# *The Originality of Registration*

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Land registration is commonly seen as a topic of little conceptual interest, involving only the complex but routine bureaucratic game of shuffling cautions, inhibitions, registered charges, and other such devices. That this should be so is perhaps testimony to the success of a school of modern 'glossators'[1] in explaining the workings of the 1925 property legislation. The work of Avner Offer and Stuart Anderson reminds us that these glosses obscure a set of issues which made land registration—or 'the land transfer question' in general—a topic of political prominence throughout the long period in which the legislation was formulated and implemented.[2] The issues in question were as much conceptual—pertaining to the 'mentalities' which were associated with the structure of conveyancing practices and institutions—as they were political: or, rather, conceptual issues were mobilized and coloured by political rhetoric. The principal hypothesis of this article is that, if one looks to the conceptual substance of the land transfer debate, it is possible to identify the signs of a transformation in the idea of title to land; a transformation which manifested itself in the gradual dissolution of the logic peculiar to the regime of contract and conveyance. More specifically, it is suggested that, because this larger horizon was unrecognized and perhaps unrecognizable, the Land Registration Act set in print an approach which was poised between the presuppositions of the old scheme and those of a structure which emerged more clearly after 1925. The Act was an equivocal answer to the question whether land registration secured the continuation of contract and conveyance by other means or whether it was the first substantial flourish of a new model of land transfer. The contemporary story of a '1925 policy' has smoothed over the particular tensions and ambiguities which resulted from this fundamental equivocation, but, because those tensions are nonetheless a structural feature of the Act, and of the relationships between the Act, Registry schemes, and professional practices, they are not so easily dismissed. Hence, the contemporary question of the so-called 'registration gap' is symptomatic not

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[1] The passage of the 1925 Acts was delayed so as to allow time for a body of explanatory literature to be compiled. (See Anderson, *Lawyers and the Making of English Land Law*, at 312, and idem, 'Land Law Texts and the Explanation of 1925' in (1984) *CLP*, 63).

[2] Offer, *Property and Politics, 1870–1914* (1981, 1993) and 'The Origins of the Law of Property Acts 1910–1925' (1977) 40 *MLR* 505. Anderson, *Lawyers and the Making of English Land Law, 1832–1940* above n 1. Cf Joshua Getzler (1993) 109 *LQR* 684.

 

only of changes in the social contexts of land transfer, but also of the persistence of the basic equivocation which characterized long-forgotten debates over the land transfer question.

This article pursues two lines of enquiry. First, it describes the emergence of the contemporary 'registration gap',[3] drawing a contrast between a rather older form of registration gap (which was in issue in the period between 1925 and 1935) and the form which the modern courts have discovered. In detailing this contrast, the argument seeks to develop a much more general account of what was original and novel about registration. The hypothesis is that registration was not simply a different or better way of doing the job of conveyancing, but rather that it brought with it a change in the understanding of what that job was; it transformed the basic conceptual and institutional resources which supported the process of conveyancing. Therefore, it did not simplify existing processes of proof, rather it developed an entirely new understanding of what was being proved and transferred. This conceptual transformation is explored by unravelling the circumstances surrounding a seemingly insignificant event: the promulgation of new Land Registration Rules in 1930 so as to encourage postal rather than personal searches of the register. The suggestion is that the introduction of protected postal searches can be seen as a key stage in a transition between two forms of property or entitlement, one based on contract and the other on insurance or indemnity. The effect of this transition was to remodel the traditional contractual process, so that private practitioners were no longer manufacturing and measuring the quality of title, but were concerned simply with the business of transferring a pre-processed title.

The idea that registration might be understood in terms of such a conceptual transition implies that legal concepts have a specific reality or materiality; they, or the processes which articulate them, are threaded into a dense fabric of practices, mentalities and institutions. To plot such a conceptual transformation is, therefore, to map the gradual reconfiguration of the elements of that fabric. The aim is not to attribute causes, but simply to describe the result of a process in which economic and political influences were absorbed into the conceptual fabric of the land transfer process.[4] Nevertheless, in suggesting that conceptual and institutional structures have this specific density or inertia, my approach addresses a slightly different question from that which motivates the work of Offer, who argues that the solicitors' opposition to the pre–1925 scheme of compulsory registration is explicable as an ultimately successful attempt to defend their land transfer monopoly. Anderson suggests that the nature of the solicitors' stake in the land transfer question was more complicated; it consisted not only in a profit motive but also in a desire to make a valuable and valued contribution

[3] See especially *Abbey National Building Society* v *Cann* [1990] 2 WLR 832.

[4] Which means that this article has obvious limitations. For example, it deals only with external signs of the Registry's performance as a bureaucratic organization, and specifically with the way in which improvements were communicated to the profession by its journals. It does not look into the workings of the Registry or at the representations of property or entitlement which were implicit in its schemes of indexing or the techniques by which it accommodated property to topography.

to the business of law reform.[5] As Anderson puts it, 'there is no incompatibility between being self-interested and being right'.[6] Although concepts and institutions were indeed shaped by economic and political influences, economic and political factors had to be translated into schemes which were workable within the constraints imposed by tradition or by the learning capacity of the new bureaucracy. For that reason, it is interesting to consider conveyancing transactions as something other than bare economic transactions. One advantage of adopting this perspective is that it reveals a line of continuity between the issues which made the land transfer question so vital and those which are disguised by the modern rhetoric of a 1925 policy. This continuity is traced by relating two different readings of the problem of 'registration gaps.' The first is the set of problems which were discussed by conveyancers around 1930, and which postal searches were supposed to resolve, and the second is the contemporary question of the registration gap, which concerns the nature of overriding interests.

## 1 Unravelling the Structure of Contract and Conveyance

### *The Problem of Personal Searches*

Before the Land Registration Rules were amended in 1930, it was quite common for conveyancers to organize the process of completion around a personal search of the register. The purpose of this personal search was to confirm that there had been no additions to the schedule of registered interests which the purchaser received when contracts were exchanged.[7] The solicitor's clerk would attend the Registry, carry out a personal search, and telephone the result to his principal. All being well, completion would then proceed. Sometimes, to ensure an almost seamless transition from completion to registration, completion would take place at the Registry rather than at the offices of the vendor's solicitor.[8] Whichever route was chosen, the process was designed to ensure that the stages of final

[5] For Offer's rejoinder see 'Lawyers and Land Law revisited' (1994) 14 *OJLS* at 269.

[6] Anderson, *Lawyers and the Making of English Land Law*, 227. Many of the texts which expressed the particular concerns about the registration gap(s) which is described below seem to do no more than relay quite genuine, if conservative, worries about registration. (Which is not to say that these more theoretical texts necessarily reported the perspective of the pragmatic conveyancer). Of course otherwise 'genuine' conceptual concerns were played up so as to secure economic objectives. For example, solicitors began to emphasize formal certainty where previously they had been quite prepared to rely on the informal reputation of a title or landowner. Conceptual structures were thereby charged with economic motives, so that self-interest served to accentuate or emphasize only selected aspects of what traditionally seemed 'right'. Nevertheless, the political project of registration inherited a conceptual vocabulary and an institutional structure which could be worked into a new process of land transfer only by overcoming the structural resistances which this rhetoric so effectively amplified.

[7] An article in (1934) 78 *Solicitors' Journal* 792–3, suggests that usually there were in fact two personal searches: 'the registers would first be searched when the abstract of title or copy entries was received by the purchaser's solicitor, and again searched at the eleventh hour before completion'.

[8] Completion at the Registry was less convenient because it could be assured only by varying standard contractual terms.

search, completion and registration were linked as closely as possible.[9] As the number of dealings in registered titles increased, this preference for personal attendance began to create practical difficulties for the administration of the Registry, and the Registrar, J. S. Stewart-Wallace,[10] sought to encourage the conduct of business by post:

> The whole business of registration can be, and is, more satisfactorily conducted by post than by personal attendance at the Registry. The fact is that personal attendance and personal searches at the Registry are inconvenient and expensive both to the public and to the department and are wholly unnecessary. They are out of date and ... if they become universal should be severely discouraged, if not entirely stopped.[11]

The question of convenience and expense was not, however, the Registrar's primary concern. Much more important was the threat which the solicitors' insistence on making personal searches posed to his programme of centralisation. However trivial it might now seem, the question of personal searches was at that time inconveniently lodged in a more extensive web of political and economic issues. Provincial solicitors emphasized that, for so long as personal searches were necessary, registration could proceed only as quickly as district registries were established. The Registry found a simple solution to the problem. What is interesting is precisely the simplicity of the solution and the role which it had in shaping conveyancing practice.

There were some very good reasons for insisting on personal searches.[12] Attendance at the Registry was seen as the most practical and effective way of dealing with a real defect of registration: the existence of a form of registration gap. Indeed, conveyancers were concerned about two gaps. The first was the interval between the purchaser's final search of the register and the moment of completion. The danger in this was that a transfer or charge might have been presented for registration between these times. The advantage of a personal search was that it was a last-minute exercise which effectively reduced this gap to a matter of seconds or minutes. The second gap was constituted by the interval between completion and registration:

[9] For an account of this see: Stewart-Wallace, *Brickdale and Stewart-Wallace's Land Registration Act, 1925* (4th ed 1939) at 493–502; Wontner, *Conveyancing Practice*, Vol III of Worsfold, *Solicitor's Office Library* (1935) at 82–3; Ewens, 'Transfers of Registered Land' (1929) XV *Conv* 65 and (1930) XV *Conv* 118.

[10] Anderson, *Lawyers and the Making of English Land Law*, gives the most thorough account of the more important personalities in the story of registration.

[11] Letter (dated 29 August 1929) from Stewart-Wallace to Sir Claud Schuster, a senior civil servant in the Lord Chancellor's Office, concerning the objections of the Yorkshire solicitors to the extension of registration (PROLCO2/1106). The principal inconvenience was the disruption caused by staff having to drop whatever they were doing in order to deal with personal searchers. For some recent complaints about the use of personal searches (notably by financial institutions checking the creditworthiness of applicants seeking second mortgages) see *Annual Report of the Chief Land Registrar, 1983–1984*, para 14.

[12] It was also convenient. A transfer had to be stamped with a receipt for stamp duty before it could be accepted by the Registry. So, as the solicitor's clerk had in any case to make a journey to Somerset House, it was simpler for him also to conduct a personal search at the Registry (see the evidence of J. J. Wontner to the first Tomlin Committee, PRO LCO2/1107). Significantly, when registration was extended to Eastbourne and Hastings, the Land Registry began (in dealing with those two areas) to act as collecting agents for the Revenue, so that stamp duty was payable as a component of the Registry's fees. (The success of this measure was noted in (1928) 72 *Solicitor's Journal* 496. In order to encourage postal dealing, it was extended to all dealings in 1932).

