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Rectification, Realignment and Indemnity in Scottish and Swiss Land Registration Law

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Abstract

The thesis is the first comparison of the land registration systems of Scotland and Switzerland. Although the history here differs significantly (national rules have existed in Scotland since 1617, in Switzerland since 1912), there are nowadays an increasing number of similarities.

Switzerland has followed the German "*Grundbuch*" model of registration of title since 1912. Scotland has moved closer to that system in time. First, the Land Registration (Scotland) Act 1979 introduced a system of registration of title to replace the system of registration of deeds first introduced in 1617, but English law heavily influenced this. Secondly, the Land Registration etc (Scotland) Act 2012 moved the system closer to the German model. Unlike under the English system, registration of an invalid deed does not cure the invalidity ("immediate indefeasibility) but a third party in good faith relying on the incorrect register entry, subject to certain conditions being satisfied, will become owner ("deferred indefeasibility").

Due to the word limit, the thesis focuses principally on three important issues. The first is rectification, the process for correcting mistakes in the register. The second is realignment, whereby what appears to be the case when reading the register becomes legal reality when the good faith parties register certain deeds in their favour. The third is indemnity, the rules under which the register will pay financial compensation to those who suffer financial loss because of it. For example, the former owner of land is usually compensated where a good faith acquirer acquires it because of realignment.

In relation to rectification, the officials responsible for the land registers in both countries are not judges. They have only limited possibilities to correct wrong register content. The Scottish concept of the referral to the Lands Tribunal is notable in terms of giving the Keeper of the Land Register a wider scope of action. In realignment, Scotland is unique internationally in imposing one year of possession as a condition for an acquirer in good faith to become owner. The thesis will assess whether this extra requirement could improve Swiss law.

Finally, on indemnity, the Scottish concept of the Keeper's warranty is unknown in Switzerland. While at first sight this seems to evidence a more generous compensation system, it will be shown that the position in the two countries is in fact closer.

Comparison on Rectification

The comparison shows that the approach taken in Scotland and Switzerland is quite similar due to the limited power of review of the Keeper of the Land Register. The Scottish rule, that the Keeper can only rectify 'manifest inaccuracies' of her own volition ('manifest' both in terms of the error itself and in terms of the process due) is comparable to the Swiss rule that the administrator may only rectify if there is a 'clearly supervening inaccuracy'. Examples are entries for rights that are limited in time and have lost their legal significance as they have expired or if there is a clerical error caused by the administrator himself, like a misspelled name. Before the electronic land register was introduced, the administrator was allowed also to rectify serious errors, provided that no third party had noticed these yet. With the introduction of direct access to electronic land registration data to lawyers, public notaries, banks etc., wrong entries can be noticed 'at once', with the consequence that the administrator has to ask the parties for their permission to rectify.

Comparison on Realignment

In Switzerland and Germany there is no requirement for a transferor to a good faith acquirer to be in possession of the land in order for the acquirer to become owner, as contrasted with s 86 of the Land Registration etc (Scotland) Act 2012. The reliance on the inaccurate land register entry is sufficient. According to German and Swiss legal thinking, possession is a suitable means of publicity for moveable property, but not for land, since possession can have many reasons (ownership, rent, neighbour looking after the house during an absence of the owner, squatters etc.). The lack of possession requirement in the Swiss system is more acquirer friendly, because it makes it easier for him to acquire title. The Scottish solution, however, can be praised for appropriately balancing the interests of the true owner with those of the acquirer. It seems very reasonable to protect the real owner,

because an 'easy come easy go' approach, which only focuses on the integrity of transactions can go against the same acquirer later.

Comparison on Indemnity

While there is only one provision in the Swiss Civil Code that deals with state compensation in land registration law, the 2012 Act has several discrete provisions. Nevertheless, as judgements of the Federal Swiss Supreme Court show, the single provision is usually interpreted generously in a wide sense. Both in Scotland and Switzerland the registration of a voidable deed will not result in a compensation claim. The Scottish position seems to be more generous with regard to transactional errors involving void deeds, but this is tempered by the provisions imposing duties on applicants and their solicitors. The concept of shared responsibility between the land register administrator and lawyers is also known in Switzerland, where a notary public is responsible for checking the identity of the parties, their capacity to act and their agreement to transfer. The administrator may rely on these checks. In the case of a forgery, the Scottish position is in principle to award compensation, if the Keeper (by mistake) warrants the title as being good. The question has not been decided yet by the Swiss Federal Supreme Court, but there are good reasons to justify compensation, since it is the administrator's duty to check the authenticity of the deed. The Swiss state liability is a strict one, which means, that the State must compensate losses although the administrator was not personally at fault, eg if he was not able to detect a forgery that looks genuine.

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List of abbreviations

1617 Act	Registration Act 1617
ABGB	Austrian Civil Code of 1 June 1811 (<i>Allgemeines Bürgerliches Gesetzbuch</i>)
Arnet, <i>Art. + N.</i>	R Arnet, 'Art. 942-977', in A Bächler and D Jakob (eds), <i>Kurzkommentar ZGB</i> , 2 nd edition (2018)
Baumann, <i>Art. + N.</i>	M Baumann, 'Art. 3', <i>Zürcher Kommentar, Art. 1-7 ZGB. Einleitung. Mit einer Einführung zu den Artikeln 1-10 von Bernhard Schnyder</i> (1998)
BBl	Swiss Federal Gazette (<i>Bundesblatt, Feuille fédérale</i>)
BGE	Landmark Decisions of the Swiss Federal Supreme Court (<i>Publizierte Leitentscheide des Bundesgerichts, Arrêts principaux du Tribunal fédéral</i>)
BGer	Decisions of the Swiss Federal Supreme Court that are not officially published
BGG	Swiss Federal Supreme Court Act of 17 June 2005 (<i>Bundesgerichtsgesetz, BGG; Loi sur le Tribunal fédéral, LTF</i>)
BV	Federal Constitution of the Swiss Confederation of 18 April 1999 (<i>Bundesverfassung, Constitution fédérale</i>)
CC	Swiss Civil Code of 10 December 1907 (<i>Zivilgesetzbuch, code civil</i>)
Deillon-Schegg, <i>Art. + N.</i>	B Deillon-Schegg, 'Art. 942-977', in M Amstutz et al (eds), <i>Handkommentar zum Schweizerischen Privatrecht</i> , 3 rd edition (2016)

H Deschenaux, <i>Das Grundbuch, Erste Abteilung</i>	H Deschenaux, <i>Das Grundbuch, Erste Abteilung, SPR V/3/I</i> (1988)
H Deschenaux, <i>Das Grundbuch, Zweite Abteilung</i>	H Deschenaux <i>Das Grundbuch, Zweite Abteilung, SPR V/3/II</i> (1989)
ECHR	European Convention on Human Rights
GBV	The Land Register Ordinance of the Swiss Federal Council of 23 September 2011 (<i>Grundbuchverordnung, Ordonnance sur le register foncier</i>)
Gretton and Reid, <i>Conveyancing</i>	G L Gretton and K G C Reid, <i>Conveyancing</i> , 5 th edition (2018)
GRS	General Register of Sasines
Hofer, <i>Art. + N.</i>	S Hofer, 'Art. 3', <i>Berner Kommentar, Einleitung und Personenrecht, 1. Abteilung. Einleitung, Art. 1-9 ZGB</i> (2012)
Homberger, <i>Art. + N.</i>	A Homberger, <i>Zürcher Kommentar, Das Sachenrecht, Dritte Art. Abteilung, Besitz und Grundbuch, Art. 919 – 977</i> (1938)
Huber, <i>Erläuterungen</i>	<i>E Huber, Erläuterungen zum Vorentwurf eines schweizerischen Zivilgesetzbuches, 2nd edition</i> (1914)
Huber, <i>System</i>	<i>E Huber, System und Geschichte des Schweizerischen Privatrechtes, Dritter Band</i> (1889)
Jenny, <i>Der öffentliche Glaube des Grundbuches</i>	<i>F Jenny, Der öffentliche Glaube des Grundbuches nach dem schweizerischen ZGB</i> (1926)
LRR 2014	The Land Register Rules etc. (Scotland) Regulations 2014
LR (S) A 1979	Land Registration (Scotland) Act 1979
LR (S) A 2012	Land Registration etc (Scotland) Act 2012

Mooser, <i>Art. + N</i>	M Mooser, 'Intro. aux art. 942-977', 'art.942-977', in P Pichonnaz et al (eds), <i>Commentaire Romand, Code civil II</i> (2016)
OR	Swiss Code of Obligations of 30 March 1911 (<i>Obligationenrecht, Droit des obligations</i>)
Pfammatter, <i>Art. + N.</i>	A Pfammatter, 'Art. 942-977', in J Kren Kostkiewicz et al (eds), <i>ZGB Kommentar, 3rd edition</i> (2016)
Pfister, <i>der Schutz des öffentlichen Glaubens</i>	H R Pfister, <i>Der Schutz des öffentlichen Glaubens im schweizerischen Sachenrecht</i> (1969)
Reid, <i>De-Throning King Midas</i>	K G C Reid, 'De-Throning King Midas: The New Law of Land Registration in Scotland' in A Goymour et al (eds), <i>New Perspectives on Land Registration: Contemporary Problems and Solutions</i> (2018)
Reid, <i>Property</i>	K G C Reid, <i>The Law of Property in Scotland</i> (1996)
Reid, <i>Tell me don't show me</i>	K G C Reid, "'Tell Me, Don't Show Me" and the Fall and Rise of the Conveyancer' in F McCarthy et al (eds), <i>Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie</i> (2015)
Reid and Gretton, <i>Land Registration</i>	K G C Reid and G L Gretton, <i>Land Registration</i> (2017)
RoS	Registers of Scotland
Schmid, <i>Art. + N.</i>	Jürg Schmid, 'Art. 942 – 977', in T Geiser and S Wolf (eds), <i>Basler Kommentar, Zivilgesetzbuch II, 6th edition</i> (2019)
Schmid and Hürlimann-Kaup, <i>Sachenrecht</i>	Jörg Schmid and B Hürlimann-Kaup, <i>Sachenrecht, 5th edition</i> (2017)

SchKG	Law on Debt Enforcement and Bankruptcy of 11 April 1889 (<i>Bundesgesetz über Schuldbetreibung und Konkurs, Loi fédérale sur la poursuite pour dettes et la faillite</i>)
SLC	Scottish Law Commission
SLC DP 125	Scottish Law Commission, <i>Discussion Paper on Land Registration: Void and Voidable Titles</i> (Scot Law Com DP No 125, 2004)
SLC DP 128	Scottish Law Commission, <i>Registration, Rectification and Indemnity</i> (Scot Law Com DP No 128. 2005)
SLC DP 130	Scottish Law Commission, <i>Discussion Paper on Land Registration: Miscellaneous Issues</i> (Scot Law Com DP No 130, 2005)
SLC Report 222	Scottish Law Commission, <i>Report on Land Registration</i> (Scot Law Com No 222, 2010)
Zobl, <i>Grundbuchrecht</i>	D Zobl, <i>Grundbuchrecht, 2nd edition</i> (2004)

I. Introduction

A. The Project

1. The lack of research in land registration law generally and particularly in comparative law studies

“Despite their dynamic development, registers are neglected in our legal reality. They are rarely the focus of scientific research.

(...)

Registers are still often treated as a purely technical and organizational tool by other legal institutions. In many ways, however, they are independent legal instruments and, as such, fulfil essential functions.”¹

Professor Arkadiusz Wudarski, the author of these remarks, is the first European legal scholar to direct a major project on comparative land registration law, with contributions of legal scholars from all over the continent.² In his view, comparative studies on land registration law “could stimulate national reforms and, perhaps, help to develop universal quality standards for land registers in Europe”.³ This may, however, be too optimistic. Professor Sergio Cámara-Lapuente notes that the land registration systems in Europe “vary enormously” with regard to their effects and organisation. He believes that a convergence in the medium of term is “highly utopian”.⁴

For his part Professor Kenneth Reid convincingly argues that at least in the manner in which protections in land registration law are arranged, it should be left to local expertise and legal scholarship, because this depends on a range of factors, such as the likely incidence of error, the role of the legal profession in the conveyancing

¹ A Wudarski, ‘Das Grundbuch in der Registerwelt. Eine rechtsvergleichende Untersuchung zum deutschen und polnischen Grundbuch im europäischen Kontext’, 31 in Wudarski (ed), *Das Grundbuch im Europa des 21. Jahrhunderts* (2016). Own translation from the German original.

² Wudarski (ed), *Das Grundbuch im Europa des 21. Jahrhunderts* (n 1).

³ Wudarski, ‘Foreword’, in Wudarski (ed), *Das Grundbuch im Europa des 21. Jahrhunderts* (n 1), 9.

⁴ S Cámara-Lapuente, ‘Registration of Interests as a Formality of Contracts: Comparative Remarks on Land Registers within the Frame of European Private Law’ in (2005) 13 *European Review of Private Law*, 837 f.

process, the practice of the registrar and the availability of insurance. It can hence be argued with good reason that harmonisation at least of protections in land register law seems neither possible nor desirable.⁵

2. The aim of comparative law

This conclusion in relation to harmonisation does not mean that a comparative analysis cannot serve any benefit. According to Zweigert and Kötz “no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries.”⁶ Research in comparative law is both “a means of expanding knowledge” and a means of “better understanding law”.⁷ Glenn argues that in times of globalisation where lawyers have gained a “historically unknown mobility” and data on foreign legal issues became easily available, law itself should be “recognized as an inherently comparative process”.⁸

While the aim of comparative law is first and foremost (new) knowledge,⁹ it serves other purposes too: “it dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding; it is extremely useful for law reform in developing countries;¹⁰ and for the development of one’s own system the critical attitude it engenders does more than local doctrinal disputes”.¹¹ This applies to a study of land registration.

⁵ K G C Reid, ‘Allocating Protections on the Land Register: A Case Study from Scotland’ in A Wudarski (ed), *Das Grundbuch im Europa des 21. Jahrhunderts* (n 1), 412.

⁶ K Zweigert and H Kötz, *Introduction to Comparative Law*, translated from the German by Tony Weir (3rd edn, 1998, reprinted 2011), 15.

⁷ H P Glenn, ‘The aims of comparative law’ in J M Smits (ed), *Elgar Encyclopedia of Comparative Law*, (2nd edn, 2012), 66 f.

⁸ Glenn, ‘The aims of comparative law’ in J M Smits (ed), *Elgar Encyclopedia of Comparative Law* (n7), 72.

⁹ Zweigert and H Kötz, *Introduction to Comparative Law* (n 6), 15.

¹⁰ In this context see eg: T Hanstad, ‘Designing Land Registration Systems for Developing Countries’, in (1998) 13 *American University International Law Review* 647.

¹¹ Zweigert and H Kötz, *Introduction to Comparative Law* (n 6), 16.

3. The topic chosen

This thesis in Chapter II provides a broad overview of Scottish and Swiss land registration law. Due to the word limit, we then focus principally on three important issues. The first, which is discussed, in Chapter III, is rectification, the process for correcting mistakes in the register. The second, examined in Chapter IV, is what can be termed realignment, whereby what appears to be the case when reading the register becomes legal reality when a good faith third party registers certain deeds. The third, considered in Chapter V, is indemnity, the rules under which the register will pay financial compensation to those who suffer financial loss in relation to it. For example, the former owner of land is usually compensated where a good faith acquirer acquires the land because of realignment.

The aspects of indemnity, realignment and rectification in land registration law all have in common that they relate to a situation where there is potential conflict. This may be because the land register is “wrong” and does not show who the owner is according to the rules of property law, or because specific content in the register is incorrect, as a result of the register officials making an error or the legal situation has changed off-register. Some of these conflicts are not easy to solve because they involve contradicting principles of law. These make it impossible to find a solution by simply applying one principle, without breaching another equally important principle at the same time. Therefore, the solutions to these conflicts need a well-balanced approach and nuanced legal reasoning.

A comparative analysis in this field seems to be particularly attractive, because the solutions found in different jurisdictions to answer to those “unsolvable problems” (Bazon Brock)¹² often emerge from small nuances in legal reasoning, which lead to

¹² B Brock, *Vom Discours zum Parcours –Arbeit an unlösbaren Problemen*, in A Bammé (ed): *Unlösbare Probleme – Warum Gesellschaften kollabieren* (2014), 9 ff. The philosopher Brock maintains (12), that ‘in principle, problems cannot be solved, because if they could be solved, one would simply have to solve them and would not have a problem at all. But we have problems all the time, precisely because they cannot be solved, because all crucial problems are important precisely because they cannot be solved. So the scientist has gone from being a problem-solving

the application of the one solution or another. It is interesting to see, *why* a country has chosen a particular model and *how* the legal scholars there support the chosen model or oppose it. In this regard, an analysis of the chosen topic opens up the possibility of learning from legal scholars abroad to understand their reasons for opting for one solution or another.

If the inspiration gained from foreign jurisdictions leads to concrete suggestions for an 'improvement' of one's own national law, the research will, according to Zweigert and Kötz as mentioned above, contribute knowledge to the legal science outside its usual national borders. The research will also sharpen a critical attitude towards one's own system and further international understanding.

4. Significance of the project

The thesis is the first comparison of the land registration systems of Scotland (a mixed legal system)¹³ and Switzerland (a civil law system).¹⁴ Although the history here differs significantly (national rules have existed in Scotland since 1617, in Switzerland since 1912), there are nowadays an increasing number of similarities. Scotland and Switzerland both take the position that an entry in the land register

specialist - in the realisation that by solving all problems, new ones are created again - to being a problem creator' (own translation from the German original).

¹³ 'Scots private law is the product of a mixture of the civilian and the common law traditions and represents today the only major mixed legal system in Europe: see H L MacQueen, 'Scots Law', in J M Smits (ed), *Elgar Encyclopedia of Comparative Law* (n 7), 789. For further accounts of the history of Scots law, see R Zimmermann and K Reid (eds), *A History of Private Law in Scotland* (2000) and R Zimmermann "'Double Cross": Comparing Scots and South African Law' in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004).

¹⁴ Switzerland belongs to the civil law family and its civil code has been strongly influenced by German legal theory and doctrine: see G Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (2015), 300. Some comparative law commentators, who do not have a unitary view of a civil law system, put Switzerland, with good reason, into the sub-category of the Germanic civil law family: see U Kischel, *Comparative Law* (2019), 360. Precedents do not normally form an official legal source in a civil law jurisdiction. Civilian commentators hold the view that judges must apply only statutory law and are not obliged to decide cases according to applicable precedents (Kischel, *Comparative Law* (n 14), 371) Nevertheless, case law is of great practical importance in civil law countries, not only in order to evaluate how a court is likely to decide in a similar case, but also for the development of law (Kischel, *Comparative Law* (n 14), 372)

alone cannot confer an unchallengeable title, unless this is needed to protect an acquirer who relied in good faith on a register entry (“deferred indefeasibility”).¹⁵ This common basis is a good starting point for a comparison, because the choice of such a system in both countries is a deliberate decision of the legislator. Therefore, a comparison with land registration systems with immediate indefeasibility¹⁶ like the English or the Australian ones, would probably be more of academic than of practical value for both Switzerland and Scotland. Since Scotland only recently¹⁷ switched to a system of deferred indefeasibility it will be interesting to see what reasons led to this change. Scotland is particularly attractive for comparative legal research, since as a mixed legal system, it combines the traditions of both civil (Roman) and common law. It must be admitted though, that in the realm of Scottish land registration and property law, the civil law tradition clearly prevails over common law.¹⁸ Both Switzerland and Scotland have built their property law upon the basis of classical Roman law, which is very helpful in a legal comparison in terms of understanding the other country’s general property law principles.¹⁹

From an economic perspective, Martinez Velencoso states that “by offering information on property rights, the Land Register reduces the costs associated with exchanges and facilitates the circulation of [land], and it can therefore be described as an instrument in the creation of wealth”.²⁰ The analysis of the different protective

¹⁵ The rationale for protecting the bona fide acquirer is explained in part IV of the thesis.

¹⁶ The entry in the land register alone is sufficient in order to confer an unchallengeable title.

¹⁷ By enactment of the LR (S) A 2012, fully in force since 8 December 2014.

¹⁸ Before Scotland joined with England in 1707 to form the United Kingdom, its law was ‘very similar in outlook and content to those other systems of Western Europe which had developed from Romanistic and Feudal sources’ (T B Smith, *A Short Commentary on the Law of Scotland*, 1962, vii). As is well known, the development of the English legal tradition took a different path. In this context it is important to know, that the Treaty of Union 1707 provided explicitly that Scotland may retain its private law tradition (Article XVIII) and that its legal institutions shall be untouched (Article XIX). At the time, the Scottish Parliament was dissolved, but in 1999 a devolved parliament in Edinburgh with broad powers to legislate on private law was established (K G C Reid, ‘Transfer of Immovable Property in Scotland’, University of Edinburgh, School of Law, Research Paper Series No 2018/34, 2018, 3).

¹⁹ For the influence of Roman law in both jurisdictions, see J.-P. Dunand, ‘The experience of Roman private law in Switzerland’, (2014) 20 *Fundamina*, 227 and W Gordon ‘The Civil Law in Scotland’ in W Gordon, *Roman Law, Scots Law and Legal History - Selected Essays* (2007), 324 ff.

²⁰ L M Martínez Velencoso, ‘The Land Register in European Law: A Comparative and Economic Analysis’, in L M Martínez Velencoso et al (eds), *Transfer of Immovables in European Private Law* (2017), 3.

provisions of land registration law in Scotland and Switzerland may also shed light on the issue, if the solutions chosen are in line with the economic objective of having a reliable instrument that contributes to prosperity.

B. Methodology

The research will be predominantly doctrinal and consider the primary sources of law (legislation and case law), as well as the secondary sources of law (legal scholarship). However, there is so far little case law on the 2012 Act in Scotland and most of this has related to the transitional provisions from the previous legislation.²¹ This is not of direct relevance to the comparison being made in this thesis. Similarly, the amount of Swiss case law is rather small.

It has been said that a generally accepted methodology in the area of comparative law studies does not exist. This may be due to the fact that an international standard reference book has not yet been published.²² Nevertheless, different methodologies exist and “to say simply that ‘comparison’ itself is the method would be reductivist”.²³

The “functional method of comparative law”, has many benefits, but still it remains a contested approach, being “both the mantra and the *bête noire* of comparative law”, as Michaels puts it.²⁴ For present purposes, the functional method seems appropriate, because as Zweigert and Kötz convincingly state, incomparable things “cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function”.²⁵

The main functions of the land register which Wudarski sets out in his comparative study about the German and the Polish land registers apply also to the Swiss and Scottish context. A land register serves – generally speaking - the functions of order

²¹ See eg *Dabsky v Tyrrell* 2019 GWD 37-603 and *MacGregor v Keeper of the Registers of Scotland* 2019 GWD 32-505 discussed in K G C Reid and G L Gretton, *Conveyancing 2019* (2020), 189-195.

²² B Markesinis, *Rechtsvergleichung in Theorie und Praxis: ein Beitrag zur rechtswissenschaftlichen Methodenlehre* (2004), 4f.

²³ A E Örüçü, ‘Methodology of comparative law’ in J M Smits (ed), *Elgar Encyclopedia of Comparative Law* (n 7), 563.

²⁴ R Michaels, ‘The Functional Method of Comparative Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law*, (2nd edn, 2019), 340.

²⁵ Zweigert and Kötz, *Introduction to Comparative Law* (n 6), 34.

(“*Ordnung*”), information (“*Information*”), creation (“*Gestaltung*”) and protection (“*Schutz*”).²⁶

The aspects of rectification, realignment and indemnity all serve in some way the protective function of the land register. But the crucial question is, who is when protected and how? As protection is not the only purpose of the land register, the second question is: how can protection be granted if there is a conflict with another function of the land register? And thirdly, it must be asked, what solution does the legislator choose when there is a conflict between general property law rules and the functionality of the land register?

The legislator’s task is to balance fairly all conflicting principles or functions involved. The thesis evaluates the Swiss and the Scottish solutions and tries to assess if the chosen solutions are persuasive.

²⁶ Wudarski, ‘Das Grundbuch in der Registerwelt. Eine rechtsvergleichende Untersuchung zum deutschen und polnischen Grundbuch im europäischen Kontext’ (n 1), 80.

II. Overview of Swiss and Scottish Land Registration Law

A. The reason for an official register of land

The rationale for a register identifying the holders of real property rights is because such rights usually require to be publicised. Since right holders, irrespective of whether over moveable property or immovable property, exercise their rights *erga omnes* (against everyone), it is necessary for these rights to be made public to some extent.²⁷ Professor Reid stresses in this context, that “real rights cannot usually be conferred by private act, known only to the immediate parties.”²⁸

If a person, Anna, has no way of knowing about the property right of another person, Brian, it would seem odd to hold Anna accountable for infringement of Brian’s right.²⁹ In the Swiss law of moveable property (*bewegliche Sachen, Mobilien; meubles*), possession (*Besitz, possession*) is the normal means of publicising the right of the possessor to everybody. While that person (*Besitzer, possesseur*) need not necessarily also be the owner (*Eigentümer, propriétaire*), possession is protected by law.³⁰ The Civil Code further establishes the presumption that the possessor of a corporeal moveable is also the owner.³¹ The very same presumption is also recognised in Scots law.³²

However, as far as real rights in land are concerned, in Swiss law possession is not regarded as an appropriate means of publicity.³³ This is because the mere presence

²⁷ In this sense, see S Wolf and J Mangisch, ‘Das Grundbuch in der Schweiz und seine Prinzipien’ in A Wudarski (ed), *Das Grundbuch im Europa des 21. Jahrhunderts* (2016) (n 1), 729 and also G L Gretton and A J M Steven, *Property, Trusts and Succession* (4th edn, 2021), para 4.19 f.

²⁸ Reid, *Property*, para 602.

²⁹ See also in this context: Gretton and Steven, *Property, Trusts and Succession* (n 27), para 4.20.

³⁰ Art. 926-928 CC; This is also the rule in Scots law: Reid, *Property*, para 5. The Swiss Department of Justice has published an English translation of the Swiss Civil Code for information purposes: <https://www.admin.ch/opc/en/classified-compilation/19070042/201801010000/210.pdf>.

³¹ Art. 930 I CC.

³² Reid, *Property*, para 114 and 130.

³³ However, a person who exercises effective control over land may bring an action for wrongful dispossession or trespass (Art. 937 II CC).

of a person on a plot of land is not regarded as providing the same insight as somebody wearing a ring or carrying a banknote.³⁴ The fact of possession of land alone does not provide any reliable information about the rights, which the possessor has to the land.³⁵ A possessor, Peter, does not necessarily have to be the owner of the land; he could for instance also be the tenant, the liferenter, a friend who looks after the house, while the proprietor is absent, a squatter, and so on. For Scotland, Reid stresses that the mere possession as a matter of fact can also be exercised unlawfully.³⁶ While it could be argued that the same is in broad terms also true for moveable property, another argument seems to be more convincing: with regard to a single plot of land, the legal relationships thereto can be very numerous and complex (various servitudes as rights and encumbrances, securities, priority notices and so on). Possession could never visualize all these property rights. Only the land register as a “linguistic means” (*sprachliches Mittel*) is able to correctly state the differentiated legal relationships with regard to a plot of land.³⁷

Accordingly, in Switzerland, Deschenaux argues that the appropriate means of replacing possession with another form of publicity is the formal recording of ownership and other real rights in land in official documents, such as books and registers.³⁸ In Scotland, Gretton and Steven take a similar view, noting that registration ‘is a good way – perhaps the best – of satisfying the publicity principle’.³⁹ Likewise, Reid regards the public land register as the ‘fullest expression’ of the ‘doctrine’.⁴⁰

³⁴ Deschenaux, *Das Grundbuch, Erste Abteilung*, 6.

³⁵ Deschenaux, *Das Grundbuch, Erste Abteilung*, 6 f.

³⁶ Reid, *Property*, para 5. The same is true for Swiss law (see Art. 927 CC).

³⁷ J Wilhelm, *Sachenrecht*, 5th edition (2016), N. 543.

³⁸ Deschenaux, *Das Grundbuch, Erste Abteilung*, 7.

³⁹ Gretton and Steven, *Property, Trusts and Succession* (n 27), para 7.2.

⁴⁰ Reid, *Property*, para 602.

B. History

1. Swiss land registration history

a) *The unification of private law in Switzerland*

The (first) Constitution of the Swiss Confederation in 1848 did not require all laws throughout the country to be the same. Private law remained a cantonal matter. Only the constitutional revision of 1874 established the basis for the federal competence to enact legislation in fields of private law which are especially important for the economy (such as the Law of Obligations and the Law on Debt Enforcement and Bankruptcy). It was a referendum of 1898, which finally gave the Federal Parliament the competence to pass federal laws in all (remaining) areas of private law.⁴¹ In accordance with the Codification Principle (*Kodifikationsprinzip, principe de codification*) on which the Civil Code is based, it claims exclusive competence in relation to the regulation of private law, unless it provides for exceptions in favour of other federal laws or cantonal law.⁴²

b) *The emergence of national rules for land registration in Switzerland*

National rules for land registration were proposed for the first time by the Department of Justice and Police in the preliminary draft (*Vorentwurf*) of the Civil Code, which was published in 1900. In 1907 both chambers of the Swiss Parliament passed the codification unanimously. It came into force on 1 January 1912.⁴³

⁴¹ P Tuor / B Schnyder / J Schmid / A Jungo, *Das Schweizerische Zivilgesetzbuch*, 14th edition (2015), § 1 N. 7 ff.

