can be given fixed boundaries in order to maintain registered property's core characteristic of predictable durability and, at the same time, support the purchaser protection programme that underlies land registration.