> Unless completed at the Registry an interval, however short, must occur between the time of completion and the presentation of the instrument for registration. During that interval another transfer may have been lodged. If this happens the transferee whose transfer is first presented would gain priority.[13]

Completion did not mark the conclusion of the transaction, as it did in unregistered conveyancing. Even when the deed was presented for registration, it was not obvious that registration would automatically follow:[14] a further gap might open up between submission for registration and the clerical act of registration. This was because the Rules required registration (in the sense of actual entry of the transaction on the register) to be postponed for three days from the date of presentation in order to give some protection against forgery. Because the Act and the Rules were inconsistent on this point,[15] it was not clear who had standing to complain of forgery or what the consequences of an objection would be. The Registrar took the view that postponement was for the protection of the transferor and that registration therefore took effect from the date of presentation, unless within three days the supposed transferor offered evidence that the person seeking registration had forged the transfer.[16] This made sense, but conveyancers were reluctant to trust that the Registrar had the authority to make law in this way. Might the Registrar have been 'pushing ministerial authority a trifle too far'[17] in imposing this interpretation? This was a large issue, with implications which are more fully addressed in subsequent parts of this article.

In any case, the upshot was that, although the Registry had for some time offered facilities for making postal searches, these facilities were not popular. They exposed the purchaser to unwelcome risks:[18]

> Postal searches left a gap between the time of search and the time of actual completion.

[13] H. L. Ewens, 'Transfers of Registered Land' (1929) xv *Conv* 65, 66.

[14] For an earlier discussion of these difficulties see *Minutes of Evidence, First and Second Reports of the Royal Commission on Land Transfer and Titles* (1909) HCP xxvii and (1911) HCP xxx, qq 7323–33. In subsequent footnotes these *Reports* are referred to by the abbreviation *RCLT* and by a question number, no distinction being made between the *First Report* and the *Second Report*. The Minutes appended to the *First Report* cover questions 1–3426.

[15] For an explanation see Ewens above n 9.

[16] For a 'private' expression of this view see *Brickdale and Stewart-Wallace's Land Registration Act* above n 9 at 39.

[17] Ewens, 'Transfers of Registered Land' (1930) xv *Conv* 118, 119.

[18] Under Rule 88 of the 1925 Rules it was possible to register a caution so as to gain priority over subsequent dealings. However, there were difficulties with this, which were noted by Stewart-Wallace in *Brickdale and Stewart-Wallace's Land Registration Act, 1925* above n 9 at 35: 'A caution or restriction does not give the full protection required, for it does not prevent the entry of someone else, and, as the priority of equitable rights protected by cautions, &c, is not affected ... a purchaser who has searched and registered a caution may, after all, on coming with his transfer for registration two days afterwards, find that he will have to give way to an equity prior to his purchase, though only protected by a caution subsequent to his own'. This was perhaps a little disingenuous, given that a practice leaflet issued by Stewart-Wallace in January 1929, the last such leaflet before the change in the Rules, suggested that Rule 88 rendered personal searches unnecessary. Otherwise, purchasers could put the purchase money in joint names until the process of registration was complete; or, they could use the scheme of provisional registration, in which the payment of the purchase money was suspended until the completion of registration. Whether through lack of familiarity (Rule 138 was advertized as a measure to facilitate the sale of fractions of a large estate) or for other reasons, personal searches seemed more straightforward, not least because the 'first' gap which was perceived to be the more problematic one.

> Personal searches did not. A clerk could search the register within a few minutes of completion and report to his principal by telephone. The principal could then complete, secure in the knowledge that the title had been searched at the actual time of completion. It was an inconvenient practice, but it achieved its purpose.[19]

Similarly, postal searches did little to neutralize the hazards of the second registration gap. With regard to this latter gap, the conveyancers' view was that '... the vendor cannot require the purchaser to run [any] risks, however improbable it may be that he will incur any actual harm in the short interval between payment and registration'.[20] Again, personal attendance offered a ready, and relatively inexpensive, solution to the problem.[21]

### *Priority Periods and Postal Searches*

The 1930 Land Registration Rules addressed the difficulties caused by both variants of the registration gap. Adapting the suggestion of one of the witnesses who gave evidence to the first Tomlin Committee,[22] the new Rules introduced a scheme under which purchasers holding an official search certificate were given priority over any entries made during the first two days of the certificate's life. Under the new Rules purchasers effectively obtained from the Registry an official search certificate the tenor of which was guaranteed for three days from the date of issue, so offering 'a satisfactory substitute for last-minute searching'.[23] Not only did this eliminate the hazards of the registration gap, it also offered some further incentives. First, there were the now familiar benefits of a warranted official search certificate and, secondly, whereas a charge was made for personal searches, official search certificates were free.[24] Although this remedy was developed to deal with the gap between ultimate search and completion, it also accommodated the second sort of registration gap. So long as the completed transfer was submitted before the Registry opened on the third day since the issue of the official certificate search, the purchaser would gain priority over any entries made since the official search. Thus, the moments of ultimate search, completion and registration[25] could be synchronized by stopping the clock which

[19] Wontner, 'The New Land Registration Rules' (1930) XVI *Conv* 77, 78. For earlier references to this practice see *RCLT*, q3171 and q3332. Cf the observations of Brickdale, *RCLT* q187 and q11692.

[20] Lightwood and Williams (eds) *Williams on Title* (3rd ed 1923) at 1129–32. The editors canvassed four methods of completion, suggesting that provisional registration or the use of priority notices offered the most satisfactory solutions. Although this text was written before the advent of the 1925 legislation, this makes no material difference.

[21] Cf the article in (1935) 79 *Solicitor's Journal*, 107.

[22] The first and second Tomlin Committees were concerned with the extension of compulsory registration. The witness was J. J. Wontner, who suggested a priority period modeled on the scheme tacked on to the Land Charges Act 1925 by the Law of Property (Amendment) Act 1926, s 4. The suggestion was taken up by Schuster and Stewart-Wallace, who referred it to the Rule Committee, which accordingly produced the 1930 Rules (see PRO LCO2/1107).

[23] Wontner, 'The New Land Registration Rules' (1930) XVI *Conv* 77, 78.

[24] This incentive was not in itself sufficient to effect a change in solicitors' practices. Conveyancers continued to use personal searches, and simply charged the fee to their clients. The Registry responded by refusing to deal with personal searches wherever doing so would have meant disrupting the processing of a pending application (see (1934) 78 *Solicitors' Journal* 792). This meant, for example, that a personal search would have been obstructed wherever the relevant section of the Registry map was being modified to accommodate another dealing.

[25] Whether registration meant the moment of submission of documents or the date at which the clerical act of registration was deemed to have taken place.

measured the sequence of contract and conveyance. The original three-day period of suspension was apparently chosen because it was thought to allow for the certificate to be sent, verified and returned within the schedules of the first class post.[26] In 1936, the period was extended to fifteen days, in response to concerns that some country solicitors found this period too short.[27]

In what sense might this uncomplicated administrative measure be symptomatic of a profound transformation in the process of land transfer? Perhaps 'transformation' is too strong a word. Rather, it might be that this change in the Rules signalled the fact that a logic of registration had finally displaced the property logic of contract and conveyance. The traditional system of conveyancing unfolded according to a clear logical sequence. The moment of completion was the point which anchored each element of that sequence. Registration superimposed another sequence upon this; it took the elements of the old scheme and ordered them according to a new grammar of property. The registration gap might be taken as a measure of the distance between these parallel logics. Until the advent of postal searches conveyancers sought to close the distance by subsuming the logic of registration within the scheme of contract and conveyance: 'a title already completed by registration [should] be conferred on the purchaser simultaneously with the handing over of the consideration named in the transfer'.[28] This was in some sense the last flourish of traditional conveyancing logic. Postal searches completed the dissolution of the traditional scheme, confirming a trend sustained by a number of practical and administrative developments. The priority period offered by the new Rules allowed solicitors to deal with the Registry with confidence, leaving the Registry to secure the accuracy of the register while they negotiated sales and formulated long-term contracts. The postal searches scheme finally ensured that the bureaucratic processes which held the process of registration together could be taken for granted. Conveyancers had finally been persuaded to take fictions seriously.

## 2 Realizing the Fictions of Registration

The distance which the postal search scheme so conveniently bridged had once been represented as a much deeper gulf between the 'reality' which founded traditional conveyancing and the insubstantial 'fictions' which were conjured up by registration. Even in the difficult period between the introduction of compulsory registration and the emergence of the 1925 scheme, it is possible to see this tension between 'reality' and 'fiction' as the basis of a sort of conceptual compromise between the traditional logic of land transfer—which was in the

[26] See Wontner, 'The New Land Registration Rules', above n 19.

[27] The decision was taken by and passed by correspondence, with the following reasons being given: 'Since we made the Land Registration Rules 1930 experience has shown that the two days priority given by them is not sufficient, especially in the case of country solicitors, to enable them to complete the purchase and lodge the papers at the registry before it is opened on the third day'. This text was approved without a meeting of the Rules Committee (See PRO LCO2/1480).

[28] Ewens, 'Transfers of Registered Land', above n 9, 119–20, outlining the advantages of provisional registration.

process of unravelling—and the new property logic which was rather clumsily articulated in the Land Transfer Acts. The Land Transfer Act 1897[29] sought to simplify conveyancing by means of a process of coding or condensation. Registrar Brickdale offered the following metaphor to describe that process:

> If you look at the face [of a watch] you can see the time at a glance. If you open the back and look at the machinery, it would puzzle a clever man even to guess how it operated, and he would turn with a sigh of relief to an hour glass. It is much the same with our Acts and rules. If you look at the register and the instruments by which ordinary dealings are conducted, you can generally see at a glance how title stands . . .[30]

The idea was that registration would be effected through the use of a number of simple and standardized prescribed forms, which were supposedly straightforward enough for the 'lay man' to use. The deed which settled the bargain between vendor and purchaser, or between mortgagor and mortgagee, was supposed to be one and the same thing as the instrument of registered transfer. These documents were interpreted and indexed by means of a logic which was an alloy of legislation, statutory rules and administrative discretion. The user would need to know what the forms did but not how they did it. That was the concern of the Registrar, who might use his discretion, wherever appropriate, to fashion the right result.

Where Brickdale saw simplicity and coherence the opponents of registration saw arbitrariness and constricting standardization:

> So far as registration is designed to obviate the necessity of forty years' investigation of title on every sale and mortgage, by sweeping away all estates and rights that have ceased to exist, it is desirable. But when it is sought to go farther, and, by the invention of yet another legal fiction, to set up a statutory proprietor who is not a proprietor (but only a tenant for life or the like), to give a paraphrase of easements and restrictions without reference to the actual words by which they were created . . . and to stereotype a statutory charge which is only applicable to the simplest cases . . . then the system becomes a source of delay, expense and vexation.[31]

This amounted to the charge that the Registrar was being elevated to the position of 'universal conveyancer'[32] in areas of compulsory registration. There were essentially two associated complaints. The first related to the manner in which the bureaucracy of registration was administered: it was that the Registrar had been granted—or worse, had granted himself—a peculiar and quite excessive discretion.[33] The Rule was 'master of the Act'[34] and the Registrar was master of

[29] Registration was gradually extended across London within the terms of an Order in Council made in 1898 under the terms of s 20 of the Land Transfer Act 1897. The process is clearly—if not impartially—set out in the *Report of the Registrar of the Land Registry on the First Three Years of the Work of Constructing a General Register of Title for the Country of London* (1902) HCP lxxxiii. 595.