⁴² E Beck, *Berner Kommentar, Schlusstitel: Einführungs- und Übergangsbestimmungen, II. Abschnitt, Art. 51-63* (1932), Art. 52 N. 1

⁴³ Tuor et al, *Das Schweizerische Zivilgesetzbuch* (n 41), § 1 N. 2 ff.

Eugen Huber, the scholar who was mainly responsible for writing the draft and for the research which led to it, wrote a comparative study in several volumes on the private law in all the cantons.⁴⁴ The legal differences amongst these were significant. The German speaking cantons were mainly influenced by the Austrian Civil Code of 1811 or the Civil Code of the Canton of Zurich of 1853-1855, while the French speaking cantons relied more on the French Civil Code of 1804 (the so-called Code Napoléon).⁴⁵ In terms of land registration law, Huber noted that three different systems were operational in Switzerland at the time.⁴⁶

For the most of German-speaking Switzerland, the *homologation system* (*Fertigungssystem, système de l'homologation*) was in use. Under this system a private agreement was presented to the responsible authority for the purpose of so-called *homologation* (i.e. the examination and the approval of the private agreement by the state authority). On this being done the parties involved were given a certificate of creation, transfer or variation of the right.⁴⁷ The agreement was then usually recorded in a record which was chronological. Homologation generally did not cure any defects in the underlying transaction and the principle of faith of the records did not apply.⁴⁸

The French speaking cantons, Ticino and (part of) Berne, followed the *registration system* (*Registriarsystem, système de la transcription*) whose roots lay in France. In this system, real rights in land arose from the mere conclusion of a contract between the parties (principle of consensus). The entry in the register fulfilled only the purpose of making the acquisition of the right public to third parties. With this system,

⁴⁴ Huber, *System und Geschichte des Schweizerischen Privatrechts* (1886-1893).

⁴⁵ Tuor et al, *Das Schweizerische Zivilgesetzbuch* (n 41), § 1 N. 3 ff.

⁴⁶ Huber, *System*, 45 ff.

⁴⁷ Deschenaux, *Das Grundbuch, Erste Abteilung*, 24 f; Wolf and Mangisch, 'Das Grundbuch in der Schweiz und seine Prinzipien' (n 27), 731.

⁴⁸ Zobl, *Grundbuchrecht*, § 5 N. 30 f; the system of homologation differed strongly amongst the cantons; for details, see Huber, *System*, 47 ff and Huber, *Erläuterungen*, 22 ff; for the act of homologation in the Canton of Schwyz, see A Schorno, *Fertigung und Grundbuch im Kanton Schwyz* (1903), 40 ff.

the register served merely as a means of evidence. Registration did not have a curative effect, nor could the public rely on the records.⁴⁹

Finally, the *Grundbuch* (*registre foncier*) model was fully operational in only three cantons. Here there were registers based on a cadastral map and plans. Real rights were shown for each parcel of land, according to the “principle of real folios”. The entry in the register was a requirement for the creation, transfer, variation and extinction of rights.⁵⁰ The “principle of faith of the records” applied, in the sense, that reliance on an entry in good faith was protected.⁵¹ It was this model which Huber chose for the national system of land registration.

The concept of the *Grundbuch* as a registration of title (the register shows the effective rights, instead of being a collection of deeds) is a German invention and was adopted in some German states in the nineteenth century and in the Habsburg Empire. In 1858 an alternative model of registration of title was introduced in South Australia and later throughout Australia, New Zealand, in some provinces of Canada and areas of the United States of America.⁵²

Huber gave three main reasons why the *Grundbuch* would best suit the demands and needs of land registration. The first reason was that a “system of real folios” (*Realfoliensystem, classement réel*), indexed by plots, rather than indexed by owners meant that it would be possible, he argued, to record the relevant information in relation to a plot in a concise and clear way. The second reason was the constitutive effect of the entries, with the argument that it would only make sense to register rights in the land register if these rights required registration to come into existence. Before registration, rights and obligations should have effect only *inter partes*, based on the contractual agreement (*Obligation, obligation*). But, in relation to a third party, who was not party to the agreement, real rights would have *erga*

⁴⁹ Zobl, *Grundbuchrecht*, § 5 N. 32 f.

⁵⁰ Wolf and Mangisch, ‘Das Grundbuch in der Schweiz und seine Prinzipien’ (n 27), 731 f.

⁵¹ Zobl, *Grundbuchrecht*, § 5 N. 34.

⁵² Reid and Gretton, *Land Registration*, para 1.14.

omnes effect only after registration.⁵³ The third reason to favour the *Grundbuch* model follows from the second: since real rights in land come into effect only after registration, it is of the utmost importance to have the information which the land register contains made public.⁵⁴ Huber was convinced that it was only the *Grundbuch* which could adhere to the publicity principle entirely and which would allow further developments of this concept.⁵⁵

2. Scottish land registration history

a) *Origins in the sixteenth century*

Scotland has a very long tradition of land registration beginning with a number of statutes from the sixteenth century.⁵⁶ But, as Reid and Gretton show, this early legislation on land registration was mainly disregarded and even caused hostility on the part of notaries public.⁵⁷

It remains unclear therefore, why a new register, the Register of Sasines was set up shortly thereafter by an Act of 1617, a register which remains today.⁵⁸ Reid and Gretton find the timing hard to explain but mention the two aims that are manifest from the 1617 Act itself: (1) publicity and (2) the protection of acquirers.⁵⁹

⁵³ Huber, *System*, 87 f.

⁵⁴ Huber, *System*, 88.

⁵⁵ Huber, *System*, 87.

⁵⁶ K G C Reid, 'From Registration of Deeds to Registration of Title: a History of Land Registration in Scotland', University of Edinburgh, School of Law, Research Paper Series No 2015/29 (2015), 1.

⁵⁷ Reid and Gretton, *Land Registration*, para 1.1.

⁵⁸ At the time, Scotland became one of the first countries to have a national land register (SLC DP 125, para 1.18), which became 'a source of national pride' (Reid, 'From Registration of Deeds to Registration of Title' (n 56), Abstract).

⁵⁹ Reid and Gretton, *Land Registration*, para 1.2; Interestingly, to make security rights over land more transparent had not been a motivation in contrast to other countries (L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942), 14; n 6; Reid, 'From Registration of Deeds to Registration of Title' (n 56), 2 f.), while exactly these grounds had been the main motivation for establishing the Swiss 'Grundbuch' (see chapter IV B 1).

Acquirers were given 'negative protection' in the sense that they could rely on the fact that the most important deeds were recorded, but that did not necessarily mean that these deeds were valid.⁶⁰ The effect of the 1617 Act on property law remained debated for a long period of time, until finally the Court of Session decided in the landmark case of *Young v Leith*⁶¹ that registration was required to transfer ownership.⁶²

b) *The road to the Land Registration (Scotland) Act 1979*

The developments and preparations which finally led to the 1979 Act dragged on for a long period of time. As Gretton and Steven explain, the pressure to replace the Register of Sasines with a title register began about the year 1900.⁶³ The Register of Sasines is a deeds register, which holds copies or summaries of all significant deeds affecting land.⁶⁴ Since it is not a register of rights, it does not directly say who is the owner or if a bank has a security right over a piece of land.⁶⁵

In the nineteenth century, the German *Grundbuch* was recommended for adoption in England.⁶⁶ With this system, examination of title becomes a lot easier. A potential purchaser must only study the title sheet of the land being acquired and will be provided with most of the information which is needed.⁶⁷ It is clear, that the main argument in favour of registration of title is its potential to reduce transaction costs. A constant re-examination of deeds, as is the case for the Register of Sasines, is no longer necessary.⁶⁸

⁶⁰ Reid and Gretton, *Land Registration*, para 1.5.

⁶¹ (1847) 9 D 932 affd (1848) 2 Ross LC 103.

⁶² Reid and Gretton, *Land Registration*, para 1.5.

⁶³ Gretton and Steven, *Property, Trusts and Succession* (n 27), para 7.14.

⁶⁴ Reid and Gretton, *Land Registration*, para 1.13.

⁶⁵ Rennie (R Rennie, 'Land Registration and the Decline of Property Law' (2010) 14 EdinLR, 62 f.) explains that 'the actual interpretation of the title as to boundaries, burdens and the like remained essentially a private matter in which the Keeper of the Registers of Scotland took no part'.

⁶⁶ Reid and Gretton, *Land Registration*, para 1.12. with further references.

⁶⁷ Gretton and Reid, *Conveyancing*, para 6-02.

⁶⁸ J S Sturrock, 'Registration of title and Scottish Conveyancing' (1908-09) 20 JR, 14; Reid and Gretton, *Land Registration*, para 1.15. Although, the rules on acquisitive prescription reduce the number of deeds that need to be considered.

After several attempts to improve the legal framework in England, the Land Registration Act of 1925 was eventually passed.⁶⁹ This Act was based on the principle of registration of title and was well received. This successful event had an important influence on the further developments in land registration in Scotland.⁷⁰

In relation to the eventual enactment of the 1979 Act, the Reid Committee (named after its chairman, Lord Reid, a Scottish judge in the House of Lords) was of particular importance. The majority of its members supported the introduction of registration of title.⁷¹ In setting out the key features of the proposed new system, the committee was mainly inspired by the 1925 Act.⁷² Unfortunately, the effect on property law which came along with the new system, was not given enough attention.⁷³

c) *The 1979 Act*

The 1979 Act brought about the establishment of a new register: the Land Register of Scotland. As a register of title, it was designed as a register of real rights in land. Unlike the Register of Sasines, it was not the deeds that were registered, but rather the 'pure' rights.⁷⁴ Nevertheless, some real rights such as servitudes created by acquisitive prescription still came into existence off-register.⁷⁵ The way in which the new register presented the information was (and also remains under the 2012 Act) a

⁶⁹ Reid and Gretton, *Land Registration*, para 1.15; In contrast to Scotland, England has a rather short history of land registration. According to D L Carey Miller, 'Transfer of Ownership', in R Zimmermann and K Reid (eds), *A History of Private Law in Scotland* (2000), 294 the reason lies within the different legal understanding of ownership: land registration has an "obvious place" in jurisdictions (such as Scotland), where ownership is defined (in civilian tradition) as an 'ultimate right' which comes into existence only by following "a particular prescribed legal act." This is because, "where the abstract notion of 'title' prevails there must necessarily be a means of establishing the act upon which title is contingent." In England, however, "where property rights are determined by reference to relative rights to possession the circumstances under which possession was obtained takes precedence over any requirement of a formal act of transfer."

⁷⁰ Reid and Gretton, *Land Registration*, para 1.16.

⁷¹ Reid and Gretton, *Land Registration*, para 1.16.

⁷² Reid and Gretton, *Land Registration*, para 1.16.

⁷³ Reid and Gretton, *Land Registration*, para 1.16.

⁷⁴ Reid and Gretton, *Land Registration*, para 2.2.

⁷⁵ Reid and Gretton, *Land Registration*, para 2.2.

“title sheet”, which is divided into four sections: (A) the property section; (B) the proprietorship section; (C) the charges section (now the securities section); and (D) the burdens section. The register actually consists of a collection of single title sheets.⁷⁶

The 1979 Act also required that all title sheets must “consist of or include a description of it based on the Ordnance Map”.⁷⁷ Nevertheless, the accurate plotting of Sasine descriptions in the Land Register is – as Reid and Gretton put it - a “persistent source of difficulty and concern, and of claims against the Keeper”.⁷⁸

d) *Criticism of the 1979 Act and reform*

It was briefly mentioned above that the implications of the 1979 Act for property law were not given due attention. The major challenge for reformers was hence to bring land registration law and property law into line.

Central to the conceptual dissonance with underlying property law was the so-called Keeper’s “Midas touch”⁷⁹: registration was not only a necessary condition for obtaining a real right but also a sufficient one.⁸⁰ In other words, effectively any registration conferred a real right.⁸¹ Any underlying defects in the transactional documents did not constitute an obstacle; void titles were cured once they were registered. A non-owner could give ownership to anyone else, as long as the application for registration of the new owner was successful.⁸² This regime was

⁷⁶ Reid and Gretton, *Land Registration*, para 2.2.

⁷⁷ 1979 Act s 6(1)(a); Reid and Gretton, *Land Registration*, para 2.3. The Ordnance Survey map is the closest UK equivalent to a cadastral map.

⁷⁸ Reid and Gretton, *Land Registration*, para 2.3.

⁷⁹ This term was introduced by the Scottish Law Commission, SLC DP 125 para 5.34, as a metaphor to explain that everything that the Keeper registered created a real right (like everything that the mythical King Midas touched changed into gold). The Keeper of the Registers of Scotland is a public official who heads the Registers of Scotland and in whose name all acts and decisions are made, see chapter II C 2.

⁸⁰ 1979 Act s 3(1)(a); Reid and Gretton, *Land Registration*, para 9.20.

⁸¹ Reid and Gretton, *Land Registration*, para 9.20.

⁸² E Waring, ‘Lessons from Scottish Land Registration Reform: Changes under the Bonnet’, in A Goymour et al (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (2018), 416.

clearly a breach of the *nemo dat* or *nemo plus* rule, a fundamental principle of property law in Scotland and in many other countries.⁸³ This unsatisfactory result was criticised by the Scottish Law Commission (SLC), the Scottish law reform body, which described it as “bijuralism”, requiring very complex and confusing rules.⁸⁴

Registers of Scotland (RoS), which is the government department responsible for the Land Register, were aware of the problems that the 1979 Act had caused. It was at the Keeper’s request that the SLC began to review the Act,⁸⁵ publishing three discussion papers (one in 2004 and two in 2005) during the tenure of Professor Kenneth Reid as lead Commissioner for the project. Eventually, a report and a draft bill were published in 2010 under the leadership of Professor George Gretton.⁸⁶ Following a period of consultation, the Scottish Parliament considered a Bill, which closely followed the recommendations of the SLC. It was passed and became the 2012 Act. The legislation was brought fully into force on 8 December 2014.⁸⁷

e) *The 2012 Act*

The 2012 Act, however, in many ways was not revolutionary, but offered continuity for the concept of the registration of title. The revolution had actually taken place when the registration of title was first introduced by the 1979 Act.⁸⁸ A sense of continuity was also given by the fact that the 2012 Act gave much of RoS’s practice under the 1979 Act a statutory basis.⁸⁹

Some important innovations or changes made by the 2012 Act that are relevant for the present thesis shall be briefly described.

⁸³ *Nemo dat quod non habet*, literally meaning ‘no one gives what they don’t have’. It is equivalent to the *Nemo plus iuris ad alium transferre potest quam ipse haberet* rule, which means ‘one cannot transfer to another more rights than they have’.

⁸⁴ SLC, DP No 125 (n 3) para 5.34; Waring, ‘Lessons from Scottish Land Registration Reform’ (n 82), 416.

⁸⁵ Waring, ‘Lessons from Scottish Land Registration Reform’ (n 82), 417.

⁸⁶ Waring, ‘Lessons from Scottish Land Registration Reform’ (n 82), 417.

⁸⁷ Reid and Gretton, *Land Registration*, para 2.17 f.

⁸⁸ Reid and Gretton, *Land Registration*, para 3.1.

⁸⁹ Waring, ‘Lessons from Scottish Land Registration Reform’ (n 82), 418.

The problems that the “Midas touch” caused were briefly discussed above.⁹⁰ With the 2012 Act, mere registration does not provide an automatic protection (to the grantee of a void deed) anymore.⁹¹ The abandonment of this effect allowed the cessation of bijuralism,⁹² so the simultaneous application of contradicting special rules of registration with the ordinary property law rules came to an end. However, as it lies within the logic of a public register of title that a third party in good faith should be able to rely on an entry, the 2012 Act introduced a good faith acquisition rule, which can be found in German and Swiss law and in many other civilian systems, as well as in the UK Sales of Goods Act 1979.⁹³ This is discussed in Chapter IV.

Another important feature which was introduced with the 2012 Act, is the so called “one shot” rule. This means that an application has to comply fully with the application conditions at the time when it is made and cannot be improved in sending additional or corrected information later.⁹⁴

With the introduction of the “one-shot” rule, the responsibility of solicitors acting for purchasers has increased. In addition, the abolition of the “Midas touch” has impacted on their work. If under the 1979 Act a title was conferred by the Keeper, any future successful challenge was – because of the “Midas touch” of the Keeper - very unlikely. As Reid puts it, the “name of the game was to get the title past the Keeper”.⁹⁵ With the 2012 Act, the Keeper has abandoned many of her previous checks and relies in many ways on the judgement of the applicant’s solicitor.⁹⁶ This approach has been labelled as “tell me don’t show me”.⁹⁷ Under the legislation, the

⁹⁰ See II B 2 e).

⁹¹ Waring, ‘Lessons from Scottish Land Registration Reform’ (n 82), 420.

⁹² Reid and Gretton, *Land Registration*, para 2.13.

⁹³ Reid and Gretton, *Land Registration*, para 2.13; for Switzerland see Art. 973 I CC, for Germany cf. § 892 BGB.

⁹⁴ Reid and Gretton, *Land Registration*, para 9.10. This principle applies in Swiss law too (cf. Art. 87 GBV).

⁹⁵ Reid, ‘Tell Me Don’t Show Me’, 16.

⁹⁶ Reid, ‘Tell Me Don’t Show Me’, 17.

⁹⁷ Reid, ‘Tell Me Don’t Show Me’, 17.

liability of solicitors is statutorily provided for: they must take reasonable care.⁹⁸ In the case of breach of this duty, the Keeper is entitled to be compensated by for any loss suffered as a consequence.⁹⁹ This is discussed further in Chapter V.

⁹⁸ LR (S) A 2012 s 111(1) and (2); Reid, 'Tell Me Don't Show Me', 27.

⁹⁹ LR (S) A 2012 s 111(5).

C. Organisation of the Land Registers

1. Federal Structure in Switzerland

The twenty-fifth title of the Civil Code commences with organisational provisions and states *inter alia* that it is the cantons which are responsible for setting up the land registries.¹⁰⁰ Following the federal state structure of the country, decentralisation of governmental authorities is typical. The cantons, which ceased to be independent states after the establishment of the Swiss Confederation in 1848, are still regarded as being sovereign except to the extent that this is expressly limited by the Federal Constitution.¹⁰¹

As it is the cantons which run the land registries, they are liable for any losses arising from the maintenance of the land registers.¹⁰² The number of land registration offices per canton varies widely. The Canton of Uri, for instance, has only one land registration office,¹⁰³ while in the Canton of St. Gallen, there are currently 64 land register offices with 64 registers.¹⁰⁴ Swiss federal law prescribes a double supervision: the management of the land registries is subject to the administrative supervision of the cantons. The confederation, in turn, exercises the supervisory control.¹⁰⁵

¹⁰⁰ Art. 953 I CC.

¹⁰¹ Art. 3 I BV; The Swiss Department of Justice has provided an English translation of the Swiss Federal Constitution for information purposes: <https://www.admin.ch/opc/en/classified-compilation/19995395/202001010000/101.pdf>.

¹⁰² Art. 955 I CC. This issue will be discussed in Chapter V of the thesis.

¹⁰³ See <https://www.ur.ch/aemter/845>.

¹⁰⁴ See <https://www.sg.ch/politik-verwaltung/gemeinden/grundbuch/grundbuchaemter.html>.

¹⁰⁵ Art. 956 CC. According to Art. 6 GBV, the supervisory control of the confederation is exercised by the 'Federal Land Registry and Real Estate Law Office' (*Eidgenössisches Amt für Grundbuch- und Bodenrecht, Office fédéral chargé du droit du registre foncier et du droit foncier*), see <https://www.cadastre.ch/en/about/contact/egba.html> (Arnet, Art. 956 N. 4).

2. One central Land Register in Scotland

Unlike in Switzerland and many other countries, in Scotland there are no local land registers.¹⁰⁶ The GRS and the Land Register are both centrally maintained by RoS situated in Edinburgh with a branch office in Glasgow.¹⁰⁷ For administrative reasons, the whole area of Scotland is divided into 34 different registration counties with three-letter codes. Traditionally, there used to be only 33 registration areas.¹⁰⁸ The 2012 Act, however, now expressly states that “land” includes “the seabed of the territorial sea of the United Kingdom adjacent to Scotland”.¹⁰⁹ It is for this territory that a new registration area has been created.¹¹⁰

RoS is headed by the Keeper of the Registers of Scotland, a non-ministerial office of the Scottish Government.¹¹¹ It is the Scottish Ministers with the consent of the Lord President of the Court of Session that appoint the Keeper.¹¹²

RoS are not only responsible for managing the GRS and the Land Register but manage 20 different public registers in total.¹¹³

¹⁰⁶ SLC Report 222, para 2.20.

¹⁰⁷ Gretton and Reid, *Conveyancing*, para 6.01.

¹⁰⁸ Reid and Gretton, *Land Registration*, para 3.9.

¹⁰⁹ LR (S)A 2012 s 113(1).

¹¹⁰ Reid and Gretton, *Land Registration*, paras 3.9-3.10.

¹¹¹ Scotland Act 1998 s 126(8); Reid and Gretton, *Land Registration*, para 3.16. The current Keeper is Jennifer Henderson.

¹¹² Public Registers and Records (Scotland) Act 1948 s 1(1); Reid and Gretton, *Land Registration*, para 3.16.

¹¹³ Annual Report 2019-2020 p 8 available at, <https://www.ros.gov.uk/about/publications/finance/2020/annual-report-2019-2020>.

D. The Content of the Land Registers

1. The Swiss starting point: possible types of registration

The possible types of registrations in the Land Register are fixed (*numerus clausus*), with a distinction between “entries in the narrow sense of the term”, “priority notices”, “notings” and “informative comments”.

a) *Entries in the narrow sense of the term*

According to Art. 958 CC only the registration of ownership of immoveable property¹¹⁴ and certain limited real rights qualify as entries in the narrow sense of the term (*Eintragungen, inscriptions*). The structure of Art. 958 CC follows the doctrinal classification of the two types of real right in Swiss property law. First, there is ownership, understood as the comprehensive right over an object (what can be described as an “unlimited real right”). Second, there is, what Swiss scholars call “limited real rights” or “other real rights” (*beschränkte dingliche Rechte, les autres droits réels*). These latter rights - servitudes, real burdens¹¹⁵ and rights in security - give only a limited number of individual powers to their holders. They therefore only confer control over an object in certain (limited) respects, namely with regard to the use of the object or its exploitation.¹¹⁶

b) *Priority notices*

Joye-Yerly states that the term “priority notice” (*Vormerkung, annotation*) cannot be defined in a general way, because the various cases provided for by the Civil Code have different effects and are not necessarily linked. Nevertheless, priority notices

¹¹⁴ Cf. the abstract and wide definition in Art. 655 II CC: “Within the meaning of this Code, immoveable property includes: 1. parcels of land and the buildings thereon; 2. distinct and permanent rights recorded in the land register; 3. mines; 4. co-ownership shares in immoveable property.”

¹¹⁵ Art. 782 ff CC. A real burden obliges an owner of immoveable property to fulfil an obligation to a beneficiary for which he or she is liable solely with the immoveable property. For example: the duty of wood supply, the duty to build a fence.

¹¹⁶ Schmid and Hürlimann-Kaup, *Sachenrecht*, § 1 N. 32.

have in common the fact that they confer on a legal relationship effects which are similar to real rights and that, in most cases, they relate to situations in which the outcome is uncertain.¹¹⁷ For example, it is not known when or if the holder of a right of purchase¹¹⁸ will exercise this right, or if, in the event of the entering of a disputed right in the register,¹¹⁹ the applicant will succeed and obtain full registration.¹²⁰

The position must therefore be checked for each priority notice.¹²¹ While there is disagreement among commentators, Steinauer offers a synoptic table, showing the legal nature and the effects of the most common priority notices.¹²²

The Civil Code specifies three different types of priority notices, namely: “personal rights” (*persönliche Rechte, droits personnels*)¹²³, “restrictions on powers of disposal” (*Verfügungsbeschränkungen, restrictions du droit d'aliéner*)¹²⁴ and “provisional entries” (*vorläufige Eintragungen, inscriptions provisoires*)¹²⁵.

c) Notings

The function of a noting (*Anmerkung, mention*) is to make certain private law and public law issues in relation to the property transparent. However, these do not require an entry in the land register.¹²⁶ The noting hence serves mainly information purposes: it is intended to indicate in the main register that there is a legal issue concerning the property.

¹¹⁷ C Joye-Yerly, *Le registre foncier – Le système, les écritures au grand livre et leurs effets* (2018), 165, with further references.

¹¹⁸ Art. 216 ff OR. The Swiss Department of Justice provides an English translation of the Swiss Code of Obligations for information purposes: <https://www.admin.ch/opc/en/classified-compilation/19110009/202004010000/220.pdf>.

¹¹⁹ Art. 961 I (1) CC.

¹²⁰ Joye-Yerly, *Le registre foncier* (n 117), 165, footnote 673.

¹²¹ Schmid and Hürlimann-Kaup, *Sachenrecht*, § 10 N. 474.

¹²² P-H Steinauer, *Les droits réels, Tome I*, 5th edition (2012), 289.

¹²³ Art. 959 CC.

¹²⁴ Art. 960 CC

¹²⁵ Art. 961 CC.

¹²⁶ Zobl, *Grundbuchrecht*, § 17 N. 338.

In conjunction with Art. 970 IV CC the noting can prevent a person from being in good faith, because a defence based on ignorance of a land register entry is inadmissible.¹²⁷ The Civil Code expressly refers to the possibility to enter notings in relation to public law restrictions¹²⁸ as well as for legal representatives.¹²⁹

d) *Informative comments*

The legal basis for informative comments (*Bemerkungen, observations*) is Art. 130 GBV. These are registrations of a more technical nature that have an informational purpose. They can be entered in all sections of the main register and are part of the entry.¹³⁰

2. The Scottish starting point: registrable deeds

Scottish law does not strictly follow a classification of different types of registrations, in contrast to Swiss law. The position under the 2012 Act is whether a deed by law may be registered (the technical term used is “registrable deeds”).¹³¹ The focus lies hence not on the type of entries, as it is the case for Switzerland, but on the type of deeds.¹³²

The 2012 Act does not list which deeds can be registered. The rationale for this omission is (as for Swiss law) that the registrability should be laid down in sector-specific legislation.¹³³ The *numerus clausus* principle applies, insofar as the

¹²⁷ Schmid and Hürlimann-Kaup, *Sachenrecht*, § 10 N. 495. According to Art. 712g III CC, the rules (*Reglement, règlement*) for co-owners of a building, which is divided into owner-occupied flats, can be noted in the land register. The noting draws the purchaser's attention to the existence of such rules, which are binding on successor owners. See P Liver, ‘Die Anmerkung’, in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 50 (1969), 13.

¹²⁸ Art. 962 CC; For example a noting concerning a ground water protection zone.

¹²⁹ Art. 962a CC; For example the lawyer of the proprietor.

¹³⁰ Art. 89 IV GBV; Schmid and Hürlimann-Kaup, *Sachenrecht*, § 10 N. 496; for example, changes in the order of priority of security rights over the land.

¹³¹ LR (S)A 2012 s 49.

¹³² Reid and Gretton, *Land Registration*, para 6.1.

¹³³ Reid and Gretton, *Land Registration*, para 6.2.

registrability of a deed must be provided explicitly in an enactment. No deeds are registrable at common law; the matter is regulated exhaustively by statute.¹³⁴

The primary purpose of the Land Register is to register private-law deeds. Nevertheless, some public law documents affecting land are also registrable.¹³⁵

Unlike in Switzerland, in Scots law, “deed” is not a formal technical term.¹³⁶ Lord Drummond Young has said “that the significant characteristics of a deed are first that it should have some degree of formality and secondly that it must demonstrate an intention to create a legal relation”.¹³⁷ In this context, it is relevant to mention, in the words of Reid, that “to Continental eyes the most notable omission is the absence of any role for a notary public”.¹³⁸

Traditionally in conveyancing three classes of deeds are distinguished: deeds of constitution (or deeds of creation; these deeds create a new real right, examples are leases and standard securities), deeds of transfer (disposition and assignation are the main examples for heritable¹³⁹ property) and deeds of extinction (examples are renunciations of leases and discharges of standard securities).¹⁴⁰

¹³⁴ Reid and Gretton, *Land Registration*, para 6.2.