[30] *RCLT*, q1327.

[31] Underhill, 'Report of the Land Transfer Commissioners' (1907) 56 *LQR* 173, 173.

[32] See *RCLT*, q392, and note Brickdale's response: 'I cannot get out of that position altogether'.

[33] The provisions which caused this anxiety were sections 6 and 17 of the 1875 Act, which provided for titles to be accepted only if they were 'approved' by the Registrar. See the complaints in *RCLT*, q8196; qq 1074–9; qq 1221–3; qq 1286–99. Cf Brickdale, q846.

[34] *RCLT* q462.

the Rules. To render the mechanics of registration invisible was to force people to trust in the proper exercise of this discretion. The second complaint was that, however it was administered, the bureaucracy was appropriating too large a slice of the conveyancing process. The process of conveyancing by way of fictions, paraphrases and stereotypes reduced transactions to elements which were entirely within the control of the Registry, not only in the sense that they were processed by the Registry, but also in that the mechanisms were, through the discretion of the Registrar, held together by a form of bureaucratic *bricolage*. Solicitors were indeed in danger of losing their livelihoods, or of becoming no more than remote functionaries of the Registry, which was where, as Brickdale put it, the 'pith of the action' lay.[35]

These objections touched on a number of the issues which made the registration gap so problematic. These issues might be explored through the specific example of the prescribed form of mortgage charge, which was treated by contemporaries as the most problematic aspect of the pre–1925 scheme of registration. The mortgage by prescribed form required the mortgagee to take not the legal estate but only a statutory charge buttressed by statutory remedies. The idea was that mortgages should be treated 'as what they really are, charges to secure debts, and not make-believe conveyances'.[36] The title charged remained registered in the name of the mortgagor. The mortgagee became the proprietor of a registered charge, thereby acquiring rights which were supposed to include the usual mortgagees' remedies. The outline of the scheme will seem familiar, but until the elasticity of the mortgage by demise was recognized[37] it was not at all straightforward to construct mortgages as security interests. There were two specific concerns; first, that the mortgage charge was insufficiently flexible and, secondly, that it offered inadequate security. Each of these concerns gave expression to some more general anxieties about the relationship between registration and traditional conveyancing, and, specifically, about the relation between the contractual and proprietary elements of land transfer.

Brickdale's metaphor was perhaps misleading. Registration did not condense the complexities of conveyancing into a shorter and yet equally expressive form of notation. Rather, the effect of the prescribed forms was to leave the conveyancer with a much sparser repertoire of professional tools. The semantic or conceptual complexity which had in the past enabled transactions to be adapted to local or particular circumstances was severely restricted. Such adaptability as there was seemed to depend upon a sympathetic exercise of the 'ministerial authority' of which conveyancers were so suspicious. Indeed, the dubious nature of the Registrar's discretion made prescribed forms seem yet more pernicious than the word-saving clauses of the Conveyancing and Law of Property Act 1881.[38] For its opponents, registration was therefore the most perverse realization of 'a system

[35] *Report of the Registrar for the Years 1902, 1903, 1904 and 1905* ... Cmnd 3132, HCP (1906) aaaa, 18.
[36] Cited in Hogg, 'The "Mortage Charge" of the Land Transfer Acts' (1907) LXXXIX *LQR* 68, 69.
[37] On the discovery of these virtues see Anderson, *Lawyers and the Making of English Land Law* 285–6.
[38] Note the Commissioners' demolition of the argument that although these forms were not shorter, they were simpler and in expressed in plainer language (*RCLT*, qq 1553–652).

of conveyancing by code-words and statutory powers of appointment'.[39]

The constraining effect of the prescribed forms was partly attributable to the fact that they compounded questions or functions which were quite subtly differentiated in the framework of a traditional conveyance. Not everything in a conveyance was strictly related to proof of title. The old conveyancing treatises distinguished between matters of title and matters of conveyance. The former questions related to proof of title and the latter related to the mode of transfer or enjoyment of what was proved.[40] Registration accentuated this distinction between the certification of entitlements and the realisation of entitlements. In offering a measure of certainty that was extra-contractual, it began to distinguish what one might cautiously label a 'property' element, which had to do with the basic provision of certainty, and a 'contractual' element, which had to do with the structure of transactions. So, for instance, the minutes of the Land Transfer Commissioners' inquiry show Brickdale trying to distinguish between the core and periphery of a title. According to him, those conveyancers who thought that it was still necessary to investigate absolute titles confused that which was properly to do with investigation of title and that which was something else (for example, the perusal of peripheral tenancy agreements).[41] Doubtless this was a rather opportunistic way of trying to defend the rigid formalism of the pre-1925 scheme, but it does hint at the idea that registration might provide a substratum of certainty, which would not itself be a matter for negotiation but which would instead be realized or deployed through longer or shorter-term contracts.

In relation to the question of the mortgage charge, this might suggest that there were practical limits to registration. Mortgages needed to be flexible if they were to accommodate the variety and complexity of credit arrangements. Stewart-Wallace, commenting on the demise of the mortgage charge, noted that its greatest failing was indeed its inflexibility:

> [W]hat we really want is not a hard and fast system [for pledging land credit] but something elastic, so that practitioners may adapt it to needs so different as the provisions normally required to protect £1,000,000 and those normally sufficient to cover trifling amounts of £25 to £50.[42]

Of course, mortgages also presupposed a reliable measure of certainty, and registration might have promised significant advantages in this regard. Functionally, it allowed complex, impersonal, or institutional deals to be made without extensive reliance on personal or local knowledge and trust. If the mortgage question was indeed the most difficult aspect of the land transfer question[43] it would be valuable, but also extraordinarily difficult, to identify changes in the structure and function of credit and to relate these to the development of land

[39] Sweet, 'The Land Transfer Acts' (1908) 43 *LQR* 26, 34.
[40] For practical illustrations of the distinction, see *Re Monckton and Gilzean* (1884) 27 Ch D 555 and *Taylor* v *Martindale* (1842) 1 Y & CCC 656.
[41] *RCLT*, q11677.
[42] Stewart-Wallace, 'Land Registration under the Law of Property Act, 1922' (1924) 9 *Conv* 92, 94.
[43] Anderson, *Lawyers and the Making of English Land Law* 332.

transfer law. This article uses the example of mortgages only to illustrate the need for some workable balance between certainty and complexity. Examples of this recur in the conveyancers' complaints about the scheme of the 1875 and 1897 Acts. For instance, the statutory formula did not allow the benefit of covenants benefiting the mortgagor to be secured for the mortgagee,[44] which meant that deeds had to be made off register.

The other major complaint about the mortgage charge was that the prescribed forms offered inadequate protection for the mortgagee. Specifically, the objection was that unless the mortgagee acquired a traditional legal estate he could not be sure of acquiring the rights and remedies which were incidental to that estate:

> [A] registered charge does not confer any legal estate so as to enable the mortgagee to maintain an action for recovery of the land, ... the statutory power to enter is inadequate, and notwithstanding the provisions in the rules the legal estate would not be re-acquired by foreclosure.[45]

The conveyancers' response to this problem was to insist that the mortgagee should take not only the prescribed mortgage charge but also a mortgage off register, thereby acquiring a traditional legal estate as well as a statutory charge. This practice assumed a particularly conservative—and yet highly sophisticated—view of the role of registration and of its relation to traditional conveyancing: it was founded in the assumption that a registered estate was not a real or substantial estate.[46] A registered owner was only 'a person with a power'.[47] This person possessed no legal estate, only a statutory power of appointment which authorized him to transfer the unencumbered extent of the estate.[48] Where a modern eye might see a peculiarly 'substantive' fiction—an artificial but nonetheless effective framework of ownership—these conveyancers saw nothing other than a scheme of hollow powers which gained solidity only from the substance which they parcelled up and transferred. That substance was shaped and supported by the processes of traditional conveyancing.[49]

These concerns prompted conveyancers to develop a practice of double conveyancing; a 'proper' document of transfer would settle the transaction and

[44] See Hogg, 'The "Mortgage Charge" of the Land Transfer Acts,' above n 36 at 68, 78–9.

[45] Elphinstone, 'On the Land Transfer Acts, 1875 & 1897' in (1905) LXXXI *LQR* 23, 24, which refers to those conveyancing texts which advocated the practice of taking mortgages off register. It may not be insignficant that these objections were raised against the background of the 'Edwardian property slump' described by Offer, and in the context of the general demand for more effective remedies of sale and foreclosure which this slump provoked. See Offer, *Property and Politics* ch 8.

[46] This view was encouraged by judicial interpretations of the mortgage charge. See especially the influential decision in *Capital and Counties Bank* v *Rhodes* [1903] 1 Ch 631. It was undeniable that the powers of a registered proprietor were severely restricted: for example, the legislation conferred no power to grant leases or easements.

[47] *RCLT*, q818.

[48] T. Cyprian Williams, *RCLT*, q10550. The argument was that the statutory power and the legal estate were distinct. The vendor might exercise his power, but this power would not bite on his estate unless it was expressly stated that it should. So, a purchaser was advised to ensure that the appropriate words of inheritance were inserted in order 'to show unmistakeably that [the transferor] grants his estate in the land as well as exercises his statutory power of transfer'.

[49] Against that trend, even the sceptics suggested that the fiction should be consolidated, and that the real problem was the 'impotent condition of the registered proprietor' (Benjamin Cherry, *RCLT*, q6804).

an abbreviated version would be produced for the purposes of registration:[50]

> [T]here were certain printed forms which could be filled up to pass the scrutiny of the Registry officials. But all real conveyancing was to be done by documents, many of which were never presented to the Registry, and which were designed to follow the precedents for unregistered conveyancing. ... This was not an attempt to practise registered conveyancing, but to make a minimum compliance with obnoxious rules.[51] [I]nstead of putting them into the registered charge, which is the real thing, the registered charge is made a small and unimportant-looking document, and the things which are really regarded as important between the parties are put into that which is kept outside...[52]

The difference between what was left off the register and what was registered was not simply quantitative but also qualitative. Off-register deeds were formulated in accordance with a different logic of property. For those who thought in terms of that logic, registration was at best a supplement to the traditional scheme of contract and conveyance, and, it seemed, a pretty useless supplement at that. The Registry was nothing more than 'the fifth wheel of the coach'.[53] This view was encouraged by the difficulties which attended transactions in possessory titles.[54] Although the theory of possessory titles was that they would gradually harden into absolute titles, until that time they had to be processed as though they were unregistered titles. Given that absolute titles were 'quite inconsiderable'[55] in number, this meant that conveyancers spent most of their time operating according to the traditional logic of contract and conveyance. This could only have sustained the idea that the old ways constituted reality whereas registration was merely an irritating supplement.

Yet, even if Brickdale was prepared reluctantly to 'give up the theory'[56] of registration to the (limited) extent necessary to facilitate mortgage practices, the basic theory was quite clear: '[t]he statutory fee simple and other rights conferred by registration resemble precisely the 'estate' of the general law, and differ precisely from the power of the general law, in carrying with them the *prima facie* right to possession and enjoyment as well as the capacity of disposition'.[57] This was consistent with the idea that registration involved the construction of fictitious ownership, something which had originally been offered as a virtue:

> Either the interests carved out of the original fee must be themselves placed on the register, a process which would defeat the first object of such a registration, simplicity

[50] Though there was a suggestion that double deeds offered a way of avoiding stamp duty (see *RCLT*, q1406)
[51] H. Potter, 'Registered Conveyancing Technique' (1942) 7 *Conv* (NS) 24, 24.
[52] Brickdale, *RCLT*, q1193.
[53] *RCLT*, *Second Report*, q8722.
[54] Also, general doubts about the operation of the scheme—partly a question of administration as much as rules: 'No doubt in some cases deeds have been executed off the register when there has been no need for them. But what is to be done? Every solicitor cannot become an expert on the Acts and rules ...' (Cherry, giving evidence to *RCLT*, q6795).
[55] Brickdale, *RCLT*, q161.
[56] *RCLT*, q1381.
[57] Hogg, 'The "Mortgage Charge" of the Land Transfer Acts' above n 36 at 70; cf idem, 'A Contribution to "The Land Transfer Question"' (1905) LXXXI *LQR* 29. For Brickdale's view see *RCLT*, q236.

> of title for the purpose of disposition, or an owner, *pro hac vice*, so to speak, must be created for the purpose of registration, while all remaining interests being kept off the register must . . . become the subject of a second record of title outside the Register.[58]

Registration involved much the same quality of fiction or abstraction as any other scheme of juridical codification or rationalization. The *persona* of the registered proprietor was fashioned according to a perception of how legal proofs of property could provide certainty for economic transactions. Conveyancers were, then, confronted with a a sort of double fiction. The registered owner was a character of fiction not only because the beneficial owners were kept off the title but also because the title itself was organized by an alien logic of entitlements, a sense of property that was unfamiliar and somehow implausible.[59]

## 3 From Genealogical Property to Tabular Property

This contrast between 'fiction' and 'reality' gives some sense of the conceptual and institutional parameters of the debate surrounding political programmes of registration. It suggests the importance of the Rules, and then of the Registrar's discretion or of bureaucratic practice or routine,[60] in making the statutory Rules workable. It suggests also that, against this new fabric of property, a traditional sense of property and entitlement, according to which everything had to wrapped up in contract, persisted. This confrontation between 'reality' and 'fiction' opposed the two logics which were reconciled by the 1930 scheme of postal searches. What was being negotiated in the opposition of these models was a reconfiguration of the traditional scheme of contract and conveyance, or, more specifically, the differentiation of the proprietary and contractual elements of the process. This might be expressed as a distinction between 'contractual property' and 'compensation-based property'.

### *A Paradox of Proof*

In the scheme of contract and conveyance, proof was the product of a private and self-contained contractual process. Contracts were dependent upon pre-proprietary social expectations; they evaluated these understandings through creative compliance with the prescriptions of the conveyancing treatises. With registration, this task of constructive evaluation is made redundant. Contracts simply record or incorporate a pre-packaged measure of certainty. The system of contract and conveyance had instead to begin with uncertainty. For that reason, it was said that retrospective deduction of title made 'every dealing in

[58] *Report, Select Committee on Land Titles and Transfer (1878–1879)* HCP xi, para 13.

[59] Hence Williams' complaint in *RCLT* at q10551: '[T]he effect of these Acts and Rules is to impose upon a land law, which is already so complicated that few lawyers really understand it, a new and additional body of rules expressed in terms of great obscurity and founded on principles entirely at variance with those of the previous law'.

[60] The most notable example of this is the Registrar's use of Rule changes and administrative discretion to soften the principles by which the Land Transfer Acts marked the division between absolute and possessory titles.

real property, however small, a gambling transaction, a speculation in risks . . .'[61] Perhaps this overstated the extent to which uncertainty jeopardized practical enjoyment of land, but it does capture the sense in which uncertainty was the basic presupposition of conveyancing contracts. This peculiar quality of uncertainty arose because a prospective purchaser could never be sure that the title offered was complete. In theory no title was complete unless it could be proved that no relevant document had been mislaid or suppressed. In retrospect, this may seem to amount to nothing more than the tautology that a title was incomplete if any element of it was unaccounted for.[62] Nevertheless, it was a perversely productive tautology, which threatened to unfold a never-ending spiral of proof. Indeed, the formula was perhaps not as circular as it seems: commonsense understandings of the relation between whole and part were suspended.

From the perspective of conveyancing theory it was impossible to know for sure that an abstract mapped the whole story of a vendor's title; or, rather, one could never be sure how much of the story it did not tell. According to conveyancing theory there was indeed a true and complete story of any title, and this could be established by gathering in all the relevant evidence. In practice, however, proving a title was not a matter of starting with a template of title and then inserting each document as though it were a piece of a jigsaw with a clearly defined area and pattern. Instead, one started by taking what pieces one had and, judging by their shape and position, making a guess as to what sort of jigsaw they might once have fitted. In theory, one could never be sure that one had all the pieces, and there was always the danger that a single piece of evidence might emerge to confound one's sense of what shape the pieces were and how they fitted together. Proof of title therefore began with the available documents and, on the basis of a practical reading of conditions on the ground, fashioned a sense of what the possible or plausible stories were. One could know what documents might be relevant, or where to look for them, only by a process of guesswork; or, more technically, a process of inductive or abductive reasoning.[63] There was no standard measure by which one could determine whether there were any absences and inconsistencies. The whole was therefore not necessarily the sum of its parts.

Within the scheme of contract and conveyance this uncertainty could be addressed by allowing that proof should be strictly what each private contract said it should be.[64] The parties effectively manufactured their own criteria of validity, drawing up an agreed template of title which then served as the measure

[61] J. J. Park, *Registration and Conveyancing* (1833) 17. Reformers in the nineteenth century made do with some rather vague figures in their attempts to describe this uncertainty. James Stewart, in his proposal for registration allied to titles insurance, relied on an assessment by in Sugden in his *Vendor and Purchaser* that at most one in fifty titles were 'bad.' See, for example, the article in (1847–8) 7 *Law Review* 154, and his evidence to the 1850 Registration and Conveyancing Commission (*Minutes of Evidence* (1850) HCP xxxii, 461–6).

[62] Anderson, *Lawyers and the Making of English Land Law* 42.

[63] For the application of these concepts in the context of evidence and proof see Anderson and Twining, *Analysis of Evidence* (1991) ch 2.

[64] Which is one way of interpreting Bentham's point that conveyances established a form of private law.

of proof.[65] This template was constructed by reading the available documents of title against the light of the dimension of social life from which they had precipitated. Did the abstract offered by the vendor make sense given what was known of the local or family history which it condensed? This sort of question had to be addressed according to practical evaluative judgement,[66] which might involve reliance on the approval of 'an esteemed conveyancer',[67] or on the integrity of a well-known 'family title'.[68] Because not all titles were complicated, and because practical senses of property were often quite trustworthy, it is important not to exaggerate the problems caused by the fact that one could never achieve 'complete' theoretical proof.[69] Nevertheless, although proof was essentially practical rather than theoretical, informal social practices could be formalized only because of the inherent flexibility of private bargaining frameworks, which allowed contractual terms to be adjusted to a compromise between the need to make a contract which did not commit the vendor to proving the impossible—a theoretically good root of title[70]—but which nonetheless provided the purchaser with a reasonably substantial abstract to show to future purchasers. Although the stipulations which were used to achieve this were chosen from a standard repertoire of formulae, each bargain ordered and adapted them in accordance with a unique contractual scheme.

## *Anchoring Entitlements*

Registration made a decisive break with this model of titles and transfer. Registration did not reinforce or perfect the traditional style of manufacturing titles.

[65] From the point of view of the purchaser, the likelihood was that to push for further enquiries was to risk incurring further expense. See, for example, the memorandum of the Incorporated Law Society—hardly a disinterested party—in the Appendix to the *Report of the Royal Commission on the Operation of the Land Transfer Act* (1870) HCP, xviii 53: 'Ordinary purchasers are almost invariably tied down by special conditions limiting the length of title to be required—precluding inquiries into this and that, and throwing on the purchaser the expense of the production and deeds and a variety of other matters—and it frequently happens that points are waived to avoid expense'.

[66] Ultimately, there was no standard of full proof, no standard measure of certainty, so that fell back on practical distinctions between 'hypercritical' and 'proper' objections, which was simply the distinction between willing and unwilling purchasers (see the evidence of James Stewart to the *Commission on Registration and Conveyancing* (1850) HCP xxxii, 458–60).

[67] See *Report of the Royal Commission on the Operation of the Land Transfer Act* (1870) HCP xviii, 595 at 536: 'A sale under a condition precluding a purchaser from seeking for more title than the last conveyance to a vendor, who is selling under a title approved by some esteemed conveyancer, will fetch as much money as a sale under a title registered here as indefeasible'.

[68] For an instance of this see the evidence that purchasers would accept a conveyance from the Grosvenor estate 'without questioning the title', the status of the estate and its owners being 'quite a sufficient guarantee'. (See *RCLT*, q10153)

[69] 'It was sometimes said that far from aristocratic ownership being an impediment to the investigation of title to small properties—because the difficulty of investigating title meant that its cost was more than the property's value—the reverse was true. The best title possible, it as claimed, was just to know that the land had been in the noble lord's family for a long time. Further, if the land was rural, the conveyance would be handled by a local firm of solicitors who would know the title anyway.' (Anderson, 'Land Law Texts and the Explanation of 1925,' 73; cf Offer, 'Farm Tenure and Land Values in England c 1750–1850' (1991) *Econ Hist Rev* 1).

[70] The theory of proof prescribed that the vendor had to identify a transaction made at least sixty years earlier (the Vendor and Purchaser Act 1874 reduced the period to forty years for open contracts), preferably a transfer made for valuable consideration, and then demonstrate that the estate had devolved to him intact and unimpaired. The idea was that, working backwards towards the source of entitlement, 'the course of each separate portion [should] be traced until the ownership of the whole of them [united] in a single party' (W Hughes, writing in (1846) 7 *Law Times* at 246).

Rather, it constructed an entirely new foundation for property in land. In effect, the reliance of registration upon a technique of insurance or indemnity dissolved the traditional logic of devolution and unfolded another order of entitlement. The novelty of registration—in the specific form which emerged between 1898 and 1930—is clear if one contrasts registration of titles with registration of deeds.[71] In both cases, only registered documents of title would bind purchasers. In both cases, the accuracy of the register was to be guaranteed by public or private insurance. The essential difference was that in deeds registration interests were still to be indexed and deciphered according to the devolutionary or genealogical model of property.[72] Thus, the 'archaeological' process of proof survived. In place of this essentially 'vertical' template of entitlement, registration of set the elements of a title out an a horizontal table. There was no (fictitious) founding entitlement to be retraced. The function of insurance was therefore not to indemnify purchasers against the risks or uncertainties generated within the traditional scheme of property, but rather to serve as a new foundation for titles. The latter had no justification or support other than the authority of the register and the warranty offered by public indemnity. Property was no longer grounded in a practice of 'social mnemonics'—the rich medium of practical social memory—but in administrative practice.[73]

It is of course true that, if one associates insurance with a form of actuarial practice, then the indemnity provided by the Land Registration Act was not strictly a form of insurance. The idea of an insurance fund for registration was formulated without reference to any sort of statistical enquiry, and, once established, the fund was managed according to a very crudely pragmatic sense of how the Registry's income should be balanced against its actual and projected losses. For all those reasons, it is perhaps better seen as a model of indemnification rather than insurance.[74] Nevertheless, if insurance is taken to connote a more general technique of legal and political judgement,[75] then it is possible to identify some features of 'insurance logic' in the functions of registration. Specifically, registration implied a process of aggregation and standardization. It uprooted titles from the local medium which sustained them and which made them

[71] See generally Anderson, *Lawyers and the Making of English Land Law* ch 2.