¹³⁵ Reid and Gretton, *Land Registration*, para 6.3. An example is a tree preservation orders. See Reid and Gretton, *Land Registration*, para 3.5

¹³⁶ Gretton and Reid, *Conveyancing*, para 11-01; In Switzerland, the term has been defined by the Federal Supreme Court in 1973 (BGE 99 II 159 E. 2a) as follows: “Public certification is the recording of legally relevant facts or legal declarations by a person entrusted by the state with this task, in the form and in the procedure required by the state”. See R Arnet, ‘Form folgt Funktion – Zur Bedeutung der öffentlichen Beurkundung im Immobiliarsachenrecht’, in *ZBJV (Zeitschrift des Bernischen Juristenvereins)*, vol. 149 (2013), 393. For the immense importance of the public deed in Swiss land law, see Arnet, ‘Form folgt Funktion – Zur Bedeutung der öffentlichen Beurkundung im Immobiliarsachenrecht’, 391 ff.

¹³⁷ *Low & Bonar Plc v Mercer Ltd* [2010] CSOH 47; 2010 GWD16-321; Gretton and Reid, *Conveyancing*, para 11-01.

¹³⁸ Reid, ‘Transfer of Immovable Property in Scotland’ (n 18), 8.

¹³⁹ In Scots law, heritable property is the term used to classify property that is either land or rights connected with land. It is called heritable property for historical reasons relating to the law succession (‘inheritance’). See Reid, *Property*, para 11.

¹⁴⁰ Gretton and Reid, *Conveyancing*, para 11-01.

RoS provides a (non-exhaustive) list of deeds that are registrable in terms of section 49 of the 2012 Act.¹⁴¹ However, 90% of all deeds presented for registration are either dispositions,¹⁴² standard securities or discharges.¹⁴³ Other registrable deeds or matters are *inter alia* liferents, leases, decrees of reduction, judicial rectifications of documents, ranking agreements, caveats and advance notices.¹⁴⁴

¹⁴¹ See <https://kb.ros.gov.uk/land-and-property-registration/pre-registration/registrable-deeds/list-of-registrable-deeds> (last updated: 01 April 2019). See also: Reid and Gretton, *Land Registration*, para 6.3 and appendix to chapter 6.

¹⁴² In Scots law, the term disposition is used for a deed that transfers ownership of land: Gretton and Reid, *Conveyancing*, para 11-02.

¹⁴³ Gretton and Reid, *Conveyancing*, para 13-03.

¹⁴⁴ Reid and Gretton, *Land Registration*, paras 6.9-6.16.

III. Rectification

A. Switzerland

1. Inaccuracies

In his insightful doctoral thesis, Schiller explains why the Swiss land register is susceptible to inaccuracies. It was the deliberate choice of the legislator that (1) the 'entry principle' (i.e. no right without registration) does not apply with full rigor, with the effect that real property rights may – in exceptional cases – exist although they are not registered; and (2) the mere entry in the register does not guarantee that the right really exists. An entry might for instance be based on a void transaction. The registration itself has no 'curative effect' (the principle of 'formale Rechtskraft', the 'formal power of law' had not been adopted).¹⁴⁵

As regards (1), a stringent application of the 'entry principle' may be regarded as disproportionate and impractical.¹⁴⁶ For example, in succession law, it would contradict the 'principle of universal succession' (*Universalsukzession, succession universelle*), whereby ownership of land passes immediately on death to heirs.¹⁴⁷ In order, however, to avoid 'secret legal relationships' and the land register becoming an 'insufficient means of publicity'¹⁴⁸, the law prescribes that those who acquire land off-register must register in order to be able to transfer or otherwise deal with the land.¹⁴⁹

In relation to (2), Huber acknowledges that a rule under which making an entry in the register is the only condition for the creation of a real right in land would undeniably have the advantage of establishing a very clear legal position. But, in his opinion, this solution cannot be justified by the purpose of the land register as a means of

¹⁴⁵ M Schiller, *Die Unrichtigkeit des Grundbuches nach dem Schweizerischen Zivilgesetzbuch* (1928), 10.

¹⁴⁶ Schiller, *Die Unrichtigkeit des Grundbuches* (n 145), 10.

¹⁴⁷ The heirs acquire the inheritance as a whole *ex lege* upon the death of the testator (Art. 560 I CC).

¹⁴⁸ Schiller, *Die Unrichtigkeit des Grundbuches* (n 145), 11.

¹⁴⁹ Art. 656 II CC.

publicity.¹⁵⁰ This is because this purpose is only to protect those who rely in good faith on an entry. But in the case of void transactions, it is not the land register that has a negative impact on the party in question, but the invalid legal transaction which that person concluded.¹⁵¹

At a broad level two types of inaccuracies can be distinguished: the first one reflects a mismatch between the entry in the land register and the substantive legal situation (e.g. a right that the register does not show), while the second is an unintentional clerical error of the administrator (e.g. a typographical error) resulting in a mismatch between correct documents and an incorrect entry. An administrator making an intentional error is not really possible, except if that person commits fraud or intends to sabotage the land register which is of course both possible, but very unlikely.

Notwithstanding the two-part taxonomy at a broad level, Huber correctly identifies three situations where the land register can be wrong:

(1) the aforementioned unintentional errors of the administrator (the civil code calls these ‘incorrect or inaccurate entries’, *unrichtiger Eintrag, inscription inexacte*);¹⁵²

(2) entries that lack a *causa* or result from an invalid transaction like a forged deed (these inaccuracies are usually referred to as ‘unjustified entries’¹⁵³, *ungerechtfertigter Eintrag, inscription indue*); and finally

(3) entries that have lost their legal meaning due to a supervening event (e.g. if the registered right has been extinguished)¹⁵⁴. The Code labels these simply as ‘meaningless entries’ (*bedeutungslose Einträge*), ‘irrelevant entries’ (*iscrizioni*

¹⁵⁰ Huber, *Erläuterungen*, 417.

¹⁵¹ Huber, *Erläuterungen*, 417.

¹⁵² Art. 977 II CC. The English translation made by the Swiss Department of Justice (“unjustified entry”), is not accurate, because this term is reserved for inaccuracies in the sense of Art. 974 II CC. The original German, French and Italian versions of the Civil Code speak of ‘unrichtiger Eintrag’, ‘inscription inexacte’ and ‘iscrizione erronea’.

¹⁵³ Art. 974 II CC.

¹⁵⁴ Huber, *Erläuterungen*, 436 f.

irrelevanti) or entries ‘without legal value’ (*inscriptions sans valeur juridique*)¹⁵⁵. These three terms have an open-ended wording and may in principle relate to both entries which were wrong from the beginning or which became wrong due to a supervening event.¹⁵⁶ But the main purpose of Art. 976-976c is to give the administrator ‘a versatile instrument’ to “relieve the land register from entries that have become irrelevant”.¹⁵⁷ Therefore, for the purpose of this thesis, such entries will be called “supervening inaccuracies”, because this term reflects the usual situation where these entries were initially accurate and became inaccurate only over time due to a supervening event (for example, where there is a right of a deceased person which cannot be inherited).¹⁵⁸

a) *Incorrect entries due to an error made by the administrator*

Art. 977 CC is the legal basis for dealing with incorrect entries that have been made unintentionally by the administrator.¹⁵⁹ It depends on the nature of the error, especially if the substance of the right involved is affected¹⁶⁰ whether the administrator may correct the land register of his own accord without the consent of the parties.¹⁶¹

¹⁵⁵ Art. 976-Art. 976c in the German, Italian and French Versions of the Civil Code. These three versions are of equal status (see Art. 70 of the Swiss Federal Constitution).

¹⁵⁶ R Arnet, ‘Neuerungen bei den Dienstbarkeiten’, in W Fellmann and J Schwarz (eds), *Revision des Sachenrechts - ein erster Überblick für Eilige*, Tagungsband Weiterbildung Recht der Universität Luzern 2011 (2012), 13 ff.

¹⁵⁷ BBI 2007 5283, 5296.

¹⁵⁸ E.g. a right of residence (*Wohnrecht, droit d’habitation*), i.e. the right to live in all or part of a building (Art. 776 I CC) is neither transferable nor heritable (Art. 776 II CC). Upon the death of the entitled person, the land register entry becomes obsolete and can be deleted by the administrator (cf. Art. 976 fig. 2 CC)

¹⁵⁹ Pfammatter, Art. 977 N. 1.

¹⁶⁰ For the explanation of what that means, see chapter III A 2 a (2).

¹⁶¹ Schmid and Hürlimann-Kaup, *Sachenrecht*, § 11 N. 640 ff.

b) *Unjustified entries*

Art. 974 II CC provides that an entry is unjustified if it is (a) without legal basis (*ohne Rechtsgrund, sans droit*) or (b) was made on the basis of a non-binding transaction (*unverbindliches Rechtsgeschäft, acte juridique non obligatoire*). Examples of (a) are scarce. Homberger¹⁶² mentions the case where the administrator mixes up numbers of plots or persons, i.e. he registers the wrong plot for the buyer or the plot is not registered in the name of the buyer. This happens very rarely because every entry is double checked by an assistant and the administrator. The other example which can be found¹⁶³ is where a suspensive transaction is registered; that entry would be temporarily without a “causa” until the condition is fulfilled. This example is not persuasive, because transactions with suspensive conditions must not be registered.¹⁶⁴

As regards (b), it can be stated that a transaction is non-binding, if it is either void or if it is voidable in the sense that a party may unilaterally seek its juridical reduction.¹⁶⁵ In Swiss law, a contract is null and void, if its terms are impossible, unlawful or immoral¹⁶⁶ and also where the legal capacity of a party is lacking, where a defect of formality occurred¹⁶⁷ or where a regulatory approval was necessary but has not been obtained.¹⁶⁸ A voidable transaction is termed by commentators as a ‘unilaterally non-binding transaction’ (*einseitig unverbindliches Rechtsgeschäft*) and may arise *inter alia* when a party was in a fundamental error¹⁶⁹, was deceived¹⁷⁰, had entered into the contract under duress¹⁷¹ or had only been partially capable of acting

¹⁶² Homberger, Art. 974 N. 4.

¹⁶³ Homberger, Art. 974 N. 4.

¹⁶⁴ BGer 5A_518/2017 E. 4.2.2.

¹⁶⁵ Homberger, Art. 974 N. 5 f. However, until a court has reduced the transaction, the voidable agreement remains binding and the register is not incorrect.

¹⁶⁶ Art. 20 OR.

¹⁶⁷ BGE 106 II 146 (regest).

¹⁶⁸ Schmid, Art. 974 N. 9.

¹⁶⁹ Art. 23-27 OR.

¹⁷⁰ Art. 28 OR.

¹⁷¹ Art. 29 OR.

(*beschränkte Handlungsfähigkeit, capacité limitée*).¹⁷² The last case concerns persons who are capable of judgement but lack the capacity to act, such as children, and adults that are placed under guardianship.¹⁷³ This group of persons may only enter into agreements or give up rights with the consent of their legal representative.¹⁷⁴ If the consent of the legal representative was not present at the time when the contract was concluded, that person may approve the transaction retrospectively.¹⁷⁵

The term “entry” is used in a wide sense: deletions or amendments of existing entries are included.¹⁷⁶ Art. 974 II CC demonstrates the principle of causality in Swiss property law, according to which ownership cannot be transferred without a valid legal basis (“*causa*”).¹⁷⁷ If for instance a disposition of land is registered in the land register but suffers from the lack of required form, ownership will not transfer. The consequence is that the land register is inaccurate and may be rectified on the request of the seller on reimbursement of the selling price.¹⁷⁸

As this example shows, in the case of “unjustified entries” in the sense of Art. 974 II CC, the entry in the land register does not reflect the legal situation correctly. The land register can be altered without changing the substantive legal position (e.g. ownership has not passed under a forged disposition).

In summary, it can be stated that an unjustified entry in the sense of Art. 974 II CC is a mismatch between the legal reality and the entry in the land register: for example, even if the register shows that Heidi is the owner of the house, she has never acquired the property, because she lacked legal capacity to transact.

¹⁷² Homberger Art. 974 N. 5.

¹⁷³ Art. 19-19d CC.

¹⁷⁴ Art. 19 I CC.

¹⁷⁵ Art. 19a I CC.

¹⁷⁶ Homberger, Art. 974 N. 2.

¹⁷⁷ Arnet, Art. 974 N.2.

¹⁷⁸ The example is made by Schmid and Hürlimann-Kaup, *Sachenrecht*, § 1 N. 76.

c) *Supervening inaccuracies*

Before the revision which came into force on 1 January 2012, the old Art. 976 CC with the marginal note “when the registered right expired”, allowed an affected person to ask the administrator to delete any entry that has lost all legal relevance, i.e. entries that had become inaccurate due to a supervening event. Alternatively, the administrator had the power to delete such entries on his own initiative.¹⁷⁹ With the intention of giving the administrator more possibilities to clear the land register of obsolete entries,¹⁸⁰ Art. 976 CC was amended and three new articles were inserted into the CC.¹⁸¹ The open-ended wording of these articles also allows the rectification of some inaccuracies *ab initio*, but the main purpose of the revision remains to relieve the land register from supervening inaccuracies.¹⁸²

A distinction is now drawn between “clearly irrelevant entries”, which may be deleted by the administrator by virtue of his office (i.e. by executive act as part of his role)¹⁸³ and “other entries that are most probably irrelevant”¹⁸⁴, which can be only deleted if the administrator follows a more elaborate process.¹⁸⁵ There is little detail on the issue of what can constitute a “most probably irrelevant entry”, but the example is given of where an entry - according to the supporting documents or the circumstances of the case - does not relate to the property.¹⁸⁶ Professor Arnet further mentions the case of the occurrence of a subsequent event with legal effect, e.g. a right of residence that is dissolved by the remarriage of the beneficiary.¹⁸⁷

¹⁷⁹ The pre-2012 version of the civil code can still be found on the website of the Department of Justice: <https://www.admin.ch/opc/de/classified-compilation/19070042/201101010000/210.pdf>.

¹⁸⁰ BBI 2007 5283, 5285. As briefly touched before in chapter III A 1.

¹⁸¹ Art. 976a, 976b and 976c CC.

¹⁸² BBI 2007 5283, 5296.

¹⁸³ Art. 976 CC.

¹⁸⁴ Art. 976a I CC.

¹⁸⁵ Art. 976 a II – Art. 976b CC.

¹⁸⁶ Art. 976a I CC. However, depending the respective situation, such cases could of course also entail inaccuracies *ab initio*.

¹⁸⁷ Arnet, Art. 976a N. 3 referring to BGE 106 II 329 E. 3d.

2. Rectification processes

The administrator's power of review (usually called *Kognition*, *cognition*, which stems from Latin *cognitio*, ie inquiry) is limited. He is not entitled to review substantive law. The extent of his powers is hence less comprehensive than that of a judge.¹⁸⁸

Entries which have been made without legal basis or as a result of a void causa ("unjustified entries") usually have to be rectified as a result of an action by the person whose right has been infringed. This is done by means of the so-called "land register correction action" (*Grundbuchberichtigungsklage*, *action en rectification du registre foncier*)¹⁸⁹. But not all entries which fail to reflect the true legal position have to be the subject of such an action. It was briefly mentioned above that both the deletion of "clearly irrelevant entries" and "probably irrelevant entries" (which constitute both supervening inaccuracies) follow a simplified method.¹⁹⁰ This will be examined in more detail below.¹⁹¹

The other type of incorrect entries is those that have been created unintentionally by the administrator. They are not subject to the land register correction action, which is an action of private law, but are dealt with by an administrative (public law) procedure.¹⁹²

¹⁸⁸ In more detail: Schmid and Hürlimann-Kaup, § 10 N. 533 ff. But this considerably restricted interpretation of the administrator's power of review has been disputed. Fasel shows that the legislator actually intended a wider scope of the administrator's powers and that the Federal Supreme Court initially followed a much more generous approach, but later the powers became more and more restricted; see U Fasel, *Grundbuchverordnung (GBV) vom 23. September 2011, Kommentar, 2nd edition* (2013), Einleitung, N. 98 ff.

¹⁸⁹ Art. 975 CC.

¹⁹⁰ See chapter III A 1 c.

¹⁹¹ See chapter III A 2 c.

¹⁹² Art. 977 CC; BGE 123 III 346 E 1b; Deillon-Schegg, Art. 977 N. 12.

a) Rectification of inaccurate entries due to an error made by the administrator

The CC here lacks detail and merely states as a rule that the administrator may rectify the register only if the involved parties consent in writing or, alternatively, if a court order is issued.¹⁹³ As an exception, the law allows the administrator to rectify typographical errors directly.¹⁹⁴ Equally, he also has power to rectify irrelevant inaccuracies of a factual nature or orienting comments with no legal significance.¹⁹⁵ For example, the description details of a plot are merely of an informational nature and not relevant to the doctrine of public faith of the land register.¹⁹⁶ The description details may include information on the location, the floor area, existing buildings, the number of rooms and the location of tenements and the tax and insurance values.¹⁹⁷

The implementing ordinance defines the whole process of rectification (*Berichtigung, rectification*) as being the modification of inaccurate data with legal effect.¹⁹⁸ But this definition appears too narrow, because errors that do not affect a right, like the ones just mentioned, usually do not have legal effect.¹⁹⁹

Further, the ordinance prescribes a general duty to rectify: the land registry is obliged to correct any errors found as far as possible.²⁰⁰ This duty seems to be self-explanatory because the Supreme Court has not attempted to provide any illumination of the issue.²⁰¹ By taking into consideration the fact that the land register is of huge economic and legal importance, it has to be a reliable source of information. This purpose can only be fulfilled if it is correct. It is the administrator's duty to ensure the accuracy of the land register insofar as it is possible for him to do so (he cannot possibly be aware of all inaccuracies that have occurred). This is not

¹⁹³ Art. 977 I CC.

¹⁹⁴ Art. 977 III CC.

¹⁹⁵ Fasel, *Grundbuchverordnung* (n 188), Art. 977 N. 14.

¹⁹⁶ Art. 20 II GBV.

¹⁹⁷ Art. 20 I GBV.

¹⁹⁸ Art. 140 I GBV.

¹⁹⁹ Schmid, Art. 977 N. 3.

²⁰⁰ Art. 140 II GBV.

²⁰¹ BGE 117 II 43. The specific case law is scarce and does not reflect this question.

mentioned in the CC itself, but can be deduced at least in part from the principle of legality, requiring the administrator to follow the statutory provisions (with the requisite care).²⁰² If the administrator is not aware of an erroneous entry, any person affected by it is entitled to request the land registry to initiate the rectification procedure. If the land registry fails to do so, the applicant may make a land register appeal to the cantonal supervisory authority.²⁰³

(1) Where an error can be rectified immediately

Art. 977 CC stipulates two different procedures depending on whether the error has an impact on a registered right or not.²⁰⁴ The Code and the Ordinance mention typographical errors which may be corrected by the administrator *anytime*.²⁰⁵ In contrast, the correction of “errors that change the meaning” of an entry (*sinnverändernde Fehler, erreurs modifiant le sens*) can only be done if the administrator *immediately* discovers the errors and makes the necessary amendment.²⁰⁶

It is hence only time that determines if the administrator may rectify this latter type of error without any special procedure. If detected immediately, both typographical and more serious errors are dealt with on equal terms.²⁰⁷ But if errors are discovered later, only clerical errors may be altered of the administrator’s own accord.

The question of what “immediately” means cannot be answered precisely. What is clear is that the rectification must take place before the mistake can be discovered either by the involved persons or by a third party.²⁰⁸ Nowadays, the land register is usually managed electronically by the cantons. According to the logic of Mooser, there is no room anymore for the immediate rectification of data that changes the

²⁰² Homberger, Art. 965 N. 35, with regard to the general auditing duty of the administrator.

²⁰³ BGE 117 II 43 E. 6 (and regest); Schmid, Art. 977 N. 21.

²⁰⁴ Pfammatter, Art. 977 N. 3.

²⁰⁵ Art. 977 III and Art. 141 GBV.

²⁰⁶ Art. 142 I GBV *e contrario* and Art. 143 I GBV concerning the paper-based land register.

²⁰⁷ Deschenaux, *Das Grundbuch, Zweite Abteilung*, 905.

²⁰⁸ Art. 143 I GBV.

meaning of an entry.²⁰⁹ This is because every modification in the now electronic land register is double checked. Initially an assistant carries out a “provisional registration” without any legal force. It is only after the administrator’s validation of his assistant’s registration that the entry becomes legally effective.²¹⁰ Mooser’s argument is that if the administrator detects a fault of his assistant’s provisional entry in the computer software and then corrects it, this would not be a rectification in the sense of the Code because the registration process has not been completed and no legal effects have been produced.²¹¹ This is certainly true because according to Art. 91 II GBV, during the ongoing registration process all data entered in the journal may be altered at the discretion of the administrator, because this kind of registration does not affect the legally valid data that the land register already contains.

But if an error is only detected after the administrator has validated the provisional entry, Mooser disputes this being classed as immediate²¹², with the consequence that there would be no room for the rectification of the administrator’s own initiative of errors that have a legal impact. His reasoning is that it is too late for the rectification to be “immediate” after the administrator’s validation, because two persons, the assistant and the administrator both overlooked the error. There is also a time interval between the provisional entry and its validation, which may vary significantly due to the workload of the land registration office (from roughly a few hours to a few days).

However, this rather strict interpretation of the term “immediate” does not appear to be very convincing because, following Mooser’s logic, the administrator would lose any possibility of rectification of his own right of errors with a legal impact. The length of the time interval is of course important and the failure of two persons to detect an error may cause embarrassment on the part of land registration office. But the rationale for the requirement of a prompt correction for errors that affect the meaning of an entry is to prevent nobody, either the parties involved or – more importantly -

²⁰⁹ Mooser, Art. 977 N. 14.

²¹⁰ Art. 91 GBV.

²¹¹ Mooser, Art. 977 N. 14.

²¹² Mooser, Art. 977 N. 14.

third parties, from gaining knowledge of the erroneous entry.²¹³ This is because according to the principle of publicity of the land register, rectification becomes impossible whenever a third party in good faith with the intention of acquiring the property or another real right has relied on the erroneous entry.²¹⁴ If this is the case, the erroneous entry may be only rectified with the consent of the good faith acquirer or by means of a land register correction action, but there the party raising the action can only contest the good faith of the third party.²¹⁵

In cases where it is established that nobody outside the office has learned about the error, there should always be the possibility for the administrator to rectify of his own initiative. This was the position for the paper-based land register and one could argue that this rationale should apply also to the electronic land register. But, for the electronically-managed land registers now operating, it is almost impossible to know whether a third party has gained knowledge of an erroneous entry. This is because Art. 28 GBV allows the cantons to provide direct electronic access to the data of the land register to certain persons and administrative bodies. The group of entitled persons or bodies include *inter alia* notaries, registered land surveyors, registered lawyers, tax authorities, banks and insurances.²¹⁶ As a result of this provision, the land registries have partly lost their data sovereignty. The aforementioned group can access data as they wish, without the consent of the land register.²¹⁷ With regard to rectification, this means that immediately after an erroneous entry is created, a third party like a lawyer or a notary with direct electronic access, may theoretically discover it. Mooser did not mention this point, even though it seems to support his view strongly. After an entry is validated by the administrator, rectification should only be done with the approval of the involved persons, because it can be seen at once by a third party.

²¹³ Cf. Art. 143 I GBV.

²¹⁴ Art. 973 I CC (principle of faith of the records, protection of the *bona fide* acquirer) is applicable also in conjunction with Art. 977 CC, cf. Schmid, Art. 977 N. 27.

²¹⁵ BGE 123 III 346 E. 2 (and regest); Zobl, *Grundbuchrecht*, § 19 N. 442.

²¹⁶ Art. 28-30a GBV

²¹⁷ Anyhow, a record of each access is automatically generated (Art. 30 I GBV). In cases of unauthorized access, the canton will withdraw the access permission immediately (Art. 30 IV GBV).

(2) *Where rectification cannot be done immediately, and the error has a legal impact*

If an error of the administrator affects the substance of a right registered in the land register and is not rectified immediately, a more elaborate process has to be followed. According to legal commentaries, the substance of a right is *inter alia* affected if the subject matter, the date, the characteristics or the person of the owner have been registered incorrectly.²¹⁸ In such cases, the aforementioned rule applies, namely that the affected persons have to provide written permission. Failing this, the administrator has to ask the competent court to order rectification.²¹⁹ Importantly, the procedure in court is of an administrative nature and does not result in a substantive judgement.²²⁰ However, the Supreme Court has stated that this does not exclude cases where a preliminary question of private law has to be answered first, namely whether the substantive legal basis justifies the correction sought.²²¹

b) Rectification of unjustified entries

Unjustified entries are rectified by a land register correction action. The Civil Code provides that where either an entry in relation to a real right is unjustified or a correct entry has been deleted or modified in an unjustified manner, any person whose real rights are thereby infringed may bring an action for deletion, restoration or amendment of the entry.²²² But it is also provided that real rights acquired in good faith by third parties relying on the entry and claims for damages are protected.²²³ According to the wording of paragraph 2 of the article, the defender in a rectification

²¹⁸ Pfammatter, Art. 977 N. 4.

²¹⁹ Art. 977 I CC, Art. 142 II and III GBV.

²²⁰ BGE 123 III 346 E. 1b (and regest).

²²¹ BGE 123 III 346 E. 1b.

²²² Art. 975 I CC. The Federal Supreme Court has not yet decided the matter, but according to the Supreme Court of the Canton of Zurich (OGer ZH vom 28.11.1988, ZBGR 1991, 263, 266) a wrong cadastral plan can be the subject of this action as well. See also Arnet, Art. 975 N. 2. For the complex issue of wrong mapping in general, see M Huser, *Schweizerisches Vermessungsrecht - Unter besonderer Berücksichtigung des Geoinformationsrechts und des Grundbuchrechts* (3rd edition, 2014), 200 ff and H-P Friedrich, 'Fehler in der Grundbuchvermessung, ihre Folgen und ihre Behebung', in ZBGR 58 (1977), 131 ff.

²²³ Art. 975 II CC.

action can therefore, in addition to asserting claims for damages against the canton,²²⁴ raise the objection that he acquired the land or the real right in good faith relying on the entry in the register.²²⁵ If the defender relied in good faith on the entry and qualifies as a third party (i.e. he was not involved in the process that led to the entry²²⁶), his legal position prevails and the action will be dismissed.²²⁷

Zobl argues that the purpose of the land register correction action is to bring about a concordance between the existing substantive law and the inaccurate entry in the land register.²²⁸ Schmid and Hürlimann-Kaup mention the example of where a purchase of land proves to be invalid, e.g. due to a lack of compliance with required formalities.²²⁹

But where a third party relies in good faith on the land register, the principle of causality²³⁰ is in conflict with the principle of faith of the records.²³¹ If these two principles are in conflict, the legislator has chosen to attach greater weight to the principle of faith of the records.²³² This means that if an acquirer (who is in good faith) has purchased land from someone with a forged power of attorney bearing to be granted by the registered owner, the good faith of this third party would prevent the court bringing the land register into line with the true legal position in relation to the invalid transaction. The person whose real right has been infringed can hence only try to obtain compensation.²³³ Hrubesch-Millauer, Graham-Siegenthaler and Roberto argue in this context that the provisions of Arts. 971-975 CC are based on a careful balancing of interests by the legislator. While the principle of causality

²²⁴ Art. 955 CC.

²²⁵ Art. 973 CC.

²²⁶ Homberger, Art. 973 N. 9.

²²⁷ Schmid and Hürlimann-Kaup, *Sachenrecht*, § 11 N. 624.

²²⁸ Zobl, *Grundbuchrecht*, § 19 N. 450.

²²⁹ Schmid and Hürlimann-Kaup, *Sachenrecht*, § 11 N. 615; Of practical importance are the cases where the parties are aware of the defect affecting the contract, for example the parties deliberately state a wrong (too low, occasionally too high) purchase price to the notary (so called purchase price simulation, *Kaufpreissimulation*), A Koller (ed), *Der Grundstückskauf*, 3rd edition (2017), § 3 N 6.

²³⁰ Art. 974 II CC.

²³¹ Art. 973 I CC.

²³² The issue of realignment will be treated in chapter IV of the thesis.

²³³ Indemnity will be considered in chapter V below.

protects the legally entitled person (normally the original owner), the principle of faith of the records guarantees legal certainty.²³⁴

As a proprietary action, the land register correction action is not subject to a limitation period and can hence be commenced at any time.²³⁵ It qualifies as a pecuniary matter, with the effect that a ruling of the cantonal court of final instance can only be challenged in the Federal Supreme Court, if either (a) the amount in dispute is at least CHF 30,000²³⁶, (b) the case raises a legal question of general importance²³⁷ or, only as a subsidiary reason, (c) if constitutional rights have been breached.²³⁸

c) *Rectification of supervening inaccuracies*

Art. 976 CC contains an exhaustive²³⁹ list of entries which qualify as clearly supervening inaccuracies and that therefore the administrator has power to delete of his own initiative. The four situations are (1) entries in respect of rights that are limited in time and have lost their legal significance as they have expired, (2) entries that relate to a non-assignable or non-inheritable right of a deceased person, (3) entries that can no longer affect the property due to the local situation and finally (4) entries that relate to a property that no longer exists.²⁴⁰ While most of these situations are self-explanatory, the question of when a local situation may make an entry redundant has to be answered case-by-case. The Federal Council mentions in

²³⁴ S Hrubesch-Millauer, B Graham-Siegenthaler and V Roberto, *Sachenrecht, 5th edition* (2017), N. 03.33.

²³⁵ R Arnet and N Roth, 'Die Grundbuchberichtigungsklage im Kontext von Art. 976 ff. und Art. 736 Abs. 1 ZGB', in P Breitschmid et al, *Tatsachen Verfahren Vollstreckung – Festschrift für Isaak Meier zum 65. Geburtstag* (2015), 31.

²³⁶ Art. 74 I lit. b BGG.

²³⁷ Art. 74 II lit. a BGG.

²³⁸ Art. 113 and 116 BGG; BGer 5A_195/2012 E. 1.

²³⁹ Arnet, Art. 976 N. 3.

²⁴⁰ Physical destruction of land is of course rare. Extinction of rights in land is more frequent, for example where the maximum timeframe of 99 years for a building right, which has its own real folio, has elapsed (Schmid, Art. 976 N. 15.)

its “*Botschaft*” (*message, report*)²⁴¹ only the example of grazing rights on a plot that is now completely covered with buildings.²⁴² According to Deillon-Schegg the ambit of the provision often involves former divisions of plots, where existing servitudes have been transferred to all the new plots, even if they relate only to a specific part of the land²⁴³ (Plot X is divided into two new plots Y and Z. Even if the servitude route is only on plot Y, the existing servitude is transferred to the register entries of both Y and Z). In this case however, it could be argued, that this would not qualify as a supervening inaccuracy, since the new real folio of a new plot contains a wrong entry from the beginning.²⁴⁴

According to Art. 976a CC, every person affected by a “most probably irrelevant entry” (i.e. a most probably supervening inaccuracy) may request its deletion.²⁴⁵ In contrast to Art. 976 CC, the administrator cannot initiate the proceeding of his own initiative and the degree of probability of insignificance is lower. Since the insignificance of entries within the scope of Art. 976a is not absolutely certain, an assessment of the substantive legal situation may also be required.²⁴⁶ The report of the Federal Council is very vague concerning the scope of application of the article in simply holding that the provision relates to cases which are more complex and cannot easily be broken down into simple categories.²⁴⁷ In any event, the provision may not only be used in the case of the deletion of servitudes which were wrongfully added to a new entry in the context of land being divided, but may serve as a legal basis for the deletion of entries in general.²⁴⁸

²⁴¹ The reports that the Federal Council submits to the Federal Assembly provide an explanation of the bills it drafts, which are submitted to the Federal Assembly for approval.

²⁴² BBI 2007 5283, 5336.

²⁴³ Deillon-Schegg, Art. 976-976c N. 7.

²⁴⁴ Arnet and Roth, ‘Die Grundbuchberichtigungsklage im Kontext von Art. 976 ff. und Art. 736 Abs. 1 ZGB’ (n 235), 34 (footnote 58).

²⁴⁵ Principally, entries that have no legal relevance from the beginning are covered as well by the provision (BBI 2007 5283, 5337; see Arnet, Art. 976a N. 3).

²⁴⁶ Arnet and Roth, ‘Die Grundbuchberichtigungsklage im Kontext von Art. 976 ff. und Art. 736 Abs. 1 ZGB’ (n 235), 35.

²⁴⁷ BBI 2007 5283, 5337.

²⁴⁸ BBI 2007 5283, 5337.

Arnet and Roth state that Art. 976a CC may also be invoked if a servitude has lost all its value to the dominant property.²⁴⁹ In relation to the latter example, according to prevailing legal doctrine, a servitude is extinguished at the time of loss of all utility to the dominant tenement *ipso iure*.²⁵⁰ Even although Art. 736 CC already offers the possibility to the burdened proprietor to ask the court to delete servitudes of no value, the procedure of Art. 976a CC seems more attractive because mere notification to the land registry is sufficient. The administrator has power to rectify.²⁵¹ If he decides that the request is justified the holder of the relevant right will be informed that the entry will be deleted unless an objection to the land registry is lodged within 30 days.²⁵² It seems clear that this step is needed, since the administrator is not a judge and – except for cases that are beyond any doubt - cannot decide on questions of substantive law.

Nevertheless, the whole process can be regarded as an expedited route to delete an entry because, under normal circumstances, a written declaration of renunciation from the part of the proprietor of the dominant property would be necessary for a deletion.²⁵³ Under this procedure, however, the administrator may delete the entry if the holder of the relevant right simply does not react within the necessary period of time; in other words, a “tacit waiver” is sufficient. If the right holder lodges an objection instead, the administrator will reassess the request for deletion.²⁵⁴

If, finally, the administrator concludes that the request should be granted, he will notify the holder of the relevant right that the entry will be deleted unless the latter brings a court action within three months to declare that the entry is of legal significance.²⁵⁵ The burden of proof lies upon the person who contests the significance of the entry. Even if the period prescribed to raise a court action has

²⁴⁹ Arnet and Roth, ‘Die Grundbuchberichtigungsklage im Kontext von Art. 976 ff. und Art. 736 Abs. 1 ZGB’ (n 235), 37f.

²⁵⁰ M Kähr in J Kren Kostkiewicz et al (eds), *ZGB Kommentar, 3rd edition* (2016), Art. 736 N. 14.

²⁵¹ Arnet and Roth, ‘Die Grundbuchberichtigungsklage im Kontext von Art. 976 ff. und Art. 736 Abs. 1 ZGB’ (n 235), 37.

²⁵² Art. 976a II CC.

²⁵³ Art. 964 CC.

²⁵⁴ Art. 976b I CC.

²⁵⁵ Art. 976b II CC.

expired, a later action for reinstating the entry remains possible.²⁵⁶ Although this last point seems awkward from a procedural point of view, it follows the general logic that a question of substantive law has to be answered by a judge, who has not been involved in the deletion (no *res judicata*).

Where real rights exceptionally have been transferred off-register (due to appropriation, inheritance, compulsory purchase, debt enforcement or court judgment²⁵⁷) or where such rights have expired off-register, the entry is no longer justified. But here the register may be rectified by a simple application by the new owner.²⁵⁸

Finally, not all supervening inaccuracies will reach the high evidential standard of Art. 976-976b CC or relate to off-register transfers. Deschenaux²⁵⁹ supports the law's inherent logic of the "division of tasks" between administrator and judge. He stresses the necessity for a land register correction action whenever an assessment of the substantive legal situation is needed. His examples include *inter alia* (1) a conclusive or verbal waiver with regard to a servitude, real burden or "*Vormerkung*" (advance notice) or (2) the extinction of a security right, when the debt is extinguished.²⁶⁰

²⁵⁶ BBI 2007 5283, 5338.

²⁵⁷ «Relative Entry Principle», Art. 656 II CC in conjunction with Art. 963 II CC.

²⁵⁸ Art. 963 II CC.

²⁵⁹ Deschenaux, *Das Grundbuch, Zweite Abteilung*, 884 ff.

²⁶⁰ Art. 826 CC.

B. Scotland

1. Inaccuracies

As a result of the transitional provisions of the 2012 Act, the impact of inaccuracies which arose under the 1979 Act are still of relevance.²⁶¹ It is therefore appropriate to begin by explaining how rectification was carried out under the old Act.

a) The 1979 Act - actual and bijural inaccuracies

As mentioned in the introduction to this thesis,²⁶² the Keeper's "Midas touch" (registration as the sole condition for obtaining a real right) under the 1979 Act caused the phenomenon of "bijuralism". In other words, there were two laws: (1) land registration law and (2) ordinary property law that had to be applied at the same time. These did not (necessarily) fit together.²⁶³ This setting gave rise to "bijural inaccuracies".²⁶⁴ For example, a fraudster who had forged a deed of transfer would never have obtained ownership under ordinary property law rules, but under the 1979 Act became the legal owner if he succeeded in registering a title. The "true" owner lost his ownership as a result of that registration and could only try to obtain rectification of the land register.²⁶⁵ Bijural inaccuracies must be contrasted with actual inaccuracies. As explained by the Scottish Law Commission: "An inaccuracy is actual if what the Register says is simply untrue. An inaccuracy is bijural if what the Register says is false in terms of general law, but true within the scheme of the Act."²⁶⁶

²⁶¹ LR (S) A 2012 sched 4 paras 17-24.

²⁶² See chapter II B 2 d.

²⁶³ Reid and Gretton, *Land Registration*, para 2.13.

²⁶⁴ SLC Report 222, para 17.33.

²⁶⁵ See SLC Report 222, paras 17.7-17.9.

²⁶⁶ SLC Report 222, para 17.6.

It is only the category of bijural inaccuracies that are addressed in the transitional provisions because the legislator's aspiration was to bring an end to this troublesome kind of inaccuracy.²⁶⁷ Actual inaccuracies are therefore the only category of inaccuracies that may emerge under the 2012 Act²⁶⁸ and will be looked at in the next subchapter.

The question of how to deal with inaccuracies that existed already on the eve of the "designated day" of 8 December 2014, i.e. when the 2012 Act came fully into force, is solved by recourse to the 1979 Act. If the Keeper could have rectified the inaccuracy under the old law, it remains an inaccuracy also under the new legislation.²⁶⁹ If she on the other hand could not have rectified the inaccuracy, it ceases to be an inaccuracy.²⁷⁰ But of course on the designated day the land register was not magically altered.²⁷¹ Actual changes inevitably require action by the Keeper whether because of a court order or otherwise.

The new provisions provide legal certainty and allow affected parties to evaluate whether a claim for rectification with regard to the regime of the 1979 Act would have prospects of success.

Under the 1979 Act "bijural inaccuracies" could usually not be corrected if the rectification was "to the prejudice of a proprietor in possession"²⁷². While the element of possession is still of relevance in the 2012 Act (in particular with regard to the realignment of rights),²⁷³ it had a stronger standing in the 1979 Act.

The term "possession" was not itself defined in the 1979 Act. Legal scholarship was nevertheless able to derive from the emerging case law a total of eleven situations

²⁶⁷ Reid and Gretton, *Land Registration*, para 11.9; SLC DP 130 part 9; SLC Report 222 paras 36.9-36.15.

²⁶⁸ SLC DP No 128, 6.18.

²⁶⁹ LR(S)A 2012, sched 4 para 17.

²⁷⁰ LR(S)A 2012, sched 4 para 22.

²⁷¹ Reid and Gretton, *Land Registration*, para 11.9.

²⁷² LR (S) A 1979, s 9.

²⁷³ LR(S) A 2012, s 86; see chapter IV C 3 b.

that would constitute possession, involving *animus* and *corpus*, in accordance with the heritage of Roman law.²⁷⁴ With the strong protection of proprietors in possession it was only possible to cure “bijural inaccuracies” in exceptional cases, including where the registered proprietor behaved in a fraudulent or careless manner or where a court order for rectification has been issued.²⁷⁵ As time goes by, it will become increasingly difficult to prove who was in possession on 7 December 2014. Therefore, the transitional law establishes a rebuttable presumption: “the person registered as proprietor of the land is to be presumed to be in possession unless the contrary is shown”.²⁷⁶

It seems impractical to put the Keeper under the duty to rectify “bijural inaccuracies” that stem from the regime of the 1979 Act,²⁷⁷ at least with regard to rectification of her own initiative. Although the question has not been raised in the literature, it seems at least doubtful if these (*rectifiable*) “bijural inaccuracies” could meet the “manifest” standard under the 2012 Act described below.²⁷⁸ With respect to the Keeper’s limited power of review, which stems from her role which is purely administrative and not judicial,²⁷⁹ it is likely that a competent court would usually have to issue a declarator (e.g. concerning a forged deed of transfer).

b) The 2012 Act

Professors Reid and Gretton state that under the 2012 Act inaccuracies can arise in three situations: (1) the error may be in the deed that is registered (e.g. a forgery), (2) the Keeper may make an administrative error or (3) the initially accurate entry in the register may have become inaccurate in the meantime (e.g. by extinction of a

²⁷⁴ Reid and Gretton, *Land Registration*, para 11.12.

²⁷⁵ See Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 8; Reid and Gretton, *Land Registration*, para 11.10.

²⁷⁶ LR (S) A 2012, sched 4 para 18.

²⁷⁷ Reid and Gretton, *Land Registration*, para 11.9.

²⁷⁸ See chapter III B 1 b (2) below.

²⁷⁹ Reid and Gretton, *Land Registration*, para 3.19.

right off-register).²⁸⁰ As seen earlier,²⁸¹ the same categories can be found in Swiss law and probably in any other legislation for a system of registration of title.

Only the Title Sheet Record²⁸² and the Cadastral Map²⁸³ have legal effect with regard to the assertion of rights and therefore it is only these two parts of the land register that can be the object of a rectification.²⁸⁴ The other parts, namely the Application Record²⁸⁵ and the Archive Record,²⁸⁶ cannot be rectified. In the case of a forged disposition, for example, it is the title sheet that will be rectified, while the forgery will remain in the Archive Record for record keeping purposes (together with a copy of the decree of reduction).²⁸⁷

In providing a brief definition of the term “inaccuracy”, the SLC drew from the wording of § 894 of the German BGB that the register is inaccurate if “it fails to reflect the true legal position”.²⁸⁸ Although the wording in Swiss law is different in providing a legal remedy for “unjustified entries”²⁸⁹, these entries also fail to reflect the true legal position, either because they generally lack a legal basis or they came into being due to an invalid transaction.²⁹⁰

²⁸⁰ Reid and Gretton, *Land Registration*, para 11.1.

²⁸¹ See chapter III A 1.

²⁸² The title sheet record is ‘the totality of all single title sheets’: LR (S) A 2012 s 3(3).

²⁸³ ‘The cadastral map is a map—(a) showing the totality of registered geospatial data (other than supplementary data in individual title sheets), (b) showing for each cadastral unit— (i) the cadastral unit number, (ii) the boundaries of the unit, and (iii) the title number of any registered lease relating to the unit, and (c) otherwise depicting registered rights in such manner as the Keeper considers appropriate’. See LR (S) A 2012 s 11(1).

²⁸⁴ SLC Report 222, para 17.47.

²⁸⁵ ‘The application record is to consist of all— (a) applications for registration as are for the time being pending, and (b) advance notices as are for the time being extant., See LR (S) A 2012 s 15.

²⁸⁶ ‘The archive record is to consist of— (a) copies of all documents submitted to the Keeper, (b) copies of all documents which the Keeper is required to include under land register rules, and (c) copies of such other documents as the Keeper considers appropriate’ See LR (S) A 2012 s 14(1).

²⁸⁷ SLC Report 222, para 17.47.

²⁸⁸ § 894 BGB provides a procedure for the rectification of the land register, if the content of the land register is not consistent with the actual legal position (“Steht der Inhalt des Grundbuchs (...) mit der wirklichen Rechtslage nicht im Einklang”); SLC Report No 222, para 17.40.

²⁸⁹ Art. 975 CC.

²⁹⁰ Art. 974 II CC.

In contrast to Swiss law, the 2012 Act provides a rather detailed definition of the meaning of “inaccuracy”, resulting for both the Title Sheet and the Cadastral Map in three types of ‘inaccuracy’.²⁹¹ With regard to the Title Sheet, the 2012 Act states, that the “title sheet is inaccurate in so far as it — (a) misstates what the position is in law or in fact, (b) omits anything required, by or under an enactment, to be included in it, or (c) includes anything the inclusion of which is not expressly or impliedly permitted by or under an enactment”.²⁹²

As regards (a), Reid and Gretton use the example of a property called “Blackmains” which is actually owned by Alan, but the register says the owner is Barbara. The authors call this an “inaccuracy by commission”.²⁹³ This may be because of the registration of a void deed such as a forgery. But a misstatement in the land register under (a) can also be caused by an ‘inaccuracy by omission’. Reid and Gretton give the example of the same property “Blackmains”, which is encumbered by a standard security that the register does not show.²⁹⁴ Giving these two examples, the authors state as a general rule that the register can be inaccurate either by commission or omission.²⁹⁵

As regards (b) - inaccuracies by omission - they say that these emerge often when “an encumbrance or a pertinent is overlooked at the time of first registration”.²⁹⁶ In addition, a “forged discharge” or off-register rights that are not mentioned in the title sheet (such as servitudes created by prescription) may cause an inaccuracy by omission.²⁹⁷ In relation to (c) - entries whose registration is not permitted at all -²⁹⁸ this is a breach of the *numerus clausus* principle, which is embodied in the 2012 Act.²⁹⁹

²⁹¹ LR (S) A 2012 s 65.

²⁹² LR (S) A 2012 s 65(1).

²⁹³ Reid and Gretton, *Land Registration*, para 11.2.

²⁹⁴ Reid and Gretton, *Land Registration*, para 11.2.

²⁹⁵ Reid and Gretton, *Land Registration*, para 11.2.

²⁹⁶ Reid and Gretton, *Land Registration*, para 11.3.

²⁹⁷ Reid and Gretton, *Land Registration*, para 11.3.

²⁹⁸ Reid and Gretton, *Land Registration*, para 11.4.

²⁹⁹ LR (S) A 2012 s 49(1), Reid and Gretton, *Land Registration*, para 6.2.

(1) The Keeper's duty to rectify

The 2012 Act introduced a duty on the Keeper to rectify the register.³⁰⁰ Under the 1979 Act, the Keeper had discretion as to whether an inaccuracy was rectified or not, except for the case where an order from a court or the Lands Tribunal was issued.³⁰¹ The SLC recommended that it should be the Keeper's duty to "maintain an accurate register". Under this approach, it found "no basis for any discretion" of the Keeper to rectify or not.³⁰² As mentioned above,³⁰³ the same is true for Swiss law, even although the duty to rectify is only mentioned expressly in the subordinate Ordinance concerning administrative errors.³⁰⁴

(2) Manifest inaccuracies

The Keeper can only rectify inaccuracies that are "manifest" and furthermore, it is necessary too that the necessary steps to rectify are "manifest", i.e. it has to be clear what has to be done.³⁰⁵ That means, that the Keeper has to satisfy two manifest tests, before she is able to rectify the register of her own initiative (double manifest standard).³⁰⁶

The question of when the Keeper is entitled to rectify is hence contingent on a high evidential standard. In relation to applications for registration, the SLC was satisfied with the lower balance-of-probability standard and argued that the Keeper would also be able to accept applications that give rise to significant doubt. In these cases, the Keeper may limit her warranty.³⁰⁷ But, concerning rectification, this lower evidential

³⁰⁰ Reid and Gretton, *Land Registration*, para 11.1.

³⁰¹ SLC Report 222, para 18.4.

³⁰² SLC Report 222, para 18.10.

³⁰³ See Chapter III A 2 a.

³⁰⁴ Art. 140 II GBV.

³⁰⁵ LR (S) A 2012 s 80(1)(2).

³⁰⁶ See <https://kb.ros.gov.uk/land-and-property-registration/inaccuracies-and-compensation/inaccuracy-and-rectification>.

³⁰⁷ SLC Report 222, para 12.59.

standard is not appropriate, because “then a title sheet could become a seesaw, according to how the balance tipped from time to time”.³⁰⁸

Even although the 1979 Act was silent with regard to the evidential standard in the case of application and rectification, the propositions that the SLC made in its Report on Land Registration followed the practice which evolved under that legislation: “If the matter is litigated, the standard is of course one of balance of probabilities. But if there is no litigation the Keeper in practice operates a high evidential standard”.³⁰⁹ The SLC found this practice to be sound and stressed that applications for rectification very often relate to title disputes, which cannot be resolved by the Keeper, who cannot act judicially.³¹⁰

The SLC drew from other legislation in introducing the term ‘manifest’ to land registration law.³¹¹ It applies to situations where “the fact of the inaccuracy is perfectly clear, or not reasonable disputable”.³¹² In the absence of an exhaustive list of inaccuracies which reach the ‘manifest’ standard (like it would be under Swiss law)³¹³ the Scottish solution grants a certain limited discretion to the Keeper, when she feels confident that a certain inaccuracy is “manifest” or not.

The 2012 Act came fully into force only seven years ago and as noted earlier the case law reflecting rectification has concerned only to the transitional provisions in Schedule 4. But in the future, when more cases have been decided, it will be possible to form different case groups and predict how likely it is that the Keeper will carry out the rectification sought.

For the time being, RoS gives a few examples on their website. This states that the “manifest” criterion is *inter alia* met, where “a void deed is given effect to”, “the

³⁰⁸ SLC Report 222, para 18.20.

³⁰⁹ SLC Report 222, para 3.14.

³¹⁰ SLC Report 222, para 18.16.

³¹¹ SLC Report 222, para 18.17, footnote 15.

³¹² SLC Report 222, para 18.17.

³¹³ As discussed earlier, Art. 976 CC enumerates the four cases, in which the administrator may delete an entry of his own initiative. See chapter III A 2 c.

Keeper has incorrectly delineated a plot on the cadastral map” or where “rights and burdens have been omitted”. Considered as not being “manifest” are inaccuracies with regard to “the existence or extinction of prescriptive rights”, “habile competing titles with disputed claims of possession” or “anomalies between a description and plan within a deed”.³¹⁴

However, in the present writer’s view, the general statement of RoS that a registered void deed meets the manifest criterion for rectification leaves some questions unanswered. There might be cases where the deed is void beyond any doubt (e.g. a five year old child signing a disposition), where it would be cumbersome to involve a court. But not always. It must be remembered that the Keeper has no judicial role and cannot decide on questions of law. Therefore, she cannot declare a deed null and void; this task falls within the responsibility of a court.

The further example of RoS, that the Keeper may rectify when “rights and burdens have been omitted” must be critically evaluated as well. While it might be totally clear which rights or burdens have been omitted and therefore the “manifest criterion” would be fulfilled, rectification cannot take place if since the error arose a third party in good faith has acquired the property.³¹⁵ Inaccuracies by omission may also be cured by negative prescription if the rights omitted have not been exercised for (usually) twenty years.³¹⁶

The example of RoS concerning the wrong delineation of a plot in the cadastral map might also be addressed by the aforementioned curative effect of the protection of good faith³¹⁷ and prescription.³¹⁸

³¹⁴<https://kb.ros.gov.uk/land-and-property-registration/inaccuracies-and-compensation/inaccuracy-and-rectification>.

³¹⁵ Reid and Gretton, *Land Registration*, para 11.8. See chapter IV C.

³¹⁶ Prescription and Limitation (Scotland) Act 1973 s 8; Reid and Gretton, *Land Registration*, para 11.7.

³¹⁷ However, the good faith acquisition rule of section 86 of the 2012 Act may not necessarily apply here if the wrong delineation of the plot results in a title sheet showing an acquisition more extensive than the deed registered bore to effect. See s 86(2)(f) read with s 73(2)(h)(i).

³¹⁸ See Chapter IV C.

(3) The negative impact of the “tell me don’t show me approach” on the accuracy of the land register

In the introduction to this thesis,³¹⁹ it was mentioned that under the 2012 Act, RoS has established a practice, according to which most of the necessary checks for an application are – in contrast to the regime under the 1979 Act - now left to applicant’s solicitor. This approach is referred to as “tell me don’t show me”.³²⁰

It is strongly criticized by Professor Reid, who argues that this paradigm shift is not implied or supported by the 2012 Act.³²¹ He argues that it entails “grave risks for the accuracy” of the land register.³²² His main point is that a solicitor’s job is to represent his or her client and not the public interest. The solicitor’s aim is to get the application successfully through the process of registration (unlike to a public official, whose focus would of course be the reliance in and accuracy of the land register). It is not advisable to give private persons such a great influence on the content of a public register.³²³ The accuracy of the land register can only be maintained by public officials, who do not represent individual but, rather, the public interest.

According to Reid, “tell me don’t show me” will unavoidably lead to a “higher incidence of error or even of fraud”.³²⁴ As an example, he mentions that death certificates do not have to be sent to the register anymore, which facilitates fraud, e.g. by allowing a husband to fabricate his wife’s death in order to sell the matrimonial home.³²⁵ Perhaps the dangers of “tell me don’t show me” will be partly mitigated by the duty of the solicitors to take reasonable care³²⁶ and the threat of criminal liability.³²⁷ According to the officials from RoS in a meeting with the present

³¹⁹ See Chapter II B 2 e.

³²⁰ Reid, ‘Tell Me Don’t Show Me’, 17.

³²¹ Reid, ‘Tell Me Don’t Show Me’, 23.

³²² Reid, ‘Tell Me Don’t Show Me’, 30.

³²³ Reid, ‘Tell Me Don’t Show Me’, 30.

³²⁴ Reid, ‘Tell Me Don’t Show Me’, 30.

³²⁵ Reid, ‘Tell Me Don’t Show Me’, footnote 69.

³²⁶ LR (S) A 2012 s 111.

³²⁷ LR (S) A 2012 s 112. See chapter V B 4.

author on 10 December 2021, “applications are generally of a high standard’ and the practice would not ‘operate as blindfold’, which means that the Keeper still would ‘seek further information and conduct enquiry at her own instance in certain cases”.

While in practice, the concept of “tell me don’t show me” seems to work out well, the fundamental conflict of delegation of public interests - such as correct applications for land registration - to solicitors, whose task is not to represent public but their client’s personal interests, remains in the author’s view controversial.

2. Rectification processes

While the duty of the Keeper to rectify “manifest” inaccuracies was already mentioned, she is of course also dependent on information that applicants for rectification bring to her attention. For this purpose, RoS provides a rather detailed “notification of inaccuracy form” on their website, which may (but need not) be used to inform the Keeper.³²⁸

It was very perceptive of the SLC in recommending the legislation to realise that there are situations where the inaccuracy itself is obvious (“manifest”) but it is not clear how to proceed.³²⁹ It stated that in this case the Keeper should not rectify but instead mention and explain the situation in a note, so that everybody reading the property would be informed, which is of course important in relation to the Keeper’s warranty³³⁰ and the realignment of rights.³³¹ This recommendation was incorporated into the new law.³³² Therefore, the Keeper’s duty to rectify “manifest” inaccuracies is only applicable if the rectification process required is “manifest” as well.³³³ As an example of where the process is not clear, Professors Reid and Gretton quote the

³²⁸ See https://www.ros.gov.uk/_data/assets/pdf_file/0010/11413/Notification-of-inaccuracy-in-the-land-register_v03b.pdf.

³²⁹ SLC Report 222, para 18.12.

³³⁰ See Chapter V B 1.

³³¹ SLC Report 222, para 18.12. For realignment see chapter IV C.

³³² LR (S) A 2012 s 80(3).

³³³ LR (S)A 2012 s 80(2).

case of two title sheets that overlap one another on the same area.³³⁴ The question of how to proceed in such cases may be referred to the Lands Tribunal.³³⁵ The referral procedure is an invention of the 2012 Act and provides “an expert and relatively cheap forum” for all questions that relate to the accuracy of the land register and to the question of how inaccuracies are rectified.³³⁶

If the Keeper is not convinced that an inaccuracy meets the “manifest standard”, the applicant would need to resort to the ordinary courts or the Lands Tribunal.³³⁷ Any decision thereby issued in favour of the appellant would elevate the inaccuracy to the “manifest standard”, giving the Keeper the power to rectify.³³⁸

In relation to the rectification of “administrative errors” made by the Keeper, only the secondary legislation touches on the issue briefly and provides that the Keeper may correct “typographical errors” in a title sheet.³³⁹ The definition of this category of error given by the statutory instrument is purely negative in relation to inaccuracies: “typographical error” means an error which is not an inaccuracy (within the meaning of section 65 of the Act).³⁴⁰ Reid and Gretton remark that these kind of errors usually do not reach the severity of “misstating the position in law or in fact”.³⁴¹ If a typographical error would have a direct impact on the legal position, like for instance, the wrong spelling of the proprietor’s name in the title sheet, this would be regarded as an inaccuracy which must be corrected by rectification.³⁴²

³³⁴ Reid and Gretton, *Land Registration*, para 11.13.

³³⁵ LR (S) A 2012 s 82(1)(b).

³³⁶ Reid and Gretton, *Land Registration*, para 11.19.

³³⁷ LR (S) A 2012 s 82(1)(a); Reid and Gretton, *Land Registration*, para 11.14.

³³⁸ Reid and Gretton, *Land Registration*, para 11.14.

³³⁹ LRR 2014 r 17(1).

³⁴⁰ LRR 2014 r 17(2).

³⁴¹ Reid and Gretton, *Land Registration*, para 11.5.

³⁴² Reid and Gretton, *Land Registration*, para 11.5.