[72] Before registration, the practice was to arrange abstracts of title as thought they were family trees, ordering the documents by date and by 'channel' (or branch). Indeed, a pedigree of ownership often retraced the descent of a particular family pedigree, so that property was thoroughly genealogical. This was also the logic of deeds registration: 'the indexes are great ledger-books, in which titles are posted analytically, somewhat in the way in which you sometimes see history drawn out into tables, by making every dynasty a root, from which branch out, in a variety of places, the derivative dynasties, and so forth'. (J. J. Park, above n 61 at, 36 (modified slightly)).

[73] This point is developed (in relation to proof of identity in the traditional scheme) in A. Pottage, 'The Measure of Land' in (1994) 57 *MLR* 361.

[74] The point is that the fees levied by the Registry do not constitute anything like an insurance premium. The relation between registration fees has been structured by a range of plainly external considerations. For example, in the period whith which this article is concerned, registration fees were used to fund the the building which housed the Registry. Also, the 1908 Rules traded fees for registration of absolute titles—which were presumably more of a gamble—against fees for possessory titles in order to encourage the take-up rates for absolute titles. For some more recent illustrations of this point, see Smith, 'Land Registration: White Elephant or Way Forward?' (1986) *CLP* 111, 116–17.

[75] For a sustained development of this idea see François Ewald, *L'État providence* (1986) or idem, 'Insurance and Risk', in Gordon et al (eds), *The Foucault Effect* (1989).

intelligible, and relocated them in an essentially public medium (which is true whether titles were to be guaranteed by the state or by a 'private' insurance company). In other words, whereas contracts had previously been private operations, closely tailored to the peculiar contours of a given locality or family, each was now guaranteed by a common reference point. Each contract was secured by—or secured itself to—the anchor of the public indemnity scheme and to a standardized Ordnance Survey map. In contrast with the traditional scheme of conveyance, vendor and purchaser did not process risks or uncertainties privately, but off-loaded them on to the scheme of public indemnity.

The incorporation of this external reference point was accompanied by a reconfiguration of the process of contract and conveyance. One result was that completion lost the significance it enjoyed in the scheme of practical proof. Obviously land transfer practices varied quite widely—according to whether the sale was by auction or by private contract, or whether it was to be made by special contract or open contract—and information about the extent and quality of these variations is lacking. Nevertheless, it seems plausible to suggest that in many cases, and certainly in the (rare?) case of an open contract (which the treatises took to be paradigmatic), there would have been serious doubt about the ability of the vendor to make title according to the contract. The purchaser's solicitor received the relevant documents after exchange of contracts, and might then have made requisitions to test apparent weaknesses in the narrative of title. The period between contract and completion was therefore a period of 'live' negotiation, and the success of the contract may often have depended upon the co-operation of the purchaser in making only 'proper'—as opposed to 'hypercritical'—requisitions.[76] In short, completion was problematic in a sense which it only rarely is today. The decision whether or not to go ahead with completion was governed by practical concerns about being left with a bad bargain, or, alternatively, dealing with a bill for specific performance or forfeiting the deposit. To close the private loop of consensus would often have required careful assessment and negotiation rather than simple verification. Once, however, registration turned entitlement into a guaranteed quality, land transfer contracts were freed from the spiral of proof and the contortions which it imposed. Contracts simply adapted themselves to conditions in which the existence of entitlement was less a problem than a presupposition.

The difficulty of registration in the period before 1925 was that the anchor which was supposed to secure titles was not as securely lodged as it might have been. Doubts about the accuracy and authority of the register were accentuated by concerns about the scope of the insurance fund.[77] Some of those concerns

[76] See the comments of James Stewart, referred to in n 66 above.

[77] '[T]he one solid advantage to the credit of registration is the insurance fund, an advantage somewhat discounted, however, by the difficulty of being sure that the guardians of the fund will admit liability in any particular case.' (Comment in (1921) 65 *Solicitor's Journal* 488, 489). The decision in *Re Odell* [1906] 2 ChD 47—which seemed to decide, against the interpretation of the Registrar (see *RCLT*, q49) that a purchaser who obtained first registration of a forged instrument could not be indemnified by the insurance fund—caused particular concern. This interpretation was overruled by the Law of Property Act 1922/1925.

about the trustworthiness of the register survived after 1925, and are evident in concerns about the adequacy of official searches in closing registration gaps.[78] These doubts expressed the fact that registration could not be grounded in insurance alone, but that it depended as much upon the integrity and predictability of the routine hidden operations of the Registry in, for example, identifying land, or in constructing a workable index. Unless solicitors could be persuaded that the register was indeed authoritative, then they might have good reasons for persisting with the traditional scheme of transfer, in which contracts absorbed uncertainties privately. The personal search was one of the instruments which conveyancers used in their attempts to embrace the register within the old process of contract and conveyance. The essential difference was that the relevant uncertainties were attributable not to the hazards of proving devolution but to deficiencies in the administration of the register. The difficulties of those uncertainties became less acute as the quality of the Registry's processes improved and, just as tensions between 'reality' and 'fiction' in the pre-1925 period might be taken to illustrate the conceptual dimension of the emergence of registration, the development of the bureaucracy might be taken to show that the shaping of registration was as much the result of the need to 'materialize' or to ground concepts in practices and institutions as it did upon economic motivations.

## 4 Differentiating the Core and Periphery of Titles

### *Simplification and Standardization*

The emergence of a logic of registration of titles might be seen as part of a broader trend. For example, just as registration of titles began to attract serious attention, similar debates about the merits of bureaucratic systems of proof were taking place in relation to patents.[79] It is, however, possible to identify a more defined pattern of standardization and insulation in this general trend. The traditional contractual art of measuring and constructing entitlements was significantly weakened by precisely those measures of simplification which were designed to secure it. The implementation of standard contractual terms, *ad*

[78] Modern solicitors seem not to share this concern. See the *Annual Report of the Chief Land Registrar for the year 1982–1983* para 15: 'The [1981 Rules] extended the period of priority conferred by an official search from 20 to 30 working days in order to give practitioners more time to attend to post-completion formalities before lodging the protected application for registration. I am sorry to have to report that in the case of applications for official search made in respect of the whole of the land comprised in a title, no less than 40 per cent of the ensuing applications were lodged after the period of priority had elapsed'. This casual approach might suggest that the indemnity offered by registration is no longer immediately supports practical confidence. Although the provision of insurance was essential in establishing registration, or in persuading solicitors that their concerns about the reliability of registration could be met, it is perhaps unsurprising that, once this transitional period had been left behind, conveyancers returned to an older ethos of land transfer, in which 'people do not proceed cautiously; they proceed indolently, confidingly, eagerly, recklessly; they prefer risk to trouble, suspicion, restraint, delay ...' (comment in *Solicitors' Journal* (1886–7) cited in Anderson, *Lawyers and the Making of English Land Law* 180). Domestic conveyancing at least seems to be based on a more practical sort of confidence, derived, perhaps, from the routine nature of this sort of work.

[79] See generally Coulter, *Property in Ideas* (1991), and A. Pottage & B. Sherman, 'Création et Appropriation' in M. Buydens & A. Strowel (eds) *Profils de la création* (forthcoming).

*valorem* fee scales,[80] or standardized and simplified powers for limited owners, which were supposed to make sales speedier and less expensive imposed a straight-jacket upon the essential versatility and adaptability of the traditional contractual process:

> [T]he only way in which sales could be speeded—save trivially by sparing solicitors the bother of identifying which proffered conditions of contract were novel—was through reducing permissible inquiry into title.[81]

Whereas in the past the prescriptions of the conveyancing treatises had been moulded to the local or otherwise peculiar conditions of a particular title, now the scope of practical enquiry was limited to those measures which could be accommodated within a fixed framework of fees and conditions. This point should not be overstated. Obviously there were variations; in rural areas, or in other contexts in which titles could be trusted, quite perfunctory contractual terms sufficed. Purchasers could buy a title with very little fuss, and perhaps even at a reduced fee.[82] Nevertheless, practical proof was not always so straightforward, and when dealing with a complicated or idiosyncratic title, it would have been obvious that standardization of terms could work only if one had a standard measure of proof. This was the point made by James Stewart who, in defending his innovatory scheme of title insurance, dismissed the idea that conveyancing might be modernized by restricting or standardizing contractual terms: 'I do not see that you can provide for the special circumstances that arise. Each title rests on its own circumstances. You could not, therefore, meet the particular case; you could not [for example] say that such and such evidence should satisfy a person as to heirship'.[83] Instead of leaving the construction of a measure of proof to private bargaining, standardization denied the peculiarity of each title, and so reinforced the practical—if not the political—appeal of registration, which at least offered a universal standard which was insulated from local conditions.

One should be careful not to identify a ready pattern of cause and effect in this. For example, Anderson suggests that the movement towards standardization emerged from the promotion of local interests. Local law societies introduced standard conditions so as to make their auction rooms fairer and more efficient than their competitors in adjacent districts. These conditions were often tailored to patterns established by the management practices of local estates.[84] Peculiarly, therefore, standardization may have been the outcome of apparently divergent local initiatives. As the profession began to fashion itself into a more uniform and cohesive body, and as statutes began to standardize practices, these local

[80] This issue is not uncomplicated. Not only do we have no measure of the 'proper' price of conveyancing (see Anderson, 'Land Law Texts and the Explanation of 1925' 71), but the fact is that the Law Society's claim that its members would often charge less than the scale fee is quite plausible (see RCLT, q141 and qq 8910–12).

[81] Anderson, *Lawyers and the Making of English Land Law* 153.

[82] As indicated in the Law Society's evidence about the use of *ad valorem* fee scales (see above n80).

[83] Minutes of evidence, *Report of the Registration and Conveyancing Commission*, q159. For Stewart's influence on the reform of land transfer law, see Anderson, *Lawyers and the Making of English Land Law* ch 3.