C. Comparative analysis

1. Similar powers of the land register executives in Switzerland and Scotland with more possibilities for the Scottish Keeper to act of her own initiative

The Swiss administrator's powers are very comparable to his Scottish counterpart: both have an administrative role and do not have the powers of a judge. The Scottish provision on "manifest inaccuracies"³⁴³ resembles the Swiss approach of allowing the administrator to delete "clearly irrelevant entries" (clearly supervening inaccuracies) which also concerns the matter of rectification, but only in relation to *deletions*.³⁴⁴

The Scottish concept is more extensive: if the high evidential standard is met, an entry may be *altered* as well and the Scottish law - in contrast to the Swiss position – does not list the cases in which the administrator may act of her own initiative. This seems to be a favourable approach: it offers more possibilities for the Keeper to act without involving the courts. If an inaccuracy is self-evident, that is to say obvious, it seems unnecessary to involve a court.

2. The "double manifest test" as an innovative Scottish solution

The double manifest test (i.e. the obviousness of both the inaccuracy itself as well as the process due for rectification) that the Keeper has to follow with regard to rectification of her own initiative seems to be an innovative Scottish solution which deserves particular attention. The idea that an inaccuracy can be perfectly clear, but it is not clear what step is needed for rectification, gains particular significance in jurisdictions where a register administrator has no judicial power and is reduced to a purely administrative role.

³⁴³ LR (S) A 2012 s 80.

³⁴⁴ Art. 976 CC.

This is both the case in Scotland and Switzerland, whereas in Germany, the land register is kept by the local competent district court (*Amtsgericht*).³⁴⁵ The German *Grundbuchamt* (land register office) is part of the district court, led by a judge and not an administrative body, despite the misnomer as *Amt* (office).³⁴⁶ Therefore, the appellate court against its decisions is the Higher Regional Court (*Oberlandesgericht*).³⁴⁷

In systems where an administrator has judicial power, this extends to rule on questions of substantive private law, such as declaring a deed of transfer null and void. In Switzerland and Scotland on the contrary, the fact that a deed of transfer is void can be perfectly clear and apparent to the administrator/Keeper, eg in the case where a person has proved that the power of attorney under which a deed was purportedly signed in fact was forged. Given her non-judicial administrative role, however, the administrator/Keeper cannot herself declare the disposition null and void. With regard to the Scottish double manifest test, this example shows, that the inaccuracy itself may be manifest, but not the further procedure that is required. While the administrator in Switzerland would usually simply inform the parties that they would need to file a land register correction action at the local competent court *à ses risques et périls*, his Scottish counterpart has another option, despite her power of review being the same: she may refer to the Lands Tribunal and ask it what to do.

³⁴⁵ § 1 I of the German GBO (*Grundbuchordnung*).

³⁴⁶ Wudarski, 'Das Grundbuch in der Registerwelt. Eine rechtsvergleichende Untersuchung zum deutschen und polnischen Grundbuch im europäischen Kontext' (n 1), 50 f.

³⁴⁷ § 72 GBO.

3. The referral to the Lands Tribunal as a useful Scottish tool and potentially helpful for Swiss law to consider

To the eyes of a Swiss lawyer, the Scottish legal procedure of the “referral” to a specialist court which can give advice and answers is novel.³⁴⁸ The preliminary ruling of the ECJ for member states of the EU³⁴⁹ arguably serves a similar purpose of providing legal clarity by an authoritative legal body. A similar procedure to the “referral to the Lands Tribunal” could be a useful tool in Switzerland as well. As the administrator cannot decide on questions of law, a “referral” could avoid the necessity for applicants to litigate protracted and expensive processes.

4. Slightly different emphasis on the land register executive’s duty to rectify in Switzerland and Scotland

The duty of the administrator to rectify the land register is established in Swiss law *expressis verbis* only for (unintentional) errors caused by the administrator himself, but not for inaccuracies that are caused by the parties to the transaction that is registered, a third person or a supervening event. According to Schiller, the reason why the legislator did not choose to establish a general duty of the administrator to rectify flaws is that most inaccuracies are latent to the administrator. Inaccuracies *ab initio* can best be known by the parties themselves, while supervening inaccuracies due to later events are usually not known by the administrator.³⁵⁰ The Scottish legislator chose exactly the opposite solution: while the Keeper is under no duty to rectify her own clerical errors, she must rectify all other inaccuracies, even though commentators admit that the Keeper can only rectify inaccuracies which come to her knowledge – and presumably – many will not.³⁵¹

³⁴⁸ According to information provided by RoS (as of December 2021) there have been 54 such referrals made to the Lands Tribunal for Scotland since the introduction of the section 82 referral route under the LR (S) A 2012.

³⁴⁹ Art. 267 of the Treaty on the Functioning of the European Union.

³⁵⁰ Schiller, *Die Unrichtigkeit des Grundbuches* (n 145), 92.

³⁵¹ Reid and Gretton, *Land Registration*, para 11.15.

Apparently, the Scottish and Swiss legislators have each placed a different emphasis. The Swiss legislator has provided that the administrator can only be obliged to correct flaws of which he is aware – that is: his own. The Scottish legislator, for his part, seems to weigh the Keeper's own minor flaws against the more serious inaccuracies that are due to void transactions. Accordingly, it is the latter that put the Keeper under the duty to act.

However, it seems that Scottish law does not give administrative errors that leave a registered right unaffected the same weight as it is the case in Switzerland. The Keeper may or may not correct clerical errors. She is not obliged to do so. In Switzerland, the administrator must correct also 'minor' flaws, like misspelled names or wrong addresses. For the purpose of reliance in the land register from the public, it would seem appropriate that the duty of the Keeper to maintain a correct register should include the duty to correct minor errors as well, even if they do not have legal impact. But this difference should not be overstated. As stated above, serious administrative errors like a mis-spelled name would qualify as inaccuracies and put the Keeper under the duty to act.³⁵²

³⁵² See chapter III B 2.

IV. Realignment

A. Terminology

The specific terminology for the protection of the good faith acquirer in land registration law is inconsistent as between Scotland and Switzerland where legal scholars use different terms to describe the same phenomenon: wrong entries may be cured by the corrective power of the land register in relation to a third party acquiring in good faith.

The term which is found in German and Swiss legal scholarship in this regard is the ‘public faith in the land register’ (*Öffentlicher Glaube des Grundbuchs; foi publique du registre foncier*).³⁵³ According to Kiehnle, ‘public’ in this context means open for consultation by everybody. The doctrine of public faith can therefore be developed from the standpoint that a register which is open to the public creates an expectation of members of the public that the register is correct. This faith that the public has in the register, Kiehnle argues, should not be undermined.³⁵⁴

The SLC, in its first discussion paper on land registration, termed the protection of the good faith acquirer the ‘integrity principle’ and gave it the following definition: ‘the principle that, in a question with a *bona fide acquirer*, the integrity of the Register can be taken for granted.’³⁵⁵ This seems well chosen and clear. Nevertheless, in its final Report on Land Registration, the SLC stated that the policy of the integrity of the register is broad and entails situations where a grantee receives only financial compensation.³⁵⁶ ‘Realignment’ is therefore a more convenient, narrower term for

³⁵³ The heading of § 892 of the German BGB itself is “Öffentlicher Glaube des Grundbuchs”. For the Swiss law see Mooser, ‘Intro aux art. 942-977’, N. 16 and Mooser, Art. 973 N. 1 ff. and Schmid, Art. 973 N. 1 ff. In Scottish cases on the Register of Sasines the concept of “faith of the records” can be found. See eg *Aberdeen Trades Council v Skip Constructors’ and Shipwrights’ Association* 1949 SLT 202 and *Trade Development Bank v Warriner and Mason (Scotland) Ltd* 1980 SLT 223.

³⁵⁴ A Kiehnle, *Das Öffentliche im Privaten - Was war und ist am öffentlichen Glauben im Privatrecht öffentlich?* (2020), 70.

³⁵⁵ SLC DP No 128, para 1.7.

³⁵⁶ SLC Report 222, para 21.40.

the protection of those acquiring property in good faith: 'we have come to the conclusion that it would be better to say that when the title guarantee takes the form of mud,³⁵⁷ the rights of the parties are realigned, meaning that they are made to conform with what the Register says they are.'³⁵⁸ However, the term 'realignment' cannot be found in the 2012 Act itself. The terminology used in Part 9 of the Act is 'Rights of persons acquiring etc in good faith'.

B. Switzerland

1. A deliberate decision of the legislator

It was briefly mentioned in the previous section that a public register raises the expectation by those who consult the register that it is correct. If this expectation is to be protected by law and, if so, how, is in the end a matter for the legislator.³⁵⁹

Pfister in his doctoral thesis on the protection of public faith in private law admits that, according to the rules of strict logic, rights can be derived from a person only to the extent to which he is entitled to confer these.³⁶⁰ This purely formal approach was also the basis of the Roman principle of *nemo dat* or *nemo plus*.³⁶¹ Modern private law, however, considers not only the rules of formal logic, but also the ethical justification and the economic viability of legal institutions.³⁶² In the words of the famous German scholar Rudolf von Jhering, in opposition to the prevailing 'formal-

³⁵⁷ 'Money or mud' is an expression used by the Scottish Law Commission and attributed to the Canadian scholar Thomas Mapp. It refers to the two forms of guarantee of title: 'If a registered grantee keeps what the title sheet says, then that is title guarantee by way of "mud" and if the registered grantee does not keep it but is compensated instead, that is title guarantee by way of "money"'. See SLC Report 222, para 21.2 and Reid and Gretton, *Land Registration*, para 12.2. See also chapter IV C 2.

³⁵⁸ SLC Report 222, para 21.40.

³⁵⁹ On the issue of how to protect and whom from a Scottish perspective see Reid, 'De-Throning King Midas: The New Law of Land Registration in Scotland', 160-173.

³⁶⁰ Pfister, *Der Schutz des öffentlichen Glaubens*, 3.

³⁶¹ D. 50,17,54. See also footnote 83.

³⁶² Pfister, *Der Schutz des öffentlichen Glaubens*, 3; A Meier-Hayoz, *Das Vertrauensprinzip beim Vertragsabschluss – Ein Beitrag zur Lehre von der Auslegung und den Mängeln des Vertragsabschlusses beim Schuldvertrag* (1948), 78 ff.

logical method' (*formal-logische Methode*) at the time (1864): "There is something higher in law than the logical element."³⁶³

When two legal principles of equal importance are in conflict, a decision in favour of one principle becomes necessary because it will not obviously be possible to protect both opposing interests in equal measure.³⁶⁴ In this regard, the question of protecting the good faith acquirer arises, when the equally important principles of 'legal certainty' (*Rechtssicherheit*) and 'security of legal trade' (*Verkehrssicherheit*) clash.³⁶⁵ According to Hofer, the common ground of all provisions on the protection of good faith is that the legislator tries to balance the conflicting interests in a sophisticated manner. The balance between the opposed interests is sought on different levels and entails *inter alia* the recognition of the outer appearance of a right (*Rechtsscheinposition*; in our case the public land register), the allocation of the burden of proof and an assessment of the interests involved, which is decisive to determine the legal consequences.³⁶⁶

While the principle of legal certainty protects the interest of holders of property rights that these remain unaffected except when they decide themselves to dispose of them,³⁶⁷ the principle of security of legal trade is aimed at favouring 'acquiring interests' in legal transactions.³⁶⁸ In doing so, the principle protects the circulation of property and economic momentum.³⁶⁹

³⁶³ "Es gibt noch etwas Höheres im Recht als das logische Element", cited in E Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte* (1939), 508; Meier-Hayoz, *Das Vertrauensprinzip beim Vertragsabschluss* (n 362), 78 f.

³⁶⁴ Pfister, *Der Schutz des öffentlichen Glaubens*, 7; Jenny, *Der öffentliche Glaube des Grundbuches*, 11 f.

³⁶⁵ P Liver, 'Entstehung und Ausbildung des Eintragungs- und des Vertrauensprinzips im Grundstücksverkehr', in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 1 (1979), 2; V Ehrenberg, 'Rechtssicherheit und Verkehrssicherheit, mit besonderer Rücksicht auf das Handelsregister', in *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*, vol. 47 (1904), 281; Pfister, *Der Schutz des öffentlichen Glaubens*, 6.

³⁶⁶ Hofer, Art. 3 N. 39.

³⁶⁷ Pfister, *Der Schutz des öffentlichen Glaubens*, 4f.; Ehrenberg, 'Rechtssicherheit und Verkehrssicherheit, mit besonderer Rücksicht auf das Handelsregister' (n 365), 281 f.

³⁶⁸ Pfister, *Der Schutz des öffentlichen Glaubens*, 5.

³⁶⁹ Pfister, *Der Schutz des öffentlichen Glaubens*, 5.

If the two mentioned principles conflict, the legislator must make a choice in defining the overriding principle. It is a difficult task for the legislator to find a fair balance here between the competing interests: on the one hand, the existing right demands protection, on the other hand, legal transactions need a sound basis for the exchange of property.³⁷⁰ According to the economic approach, the protection of the security of legal trade is regarded as being an economic imperative,³⁷¹ with the argument, that a system of ongoing division of labour (as can be witnessed in the vast majority of the countries worldwide) is only successful, if the (increasing) exchange of goods is not only possible, but also secure.³⁷²

How the conflict is solved in modern private law is a decision left to the legislator, who requires to choose a solution (*Opportunitätsentscheidung*). The need to protect the security of legal trade does not preclude the discretion of the legislator to give weight to other concerns.³⁷³

Pfister maintains that it should be borne in mind that normally outer appearance (*Rechtsschein*, legal appearance) corresponds with the “inner” right, so that the “conflict” of “legal certainty” with “security of legal trade” is rare. Nevertheless, even a few cases where confidence has been damaged can have far-reaching psychological effects on legal transactions (*Rechtsverkehr*) as a whole.³⁷⁴ In this regard Baumann convincingly states that it is for the sake of the protection of the legal transactions that good faith parties must be able to rely on the land register.³⁷⁵

The disadvantage of a good faith acquisition rule is self-evident: the true owner loses his right. From the point of view of justice, the correctness of this result is open to

³⁷⁰ F Regelsberger, ‘Der sogenannte Rechtserwerb vom Nichtberechtigten’, in (1904) 47 Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts, 342.

³⁷¹ Pfister, *Der Schutz des öffentlichen Glaubens*, 8.

³⁷² Pfister, *Der Schutz des öffentlichen Glaubens*, 8; According to Meier-Hayoz the security of trade has to be taken into account in solving the conflict of interests, but it shall not be the only decisive factor: Meier-Hayoz, *Das Vertrauensprinzip beim Vertragsabschluss* (n 362), 115.

³⁷³ Liver, ‘Entstehung und Ausbildung des Eintragungs- und des Vertrauensprinzips im Grundstückverkehr’ (n 365), 2.; Pfister, *Der Schutz des öffentlichen Glaubens*, 11.

³⁷⁴ Pfister, *Der Schutz des öffentlichen Glaubens*, 12 f.

³⁷⁵ Baumann, Art. 3 N. 72.

doubt.³⁷⁶ Lutter finds it surprising that this 'almost rough solution' is hardly ever criticized by commentators.³⁷⁷ According to Lieder, the high reliability of the (German) land register is directly related to the acceptance of the good faith acquisition: to allow a buyer in good faith to acquire ownership from a non-owner is only justified if the land registration system is secure and the probability of incorrect registrations is very low.³⁷⁸ Hofer also sees the concept of public faith justified by the fact that errors in registration rarely occur (due to the secure nature of the procedure).³⁷⁹ Indeed, losses of true owners to buyers in good faith should be the rare exception and if possible, the legislator should provide for safeguards to strengthen the integrity of the land register.

However, when the Swiss Civil Code was drafted, two economic reasons were the decisive factors in the decision to protect good faith acquirers: the mobilisation of land value and the suitability of land for security rights.³⁸⁰

Even although the policy of the public faith of the records is accepted now, the question of the ideal 'architecture' of the land register for this purpose remains to be discussed.

Pfister states that the protection of the good faith acquirer presupposes the use of a land register system with real folios, because only this register system allows a complete statement of the existing real rights with regard to a plot of land.³⁸¹ Therefore, it can be concluded that the protection of the good faith acquirer must be guaranteed in a register of title, rather than in a register of deeds. In a register of title,

³⁷⁶ J Lieder, 'Die Lehre vom unwirksamen Rechtsscheinträger: Ein Beitrag zu den rechtsdogmatischen und rechtsökonomischen Grundlagen des redlichen Erwerbs' in *Archiv für die civilistische Praxis*, vol. 6 (2010), 911.

³⁷⁷ M Lutter, 'Die Grenzen des sogenannten Gutglaubensschutzes im Grundbuch', (1964) 2/3 *Archiv für die civilistische Praxis*, 125.

³⁷⁸ Lieder, 'Die Lehre vom unwirksamen Rechtsscheinträger' (n 376), 870.

³⁷⁹ Hofer, Art. 3 N. 51.

³⁸⁰ Hofer, Art. 3 N. 50.

³⁸¹ Pfister, *Der Schutz des öffentlichen Glaubens*, 232.

the real folio will usually contain all the necessary information for a buyer, with no need to scrutinize the underlying deeds (the “curtain principle”).³⁸²

The protection of public faith should only be conferred in land register systems where precautionary measures are taken that ensure the correctness of the land register.³⁸³

As already stated, the situation where the entry in the land register contradicts ordinary property law should always be a rare exception. This is because the decision of the legislator to favour the ‘registered proprietor’ over the ‘true proprietor’ has an unsatisfactory impact on the ‘true proprietor’: he loses the land and may obtain compensation only (if certain criteria are met).³⁸⁴

Since plots can usually not be regarded as fungible property, quite the contrary: every plot is unique and irreplaceable, the interests of the party that gets the money rather than the land are not comprehensively protected.³⁸⁵ The Swiss system of land registration facilitates the protection of the good faith acquirer in this respect in many ways. The breach of the *nemo dat* or *nemo plus* principle in the land registration context can *inter alia* be justified by the reliable management of the land register by state officials, the precise and complete presentation of real rights by the use of real folios,³⁸⁶ but also by the entry principle (i.e. the necessity to register a property right for its creation), without which the building of a complete register of real rights would not be possible.³⁸⁷ The administrator’s strict auditing duty (sometimes called ‘principle of legality’, *Legalitätsprinzip*) is certainly also helpful in avoiding

³⁸² See T Ruoff, ‘An Englishman looks at the Torrens System’ (1952) 26 ALJ 118; Reid and Gretton, *Land Registration*, para 12.2.

³⁸³ Pfister, *Der Schutz des öffentlichen Glaubens*, 244; Jenny, *Der öffentliche Glaube des Grundbuches*, 240 f.

³⁸⁴ Liver, ‘Entstehung und Ausbildung des Eintragungs- und des Vertrauensprinzips im Grundstückverkehr’ (n 365), 2.

³⁸⁵ Pfister, *Der Schutz des öffentlichen Glaubens*, 243; Jenny, *Der öffentliche Glaube des Grundbuches*, 240 f.

³⁸⁶ Pfister, *Der Schutz des öffentlichen Glaubens*, 243.

³⁸⁷ Pfister, *Der Schutz des öffentlichen Glaubens*; 237; Baumann, Art. 3 N. 72.

contradictions between what the register says and what real property law says,³⁸⁸ but this duty should not be overestimated, since it is limited to formal aspects of registration and not extended to an examination of the 'material law'.³⁸⁹ Even in formal aspects of registration, the administrator's power of review is restricted. In relation to the legal capacity to act of the parties that apply for registration, the administrator must usually rely on the notary public's checks and is not entitled to reassess the question of legal capacity.³⁹⁰

The increased power of proof that public registers and public deeds enjoy in Swiss law is helpful for the maintenance of a reliable register.³⁹¹ A public deed which serves as a legal basis for an entry in the land register constitutes full proof of the facts it contains.³⁹² The presumption may be rebutted only, if it can be shown, that its content is incorrect.³⁹³ The onus of proof is therefore on the challenger.

All these safeguards help to ensure the reliability of the public register. According to Pfister, the increased credibility of the register naturally brings with it an increased confidence by the public into the content of the register.³⁹⁴ That same confidence by the public is even further strengthened by the strong effects of the register,³⁹⁵ especially the protection of an acquirer in good faith.

A necessary condition for protection of the good faith acquirer is that the land register is open for consultation (this is called the 'formal publicity principle'. *formelles Publizitätsprinzip, principe de publicité formelle*). Without being accessible, the land register could not meet its function as a means of publicity.³⁹⁶ The Code

³⁸⁸ Pfister, *Der Schutz des öffentlichen Glaubens*, 237; Jenny, *Der öffentliche Glaube des Grundbuches*, 242; F Jenny, 'Das Legalitätsprinzip im schweizerischen Grundbuchrecht' in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 5 (1930), 185 ff.

³⁸⁹ See chapter III A 2.

³⁹⁰ BGE 124 III 341 E. 2c/bb (and regest); however, in exceptional cases, i.e. if the inability to act is immediately obvious or is based on certain knowledge, the administrator may refuse to register.

³⁹¹ cf. Art.9 CC; Pfister, *Der Schutz des öffentlichen Glaubens*, 238.

³⁹² Art. 9 I CC.

³⁹³ Art. 9 I and II CC.

³⁹⁴ Pfister, *Der Schutz des öffentlichen Glaubens*, 239.

³⁹⁵ Pfister, *Der Schutz des öffentlichen Glaubens*, 239

³⁹⁶ Schmid, Art. 970 N. 1.

stipulates that any person showing a legitimate interest is entitled to consult the land register or to be provided with an extract.³⁹⁷ Pfister argues that the term 'legitimate interest' is to be interpreted generously, because this requirement is only to prevent the land registration office being disturbed by inquiries that are motivated purely by curiosity.³⁹⁸

2. The general rule

In Switzerland, the principle of the protection of the good faith acquirer is sometimes also called the 'substantive publicity principle' (*materielles Publizitätsprinzip, principe de publicité matérielle*).³⁹⁹ However, the favoured and more frequent term is certainly that of 'public faith'.⁴⁰⁰ Commentators state that an entry in the land register creates a legitimate expectation on the part of the good faith acquirer, just like possession does in the case of moveable property.⁴⁰¹ To protect the trust in the land register of good faith acquirers and their legitimate expectation that the register is correct certainly fosters the publicity principle in the sense that the register has to be reliable as much as possible. Schmid-Tschirren states that without this principle, legal transactions would be exposed to a serious threat and the publicity of the land register would be deprived of one of its essential functions.⁴⁰² It was mentioned above that a legal policy may also pursue an economic rationale. In the case of the protection of the good faith acquirer in land registration law, the aim of having smooth and reliable land transactions was an economic driving force for the implementation of this specific rule.⁴⁰³

³⁹⁷ Art. 970 I CC.

³⁹⁸ Pfister, *Der Schutz des öffentlichen Glaubens*, 239 f; Tuor et al, *Das Schweizerische Zivilgesetzbuch* (n 41), § 94 N. 41, share this view. Since the local land registries in Switzerland are nowadays mainly managed electronically, it could be argued, that there is hardly any disturbance, since the data is quickly available.

³⁹⁹ As an important complement to the aforementioned 'formal publicity principle'.

⁴⁰⁰ Instead of many: Schmid, Art. 973 N. 1 ff.

⁴⁰¹ Zobl, *Grundbuchrecht*, § 13 N. 123.

⁴⁰² C Schmid-Tschirren, 'Rechtswirkungen und Rechtswirkungsprobleme kantonaler Publizitätseinrichtungen' in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 4 (1999), 220.

⁴⁰³ Pfister, *Der Schutz des öffentlichen Glaubens*, 241 f.

The Civil Code provides that any person who, relying in good faith on an entry in the land register, has acquired land or any other real right in land in reliance thereon, is protected.⁴⁰⁴ The provision refers to the good faith of a third party who is not connected with the transaction which led to the entry. The parties to a transaction, as well as their universal successors (e.g. heirs) cannot invoke the principle because they are expected to know the *causa* (obligation), which underlies the entry.⁴⁰⁵ Generally, the presence of good faith is presumed.⁴⁰⁶ Hence, the burden of proof is imposed upon the party who contests the presence of good faith on the part of another party. However, no person may invoke the presumption of good faith if he or she has failed to exercise the diligence required by the circumstances.⁴⁰⁷ This can be the case if entries in the land register contradict each other or if an entry contradicts with the factual circumstances (i.e. the physical appearance of the plot).⁴⁰⁸

The principle of public faith produces a positive and a negative effect. The positive effect means that the third party may rely on the existence of the rights that are recorded in the register. The negative effect means that the third party does not have to accept more encumbrances than those which are registered.⁴⁰⁹

Even although Art. 973 CC mentions only the reliance on “entries” in the land register, it is accepted by case law and commentators that a good faith acquirer can also rely on the plans of the official cadastral survey (*amtliche Vermessung, mensuration officielle*), which form an integral part of the land register.⁴¹⁰ However, plans that are not based on the official cadastral survey⁴¹¹ are not protected by the

⁴⁰⁴ Art. 973 I CC.

⁴⁰⁵ Wolf and Mangisch, ‘Das Grundbuch in der Schweiz und seine Prinzipien’ (n 27), 754, with further references.

⁴⁰⁶ Art. 3 I CC.

⁴⁰⁷ Art. 3 II CC.

⁴⁰⁸ C Schmid-Tschirren, ‘Aspekte des sachenrechtlichen Publizitätsprinzips – Insbesondere zu Anwendungen und Auswirkungen dieses Prinzips im Dienstbarkeitsrecht’, in A Rumo-Jungo et al (eds), *Mélanges en l’honneur de Paul-Henri Steinauer* (2013), 613.

⁴⁰⁹ Schmid, Art. 973 N. 37a.

⁴¹⁰ Art. 942 II CC, Deillon-Schegg, Art. 973 N. 8.; Mooser, Art. 973 N. 21.

⁴¹¹ Art. 950 CC.

concept of public faith.⁴¹² The underlying deeds (*Belege, pièces justificatives*) may enjoy public faith protection insofar as they are referred to and they describe the content or scope of a real right in more detail.⁴¹³ However, as they do not form part of the folio, it is not advisable to refer to them in an entry (if not absolutely necessary), as this would be troublesome with regard to the rule that underlying deeds need not be checked (the “curtain principle”). In practice, it is very rare that an entry refers to a deed.

In contrast, purely descriptive information contained in the real folio and the description of the area of land are not subject to public faith protection.⁴¹⁴ Art. 973 CC primarily aims to protect good faith as regards entries in the narrow sense of the term. Annotations serve informative purposes only and are hence not subject to the public faith rule.⁴¹⁵ Priority notices occupy a special position (or middle position) with regard to public faith: they do not participate in the ‘positive effect’ of public faith, i.e. the existence of the respective right cannot be taken for granted. But they enjoy the ‘negative effect’ of public faith insofar as a third party in good faith does not have to accept a personal right (in the form of a priority notice) that has not been registered.⁴¹⁶

3. A third party

The legal term “third party” is not discussed by scholars in great detail and does not seem to have caused major difficulties in legal practice. The Supreme Court has only commented very briefly on the issue and stated that a person who is involved in the legal transaction that forms the basis for the entry in the register in relation to the real

⁴¹² BGer 5A_375/2010 E. 3.1; Deillon-Schegg, Art. 973 N. 8.

⁴¹³ Deschenaux, *Das Grundbuch, Zweite Abteilung*, 766; Deillon-Schegg, Art. 973 N. 8.; Mooser, Art. 973 N. 20

⁴¹⁴ Deschenaux, *Das Grundbuch, Zweite Abteilung*, 765.

⁴¹⁵ Jürg Schmid, ‘Gedanken zum öffentlichen Glauben des Grundbuchs - Vom Sein und Schein im Immobiliarsachenrecht’, in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 90 (2009), 113 f.

⁴¹⁶ Schmid, ‘Gedanken zum öffentlichen Glauben des Grundbuchs’ (n 415), 113.

right would not qualify as a third party.⁴¹⁷ When a power to act is conferred by a principal to an agent, the good faith of the agent will lead to the presumption that the principal is in good faith as well. Equally, the agent's bad faith will likewise lead to the presumption that the principal is in bad faith too.⁴¹⁸ In the case of legal entities and corporate bodies, it is the good or bad faith of the governing board that is decisive.⁴¹⁹

4. Good faith

The term "good faith" is not defined by the Code. According to a respected definition of the late Professor Jäggi, it means the lack of sense of wrong (*Unrechtsbewusstsein*) despite the presence of a legal defect.⁴²⁰ A person is deemed to be acting in good faith if he or she is neither (i) aware of the incorrectness of the land register entry at the time of acquisition nor (ii) should have been aware of it if he or she had paid due attention.⁴²¹

As already mentioned, the presence of good faith is presumed⁴²², but not where a person fails to exercise the diligence required by the circumstances.⁴²³ In the context of land registration, a general tension can be seen between the requirement of requisite care on one hand and the curtain principle in land registration law on the other hand. In accordance with that principle, the Supreme Court has stated that a buyer is not required to consult the deeds and documents that led to the entries on the folio. Anyone who inspects a real folio can assume that the entries are complete and correct.⁴²⁴

⁴¹⁷ BGer 5A_412/2009 E. 5.1; Schmid, Art. 973 N. 34.