[84] Anderson, 122 and 154.

variations in texture were ironed out of the process of proving title, only to resurface elsewhere. There remained a range of functions which could not be managed from a centralized registry: 'there were simply too many aspects to a land transaction other than the act of transfer for solicitors to be ousted'.[85]

This is partly why it was unclear what relation the 1881 Conveyancing and Law of Property Act (which introduced word-saving clauses and other simplifying measures) was supposed to have to the Land Transfer Acts of 1875 and 1897. Was the scheme constructed by the 1881 Act an alternative to registration, or was it designed to reinforce or facilitate registration?[86] This question touches on the status of what Offer calls the 'simplification strategy':[87]

> [Its] purpose was to limit legal title to two forms, fee simple and leasehold, pushing all other interests such as trusts and equitable interests behind a 'curtain' which left the title unaffected—they were to be protected by cautions on the title. With this simplified procedure and remuneration scales unchanged, solicitors could operate private conveyancing on a much more profitable basis.[88]

The ambivalence of the 1881 Act, which solicitors had taken to be the foundation of this strategy, suggests that simplification and registration were not so divergent. Of course the difference might be that one scheme seemed to preserve the solicitors' land transfer monopoly whereas the other seemed to deliver it to the Registry. Nevertheless, the process of simplification led just as surely to the dissolution of contract and conveyance as did the supposedly antithetical programme of registration. The important difference was rather that registration, precisely because it flattened the devolutionary model of property and replaced it with a scheme of indemnity, offered a more viable solution to the problems which standardization of both varieties would eventually encounter. Only in the scheme of registration was the statutory imposition of a standard range of enquiries supported by a common measure of certainty.

## *Legislation and Bureaucratic Practice*

This measure of certainty could not have been instituted simply by passing legislation: indeed, the solution offered by registration was largely a product of bureaucratic organisation. Statutes were of course an essential part of the process. The Law of Property Act 1922, which implemented a large part of the 1925 compromise, stifled old-style conveyancing by abolishing possessory titles[89] and giving the registered proprietor all the powers of an owner in general law. These measures were reinforced by relaxing the regime of prescribed forms. The existence of an interest was to be noted and indexed on the register, leaving the extent of the interest to be verified by examining the instrument itself, which

[85] Anderson, *Lawyers and the Making of English Land Law* 228.
[86] See the debate in RCLT, qq 715–33.
[87] See *Property and Politics* 47.
[88] Offer, 'The Origins of the Law of Property Acts' above n 2 at 511.
[89] The 1908 Rules had gone a long way to achieving this by providing that possessory titles could 'mature' into absolute titles in six years.

was retained at the Registry for that purpose. It might seem that this scheme confused the elements of registration of title and registration of deeds, but the scheme of indexation was tabular rather than 'dynastic'. The resemblance does, however, say something about how dealings should be incorporated into the register. Where the pre-1925 order favoured direct incorporation, the 1925 scheme formulated patterns of indirect articulation. The distinction between the 'existence' and 'extent' of an interest which was implicit in the new, more relaxed, scheme of prescribed forms[90] is clearly illustrated in the role which the 1925 scheme accorded to cautions. The sense in which cautions implied a less expansive role for the Registry may be compatible with the view that the corporate self-interest of the solicitors had prevailed,[91] but, seen in this light, such a minimal articulation of existence and extent shows the consolidation of a conceptual model in which the role of the Registry was essentially to provide a stable and reliable guide to the existence of entitlements.[92]

Nevertheless, political programmes of law reform had to be translated into concrete bureaucratic and professional practices, and even this more flexible legislative structure had to be substantially fleshed out with a coherent bureaucratic scheme. To some extent this was a matter of developing more efficient routines within the Registry, and by the time protected postal searches were introduced this process of adaptive evolution had progressed significantly.[93] Even sceptics acknowledged that Stewart-Wallace had been remarkably successful in reducing 'the long delays which took place between the lodging of an application for registration and the issue of the certificate'.[94] It was also a matter of negotiating workable links with the agencies upon which the progress of registration was dependent, the obvious example being the Ordnance Survey. Since 1898, the Registry had worked out a subtle administrative *modus vivendi* with the Ordnance Survey. This allowed the necessary revision of the maps of compulsory areas of London to proceed at a manageable pace, at the same time allowing the Registry to adapt its procedures of investigation and indexing to the quite novel idea that property could be defined and indexed topographically.[95] It may even be that

[90] For this distinction see Potter, 'Registered Conveyancing Technique', (1942) 7 *Conv* 24, 35.

[91] See Offer, 'The Origins of the Law of Property Acts' above n 2. Indeed, the Law Society began to argue that the Registry dealt with only 'the comparatively easy part of the transfer of land' (*Evidence to the Land Transfer Committee*, PRO LCO2/1482 and LCO2/1483). The suggestion was that trickiest part of the transfer was the business of settling the contract.

[92] The principal disadvantage of this looser scheme of indexation being that antiquated principles of priority and creation survive alongside the scheme of registration.

[93] These are set out in the successive *Annual Reports* returned by Stewart-Wallace. One of the most useful steps was the scheme of 'provisional priority' discussed in the *Report* for year 1934–35.

[94] See the 'Editor's Note' (1923) 8 *Conv* 73. Even more efficient by 1931. The same journal (see (1932) 18 *Conv* 1) reported that '5.6 days is the latest speed record for the average time taken to complete a first registration in London, a process that required 24.8 days so recently as 1920'. This commentary went on to note how dependent registration was upon the efficiency of the bureaucratic scheme: 'the great measure of success with which the title registration system is at present being administered owes more to the organisation of the administering office than to the excellence of the statutes and rules under which it operates.' See also the comment in *Solicitors' Journal* 6 May 1933 at 312.

[95] See Pottage, 'The Measure of Land' n 73 above. Progress in the indexing of property on maps meant that the procedure for making an official search of the map index to discover whether a particular titles was registered could be streamlined (see (1936) 80 at *Solicitor's Journal*, 575).

the progress of these less visible dimensions of registration was more important than the development of political and legislative contests. Certainly it is true that the administration of the Registry had progressed to such an extent that it was gradually consolidating and extending a practice of registration which was far in advance of the possibilities contemplated by participants in the disputes over legislation.

This degree of progress created a tension between the commitment which drove the bureaucracy of registration and the equivocation which characterized the 1925 legislation. This tension is quite neatly illustrated by the difficulties which arose when Eastbourne Borough Council applied for registration to be extended to its administrative area. The application was opposed by the Sussex Law Society[96] on the grounds that the Land Transfer Act 1897 required that any registry should be 'conveniently near' to the county or borough which it served.[97] The Registry rejected this anachronistic view of registration:

> The idea of local registries is a relic of the 1875 legislation. In my view the telephone and telegraph, together with the general quickening of communications since 1875, have greatly qualified the wisdom of a local registry policy. The advantages of mass production in land registration as in so many other fields.[98]

Although the 1925 legislation represented no clear policy with regard to centralization, the Registry itself was making a policy of centralization seem more and more obvious. This momentum had been generated by the resolution of a number of problems of bureaucratic organization. In light of this gap between practice and policy, Stewart-Wallace persuaded Benjamin Cherry to amend the clause which was to becomes 120(3) of the Land Registration Act 1925 so that it emphasized administrative convenience rather than geographic distance. In his response to the Sussex Law Society's petition this was presented as the proposition that the intention of the 1897 Act, despite the apparent reference to geographic distance, had been to make administrative practicality the sole measure of convenience.[99] So, even as it was being passed, the 1925 legislation had begun to show its age.[100]

The Eastbourne case is also significant because it indicates an important but less obvious factor in the construction of a scheme of postal searches. Personal searches were more than merely inconvenient. For Stewart-Wallace a more significant objection was that provincial law societies, and specifically the Yorkshire solicitors, cited the necessity of making personal searches as a reason for

[96] For the full text of the petition submitted by the Society, see PRO LCO2/927.

[97] Land Transfer Act 1897, s 20(5).

[98] Stewart-Wallace, commenting on the later application made by Hastings (letter to Claud Schuster, 27 October 1927, PRO LCO2/1104).

[99] Nevertheless, he conceded that the notice of extension would have to be 'drawn with some art'. See generally PRO LCO2/927.

[100] The Eastbourne application was made at the beginning of 1925. Obviously the Eastbourne case did not present the difficulties encountered in the wrangle over the Yorkshire Deeds Registries.

restraining the centralizing ambitions of the Registry.[101] To sustain a practice of personal attendance would have meant linking the extension of registration to the provision of accessible local registries, which would in turn have had unwelcome financial and political implications for the Registrar.[102] The difficulty, however, was that the practice of making personal searches was rooted in a set of genuine concerns about the integrity of the process of registration. Even if those concerns were coloured or accented by economic interests, they would persist so long as no satisfactory solution was found. As the example of Eastbourne illustrates, the Registry had worked itself into a position where there was very little left to be done to dissolve the conveyancing logic which the practice of personal searches expressed. Stewart-Wallace claimed that he had 'made it one of the foremost aims of the administration so to mould [Registry] practice that the normal business of land registration—including searches of the register—[could] be conducted by post'.[103] Doubtless this was said with the benefit of hindsight, but there was some truth in it. Personal searches were a problem—and postal searches worked as a solution to that problem—only because of the vast amount of legislative and bureaucratic adaptation which preceded their introduction in 1930.

## 5 From Conveyance to Contract

The idea that postal searches confirmed the dissolution of traditional conveyancing implies that registration involved settling a conceptual—as much as an economic—division of labour between the Registry and the profession. This division of labour might be represented as the product of a process in which the elements of traditional conveyancing were fractioned into two layers, separating the 'proprietary' elements of the process from its 'contractual' elements. Within the practical and logical sequence of registration, the moment of completion marked the boundary between these two domains. Within the scheme of contract and conveyance, on the other hand, there was no such boundary. Even in areas of compulsory registration, solicitors adhered to the notion that titles were sealed before completion, and that the function of the Registry was simply to record the fact of completion. Registration was to be purely 'ministerial,' doing no more than to 'register what the parties had done'.[104] Certainty was manufactured privately and the result noted in the register. To effect the transition from this understanding to one consistent with the logic of registration it was necessary

[101] See the minutes of evidence to the Tomlin Committee, PRO LCO2/1107, and the letters exchanged between Stewart-Wallace and Schuster, 25 and 29 July 1929, PRO LCO2/1106. For Stewart-Wallace, the problem was that the obvious practical solution—that provincial solicitors should employ London agents—was politically unacceptable: '[T] o make attendance at the London Registry essential would have penalised provincial solicitors by making the employment of London agents necessary ...' (Stewart-Wallace, 'Official Searches in Form 94', (1937) 81 *Solicitor's Journal* 933).

[102] This was particularly inconvenient given that registration was still being sold on the basis that it reduced conveyancing costs.

[103] *Evidence to the Tomlin Committee*, May 1929, PRO LAR1/49.

[104] Beale, President of the Law Society, *RCLT*, q8914.

to persuade solicitors that the fabrication of entitlement was something which could safely be entrusted to the Registry—that it was no longer necessary to secure the elements of a registered title in the knot of a private contract.[105]

Solicitors had to be persuaded that, as Brickdale put it, 'the time occupied in the Registry being after completion is not so important as the time occupied under the old system of conveyancing which is before completion'.[106] What happened in the Registry was not 'important' because it was nothing more than a predictable and reliable routine, the result of which could be anticipated by the contract. Therefore, completion could be treated as the moment at which the contractual aspect of the transfer was concluded. The concerns expressed by solicitors about the registration gap meant that they were reluctant to take this small but significant step. The time spent in the Registry was indeed important because it was not a predictable routine, and therefore it had to be accounted for within the sequence which spanned contract and conveyance:

> Completion must be at [the Registry] if it is to be really completion. In the case of unregistered land everything is settled and agreed beforehand, and if the parties meet at the completion it is to hand over the money and receive the deeds, and nothing remains to be done over which any question or dispute can arise. There is no real completion of a transaction with registered land until the documents have been passed at the Registry.[107]

To some extent this registration gap was a 'discretion gap'. The problem was simply that there was a dimension of uncertainty which could not be gathered into the contractual process. Given that concern, the significance of the priority periods which accompanied postal searches was that they seemed effectively to neutralize those hazards. This apparently simple remedy is perhaps more significant for the vast layer of discretionary activity which it left out than it is for the comparatively small measure of insulation which it provided. A significant number of the objections made to the 1909–1911 Land Transfer Commission concerned the extent to which registration depended upon 'discretion'—if that label is taken to cover everything that was not a matter of the Acts or Rules, and to therefore to include the bureaucratic intelligence which was needed to make the scheme work. By 1930, these objections had dropped away. Undoubtedly the Registry's practices had by then congealed into routine, but there were still grounds for caution: even something as simple and as important as the scheme of indexing seemed to vary in quality and method.[108] The difference was that whereas this would previously have been seen as a serious flaw, after 1930 it was seen as an almost inconsequential irritation.

[105] The persistence of the latter idea is apparent in a range of suggestions which now seem very peculiar, all of which treated the Register as though it were simply a continuation of the old documentary process of proof. So for example, one finds the suggestion that certificates of official searches should be abstracted in order to confirm the absence of adverse interests (see *Solicitor's Journal*, 8 November 1930, 748–9).

[106] *RCLT*, q11648.

[107] *RCLT*, q7334.

[108] See Potter, 'Registered Conveyancing Technique' n 51 above at 27.

Although the bare structure of the sequence of contract and conveyance still remains, the logic which governs it is quite new. The priority periods which accompanied postal searches did more than stop the clock that measured the traditional sequence of conveyance. They bridged the gap between completion and registration, but the effect was not to incorporate the register within the traditional sequence. Rather, it was to initiate a movement by which proof of title became a process of verification rather than investigation. Within this new scheme, the stage at which contracts were exchanged became more important than the moment of completion. Anderson identifies an increase in conveyancing scale charges in 1925 as an early symptom of this development:

> [It] assimilated the structure of fees for Registry business to that for traditional conveyancing. Thus a separate charge was allowed for negotiating a sale—which included drawing the contract—and this served to integrate solicitors into Registry practice, and Registry practice into solicitors'. A work-sharing arrangement was emerging. It is symptomatic of the shift of lawyerly emphasis from conveyance to contract that Cyprian Williams, who was preparing a post-1925 edition of *Vendor and Purchaser*, should have interrupted his work to bring out a new book wholly devoted to the contract of sale of land.[109]

The effect of this reconfiguration of conveyancing was to render the interval between exchange and completion strategically inert with regard to proof of title. No longer is it characterized by a genuinely suspicious process of investigation. Instead, proof of title seems to replicate and extend the process established by the logic of priority periods, so that it becomes nothing more than a matter of checking the accuracy of a prior search. The contract is moulded to the shape of the entitlement disclosed by pre-contract searches, so that the bargain presupposes the register from the start.[110] The making of pre-completion searches serves only to verify that the presuppositions of the contract are still valid.

The 1930 scheme of postal searches may have had some role in adjusting conveyancing practice to this model of paper proof. The new scheme was not immediately or automatically effective in changing conveyancing habits; it had to be shaped by adjustments to Registry practice. In the early period of the scheme postal searches were not used in the manner prescribed by the Rules. Instead of beginning the contractual process with an accurate, up to date, copy of the register, and then using the official search procedure to confirm this initial certificate, solicitors turned their attention to the register only at the last minute, preferring, it seems, to use the register as a supplement to the traditional routine of contract and conveyance. Initially, the Registrar turned a blind eye to this, but later began to insist that an official search would be issued only where the

[109] Anderson, *Lawyers and the Making of English Land Law* 325; cf Offer 'The Origins of the Law of Property Acts', 521.

[110] See Barnsley, *Conveyancing Law and Practice* ch 8. In domestic conveyancing transactions there is more pressure to make the contract the essential stage in settling the bargain. For example, although the delays involved in making local searches could be dealt with by including in the contract a term that searches should be made after exchange, with the purchaser being given a right to rescind if an unwelcome entry should turn up, the need to synchronize completion with other transactions means that such a condition would be impractical. See ibid, 190–1.

vendor had at the outset provided the purchaser with an accurate copy of subsisting entries according to the Land Registration Act 1925, section 110.[111] This compelled solicitors to adjust practice to the logic of registration much more closely, so that the primary evidence of entitlement was not tested between contract and conveyance, but was quite straightforwardly compiled by making pre-exchange enquiries, which accordingly became the most important aspect of the process of transfer.[112] According to Stewart-Wallace, the purpose of the 1930 Rules was indeed to reduce proof of title to a simple check: 'it is only necessary for [purchasers] to satisfy themselves that, since the issue of the office copy, the plot they are purchasing has not been removed from the vendor's title, and that no adverse entry has been made on the register affecting it'.[113] There was, and is, no need for the old ritual of requisitions and objections. Indeed, largely because proof seems to be no more than a matter of verifying co-ordinates established by pre-contract searches and negotiations, contracts raise expectations which might once have seemed precarious or remote.[114]

## 6 Matching Paper Proof and Ocular Proof: The Contemporary Registration Gap

These factors may partially account for the emergence of a more modern form of 'registration gap'. In the modern context, the problem arises because a purchaser is deemed to be bound by any overriding interests which exist at the date of registration.[115] Registration usually takes place some time after the completion of the transfer and, although the relevant inspections are supposed to take place before completion, someone might enter into occupation after completion and acquire an overriding interest which would be binding at the moment of registration. A purchaser—or, more precisely, a mortgagee—might then be bound by an undiscoverable interest:

> The difficulty arises because of the interval between execution of a transfer or mortgage and registration. Once the transfer or mortgage has been executed the die has been cast. The purchaser or mortgagee may have done all that he should have done. He

[111] See the note in (1937) 81 *Solicitor's Journal*, 852.

[112] It is not insignificant that the current policy of the Registry is to give priority to applications for pre-contract searches rather than to post-completion work. (See, for example, the *Annual Reports of the Chief Land Registrar for 1984–1985* para 16). Therefore, when pressure on the Registry's limited resources is at its greatest, work on substantive registrations takes second place to the work of sustaining high response and accuracy rates for what the Registry terms 'preliminary services' (see, for example, the *Annual Report for 1988–89* paras 23–30).

[113] Stewart-Wallace, in (1937) 81 *Solicitor's Journal*, 934.

[114] This is one way of reading recent contributions to the debate over the status or value of the rule in *Bain* v *Fothergill*. The rationale of the rule was, perhaps, that the disappointed purchaser could have no damages for loss of bargain because the substratum of the bargain did not exist until title was made in accordance with the contract. The modern assumption is that a contract can raise quite legitimate expectations. It seems obvious that in the modern context, where the substratum of the bargain can be confirmed by making a few simple searches before contract, contracts should be considered to raise legitimate expectations. There may be some more specific reasons for suggesting that the rule is inappropriate in the modern scheme of land transfer (see, for example, the arguments in Harpum, '*Bain* v *Fothergill* in Chains' (1983) *Conv* 435), but these doubts do recognize the degree of confidence which now characterizes land transfer.

[115] Land Registration Act 1925, s 20(1)(*b*).

> has searched the register. He has inspected the property and made inquiry of the occupant. He then parted with his money against a duly-executed instrument. Thereafter, within days or maybe hours, someone moves into the property, and he or she is there when the transfer of mortgage is duly presented to the Land Registry for registration. If [the Land Registration Act] is to be construed as having the effect that in such a case the estate of the purchaser or mortgagee takes effect subject to the interest of the newly-arrived occupant, the result, self-evidently, would be a conveyancing absurdity.[116]

This version of things is rather misleading. The 'absurdity' of the situation arises not because the framers of the 1925 Acts did not express things quite exactly enough, but for the quite familiar reason that the legislation now applies to a wholly different social context.[117] The real difficulty is that which is expressed in the problem of the *scintilla temporis*,[118] and the solution which the judges have found neatly captures the new role of mortgage finance in supporting owner-occupation.[119] Against this background, the registration gap is simply the form in which judges confront a modern set of problems of credit regulation. Nevertheless, the form itself is interesting because it suggests that the difficulties of regulating credit and occupation arise not just from the fact of social change since 1925, but also because the 1925 scheme itself equivocated between two logics of land transfer.

The traditional conveyancing theories of inspection and notice were retained for pragmatic reasons; when it first emerged, the category of 'overriding interests' was justified on the basis that 'the register [was] only intended to take the place of the documentary title and not to supersede the usual inquiries as to possession'.[120] Not only did this reduce the complexity of the register to manageable proportions, it also limited the potential liabilities of the Registry's insurance fund.[121] However even in the early part of the life of the 1925 legislation some of the difficulties of retaining this reference were noted:

[116] *Lloyds Bank* v *Rosset* [1988] 3 All ER 915, 922, *per* Nicholls LJ.

[117] Acquisition mortgages are not new: although many mortgages in the eighteenth and nineteenth century would have been loans secured on an existing estate, in the latter part of the nineteenth century many sales of the freeholds or leases held by private landlords (and, indeed, developers) would have been transferred or carved out with the assistance of a mortgage. The freeholder or the lessee lived on the margin between the rate of mortgage interest and the return on the rents charged to occupiers. Clearly, a freehold represented a better investment for such landlords. Not only was the income more secure, but the reversion held by the freeholder added to the capital value of the rental income. For an account of this see Daunton, *House and Home in the Victorian City* (1983) ch 5). The statistics cited there suggest that, in 1914, 80 per cent of all houses were mortgaged. Given that owner-occupation then ran at about 10 percent, this may indicate the dependence of the (smaller) landlord upon mortgage finance. However, Offer's use of these figures (*Property and Politics*, ch 8) suggests that mortgage finance may not have been as widespread as Daunton suggests. In a system of conveyancing based upon title deeds, it was relatively simple for the mortgagee to secure his interest. The unencumbered estate would be transferred to the purchaser, who would thereupon execute the mortgage deed. The purchaser would never obtain the documents of title, which instead passed straight from the vendor to the mortgagee (see *Williams on Vendor and Purchaser* (1st ed, 1903) 552). The importance attributed to title documents ensured that there was no danger of interests adverse to that of the mortgagee arising between the completion of the purchase and the execution of the mortgage deed.

[118] See *Abbey National* v *Cann* [1990] 2 WLR 832.

[119] The essential difficulty is that mortgages are no longer parasitic upon a *substratum* of fee simple ownership. Instead, the reservoir of mortgage credit, in the specific form given to it by the packages marketed by financial institutions and by various schemes of regulation, supports and shapes modern forms of owner-occupation.