⁴¹⁸ Schmid, Art. 973 N. 35.

⁴¹⁹ Schmid, Art. 973 N. 36.

⁴²⁰ P Jäggi, Art. 3 N. 30, in Berner Kommentar, Schweizerisches Zivilgesetzbuch, Einleitung: Artikel 1-10 ZGB (1962).

⁴²¹ Schmid, 'Gedanken zum öffentlichen Glauben des Grundbuchs' (n 415), 115. The author paraphrases the consideration 4.1 of the Supreme Court case BGE 130 III 306, fully published in ZBGR (1986), 46.

⁴²² See chapter IV B 2.

⁴²³ Art. 3 II CC.

⁴²⁴ BGE 109 II 102 E 2b.

This is the general rule. But there can be special circumstances where the mere consultation of the real folio is not enough. In a rather abstract way, the Supreme Court has said that the purchaser shall be obliged to make further inquiries if that person is aware of facts which, given an average level of intelligence and attention, raise doubts as to the correctness of the entry in the land register.⁴²⁵ The requirement of due attention within the meaning of Art. 3 II CC depends on the circumstances of the individual case, i.e. it is a matter of judicial discretion according to Art. 4 CC.⁴²⁶ It has already been briefly mentioned that further inquiries can be necessary if entries contradict each other. But the language of an entry could also be unclear or contain an obsolete expression, if the right is very old. In these cases it would be advisable to at least ask the administrator. Both examples occur rarely and there are hardly any court cases. In those cases that have been decided, the Supreme Court has mainly had to decide cases where the physical appearance of a plot contradicts an entry or its underlying deed. Here it has developed a so-called doctrine of ‘natural publicity’ to solve these cases, as will be seen in the next sub-chapter.

Nevertheless, the Supreme Court stresses the general rule of the ‘curtain principle’ in holding that in principle there is no general duty to inquire. Only those who have reasonable suspicion must make inquiries.⁴²⁷

5. “Natural publicity”

A frequent case where due attention on the part of the acquirer is expected or good faith will be regarded as missing is what has been called ‘natural publicity’ (*natürliche Publizität, publicité naturelle*), that is the actual, outwardly visible physical condition of the property.⁴²⁸

⁴²⁵ BGer 5C.232/2003 E. 4.1; BGer 5C.301/2005 E. 3; BGer 5C.282/2005 E. 3.

⁴²⁶ BGE 137 III 153 E. 4.1.2; BGer 5C.215/2003 E. 3.

⁴²⁷ BGer 5C.215/2003 E. 3.

⁴²⁸ Schmid, Art. 973 N. 32 f.

A famous case decided by the Supreme Court in 2011 had the following facts. In 1952, a servitude right of way was established between several parcels of land by contractual agreement. The servitude was registered in the land register with the simple keyword "right of way" in relation to the parcels concerned. In the 1970s, the parcels were built upon. In the process, the previous path over which the right of way was created was relocated into a tunnel. The change was neither agreed in writing nor registered in the land register. In 2008, a third party acquired a parcel, becoming entitled to the right of way. This party now demanded its restoration in the way in which it was originally established in 1952.⁴²⁹

The Supreme Court dismissed the case in holding that, according to general experience, no-one buys a property like that here without first inspecting it and that - except in exceptional cases - no third party purchaser can claim in good faith that he was not aware of the special features of the right of way not mentioned in the land register entry which would have been recognisable to him during an inspection.⁴³⁰ Generally speaking, the Supreme Court therefore imposed a duty on buyers to inspect the property which they intend to buy. If they do not, they fail to exercise the due diligence required by the circumstances.⁴³¹ Therefore, they cannot invoke the presumption of good faith,⁴³² if they challenge building work affecting a registered servitude.⁴³³

The Court held further that if the content and scope of a right of way is determined by a structural facility, such as the tunnel in this case, the third party acquirer of the entitled property cannot invoke either the land register entry "right of way" or a right of way pursuant to the original agreement.⁴³⁴ The Court followed the reasoning of

⁴²⁹ BGE 137 III 153, BGer 5A_60/2011.

⁴³⁰ BGer 5A_60/2011 E. 4.2.3 (referring to BGer 5C.71/2006 E. 2.3.).

⁴³¹ Art. 3 II CC.

⁴³² Art. 3 II CC.

⁴³³ Hrubesch-Millauer, Graham-Siegenthaler and Roberto, *Sachenrecht* (n 234), N. 08.29.

⁴³⁴ BGE 137 III 153 (regest).

Liver,⁴³⁵ who in general supports a generous application of the concept of ‘natural publicity’.⁴³⁶

This decision and other similar ones were subject to widespread criticism.⁴³⁷ The Supreme Court’s acceptance of subsequent changes as regards a servitude as binding on a good faith acquirer, even if those changes were neither laid down in a public deed nor registered in the land register can certainly be questioned. Such factual changes usually have only an *inter partes* effect and can bind an acquirer only if he agrees.⁴³⁸

While it may be accurate to give the outer appearance of a plot some weighting as a means of interpretation of a servitude, the concept of ‘natural publicity’ should not be overused.⁴³⁹ The consideration of the physical appearance of the land required by the Supreme Court can be viewed as a troublesome relativization of the function of publicity of the land register, in the sense, that an entry in the land register is no longer completely reliable. In this light, the concept of ‘natural publicity’ can be assessed as being harmful to legal certainty and security.⁴⁴⁰ This is discussed further below in relation to the approach taken in Scotland.

⁴³⁵ P Liver, *Zürcher Kommentar*, Die Dienstbarkeiten und Grundlasten (Art. 730 bis 792), Erster Band: Die Grunddienstbarkeiten (1980), Art. 738 N. 55.

⁴³⁶ Liver, *Zürcher Kommentar*, Die Dienstbarkeiten und Grundlasten (Art. 730 bis 792) (n 435), Art. 731 N. 9 ff and Art. 734 N. 181 ff.

⁴³⁷ Schmid-Tschirren, ‘Aspekte des sachenrechtlichen Publizitätsprinzips – Insbesondere zu Anwendungen und Auswirkungen dieses Prinzips im Dienstbarkeitsrecht’ (n 408), 615 ff (with further references).

⁴³⁸ Schmid/Hürlimann-Kaup, *Sachenrecht*, § 25 N. 1281c.

⁴³⁹ D Byland and E M Küffer, ‘Natürliche Publizität contra Grundbucheintrag’, in *BN (Der bernische Notar)*, vol. 1 (2014), 245.

⁴⁴⁰ P Eberhard, ‘Die Rechtsfigur der «natürlichen Publizität»’, in *SJZ (Schweizerische Juristen-Zeitung)*, vol. 3 (2021), 137.

C. Scotland

1. An innovation of the 2012 Act⁴⁴¹

The protection of the good faith acquirer that causes a realignment of real rights in land is an innovation of the 2012 Act. While the 1979 Act gave immediate title following registration of void deeds (e.g. in the case of forgery) where there was only 'transactional error', as Carey Miller stresses, 'under the 1979 Act the critical factor is the innocent's party's maintenance of possession', while 'under the new legislation it is the factor of good faith at the time of registration'.⁴⁴² The latter statement is true, but only as regards register errors, not transactional errors. This is because in the wider context of land registration systems globally, the SLC comments that the 2012 changes constitute a shift from a system of immediate indefeasibility, that is 'a system in which a title is unchallengeable on the grounds of either Register error or transactional error'⁴⁴³ to a system of deferred indefeasibility, which stands for 'a system in which a title is unchallengeable by reason of *Register error* but not by reason of *transactional error*'.⁴⁴⁴ England and Wales, as well as those countries that adopted the Torrens title⁴⁴⁵ (e.g. Australia and Canada), follow the model of immediate indefeasibility, while most European countries that have a registration of title system use the model of deferred indefeasibility.⁴⁴⁶

The SLC in its Report on Land Registration strongly favoured the introduction of the 'good faith test' in contrast to the 'fraud or carelessness test' which applied under the 1979 Act.⁴⁴⁷ According to the SLC this latter test fell short in terms of protecting 'only

⁴⁴¹ According to information provided by RoS (as of December 2021) there has not yet been a case involving realignment under section 86 of the LR (S) A 2012.

⁴⁴² D L Carey Miller, 'Bona Fide Acquisition: New in Scottish Land Law?' in F McCarthy et al (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015), 178.

⁴⁴³ SLC Report 222, Selective glossary, xxviii.

⁴⁴⁴ SLC Report 222, Selective glossary, xxvii.; SLC Report 222, para 23.2.

⁴⁴⁵ SLC Report 222, para 21.3 ff.

⁴⁴⁶ SLC Report 222, Part 19, footnote 27.

⁴⁴⁷ SLC Report 222, para 23.8.

the innocent',⁴⁴⁸ which is usually a pre-condition for granting any legal protection. In this context, the SLC mentions *Dougar Properties Ltd v Keeper of the Registers of Scotland*,⁴⁴⁹ a case which led to an unsatisfactory result: the buyers were perfectly aware that an invalid right was registered unintentionally in the title sheet. Before the buyers took possession, the Keeper rectified the register, i.e. the right got deleted. The buyers thereupon brought an action for indemnity, which was approved by the court, in taking into consideration that 'mere knowledge' cannot be considered as 'carelessness'.⁴⁵⁰

The SLC points out that this result could have been prevented by applying the 'good faith' test, as German law shows in a specific case.⁴⁵¹ Actual knowledge of the incorrectness of the land register is a barrier to public faith protection⁴⁵² and German law stipulates that the fictitious correctness of the land register does not apply if the acquirer is aware of an inaccuracy.⁴⁵³ The same concept applies in Swiss law,⁴⁵⁴ with the effect that as a result of the 2012 Act, the land registration systems of Switzerland and Scotland have moved closer together.

2. The guarantee 'by mud'

Generally speaking, the guarantee of title under the 2012 Act has both a *positive side* (i.e. the validity of the title is warranted) and a *negative side* (i.e. the title is devoid of encumbrances that by accident are omitted from the register).⁴⁵⁵

⁴⁴⁸ SLC Report 222, para 23.8.

⁴⁴⁹ 1999 SC 513.

⁴⁵⁰ SLC Report 222, para 23.11.

⁴⁵¹ (1993) MittRhNotK 159, a decision of the Oberlandesgericht at Hamm; SLC Report 222, para. 23.11.

⁴⁵² Wilhelm, *Sachenrecht* (n 37), N 722 ff.

⁴⁵³ Cf. § 892 Para. 1 BGB: "In favour of the person who acquires a right in a plot of land or a right in such a right by legal transaction, the contents of the Land Register are presumed to be correct, **unless** an objection to the accuracy is registered or **the inaccuracy is known to the acquirer**" (translation provided by the German Federal Office of Justice: https://www.gesetze-im-internet.de/englisch_bgb/) (emphasis added).

⁴⁵⁴ Art. 974 I CC; B Schnyder, 'Der gute Glaube im Immobiliarsachenrecht', in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 66 (1985), 76 f.

⁴⁵⁵ Reid and Gretton, *Land Registration*, para 12.1.

In particular, the guarantee of title can take two forms: either 'by money' (compensation is paid by the Keeper, the so-called Keeper's warranty) or 'by mud', i.e. the acquirer receives exactly the plot of land which they intended to buy.⁴⁵⁶ Realignment may be called the guarantee 'by mud' (by property).⁴⁵⁷

Only one guarantee may apply at the same time to one party, i.e. an acquirer may not get the property ('mud') and the compensation ('money'). But usually both parties involved enjoy one or the other form of protection, e.g. if one gets the property, the other will get compensation for the loss of ownership.⁴⁵⁸

Professors Reid and Gretton term the guarantee 'by money' as the 'default guarantee', that applies everywhere except where the real right has been realigned due to the guarantee 'by mud'. According to them the following two variables apply, that determine which guarantee is used: *the type of error* and the *type of right*.⁴⁵⁹

As it had been mentioned earlier,⁴⁶⁰ it is important to distinguish between first '*transactional errors*', i.e. errors, that happen during a transaction (e.g. a forged deed) and, secondly, '*register errors*', these are errors, that are already present in the register before the relevant transaction (e.g. the register shows a wrong owner).⁴⁶¹ Transactional errors are offset by compensation (guarantee 'by money'). Register errors *can* be cured by realignment (guarantee 'by mud'), *but only*, if the following rights are affected: acquisition of ownership, long lease, and servitude.⁴⁶² If a register error instead affects a standard security (mortgage) or any other subordinate real right, compensation will be paid.⁴⁶³

⁴⁵⁶ Reid and Gretton, *Land Registration*, para 12.2.

⁴⁵⁷ Reid and Gretton, *Land Registration*, para 12.2.

⁴⁵⁸ Reid and Gretton, *Land Registration*, para 12.2.

⁴⁵⁹ Reid and Gretton, *Land Registration*, para 12.3.

⁴⁶⁰ See chapter IV C 1.

⁴⁶¹ Reid and Gretton, *Land Registration*, para 12.4.

⁴⁶² Reid and Gretton, *Land Registration*, para 12.5

⁴⁶³ Reid and Gretton, *Land Registration*, para 12.5.

This system considers that normally the acquirer of the first set of rights listed above prefers the right over the money. But where a standard security is affected, the refund of the lent sum is sufficient⁴⁶⁴, since money is all that a secured creditor wants.

3. Conditions that must be met

The default case for realignment is 'acquisition from a disponent without valid title', which is defined in section 86 of the 2012 Act. For the application of that section, Reid and Gretton distinguish between two 'major conditions', which are good faith and possession, and several 'minor conditions'.⁴⁶⁵ The same conditions apply *mutatis mutandis* to for the acquisition of long leases, for the grant of servitudes and where representatives have been acting for a disponent of land or an assignor of a long lease.⁴⁶⁶

However, for the extinction of encumbrances, which can be termed as an 'error by omission' (in contrast to an 'error by commission' in the case of the acquisition without valid title) only good faith and the non-existence of a caveat in the title sheet are necessary.⁴⁶⁷ This is because the possessory requirements merely serve the purpose to notify the 'true owner' in the case of competing titles; this situation is obviously not to be found in the case of an omitted encumbrance.⁴⁶⁸

⁴⁶⁴ Reid and Gretton, *Land Registration*, para 12.5.

⁴⁶⁵ Reid and Gretton, *Land Registration*, para 12.12.

⁴⁶⁶ LR (S) A 2012 ss 87, 88, 89 and 90; Reid and Gretton, *Land Registration*, para 12.18.

⁴⁶⁷ LR (S)A 2012 ss 91 and 92.

⁴⁶⁸ Reid and Gretton, *Land Registration*, para 12.18.

a) *Good faith*

Like in Swiss law, there is no definition given by the 2012 Act for the term 'good faith'.⁴⁶⁹ Professors Reid and Gretton state that it is 'subjective good faith'⁴⁷⁰, which is 'based on actual knowledge. The question here is what, at the material time, did the acquirer really know?'⁴⁷¹ A disponee that merely doubts the accuracy of the register is not obliged to undertake further investigations because, as Reid and Gretton convincingly argue, such a 'duty of inquiry would be to infringe the 'curtain principle' of registration of title, i.e. the principle that the Register is the sole source of information about the title.'⁴⁷² As under Swiss law, it is not necessary that the disponee has in fact consulted the register and relied upon it.⁴⁷³ The knowledge of an agent, thus also his good or bad faith, is ascribed to the principal.⁴⁷⁴

b) *Possession*

The requirement of possession for acquiring land – unknown in Switzerland - has strong roots in Scottish law. As Simpson has discovered in analyzing the earliest traceable transfer of land in Scotland in 1317, 'at this time sasine was essentially a state of fact, that is to say possession given on the authority of the feudal lord of the lands'⁴⁷⁵ The term 'sasine' itself means nothing more than taking possession of the land (c.f. the French verb *saisir*). In later years, recording of a deed in the Register of Sasines was not sufficient to transfer ownership. Until 1845 a 'formal ceremony' was necessary to acquire land by 'handling over earth and stone'.⁴⁷⁶ While this special

⁴⁶⁹ Reid and Gretton, *Land Registration*, para 12.15.

⁴⁷⁰ Reid and Gretton, *Land Registration*, para 12.15.

⁴⁷¹ SLC DP No 125, para 7.8.

⁴⁷² Reid and Gretton, *Land Registration*, para 12.15.

⁴⁷³ Reid and Gretton, *Land Registration*, para 12.15.

⁴⁷⁴ Reid and Gretton, *Land Registration*, para 12.15

⁴⁷⁵ A R C Simpson, 'Earth and Stone: History, Law and Land through the Lens of Sasine', in M Combe et al (eds), *Land Reform in Scotland: History, Law and Policy*. (2020), 115.

⁴⁷⁶ Reid, *Property*, para. 89.

form of publicity had been abolished, possession remained an important means of publicity in Scottish land law.

The 1979 Act was subject to justified criticism *inter alia* because of its 'crude possession requirement' under which proprietors in possession were protected from rectification.⁴⁷⁷ Conflicts of title were solved on the basis of possession: whoever had possession, obtained the property, even if the possession was very short-lived, without taking into account historic possession. This legal regime had been adopted from the relevant legislation in England and Wales and led to serious difficulties. It gave rise to "rough justice": possession was seized – sometimes through questionable and unfair means – solely for the purpose to get awarded 'the mud' and the courts, in much debated cases like *Kaur v Singh*⁴⁷⁸ and *Safeway Stores plc v Tesco Stores Ltd*⁴⁷⁹, ruled in favour of 'squatters' and 'trespassers'.⁴⁸⁰

According to Reid it is not 'wholly misplaced' 'that possession should play some part in the choice between acquirer and owner'⁴⁸¹. It can be reasonably argued, that a 'person in possession' has 'the stronger tie to the land', which provides a sound legal basis for a claim to the property.⁴⁸² Taking this argument into account, it seems understandable that in its recommendations the SLC retained an element of possession for the allocation of the 'mud'. However, the new role for possession under the 2012 Act is very different from its role under the 1979 Act. As Reid puts it, a 'rule of buyer in possession has been replaced by one of seller in possession', because under the new Act, 'post-transaction possession' is no longer decisive, but rather 'pre-transaction possession'.⁴⁸³

⁴⁷⁷ Reid and Gretton, Land Registration, para 2.12.

⁴⁷⁸ 1999 SC 180 (IH).

⁴⁷⁹ 2004 SC 29 (IH)

⁴⁸⁰ Reid, 'De-Throning King Midas', 162-164.

⁴⁸¹ Reid, 'De-Throning King Midas', 164.

⁴⁸² Reid, 'De-Throning King Midas', 163.

⁴⁸³ Reid, 'De-Throning King Midas', 167.

The 2012 Act imposes two separate possessory requirements for realignment to be possible. These have the function of alerting ‘the true owner to the threat to his title’.⁴⁸⁴ This may be called ‘notification by possession’.⁴⁸⁵

Firstly, realignment applies only if a person (“A”), who is not the proprietor of a plot, but erroneously registered as proprietor, is in possession of the land when disposing the land.⁴⁸⁶

Secondly, ‘the land [must have] been in the possession, openly, peaceably and without judicial interruption’ for a continuous period of at least one year of either A alone, or by A and then B (the disponee) together.⁴⁸⁷

The legislation stipulates that the term ‘possession’ includes civil possession.⁴⁸⁸ That means possession can be exercised also indirectly, e.g. a house may be let to a tenant.⁴⁸⁹ Possession of a plot of land by a representative of the mistakenly registered proprietor (‘A’) will be treated as if it were possession by A.⁴⁹⁰

Reid has observed that the necessary one-year period of possession for realignment in a title registration setting with deferred indefeasibility is a unique Scottish contribution which cannot be found in any other legislation.⁴⁹¹

c) *Minor conditions*

In addition to the two major conditions (possession and good faith), there are four minor conditions for realignment under section 86 of the 2012 Act. Reid and Gretton

⁴⁸⁴ Reid and Gretton, *Land Registration*, para 12.13.

⁴⁸⁵ Reid and Gretton, *Land Registration*, para 2.12.

⁴⁸⁶ LR (S) A 2012 s 86(1).

⁴⁸⁷ LR (S)A 2012 s 86(3)(a).

⁴⁸⁸ LR (S)A 2012 s 113(1).

⁴⁸⁹ Reid and Gretton, *Land Registration*, para 12.13.

⁴⁹⁰ LR (S)A 2012 s 87(2).

⁴⁹¹ Reid, ‘De-Throning King Midas’, 167.

specify these as being largely 'over-inclusive'.⁴⁹² Indeed, it seems that the legislator wanted to 'include too much' into the relevant sections. A brief outline on this issue will be sufficient for our purposes.

First, the title must have been warranted by the Keeper.⁴⁹³ This is usually the case, except when extraordinary circumstances apply, which will be looked at in more detail in chapter V of the thesis.⁴⁹⁴ However, in the context of realignment one provision deserves special consideration: if the Keeper is 'not satisfied as to the validity of the acquisition' or is in doubt 'that the owner or applicant is the proprietor' she may either 'grant less extensive warranty' or 'exclude warranty'.⁴⁹⁵ If this is the case, realignment is rendered impossible.⁴⁹⁶

Second, the Keeper must not have observed during the prescribed possession period that the disponent is not the 'real' owner.⁴⁹⁷ Reid and Gretton state that 'it is hard to see why this condition was thought necessary'.⁴⁹⁸ Indeed, if the Keeper would discover that the register is wrong with regard to the name of the proprietor, the application of the disposition would be rejected from the start. If, alternatively, she becomes aware of the error shortly after the registration but before the one-year period has elapsed, she would rectify the register. Both cases leave no room for realignment.⁴⁹⁹

Third, the title sheet must not contain 'a caveat relevant to the acquisition'.⁵⁰⁰ A caveat may be sought from the court by a party to civil proceedings.⁵⁰¹ The function

⁴⁹² Reid and Gretton, *Land Registration*, para 12.16.

⁴⁹³ LR (S)A 2012 s 86(3)(f).

⁴⁹⁴ Reid and Gretton, *Land Registration*, para 12.16 and (for the "Keeper's Warranty" in particular see) chapter 13.

⁴⁹⁵ LR (S) A 2012 s 75(1)(b).

⁴⁹⁶ Reid and Gretton, *Land Registration*, para 12.16.

⁴⁹⁷ LR (S)A 2012 s 86(3)(b).

⁴⁹⁸ Reid and Gretton, *Land Registration*, para 12.16.

⁴⁹⁹ Reid and Gretton, *Land Registration*, para 12.16.

⁵⁰⁰ LR (S) A 2012 s 86(3)(e)(i).

⁵⁰¹ LR (S) A 2012 s 67.

of the caveat is to warn about pending proceedings that possibly have an impact on the title.⁵⁰²

Fourth and finally, the Keeper must not have entered a statement in the title sheet 'that the name or designation is not known or as the case may be is not known with reasonable certainty'.⁵⁰³ Reid and Gretton state, that this case is rare and occurs only on first registrations (that is, for property moving from the Register of Sasines into the Land Register) by 'Keeper-induced registration' or 'automatic plot registration'.⁵⁰⁴

⁵⁰² Reid and Gretton, *Land Registration*, para 18.1.

⁵⁰³ LR (S)A 2012 s 86(3)(e)(ii) in conjunction with LR (S)A 2012 s 30(5).

⁵⁰⁴ Reid and Gretton, *Land Registration*, para 12.16; for further information see J King, 'Completion of the Land Register: The Scottish Approach' in F McCarthy et al (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015), 317 ff.

D. Comparative Analysis

1. The “middle way” of the Scottish legislator (the possessory requirements)

In Swiss law, possession by the disponent of the land being transferred is not relevant. This is probably due to the fact that Swiss legal scholars agree on the point that possession is certainly a key issue for moveable property, but cannot serve as a suitable means of publicity in land law.⁵⁰⁵

With the necessary one-year-period of the disponent’s possession for the protection of a good faith acquirer, it can be said that the Scottish legislator has chosen a ‘middle way’ which helps protect owners from fraudulent transfers by third parties. Switzerland follows the German model very closely which is more favourable to acquirers, by not having these possessory requirements. As stated above,⁵⁰⁶ it is for the legislator to balance the conflicting interests of the owners and acquirers.

If economic theory is applied to the analysis of law, the result seems to be to focus (or perhaps over-focus) on the importance of facility of transfer of property, which intends certainly a pro-acquirer land registration regime. But, if legitimate owners have to fear the loss of their land in order for there to be a reliable register, legal certainty and reliability and predictability of the law (*Rechtsfrieden*) are harmed. Reid notes that confiscation of property needs a strong justification, including in terms of the ECHR.⁵⁰⁷ Therefore, it seems to be even more appropriate to ask the question, if ‘the convenience of acquirers’⁵⁰⁸ of itself can serve as a justifiable legal policy.

In the special Scottish context there is a practical ‘need’ for the possessory requirements for realignment, because errors with regard to boundaries often occur on first registrations: a part of a plot that belongs to ‘A’ is mistakenly allocated to his

⁵⁰⁵ See chapter II A.

⁵⁰⁶ See chapter IV B 1.

⁵⁰⁷ Reid, ‘De-Throning King Midas’, 161.

⁵⁰⁸ Reid, ‘De-Throning King Midas’, 161.

neighbour 'B' when a property is transferred from the Register of Sasines to the Land Register. Without the possessory requirements, the 'true owner' A would lose a part of his land forever, provided an acquirer of the land allocated to B is in good faith.⁵⁰⁹

Taking all this into consideration, it seems appropriate for the Scottish legislator to balance the opposing interests of legitimate owners and acquirers in this way. In addition, a possible 'boomerang' effect has to be borne in mind. As Reid puts it, an 'easy come' in the protection of acquirers necessarily implies an 'easy go': the same person that has benefited from the protection of his or her good faith, may lose the property again to a third person for the very same reasons. Paradoxically, it thus does not even seem to help acquirers in the end to offer them an unconditional and absolute protection.⁵¹⁰

The question of how long the necessary possession period of a disponent should be cannot possibly be answered conclusively since its objective of balancing the interests of owners and acquirers has no objectively right answer and therefore, the decision of the concrete length of such a period remains an arbitrary one. The SLC itself initially left it open to debate how long the period should be and proposed one year, two years or 'some other period' (subject to specification by consultees) in a discussion paper.⁵¹¹ In anticipating criticism, the SLC admitted that its proposal did not represent an ideal solution, since *inter alia* the possessory requirements will not always be able fulfil their task to notify the 'true owner' at all or in time.⁵¹² Carey Miller addresses this problem and takes the view that 'the position of good faith' shall not 'give priority over an act of fraud after only one year'.⁵¹³ In his opinion, this new rule forms a 'radical concession' with regard to the ordinary property law of Scotland and cannot claim to accentuate Scotland's 'common law' from anew which had been one important objective of the law reform.⁵¹⁴ It thus appears that an arbitrary decision

⁵⁰⁹ Reid, 'De-Throning King Midas', 167. The case law, which Reid mentions in footnote 67 all still relates to the application of the 1979 Act, safeguarding a 'proprietor in possession'.

⁵¹⁰ Reid, 'De-Throning King Midas', 162.

⁵¹¹ SLC DP No 125, para 4.52.

⁵¹² SLC DP No 125, para 4.50.

⁵¹³ Carey Miller, 'Bona Fide Acquisition: New in Scottish Land Law?' (n 442), 183.

⁵¹⁴ Carey Miller, 'Bona Fide Acquisition: New in Scottish Land Law?' (n 442), 183.

like the length of a period gives rise to questions with regard to its suitability. The SLC could have decided to waive any possession requirements and follow the Swiss (and German) model. It instead chose to give the 'true owner' more protection against the loss of his property. In recommending a rather short mandatory possession period for the disponent, the SLC certainly tried to avoid an overstretching of the curtain principle, which is a prerequisite of a register of title. It can therefore be concluded, that the unique Scottish contribution to land registration law (a compulsory one year possession period of the disponent in order to grant the good faith acquirer a guarantee by 'mud') seems to be well balanced.

While the possession requirements seem to be suitable for the Scotland, they could hardly fulfil their potential benefit in the Swiss land registration setting. It was seen in the introductory part of this thesis that Switzerland opted for the German "*Grundbuch* model" when passing the Civil Code. The 'reliance on the register' rule represents a strongly developed safeguard for the possible acquirer, which leaves no room for the factual circumstance of possession. This is the theoretical reason. But, also from a practical point of view, an additional protection for the 'true owner' against realignment is not discussed by Swiss commentators. Fraud cases, especially cases of identity theft are very rare in Switzerland. One reason for this may well be that a public notary (who acts always as a state official) is compulsorily involved, when land is being transferred. The notary is *inter alia* obliged to check the identity of both parties, as well as their capacity to act. Of course, under this regime, identity fraud is possible, but more difficult. As far as can be seen, fraud is also rare in Scotland, even although the checks are done usually by solicitors and are not double-checked by the Keeper (under the 'tell me, don't show me' approach).⁵¹⁵

With regard to the wrongly allocated parts of land in first registrations, this is certainly a unique Scottish problem which does not appear in Switzerland.