[120] Haldane, quoted in Anderson, *Lawyers and the Making of English Land Law* 259–60; see also 274–5.

[121] See Anderson, *Lawyers and the Making of English Land Law* 277–80.

> The fundamental objection to the position of overriding interests lies in the retention in the law of too much of the old system of conveyancing without any compensating features. Moreover, the system of registration tends to obscure the relation of these interests to the investigation of title under the Land Registration Act.[122]

This complaint contains echoes of the treatise writers' concerns that everything should ideally be reduced to paper. Nevertheless, it also recognizes that the principal difficulty with overriding interests lies in determining how registration of documents is supposed to relate to processes of inspection and notice. The 1925 scheme seems to have been founded on two basic assumptions. The first, which concerned the past, held that titles had traditionally been proved by two complementary modes of investigation, one based upon examination of documents and the other upon the investigation of occupation. The second, which concerned the future, was that, to be effective, registration needed only to rationalize the process of documentary proof. Therefore, purchasers would be expected to inspect the land 'as before' in order to identify occupation interests. Proof of title consisted of two severable processes.

The first assumption was mistaken. Documentary interests and occupation interests were not subject to independent and yet complementary processes. Rather, they were wrapped in the same process of contractual proof. The splitting of this single process into two elements was in fact a consequence of standardization and registration; it was not a description of what preceded those movements.[123] As documents came to be organized by registration, so the traditional practices of inspection began to lose their original purpose and function. In place of the traditional understanding of a title as an interest proved by a conjunction of paper proof and 'ocular' proof, titles were indeed split into two separate domains with separate schemes of proof. Thus, the problem with overriding interests is not that they derogate from the so-called 'mirror principle' of registration. Rather, it is that their survival has resulted in two qualitatively different types of interest, resting upon different processes of proof and validity.

What are now distinguished as paper interests and occupation interests were intertwined in the scheme of traditional conveyancing because both sorts of interest rested upon the same contractual foundation. This essentially contractual character is obvious in the reference which the judges made to inspection practices when they addressed questions of specific performance or claims for compensation for deficiencies. For example, deficiencies or misdescriptions

[122] See Potter, 'The Registration of Overriding Interests' (1935) XXI *Conv* 61, 62, advocating documentary accounting for all interests.

[123] Compare the early idea that registration should reduce proof to paper, given in the *Report of the Commission on Registration and Conveyancing (1850)* HCP xxxii, 27: 'The policy of the law, which provides that the title to land shall depend as far as possible on written instruments—which excludes so far as possible the necessity of resorting to parol evidence, or to inferences from equivocal facts and circumstances—is founded on the same motives and principles which lead to the recommendation of a Register'. Against that, it should be noted that the tendency to regard both dimensions of proof as severable emerged later, and specifically in the idea that registration need not 'exonerate a purchaser from the easy and obvious task of looking at the outward and visible state of the property', or from the 'simple duty' of inspection. (*Report of the Commission on the Land Transfer Act (1870)* HCP xviii, paras 64 and 80 respectively).

which a purchaser would have uncovered if he had inspected the land offered no ground for recission of the contract.[124] The judges distinguished documentary facts from those 'objects of sense'[125] which should have been obvious to anyone who had carried out a proper 'ocular inspection'. These prescriptions formulated conventional practice in normative terms. They recognized that proof of title was practical, and that paper had to be held against the light of local or informal knowledge to check its validity. This form of contractual logic was also at work in the practice of making enquiry of occupiers. Although this practice might now be associated with questions of notice rather than questions of contract, the first reason for carrying out such inspections was not to identify adverse occupation rights but to assess the validity of the title offered. The assumption was that ownership and occupation belonged to separate spheres. A title carried the right to receive the rents paid by occupiers, and the proprietary stake held by those occupiers was relevant only if it constituted an exceptional state of occupation.[126] A purchaser's principal concern was to ensure that the sale was not fraudulent, and the responses which inquiries elicited from occupiers were important more for what they said about the rights of the vendor than for what they said about the rights of those in occupation.[127] For that very reason purchasers sometimes dispensed with making all the inquiries prescribed by the conveyancing treatises. Nevertheless, in theory these inspections served as the measure of notice. The doctrine of notice which settled third party rights was parasitic upon the theory of inspection which the judges used to settle bilateral, contractual, issues. Third party rights were founded in possession, which meant visible possession, which in turn meant 'visible' according to the light shed by contractual practices of inspection. It is striking just how much the language of the specific performance and misrepresentation cases has in common with the vocabulary used in cases concerning notice and equitable property rights.[128] Indeed, sometimes the questions were similar. Third party rights might offer a ground for repudiating the contract if they were discovered before the conveyance was completed.[129] This kinship of concepts is not surprising given that the judges originally formulated the doctrine of notice as a way of reconstructing a dispersed

[124] See *Scott* v *Hanson* (1826) 1 Sim 13; *Clapham* v *Shillito* (1844) 7 Beav 146.

[125] On this see *Dyer* v *Hargrave* 10 Ves 505, at 508.

[126] So, for example, if they held an option to purchase. Tenancies were not a problem. Even in the urban context, most working-class tenants occupied under informal weekly periodic tenancies. Only the middle classes signed tenancy agreements (usually either yearly or quarterly leases). (See generally Daunton, *House and Home in the Victorian City* (1983) ch 6).

[127] Anderson, *Lawyers and the Making of English Land Law* 274–7, which refers specifically to *Hunt* v *Luck* [1901] Ch 45.

[128] See for example *Clapham* v *Shillito* (1844) 7 Beav 146.

[129] See for example *Nelthorpe* v *Holgate* (1844) 1 Coll 203, 215, which neatly illustrates the similarities and differences between contractual and equitable notice: '[The occupier's] residence on the farm may well, as between herself and [the purchaser], have carried with it constructive notice of her rights, supposing that material to her; but it does not follow that it was notice as between [the vendor and the purchaser]'. References to a single horizon of visibility differed according to whether the dispute was contractual (between vendor and purchaser) or proprietary (between purchaser and occupier). In the former case, notice was a factor to be balanced against others in assessing whether there was a real case of misrepresentation. In this particular case the problem was that vendor was seeking to rely on a rescission clause in the contract, and the question was partly whether or not he had made a reckless misdescription which barred him from relying on that clause.

chain of paper title.[130] The question of third party rights was addressed by asking what would have appeared on the horizon of a purchaser who was concerned to ensure that he was making a good bargain. This imported the logic of investigation of title into the question of notice. More significantly, perhaps, it supposed that completion was somehow always in doubt, and that a purchaser had room to repudiate the contract if he discovered an adverse interest before conveyance. According to the theory, then, a purchaser was supposed to carry out last minute inspections in order to uncover interests which might be grounds for rescinding the contract.[131] Again, this is consistent with the idea that completion followed a period of serious investigation of title.

Although the scheme of overriding interests preserved a reference to inspection or occupation, in doing so it created a split between the logic of documentary proof and the logic of 'ocular' proof. The point of completion is unimportant so far as the former is concerned, but vitally important to the latter. Even though the 1930 Rules linked registration and completion together, the evolution of conveyancing practice has opened up a gap between exchange and completion. Whatever the modern decisions might suggest, this interval between exchange and completion is the more problematic form of registration gap. Indeed, in those modern cases where the registration gap has been an issue, the question of adverse occupation arose before completion.[132] What these cases also show is that modern conveyancers do not share their predecessors' concern that completion should be synchronized with registration.[133] The result is that completion and registration have drifted further and further apart, emphasizing, perhaps, that exchange is the vital stage of transfer, which suggests that the difficulty is not really caused by the existence of a gap between completion and registration.[134] The difficulty is rather that land transfer practices have developed along a course initiated by the legislative activity which preceded 1925, but that this development was unaccounted for in the legislation itself.

## 7 Conclusion

The 1925 legislation was already out of date in 1925. The presuppositions which governed traditional conveyancing techniques, which even committed advocates

[130] Early uses of the doctrine of notice decided priorities by asking whether the purchaser had pursued a chain of title as far as he should. This involved working out the principles of notice from the process of contractual proof, a conjunction which was affirmed in the manner in which judicial interpretations of notice tailored the doctrine to the development of conveyancing practice. See *Taylor* v *Stibbert* (1794) 2 Ves 437; *Daniels* v *Davison* (1809) 16 Ves 249; *Bailey* v *Barnes* [1894] 1 Ch 25.

[131] *Williams on Vendor and Purchaser* (1st ed, 1903) 510–11, advised that searches of any relevant registers and inspections of land 'should be made so as to extend over the very latest time before completion'.

[132] See *Lloyds Bank* v *Rossett* [1988] 3 All ER 915 (CA); *Abbey National* v *Cann* [1990] 2 WLR 832.

[133] Registration takes place as of the date at which the application for registration is delivered. Some delay arises because it is modern practice to deal with some aspects of the transfer after completion (which in itself says something about the diminished importance of completion). In addition, however, solicitors now tolerate gaps which would once have been considered unacceptable (see the text at n 77 above).

[134] It should be borne in mind that this describes only one aspect of the problem of the registration gap, and that it does not address the problems caused by the peculiar dependence of the mortgage transaction upon the conduct of the 'primary' transaction.

of registration often seemed to take for granted, had been undermined by the discreet consolidation of the bureaucratic process of registration. The significance of protected postal searches was that they adjusted the formal scheme of the 1925 legislation to the possibilities opened up by advances at the practical, administrative, level. This was the step which allowed the old logic of certainty to be dissolved and thus for the profession to be drawn into the new logic of registration. In so doing, it served as the last piece of the jigsaw which allowed centralization to proceed. Registration had indeed become an adjunct of existing professional structures, but the qualities and functions of those structures had been redefined. If one is concerned with the foundation of titles, then 'the pith of the action' does indeed lie in the Registry rather than in the profession, and, more significantly, in the Acts and Rules rather than in the offices of solicitors. Anderson astutely describes the scheme of contract and conveyance as an 'intelligent formulary system'[135] which was held together by a practical sense of how familiar tools could be turned to new or difficult applications. The process of registration shares that dependence upon practical intelligence, the vital difference being that the intelligence in question is bureaucratic rather than professional. As with any code, the legislative framework of registration had to be adapted and lubricated by practical activity and, although the Rules mediate between legislation and application, the scheme still depends upon the more or less routine activities of Registry staff. Of course these activities—which are founded more in bureaucratic culture than legislative prescriptions—settle into routine. Yet, it is the confidence invested by participants inside and outside the Registry which makes the scheme workable. One lesson to be learned from the question of protected postal searches, and one which is still of contemporary relevance, is precisely the point that the scheme depends upon a layer of practical discretion which is assumed to be straightforward or which is simply overlooked. It seems that registration—if it is identified not only as a political programme but also as a concrete bureaucratic practice—quickly superseded the set of practices and problems to which it owed its existence. The resulting equivocation remains in the shape of the modern form of registration gap. The gap in question is not primarily the distance between paper interests and occupation interests but the distance between the structure of the Act and the practices which have so awkwardly settled around it.

[135] *Lawyers and the Making of English Land Law* 220.