⁵¹⁵ See chapter III B 1 b (3). According to information provided by RoS (as of December 2021) '99% of applications are made on behalf of parties by Scottish solicitors. 'Applications submitted by non-solicitors will be subject to closer scrutiny including an identity check'.

This comparison demonstrates in the present writer's view that land registration has to follow local need and custom.⁵¹⁶ Different problems may arise in different jurisdictions which have to be encountered by a sound and reflective national legal policy. In this regard, Scotland seems to have an advantage over Switzerland, because it has a national Law Commission. In Switzerland, law reform most usually starts within government ministries, which may have qualified and skilled staff, but may not be as qualified to carry out reform as renowned legal scholars from universities or outstanding legal practitioners.⁵¹⁷ Even if the Scottish Government or Scottish Parliament may amend a well reflected draft bill later to the detriment of its legal quality, having a Law Commission has also the advantage that the divide between government departments on the one hand, and legal scholars and practitioners on the other is reduced.

2. The curtain principle put into perspective?

In both Swiss and Scottish land registration law, the curtain principle (i.e. it is unnecessary to go behind the title sheet as it contains all the information about the land) is not applied with rigor. In Scotland, the discussed possession requirements imposed on the disponent, constitute a *sine qua non* for the buyer in order to be protected in his acquisition in good faith. In Switzerland due to the Supreme Court's doctrine of 'natural publicity' it is expected from the buyer to inspect the property and check for servitudes and real burdens.⁵¹⁸

As regards Scottish law it could be said that the two possession requirements pose an additional hurdle for a successful transfer of land and therefore run counter to the economic interest of facilitation of transfer. The curtain principle also seems to be strained by such a regulation, as the 'proprietary' section in the title sheet cannot be taken for granted.⁵¹⁹ Nevertheless, the imposition of the two possession requirements do not seem to put an excessive administrative burden on the part of

⁵¹⁶ This view had been proposed already in the introduction of the thesis, see chapter I A 1.

⁵¹⁷ Sometimes, if thought necessary, renowned external experts are invited, though.

⁵¹⁸ Hrubesch-Millauer, Graham-Siegenthaler and Roberto, *Sachenrecht* (n 234), N. 08.29.

⁵¹⁹ Reid, 'De-Throning King Midas', 167.

the buyer or his solicitors. As Reid convincingly states, the check is usually a brief one, since it can be argued, that if the seller 'is in current possession and has owned for a year or more, it can be assumed that he has possessed for a year'.⁵²⁰

However, the Swiss recognition of 'natural publicity' (the outer, physical appearance of the property) as constructive knowledge of the buyer does not seem as benign as regards the curtain principle. Originally, 'natural publicity' was only recognized for the case of visible lines (cables, pipes). The law itself stipulates this exception to the entry principle: if the pipe or cable is visible, the servitude is created when the pipe or cable is laid.⁵²¹ This follows the approach of the Supreme Court that the outer appearance on the ground (e.g. of a right of way) may be taken into account in order to determine the dimension of a servitude.⁵²²

This view is not entirely straightforward, since the law itself is very clear on the interpretation of servitudes in providing a schematic order of priority (*Stufenordnung*). If it is clear, the land register entry alone defines the scope of a servitude. If not, the deed that led to the entry may be consulted. Only if both the entry and the deed are not conclusive, the scope of the servitude may be inferred from the fact how it has been exercised unchallenged and in good faith.⁵²³

However, Swiss legal scholars disagree with the Supreme Court when it stated that subsequent physical modifications of servitudes representing a form of 'natural publicity' can be invoked against a good faith acquirer.⁵²⁴ Indeed, this newer

⁵²⁰ Reid, 'De-Throning King Midas', 167.

⁵²¹ Art. 676 III CC.

⁵²² BGE 137 III 145 E. 3 and 4 (and regest); Schmid, Art. 973 N. 32a.

⁵²³ Art. 738 CC; A Koller, 'Entscheidungen', in *AJP (Allgemeine Juristische Praxis)*, vol. 4 (2008), 474-475.

⁵²⁴ BGE 137 III 153; Schmid, Art. 973 N. 32a; Schmid and Hürlimann-Kaup, *Sachenrecht*, N. 1281c. In Scots Law, the approach taken with regard to subsequent changes of servitudes seems to be well-balanced; I am grateful to Professor Andrew J. M. Steven for the following example. **Situation 1: The servitude is for a 2 m width. There is an *inter partes* agreement to widen to 4 m.** An acquirer in good faith or otherwise would only get 2 m, because a new servitude needs either a registered deed or acquisitive prescription for 20 years. But here acquisitive prescription cannot work because the possession is consensual and not as of right. See A Peterson, *Prescriptive Servitudes* (2020), chs 7 and 8. **Situation 2: The servitude is for a 4 m width.**

approach is willing to recognize the normative power of facts (*die normative Kraft des Faktischen*) with the negative effect that the actual entry with its underlying deed, that should deliver the main finding, is disregarded. This surely represents a breach of the 'curtain principle', with negative consequences for the trust in the land register as a reliable means of publicity.

But, it must be stressed that the concept of "natural publicity" always relates to servitudes, which are actually registered in the land register (except for servitudes with visible lines, which need no entry).⁵²⁵ It is therefore primarily an instrument of interpreting the scope of a servitude. In general, the concept cannot bring servitudes into existence which are not registered in the land register. This is because the entry principle for servitudes is quite strict in Switzerland. Positive prescription (*Ersitzung, prescription acquisitive*) of a servitude which has not been registered in the land register is only possible under restrictive conditions: it can be acquired only after 30 years of possession if either the servient tenement has no registered proprietor or the servient tenement has no real folio, i.e. does not appear in the land register. As might be expected, this is rare.⁵²⁶

In Scotland on the other hand, a servitude can be acquired by positive prescription if merely the following two requirements are met: (1) 'the servitude has been possessed for a continuous period of twenty years openly, peaceably and without any judicial interruption', and (2) 'the possession was founded on, and followed the execution of, a deed which is sufficient in respect of its terms (whether expressly or by implication) to constitute the servitude'.⁵²⁷ It seems that in comparison with the strict requirements in Swiss law, the acquisition of servitudes by positive prescription is much more likely in Scotland.

There is an *inter partes* agreement to narrow it to 2 m. Despite the agreement between *inter partes* if the non-use of the wider route continues for 20 years, negative prescription operates.

⁵²⁵ Art. 676 III CC.

⁵²⁶ Art. 731 III CC by analogical application of Art. 662 and 663 CC; see Schmid/Hürlimann-Kaup, *Sachenrecht*, § 25 N. 1250 ff.

⁵²⁷ Prescription and Limitation (Scotland) Act 1973 s 3(2). For a full discussion of this area, see A Peterson, *Prescriptive Servitudes* (n 524) (2020).

As regards the procedure to have the acquired servitude registered, Reid and Gretton note that the 'Keeper does not wish to see any evidence' and that 'the single assertion of its existence is enough'.⁵²⁸ This is in line with the 'tell me don't show me' approach of the Keeper, that had been discussed earlier.⁵²⁹ However, Peterson remarks that applicants should bear in mind the 'serious (and potentially criminal) consequences of any false statement to the Keeper'.⁵³⁰ But, in comparison with Switzerland, the risk that an acquirer in good faith must accept the existence of unregistered servitudes which originate from positive prescription, is higher.

With regard to servitudes that have ceased to exist off-register, it can be stated that in both countries an entry in relation to an obsolete servitude in the register would not lead to a restoration of that servitude in the case where an acquirer in good faith relied on that very entry.⁵³¹ It means that - in this case - inspecting the land makes no difference as the servitude will not be restored even where it can be said that the acquirer was in good faith. But an inspection of the land will be helpful to see if what is on the register may have been effectively overridden by changes on the ground (e.g. where the exercise of a servitude became impossible). Accordingly, with regard to obsolete servitudes, the real folio/title sheet cannot be taken for granted in both jurisdictions.

⁵²⁸ Reid and Gretton, *Land Registration*, para 4.28.

⁵²⁹ See chapter III B 1 b (3).

⁵³⁰ Peterson, *Prescriptive Servitudes* (n 524), para 5-16.

⁵³¹ SLC Report 222, paras 23.32 and 23.33; BGE 127 III 440 E. 2c: 'As far as the plaintiff's good faith in the land register entry (Art. 973 para. 1 CC) is concerned, it should be noted that this protection is not absolute', see C Schmid-Tschirren, Art. 734 N. 18 f, in A Büchler and D Jakob (eds), *Kurzkommentar ZGB*, 2nd edition (2018).

V. Indemnity

A. Switzerland

1. Rationale

The provision on the *strict* state liability for loss arising from the maintenance of the land register that entered into force in 1912 was relatively novel at the time. Similar provisions in Switzerland or elsewhere normally imposed only *fault-based* liability on the state or relevant public bodies.⁵³² The legislator instead chose from the start to impose strict liability on the state for loss that occurs in relation to land registration.

The rationale for state liability in land registration law has several aspects: first, a frequently cited argument is that the land register can be viewed as a form of 'state coercion'.⁵³³ As a mandatory instrument created by law and run by state officials, everyone must use it if they want to dispose of or acquire land in a legally binding way. If Parliament imposes the duty to use the land register, it is seen as only fair - or even as "a requirement of equity" - that the state bears the responsibility for the register and must compensate losses caused by errors and defects that happen within this system.⁵³⁴

The imposition of strict liability on the state is also seen as correlative to the serious consequences of realignment:⁵³⁵ if the innocent true owner loses his property because of the promotion of economic interests such as the integrity of the legal transactions, that person cannot be left expropriated without compensation. Certainly, the constitutional guarantee of a person's property rights demands full

⁵³² Schmid, Art. 955, N.2.

⁵³³ Huber, *Erläuterungen*, 427; Deschenaux, *Das Grundbuch, Erste Abteilung*, 210.

⁵³⁴ H Leemann, 'Die Tragweite der Haftpflicht des Staates für Schaden aus der Grundbuchführung', in *SJZ (Schweizerische Juristen-Zeitung)*, vol. 3 (1920), 41; also Arnet, Art. 955 N. 1.

⁵³⁵ J-B Grisoni, *Les conceptions française et suisse de la publicité foncière et leurs effets* (1990), 146.

compensation⁵³⁶ of loss because of realignment, as in the similar case where the state expropriates land for the construction of a motorway.⁵³⁷ Furthermore, state liability for land registration serves not only as a correlative for realignment but is also considered as being the counterpart of the auditing duty of the administrator of the land register.⁵³⁸

A failure in respect of the auditing duty of the administrator may indeed often give rise to compensation, since the registration of a wrong entry, the erroneous changing of an entry or an incorrect deletion of an entry of course always result from the administrator. The administrator may rely for some checks on the notary public (as regards the identity of the parties, their capacity to act and their mutual consent to conclude the contract in question) who supervised the transaction which led to the entry.⁵³⁹ Nevertheless, ultimately a wrong registration is always made by the administrator, which may give rise to liability, even if the official has exercised the duty of care required.

Whether the state should compensate losses that occur, even if the administrator has acted carefully and performed all of his duties, is a question for the legislator to answer. Fisch, the author of the only monograph on state liability in Swiss land registration law, concludes that the most important reason is to gain the trust of citizens to make use of the system. History has shown that if people are not willing to use a state tool such as a land register, the relevant project will be unsuccessful.⁵⁴⁰ Nowadays it is hard to imagine people being willing to form a collective resistance to a legal institution such as the land register and thus accept all the legal disadvantages that come with that refusal. Nevertheless, Fisch has a point insofar as

⁵³⁶ Art. 26 I BV: 'The right to own property is guaranteed'; Art. 26 II BV: 'Expropriations and restrictions on ownership that amount to an expropriation shall be fully compensated.'

⁵³⁷ See also ECHR art 1 protocol 1 (signed by the Swiss government, but not ratified).

⁵³⁸ F Jenny, 'Die Verantwortlichkeit im Grundbuchwesen', in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 2 (1965), 67 f, referring to BGE 51 II 385.

⁵³⁹ Of course, the notary public can be sued for compensation as well if he has not fulfilled his duties. Art. 41 OR applies to the public notary's liability as it does for the state liability for land registration (cf. BGE 90 II 274).

⁵⁴⁰ Fisch, *Die Verantwortung der Kantone für Schaden aus der Führung des Grundbuches* (1939), 8-12.

establishing a register only on a 'coercive' basis is not ideal. Certainly, a voluntary register is not advisable, since it would not achieve the high level of publicity that comes with a compulsory register. But even with a compulsory register it is helpful to gain the trust of the people in the institution, in order to have a high level of acceptance of the land register as an effective means of publicity and a valuable institution in relation to immoveable property. For that purpose, besides a high qualified staff, who ensure a low error rate, generous rules on state liability are certainly helpful.

2. Conditions

Even although state liability belongs to the realm of public law, the conditions of the private liability law of the Code of Obligations apply, because the provision on liability in land registration law is in the Civil Code.⁵⁴¹

The rules of non-contractual liability in the Code of Obligations impose four classic conditions for compensation: loss (*Schaden, dommage*), illegality (*Widerrechtlichkeit, illicéité*), causality between the loss and illegal act (*Kausalzusammenhang, causalité*) and finally fault (*Verschulden, faute*).⁵⁴² In the case of the strict liability for land registration, however, the last condition obviously does not apply. Only the first three must be satisfied if compensation by the state for the running of the land register is due.

There are approximately twenty cases from the Supreme Court dealing with state liability in land registration law. This is not many, taking into account that the provision has been in force since 1912. It can either be assumed that such compensation is generally unusual or that many cases from cantonal courts were not appealed.

⁵⁴¹ Art. 7 CC; Mooser, Art. 955, N. 2; Deschenaux, *Das Grundbuch, Erste Abteilung*, 214.

⁵⁴² Art. 41 ff OR. These rules are applicable to the state liability for land registration, see Arnet, Art. 955 N. 3.

Deschenaux lists four elements in the special context of state liability in land registration law: (1) an act in connection with the maintenance of the land register, (2) the act being illegal, (3) loss and (4) causality between the loss and the illegal act.⁵⁴³ They differ in order slightly from the classic conditions set out above. The first is a specific one, imposed by Art. 955 CC.

The four elements will now be considered.

a) *An act in connection with the maintenance of the land register*

The wording of the provision makes clear that compensation is only payable if the act which causes loss is directly linked to the management of the land register.⁵⁴⁴ Deschenaux defines the maintenance of the land register as the set of activities which the land register bodies must carry out in order to ensure the publicity of rights in land as provided for under federal and cantonal law.⁵⁴⁵

The Supreme Court has stressed that the initial idea of the provision was to set up state responsibility for any malfeasance that an employee of the land registration office commits in office. It was never intended to restrict the liability to registrations in the land register.⁵⁴⁶ The term should therefore be interpreted widely.⁵⁴⁷ Examples of defective register maintenance include *inter alia*: incorrect entries in the register and the journal, insufficient performance of the auditing duty, incorrect issuing and cancellation of security certificates, incorrect land register extracts and wrongful cancellation of a right.⁵⁴⁸ According to case law and academic commentary the initial

⁵⁴³ Deschenaux, *Das Grundbuch, Erste Abteilung*, 216 ff.

⁵⁴⁴ Art. 955 I CC: 'Die Kantone sind für allen Schaden verantwortlich, der aus der Führung des Grundbuches entsteht', 'Les cantons sont responsables de tout dommage résultant de la tenue du registre foncier' (The cantons are responsible for any damage resulting from the maintenance of the land register).

⁵⁴⁵ Deschenaux, *Das Grundbuch, Erste Abteilung*, 216.

⁵⁴⁶ BGE 106 II 341 E. 1b.

⁵⁴⁷ P Simonius and T Sutter, *Schweizerisches Immobiliarsachenrecht, Vol. 1, Grundlagen, Grundbuch und Grundeigentum* (1995), Vol. 1, § 7, N. 68.

⁵⁴⁸ Schmid and Hürlimann-Kaup, *Sachenrecht*, § 10 N. 555 with further references.

cadastral survey does not give rise to liability.⁵⁴⁹ Since this usually pre-dates the creation of the land register within the meaning of Civil Code, it can be argued that it was merely a preparatory measure for the introduction of the land register and does therefore not come within the meaning of “maintenance”.

An argument made by Schmid to exclude liability here is that the laborious process in relation to the initial surveying gives proprietors a number of opportunities to participate in the procedure, to check the final result and appeal, if they wish.⁵⁵⁰ This is certainly true and if proprietors breach their obligation to co-operate in this procedure or miss the deadline to appeal, they may therefore be regarded as being negligent or at fault in a subsequent liability case. Their position would hence not necessarily be better if they had the option to make a claim for state liability.

Subsequent surveying of the land (updating, *Nachführung, la mise à jour ultérieure des plans*), however, for example in the case of a sub-division of a plot, can be considered as being within the meaning of land registration maintenance.⁵⁵¹ The Supreme Court has left the question open so far.⁵⁵² It would probably hold that there is liability if it had to decide on the issue, because as a matter of law the cadastral plan forms an integral part of the land register⁵⁵³ and the public is entitled to have faith in it.⁵⁵⁴ Therefore, it can reasonably be argued that cadastral plans are sufficiently linked to the maintenance of the land register.⁵⁵⁵

Another argument which affirms the state liability for land registration for updated plans is the fact, that – for example - in the case of the sub-division of a plot, the proprietor must make use of an official registered surveyor.⁵⁵⁶ It has been said above

⁵⁴⁹ BGE 57 II 567 E. 1; Deschenaux, *Das Grundbuch, Erste Abteilung*, 218.

⁵⁵⁰ Schmid, Art. 955 N. 11. See also Art. 28 of the Federal Ordinance on Official Cadastral Surveying (https://www.fedlex.admin.ch/eli/cc/1992/2446_2446_2446/en).

⁵⁵¹ Schmid, Art. 955 N. 11.

⁵⁵² BGE 119 II 216 E. 3.

⁵⁵³ Art. 942 II CC.

⁵⁵⁴ Mooser, Art. 955, N. 7; See chapter IV B 2.

⁵⁵⁵ So far, the administrative court of the Canton of Thurgau has affirmed the liability (published in ZBGR, 2000, 172 ff.).

⁵⁵⁶ Art. 25 of the Federal Ordinance on Official Cadastral Surveying.

that the strict state liability for land registration can be viewed as a just consequence of the requirement to make use of the register.⁵⁵⁷ Therefore, state liability should also be applicable in the case of the required involvement of a registered certified surveyor, who performs a task (or auxiliary service) which is necessary for the maintenance of the land register.⁵⁵⁸

b) *Illegality*

The administrator acts illegally if his conduct is contrary to a regulation relating to the keeping of the land register.⁵⁵⁹ The rules of conduct to which the administrator must adhere may also result from instructions from the supervisory authority⁵⁶⁰ or from court decisions.⁵⁶¹ An increased risk that the administrator (objectively) breaches his official duties exists especially when exercising his duty to examine the legal basis (*causa*) of an application.⁵⁶² For example, a good forgery of a power of attorney will probably remain unnoticed, with the consequence that a void deed leads to a wrong entry in the land register.⁵⁶³

A rejection of an application for registration by the land registry office on the other hand, is not an unlawful act unless it is successfully appealed. This is because, in this case the land registry office will issue a dismissal order (*Abweisungsverfügung, décision de rejet*), which can be appealed within 30 days. Without an appeal, the dismissal order becomes formally and materially final with the consequence that a later action for responsibility is excluded.⁵⁶⁴

⁵⁵⁷ See chapter V A 1.

⁵⁵⁸ Jenny, 'Die Verantwortlichkeit im Grundbuchwesen' (n 538), 84 f. See also Deschenaux, *Das Grundbuch, Erste Abteilung*, 218.

⁵⁵⁹ Schmid, Art. 955 N. 12.

⁵⁶⁰ Art. 956 CC. The administrative supervision is exercised by the cantons (often by an inspectorate body); cf. Deillon-Schegg, Art. 956 N. 1 ff.

⁵⁶¹ Deschenaux, *Das Grundbuch, Erste Abteilung*, 223 f.

⁵⁶² Deschenaux, *Das Grundbuch, Erste Abteilung*, 225; Arnet, Art. 955 N. 3.

⁵⁶³ The specific issue of forgery will be treated later; See chapter V C 1 d.

⁵⁶⁴ Deschenaux, *Das Grundbuch, Erste Abteilung*, 226.

An omission can also be illegal and give rise to liability. As examples, Jenny mentions where the administrator leaves applications incomplete, tolerates unauthorized transfers of land by the administrator's employees or allows alterations or destruction of documents.⁵⁶⁵ Schmid adds the failure to comply with the duty to notify under Art. 969 CC⁵⁶⁶ and the non-intervention of the supervisory authority (usually a cantonal inspectorate) in the event of serious breaches by the administrator.⁵⁶⁷

c) Loss

There must be pecuniary loss which has been caused by the administrator and is calculated according to the general principles of liability law.⁵⁶⁸ The measure of the loss is determined by the difference between the property's value as it would have been if the administrator had complied with the relevant regulations and the property's value after the error or omission has occurred.⁵⁶⁹

The loss may result from various circumstances. Deschenaux mentions the example of the administrator who fails to register a security right. Afterwards, the debtor becomes bankrupt and the creditor's claim is not covered. It would have been if there had been a valid security right over the property.⁵⁷⁰

While this example relates to the consequences of the entry principle (no right without entry), loss may also be caused by the protection of good faith acquirers. Deschenaux provides another example. The holder of a servitude of water supply loses his right if the encumbered property is divided and the administrator fails to transfer the encumbrance to all the new parcels of land with separate titles and a

⁵⁶⁵ Jenny, 'Die Verantwortlichkeit im Grundbuchwesen' (n 538), 71.

⁵⁶⁶ The administrator must notify the people involved of all dispositions in the land register made without their knowledge (Art. 969 I CC).

⁵⁶⁷ Schmid, Art. 955 N. 17.

⁵⁶⁸ Zobl, *Grundbuchrecht*, § 24 N. 599.

⁵⁶⁹ Schmid, Art. 955 N.18, according to a Supreme Court decision, published in *ZGBR* 6, 1925, 98 ff.

⁵⁷⁰ Deschenaux, *Das Grundbuch, Erste Abteilung*, 231.

good faith third party acquires the parcel where the water source originates but the encumbrance is not registered.⁵⁷¹

The Supreme Court has held that the state must sometimes also refund legal costs, resulting from an unsuccessful case against it in court, which was pursued by reason of an incorrect maintenance of the land register. This is only the position, however, if the action had some likelihood of success. If its prospects were futile from the beginning or if the disputed right is worthless, no costs will be awarded.⁵⁷² That decision certainly encourages proprietors or holders of other real rights to bring their cases to court, even if they are not certain to win the action. Moreover, the case law on indemnity in land registration law is scarce and further clarifications on such issues by the courts are desirable for both practicing lawyers and academics.

d) *Causality between the loss and the illegal act*

Under Swiss liability law, two conditions must be satisfied in the context of causality. First, a 'natural causal link' (*natürlicher Kausalzusammenhang, causalité naturelle*) has to be established, i.e. the loss would not have occurred without the illegal act.⁵⁷³ Second, the causality is only sufficient if the loss and the illegal act are related through adequacy (*Adäquanz, adéquate*), ie though an 'adequate causal link' (*adäquater Kausalzusammenhang, causalité adéquate*).⁵⁷⁴ According to the general explanation given by the Supreme Court, an event is considered to be an adequate cause of a result if, 'according to the usual course of events and general experience of life, it is in itself capable of bringing about a result of the kind that occurred, i.e. the occurrence of the result generally appears to be caused by the event.'⁵⁷⁵

According to Zobl, the loss of a right to an acquirer in good faith because of wrongful maintenance of the land register could serve as an example for an adequate causal

⁵⁷¹ Deschenaux, *Das Grundbuch, Erste Abteilung*, 231 f.

⁵⁷² BGE 62 II 81 E. 1 (and regest); Schmid, Art. 955 N. 19.

⁵⁷³ BGE 110 II 37 E. 4; Zobl, *Grundbuchrecht*, § 24 N. 602.

⁵⁷⁴ BGE 62 II 81; Deschenaux, *Das Grundbuch, Erste Abteilung*, 233.

⁵⁷⁵ BGE 123 III 110 E. 3a; Zobl, *Grundbuchrecht*, § 24 N. 603.

link.⁵⁷⁶ This example illustrates that not only direct loss (*unmittelbarer Schaden, dommage direct*) is compensated, but also indirect loss (*mittelbarer Schaden, dommage indirect*) will be indemnified, as in the case of realignment.⁵⁷⁷

Deschenaux argues that a fault of a third party should never interrupt the causal link, if the provision of liability in land registration should “reach its goal”, i.e. to indemnify losses due to registration.⁵⁷⁸ The pursuer, however, may be denied compensation in the case of his own serious fault (*schweres Selbstverschulden, faute grave du lésé*).⁵⁷⁹ For example, if the parties put a lower price in the public deed than which they actually agreed (*Simulation, simulation*)⁵⁸⁰ and pay the price difference secretly without the knowledge of the notary public (e.g. with the intention to save taxes), the serious fault is theirs and they cannot claim compensation (e.g. for land registry fees), if the simulation gets detected and the deed is declared null and void. Further, the Supreme Court demands a ‘minimum prudence’⁵⁸¹ on the part of the pursuer in the action. Thus the main conditions for the acquisition of a right must be met, such as the formal requirement of a public deed.⁵⁸²

The Supreme Court is very strict with respect to the doctrine of avoidable consequences. If the party who has suffered loss ‘has not taken reasonable measures that would have prevented the damage caused by the unlawful act of the land register authorities’, liability is refused.⁵⁸³ More specifically, that means that a rejected application must be challenged and in the event of an unjustified entry, an

⁵⁷⁶ Zobl, *Grundbuchrecht*, § 24 Footnote 1389.

⁵⁷⁷ Deschenaux, *Das Grundbuch, Erste Abteilung*, 232 f.

⁵⁷⁸ Deschenaux (*Das Grundbuch, Erste Abteilung*, footnote 75 on page 233) gives the example of the inducement of a wrong entry by someone acting under a forged power of attorney. Even although the fault has been caused by a third party, the loss is attributable directly to the registration done by the administrator.

⁵⁷⁹ Deschenaux, *Das Grundbuch, Erste Abteilung*, 233.

⁵⁸⁰ Art. 18 OR.

⁵⁸¹ Deschenaux, *Das Grundbuch, Erste Abteilung*, 234.

⁵⁸² BGE 53 II 368: dismissal of the liability action of a small bank, which had granted the administrator a loan against delivery of an extract from the folio which showed a mortgage on the property, although no public deed in relation to the mortgage had been notarized, as the law prescribes (Art. 799 II CC). The agreement had only been discussed by telephone. The bank should have known that a mere telephone discussion is not sufficient for creating a mortgage.

⁵⁸³ BGE 110 II 37 E. 4d.

appeal for the correction of the register has to be made.⁵⁸⁴ In relation to the reduction of compensation, the grounds in Art. 44 OR apply.⁵⁸⁵ According to this provision, the court may reduce the obligation to pay compensation or discharge the person liable completely, if the party who has suffered loss has consented to the wrongful act, or if circumstances for which he is liable have influenced the occurrence or aggravation of the damage.⁵⁸⁶

3. The state's right of recourse

Art. 955 II CC provides that the cantons 'have a right of recourse against the land register officials and employees and against the immediate supervisory bodies if they are at fault'. According to Deschenaux the rationale of this provision is to 'limit the freedom' of the cantons to regulate a right of recourse.⁵⁸⁷ Therefore they may stipulate such a right if they wish, but the liability of the employees must be a fault-based one.⁵⁸⁸

4. Prescription

The Supreme Court has held that the prescription rules in Art. 60 OR apply to the claim for the state liability for wrongful land registration maintenance.⁵⁸⁹ According to the current version of that article, the right to claim 'prescribes three years from the date on which the person who suffers loss became aware of the loss, damage or injury and of the identity of the person liable' (*relative Verjährungsfrist, délai relatif de prescription*, relative limitation period).⁵⁹⁰ However, as an outer limit, the provision stipulates that the right of action prescribes 'in any event ten years after the date on

⁵⁸⁴ Deschenaux, *Das Grundbuch, Erste Abteilung*, 233 f.

⁵⁸⁵ BGE 110 II 37 E. 4; Art. 44 I OR: 'Where the person suffering loss consented to the harmful act or circumstances attributable to him helped give rise to or compound the loss or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely'.

⁵⁸⁶ Art. 44 I OR.

⁵⁸⁷ Deschenaux, *Das Grundbuch, Erste Abteilung*, 240 f.

⁵⁸⁸ Art. 955 III ZGB; Fisch, *Die Verantwortung der Kantone für Schaden aus der Führung des Grundbuches* (n 540), 76; Arnet, 955 N. 4.

⁵⁸⁹ BGE 119 II 216 E. 4.

⁵⁹⁰ Art. 60 I OR.

which the harmful conduct took place or ceased' (*absolute Verjährungsfrist, délai absolu de prescription, absolute limitation period*).⁵⁹¹ The Supreme Court has held that the absolute time limit begins to run with the unlawful entry in the register, irrespective of the knowledge of the claimant.⁵⁹²

Commentators have argued that this period is too short and that there is a significant risk that the claim has prescribed before the prospective claimant has gained knowledge of this.⁵⁹³ The argument seems strong, since a proprietor is not likely to consult the real folio for his property on a regular basis; neither is he obliged to do so. Nevertheless, reform would be for the legislator, since a judge may not alter the (clear) provision by interpretation, nor is he entitled to create a new provision on the basis that there is a legal lacuna.⁵⁹⁴

⁵⁹¹ Art. 60 I OR.

⁵⁹² BGE 119 II 216 (regest).

⁵⁹³ Schmid, Art. 955 N. 31; P Widmer, 'La revision du droit de la responsabilité civile vue sous l'angle de l'article 955 du code civile', in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 6 (1995), 358-361.

⁵⁹⁴ A Koller, 'Haftung aus Grundbuchführung; Verjährung des Schadenersatzanspruchs aus ZGB 955', in *AJP (Allgemeine Juristische Praxis)*, vol. 1 (1994), 98.

B. Scotland

1. The Keeper's warranty

In chapter IV, we saw that the guarantee of title in Scottish land registration law has two facets. While realignment is colloquially referred to as the 'guarantee by mud', the Keeper's warranty relates to the 'guarantee by money'.⁵⁹⁵

The 1979 Act contained provisions on indemnity, which were borrowed from the English Land Registration Act of 1925.⁵⁹⁶ While the 1979 Act provided for compensation in the event of rectification⁵⁹⁷ and a 'remedy-based approach' (if the register is being rectified, the Keeper must compensate), the 2012 Act offers a 'right based approach' (the Keeper warrants that the title sheet is accurate).⁵⁹⁸

The move from a land registration system of immediate indefeasibility (registration as the sole condition to acquire a right, also in terms of transactional errors) to one of deferred indefeasibility (protection for the acquirer only in terms of register error, but not for transactional errors) has of course also had an impact on the scheme of compensation.⁵⁹⁹ Under the old law upon rectification, 'the acquirer first gains and then loses ownership and is indemnified accordingly', while under the new law, in terms of transactional error, 'the acquirer was never owner', but suffered losses (e.g. paying a price for a void title) that stem from the transaction that preceded the registration.⁶⁰⁰

The Keeper's warranty is seen as necessary because the protective function of realignment will apply only under specific conditions and will always leave one side

⁵⁹⁵ SLC Report 222, para 22.1.

⁵⁹⁶ SLC DP 128, para 7.4.

⁵⁹⁷ LR (S) A 1979 s 9(1).

⁵⁹⁸ LR (S) A 2012 s 73(1); SLC Report 222, para 22.3.

⁵⁹⁹ SLC DP 128, para 7.23 f.

⁶⁰⁰ SLC DP 128, para 7.24.

(the one that loses the 'mud') unprotected. Therefore, the warranty is 'corresponding to and supplementing' the rules of realignment.⁶⁰¹

It was mentioned earlier that the protection of an acquirer in good faith implies not only that a person becomes the owner, but also that he acquires the land free of any real rights other than those shown in the register.⁶⁰² The Keeper's warranty must reflect both aspects in order to operate as a correlative to realignment.⁶⁰³

Therefore, the Keeper has to grant two warranties, the purported 'warranty as to title' and the 'warranty as to encumbrances'.⁶⁰⁴ Both warranties may also be regarded as being 'two pronged', i.e. a positive ('what you see is what you get') and a negative ('what you don't see you don't get') of a single warranty.⁶⁰⁵ The 2012 Act clearly reflects the twofold nature of the Keeper's warranty.⁶⁰⁶

a) *Only on registration*

The warranty is given upon registration and guarantees the 'accuracy of the Register as it stands in consequence of the registration'.⁶⁰⁷ Only successful applicants for registration receive it.⁶⁰⁸ Entries that are not induced by an application for registration are not warranted. The SLC mentions three cases: 'rights entering [the register] by rectification', 'rights entering by noting' (which already exist off-register) and rights 'recorded in the Register of Sasines and which are entered on the Land Register on first registration'.⁶⁰⁹ A reason to exclude these from the Keeper's warranty is *inter alia* because with rectification and the noting of an overriding interest, no right 'is being created, transferred, varied or extinguished'. Rectification brings the register

⁶⁰¹ SLC DP 128, para 7.28.

⁶⁰² See chapter IV C 2.

⁶⁰³ SLC DP 128, para 7.28.

⁶⁰⁴ SLC DP 128, para. 7.28.

⁶⁰⁵ SLC Report 222, para 22.6.

⁶⁰⁶ LR (S) A 2012 s 73(1)(a) being the 'positive' warranty and LR (S) A 2012 s73(1)(b) being the 'negative' warranty.

⁶⁰⁷ SLC Report 222, para. 22.9.

⁶⁰⁸ Cf. the wording of LR (S) A 2012 s 73(1).

⁶⁰⁹ SLC Report 222, para 22.9.

only in line with property law and overriding interests exist already without registration.⁶¹⁰ The SLC equiperates the case of 'first registration' to the noting of overriding interests: these rights already exist, when the Keeper is 'entering them' into the land register. Therefore, this situation does not involve a 'registration' within the meaning of the 2012 Act.⁶¹¹

b) Exclusions

The 2012 Act enumerates the numerous cases as regards which warranty is not given⁶¹² and can be praised for its high transparency in this matter. The Swiss Code does not provide for a similar list with exclusions for compensation; an interested user would need to search the relevant case law of the Supreme Court. While it does not seem necessary to analyse every single exclusion in detail regarding the comparative benefit thereof, one case deserves special attention, i.e. the case of the so-called 'over-registration'.

In one of its discussion papers, the SLC said that both over-registration and under-registration constitute an administrative error that does not properly reflect the content of the deed and would qualify as a 'mistake of implementation'.⁶¹³ It argued that an over-registration should not be warranted and that an under-registration should be compensated, since an acquirer is expecting to receive the property as depicted in the deed and not more or less.⁶¹⁴ The question of reliance hence does not arise.⁶¹⁵ This reasoning deserves approval also in terms of the general task of the land register to show existing property rights correctly. The parties to the conveyance had never intended to register more than stipulated; the register is simply wrong if the Keeper conferred title to more area of land to the buyer than actually agreed. The wrong content of the register should only prevail over ordinary

⁶¹⁰ SLC Report 222, para 22.10.

⁶¹¹ SLC Report 222, para 22.11.

⁶¹² LR (S) A 2012 s 73(2)(a)-(i).

⁶¹³ SLC DP 125, para 3.36.

⁶¹⁴ SLC DP 125, para 3.38.

⁶¹⁵ SLC DP 125, para 3.38.

property law if it is necessary for the integrity of the transactions.⁶¹⁶ The phenomenon of under-registration or over-registration does not appear in Switzerland, since there are no ‘first registrations’ like in Scotland. A comparable situation only appears if the parcel is being professionally surveyed for the first time. The surveyor has to rely on what the old register says about the area and the borders of the plot (which are only depicted in words). But as mentioned earlier, where the land is being surveyed for the first time, the land register is not liable for mistakes, but if a proprietor finds out that he is given less land according to the register than he should have, he may raise an objection.⁶¹⁷

2. Indemnity for realignment

Realignment is not the only reason why the Keeper becomes liable ‘outside’ her warranty, but it is probably the most important one.⁶¹⁸ Due to space constraints in this thesis, other liability cases, such as the transitional case of ‘liability for loss of the chance to rectify 1979 Act titles’⁶¹⁹ or the ‘liability in respect of information provided or documents lost’⁶²⁰ will not be considered.

Whereas in Switzerland there is only one provision for state liability that covers all possible losses due to land registration, the 2012 Act divides the liability of the Keeper into provisions concerned with the “Keeper’s warranty” in the narrow sense of the term and other provisions that deal with special situations for which the Keeper is liable. This legislative architecture is due to the fact that in cases where the Keeper has excluded the warranty, she is still liable for certain cases, like the loss of rights due to realignment or in respect of wrong information she has provided. The advantage of the Scottish legal drafting is that a prospective claimant can find the law set out in detail in the 2012 Act itself, without having to search for explanatory papers from RoS on the internet or to look at case law insofar as this exists.

⁶¹⁶ See chapter IV B 1.

⁶¹⁷ See chapter V A 2 a.

⁶¹⁸ LR (S) A 2012 s 94.

⁶¹⁹ LR (S) A 2012 sch 4 para 23; Reid and Gretton, *Land Registration*, para 14.4.

⁶²⁰ LR (S) A 2012 s106; Reid and Gretton, *Land Registration*, para 14.8.

The Keeper's liability for realignment is set out at the end of Part 9 ("Rights of persons acquiring etc. in good faith") of the 2012 Act. The heading of section 94 reads "Compensation for loss incurred in consequence of this Part", i.e. for "loss incurred"⁶²¹ to the person who 'is deprived of a right'⁶²² or 'is the proprietor of a property burdened by a servitude created' by realignment.⁶²³

Like in Switzerland, the claimant may immediately pursue the claim for compensation against the Keeper and must not 'exhaust other remedies'.⁶²⁴ Any other rights for compensation remain untouched by the Keeper's payment,⁶²⁵ but the claimant must assign these rights to the Keeper before that payment is made.⁶²⁶ This provision is reasonable, since the claimant cannot be double compensated, and the Keeper gets the opportunity to recover the sum that she has paid in the first place, although the chances of recovery for example against a fraudster may be low. In Swiss law too, the loss is compensated only once, and even if it is not explicitly stated in the Code, it is understood that the administrator may demand the claimant to assign his rights against others.⁶²⁷ But in contrast to Scottish law, the assignation is not a pre-condition of being paid by the administrator.

3. Interaction with liability at common law

Professors Reid and Gretton state that in parallel to the relevant sections of the 2012 Act, liability at common law has to be considered. This view is based on the SLC's approach that 'there is no point in re-inventing the wheel'⁶²⁸ in respect of general rules of liability law. The same is effectively true for Swiss law, where the

⁶²¹ LR (S) A 2012 s 94(1).

⁶²² LR (S) A 2012 s 94(2)(a).

⁶²³ LR (S) A 2012 s 94(2)(b).

⁶²⁴ LR (S) A 2012 s 94(3).

⁶²⁵ LR (S) A 2012 s 94(4).

⁶²⁶ LR (S) A 2012 s 94(5).

⁶²⁷ Deschenaux, *Das Grundbuch, Erste Abteilung*, 243.

⁶²⁸ SLC Report 222 para 27.17; Reid and Gretton, *Land Registration*, para 14.9.

compensation scheme for losses due to land registration is not restricted to the ensemble of land registration provisions. By force of Art. 7 CC the general principles of obligations also apply to 'other civil matters', such as those regulated in the Civil Code (and not in the Code of Obligations).

For Scotland, Reid and Gretton argue that in the event of possible liability outside the scheme provided for in the 2012 Act, the *Caparo* test⁶²⁹ is to be applied, in order to determine if the Keeper has a duty of care as regards the specific situation where the loss has occurred. The three parameters of the *Caparo* test involve (1) the 'foreseeability of damage', (2) 'the proximity of the parties' and (3) 'whether it is fair, just and reasonable to impose a duty upon the one party for the benefit of the other'.⁶³⁰

4. Defences of the Keeper

A possible defence of the Keeper is that the compensation claim has prescribed. The prescription period (twenty years since rectification or realignment) is much more generous than the ten-year period which applies in Swiss law.⁶³¹ That said, the twenty-year rule does not apply throughout the 2012 Act.⁶³²

Reid and Gretton state that the 'absence of good faith' would be the 'principal defence' which the Keeper may invoke in a claim for compensation under the Keeper's warranty because of rectification.⁶³³ The 2012 Act provides that there is no liability if the existence of an inaccuracy 'was or ought to have been, known to' either

⁶²⁹ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

⁶³⁰ *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617H-618B per Lord Bridge of Harwich; Reid and Gretton, *Land Registration*, para 14.9.

⁶³¹ Prescription and Limitation (Scotland) Act 1973 s 7, sch 1 para 2(e) in conjunction with LR (S) Act 2012 sch 5 para 18(7)(b); This limitation rule applies to ss 77 (*Claims under Keeper's Warranty*) and 94 (*Compensation for loss incurred in consequence of realignment*) of LR (S) A 2012. See Reid and Gretton, *Land Registration*, para 13.16.

⁶³² Both claims under LR (S) A 2012 ss 84 and 111 prescribe after five years, cf. LR (S) A 2012 sch 5 para 18(6).

⁶³³ Reid and Gretton, *Land Registration*, para 13.16.

the applicant himself or his solicitor acting on his behalf.⁶³⁴ The wording of the section makes it clear that both subjective and objective good faith is necessary.⁶³⁵

Another defence of the Keeper is non-compliance with s 111 of the 2012 Act by the applicant or his solicitor.⁶³⁶ This imposes a duty of reasonable care upon ‘a person granting a deed intended to be registered’ or his solicitors or legal advisors.⁶³⁷ Since it is usually solicitors who undertake conveyancing, the liability under section 111 may also be termed as “liability for solicitors”.⁶³⁸

⁶³⁴ LR (S) A 2012 s 78(b)(i)(ii).

⁶³⁵ Reid and Gretton, *Land Registration*, para 13.17.

⁶³⁶ Reid and Gretton, *Land Registration*, para 13.18.

⁶³⁷ LR (S) A 2012 s 111(1)(2).

⁶³⁸ Reid and Gretton, *Land Registration*, para 15.2.

C. Comparative Analysis

1. Compensation for transactional errors

a) *Introduction*

According to the definition given by the SLC and as discussed previously, a transactional error 'is connected with the transaction itself and not with the state of the Register. Typically, this means an error in the actual conveyance, such as inept wording or a forged signature'.⁶³⁹

Scotland generally has a generous position on compensation for transactional errors. While such an error does not lead to compensation by 'mud', i.e. the buyer does not receive the property itself, he is usually entitled to receive compensation from the Keeper in the form of money. The acquisition of the property (guarantee by 'mud') in the case of an invalid disposition is denied to buyer, because he has not been 'misled by any inaccuracy in the Register'. As a party to the disposition, he was 'in the best position to determine whether a problem exists'.⁶⁴⁰ The SLC found it therefore appropriate to deny 'the stronger of the two forms of title guarantee' in the case of transactional errors.⁶⁴¹ The reason why the aggrieved party should receive compensation is not made explicit by the SLC, but was taken as a given fact of the 1979 Act which 'should continue'.⁶⁴² Interestingly, the SLC has expressed the opinion, that 'it is not surprising' that many countries with a registration of title exclude compensation for transactional error, because the reliance on the register, a main purpose of a register of title is not relevant to these type of errors.⁶⁴³

⁶³⁹ SLC DP 125, para 3.17; see chapter V B 1.

⁶⁴⁰ SLC Report 222, para 21.42.

⁶⁴¹ SLC Report 222, para 21.42.

⁶⁴² SLC Report 222, para 21.42.

⁶⁴³ SLC Report 222, para 21.42.

Austria and Germany for example both have a fault-based state liability.⁶⁴⁴ In these countries, transactional errors cannot give rise to the land registry's liability, because the administrator is not responsible for flaws that happened within the process of conveyancing. It would be usually the notary public that becomes liable if he has breached his duties of care.

As mentioned, however, Switzerland has strict liability. The land registry may become liable even if its staff is not at fault. This starting position opens up the possibility to compensate cases where the fault has its origin in the transaction which led to the registration. In the case of void deeds, Deschenaux suggests reasonably that compensation should be paid if the defect is subject to the auditing power (*Prüfungsbefugnis, pouvoir d'examen*) of the administrator.⁶⁴⁵ This position brings to light differentiated solutions: it considers, that generally, there is a 'division of labour' or more specifically a 'division of the auditing duty'⁶⁴⁶ between public notary and administrator. It had already been pointed out that the administrator may rely on certain points, which the public notary ought to check.⁶⁴⁷ This is *inter alia* the case for the identity and the legal capacity of the contracting parties. The administrator must rely on these checks. He is not entitled to reassess these questions.

According to Wieland this shared responsibility makes sense, since the notary public knows the contracting parties personally and is hence better placed to assess their personal situation than the land registry.⁶⁴⁸ Therefore, if the public notary has not checked properly the capacity to act and the administrator registers a void deed in reliance on the public notary, the land registry is not responsible. It is the public notary who becomes liable instead.⁶⁴⁹ In short, all aspects that must be checked by the notary public are accepted by the administrator as being already sufficiently

⁶⁴⁴ Austria: § 1 AHG (*Amtshaftungsgesetz*), Germany: § 839 BGB in conjunction with Art. 34 GG; Bernd Rohlfing, *Amtshaftung* (2015), 207 f.

⁶⁴⁵ Deschenaux, *Das Grundbuch, Erste Abteilung*, 225.

⁶⁴⁶C Wieland, 'Das Grundbuchrecht im Entwurfe eines schweizerischen Civilgesetzbuches', in *Zeitschrift für schweizerisches Recht*, vol. 21 (1902), 349.

⁶⁴⁷ See chapter V A 1.

⁶⁴⁸ Wieland, 'Das Grundbuchrecht im Entwurfe eines schweizerischen Civilgesetzbuches' (n 646), 349 f.

⁶⁴⁹ Deschenaux, *Das Grundbuch, Erste Abteilung*, 225, Footnote 55a.

assessed by a public official. The Scottish position is ultimately similar due to the 'tell me don't show me' approach that had been explained earlier in this thesis.⁶⁵⁰ Solicitors have a higher responsibility under the 2012 Act than they had before. They have a duty to take reasonable care not only towards their clients, but also to the Keeper.⁶⁵¹ If the latter is breached, the Keeper will not indemnify the party to whom the warranty is granted.⁶⁵² In fact, the Keeper is even 'entitled to be compensated' 'for any loss suffered as a consequence' of such a breach.⁶⁵³ The rationale of the relevant provision, section 111, is that the 'Keeper does not inadvertently' make 'the register inaccurate'.⁶⁵⁴ The Keeper relies on the solicitor regarding the 'preparation and execution of the deed', which is delivered to the Keeper for the purpose of registration and also with respect to the 'completion of the application form'.⁶⁵⁵ Therefore, also under Scottish law, the auditing duty is shared by both the solicitor and the Keeper.

b) Voidable deeds

Nevertheless, the Scottish position towards transactional errors is not as generous as it might look at first glance, because voidable deeds are exempt from compensation.⁶⁵⁶ The category of voidable deeds includes many different forms of transactional errors, namely those that do not immediately render the deed null and void but leave it vulnerable to future reduction are not compensated.

Since in the case of voidability, the reduction is not simply declaratory of invalidity as it is with void deeds, it is a matter left to an affected party if they want to contest the validity of the transaction in court. The position of the SLC is that the Keeper's warranty is not breached if a voidable deed is reduced because at the time of registration the deed was perfectly good. A later reduction would constitute a

⁶⁵⁰ See chapter II B 2e and chapter III B 1b (3).

⁶⁵¹ LR (S)A 2012 s 111; Reid and Gretton, *Land Registration*, para 15.2.

⁶⁵² LR (S)A 2012 s78(c)(ii).

⁶⁵³ LR (S)A 2012 s 111(5).

⁶⁵⁴ LR (S)A 2012 s 111(1),

⁶⁵⁵ Reid and Gretton, *Land Registration*, para 15.2.

⁶⁵⁶ SLS Report 222, paras 20.8-20.12.; Reid and Gretton, *Land Registration*, para 13.6.

subsequent event, for which the Keeper is not accountable.⁶⁵⁷ Nevertheless, a subsequent good faith acquirer (of a voidable deed) is protected under the general law. The SLC stated that the land registration law should ‘not enhance the protection of those whom general law already deals with fairly’.⁶⁵⁸ The conclusion seems to be the following: voidable transfers are sufficiently protected by the general law. Acquirers who are in bad faith or responsible for the transactional error do not deserve to get a stronger protection by land registration law than they ordinarily enjoy. The Scottish position towards voidable deeds is very similar to Swiss law, where a voidable deed (e.g. in the event of a defect in consent⁶⁵⁹) is regarded as being perfectly good as a *causa* until reduced.⁶⁶⁰

c) *Void deeds: general*

Cases of voidness are different. MacLeod mentions six ‘classic cases of voidness’, namely ‘incapacity, error, overwhelming force, forgery, vagueness, and failure to conform to formal requirements’.⁶⁶¹ These would hence be the only transactional errors that are in principle covered by the Keeper’s warranty, while the last two of these cases are likely to lead to the application for registration being refused.

Entries that stem from such a deed distort the legal reality.⁶⁶² It is of public importance that these are rectified. Even if the Keeper or the administrator may not have been at fault personally when generating the (false) entry, it seems reasonable to indemnify a party who has suffered loss because – good faith being presupposed – in the case of a forged power of attorney, the innocent buyer has trusted the solicitors or notaries public that he would receive a real right. If the deed had been successfully registered and the registration is certified to the applicant, his trust in the land register officials will be disappointed too, if he must later face the reduction of

⁶⁵⁷ SLC Report 222, para 20.11.

⁶⁵⁸ SLC Report 222, para 20.12.

⁶⁵⁹ E.g. in the case of ‘fundamental error’, cf. Art. 23 OR: ‘A party labouring under a fundamental error when entering into a contract is not bound by that contract’.

⁶⁶⁰ Homberger, Art. 955, N. 6; Deschenaux, *Das Grundbuch, Erste Abteilung*, 225, footnote 55a.

⁶⁶¹ J MacLeod, *Fraud and Voidable Transfer* (2020), para 1-05.

⁶⁶² Because a void transaction ‘is a legal nothing’ and cannot alter any property rights; MacLeod, *Fraud and Voidable Transfer* (n 661), para 1-02.

the deed and the fact that he has never acquired a real right. To give him the 'mud' despite the fraud, would indeed go a little far, because his trust was not deceived by a wrong entry. Rather, he was merely a victim of a wrongful act, which resulted in a transactional error. In contrast to voidable deeds, for which the acquirer is often accountable, in a forgery case, the fault lies with the seller.⁶⁶³ A policy which indemnifies an innocent (deceived) buyer seems reasonable.⁶⁶⁴

On the other hand, the land registry is accountable where a void deed is registered. Since the register was correct before that registration, the acquisition has to be protected for the sake of the integrity of legal transactions. But, the land registry officials should not 'wash their hands in innocence' and decline responsibility at all, since it cannot be denied, that it was the land registry as a public authority that has created the wrong entry, even if it may have acted as a sort of 'innocent tool' of a fraudster who has granted a forged deed or otherwise purported to transfer land that they do not own. Taking this into account, it seems to be a reasonable policy to pay compensation in the event of void transactions.

d) *Void deeds: forgery*

Both in Scottish and Swiss law, fraud can either produce a void title, which is the case for forgeries,⁶⁶⁵ or it may result in a voidable title, e.g. fraud on a creditor (by way of gratuitous alienations by the insolvent debtor).⁶⁶⁶ While Scottish law favours compensation in the event of a forgery, because the Keeper warrants that the title sheet is *accurate* at the time of registration,⁶⁶⁷ the Swiss position is vague and deserves to be looked at in greater detail.

⁶⁶³ However, the transferee may also act inculpably in voidable transfers, e.g. in the case of innocent misrepresentation; MacLeod, *Fraud and Voidable Transfer* (n 661), para 1-11.

⁶⁶⁴ See chapter V C 1 d.

⁶⁶⁵ MacLeod, *Fraud and Voidable Transfer* (n 661), para 1-05; Schmid, Art. 974 N. 10.

⁶⁶⁶ MacLeod, *Fraud and Voidable Transfer* (n 661), para 1-11; Homberger, Art. 974 N. 5

⁶⁶⁷ LR (S) A 2012 ss 73 and 74.

The Supreme Court has not yet given a definitive ruling on state indemnity for forgeries, which are used to generate a wrong land register entry.

For Deschenaux it is certain that the act of a third party who is not connected with the land registration office cannot give rise to state liability.⁶⁶⁸ But he only considers cases where a forgery by a third party (like a certified extract of the land register or a security, e.g. a *Schuldbrief* (*cédule hypothécaire*)⁶⁶⁹ does not lead to a wrong entry in the land register itself. The context of the Supreme Court decision of 1927, which he cites, shows this clearly.

In that case, a municipal clerk (who had the competence to sign security certificates) forged an extract of the land register entry, which showed a non-existing 'Grundpfandverschreibung' (*hypothèque*)⁶⁷⁰ in his own favour and had it signed by his son, who also worked at the municipal administration. The Supreme Court held that the acts of the clerk and his son both gave rise to the liability by the land registry, even although they were not 'Grundbuchverwalter' (administrators) in the strict sense of the word. This is because they fulfilled an official function (*Amtsfunktion*) which usually would be attributed to an administrator of a land registry.

Importantly, for present purposes, the Supreme Court in an *obiter dictum* (but very clearly) stated that in the case of a 'mere forgery of a third party other than the administrator (or persons related to him), the canton's liability could of course not be invoked'.⁶⁷¹ The court gave no reasons why fraud by third parties should be excluded, but as this *obiter dictum* was made in the context of liable persons within

⁶⁶⁸ Deschenaux, *Das Grundbuch, Erste Abteilung*, 217.

⁶⁶⁹ The Federal Department of Justice translates 'Schuldbrief' (or *cédule hypothécaire*) as 'mortgage certificate'. The certificate gives rise to a personal debt secured by a mortgage (Art. 842 I CC). Traditionally, a paper certificate is issued. Since 2012 besides the paper certificate, a wholly electronical version may be issued (*Registerschuldbrief, cédule hypothécaire de registre*, register mortgage certificate), cf. Art. 843 CC.

⁶⁷⁰ A type of security (translated by the Department of Justice as 'mortgage contract'). 'The creditor may request that the land registrar provide him or her with an extract concerning the mortgage contract. Such an extract has only evidential status and does not constitute a negotiable instrument' (Art. 825 II CC).

⁶⁷¹ BGE 53 II 368.

the meaning of the ‘maintenance of the land register’, it can be assumed that the court believed that the nexus between third parties and the actual running of the land register by employees is not close enough. This view can be supported in the context in which it was made, since it would seem odd to hold the land register office responsible where someone somewhere forges a security certificate and sells it to somebody off-register. Fisch convincingly argues that here the buyer of the forged title had been a victim of an ‘ordinary fraud’, which has nothing to do with land registration management.⁶⁷²

Deschenaux distinguishes between such cases that do not lead to the state being accountable and cases where the administrator is actually induced to generate a wrong entry in the register by means of fraud by a third party.⁶⁷³ He affirms the liability of the state for the case where a wrong entry is induced through a forged power of attorney⁶⁷⁴ and argues that a third party’s fault should never interrupt the causal link between the illegal act and the loss, otherwise the provision on state liability for land registration would not fulfil its aim.⁶⁷⁵

The drafter of the Civil Code, Eugen Huber, however, who had been asked in the preparatory expert commission (*Grosse Expertenkommission, grande commission d’experts*) how he would decide the case where a crime committed by a third party causes the administrator to make an incorrect entry, gave the terse response that in this case there would be no unlawful maintenance of the land register.⁶⁷⁶ But, according to Auer, compensation should be paid. In his view, Huber was only giving a concession to the strong resistance in the commission to introducing a strict state liability at all, when he gave that answer.⁶⁷⁷

⁶⁷² Fisch, *Die Verantwortung der Kantone für Schaden aus der Führung des Grundbuches* (n 540), 40.

⁶⁷³ Deschenaux, *Das Grundbuch, Erste Abteilung*, 217, footnote 27 and page 233.

⁶⁷⁴ Deschenaux, *Das Grundbuch, Erste Abteilung*, 233, footnote 75.

⁶⁷⁵ Deschenaux, *Das Grundbuch, Erste Abteilung*, 233.

⁶⁷⁶ Protokolle der grossen Expertenkommission 1902, 345. See U Fasel (ed), *Sachenrechtliche Materialien – Von den ersten Entwürfen bis zum Gesetz 1912* (2005), 773.

⁶⁷⁷J Auer, *Die Prüfungspflicht des Grundbuchverwalters nach schweizerischem Recht* (1932), 27.

Auer tries to answer the question of liability for wrong entries induced by fraud on the basis of illegality. He draws a distinction between 'subjective' and 'objective' unlawfulness. A breach of duty on the part of the administrator (*Amtspflichtverletzung*), like an insufficient examination of the applications for registration, would constitute subjective unlawfulness, for which compensation is due beyond doubt. But in the case of a forgery, the administrator is not personally at fault or negligent if he fails to detect this. He is of course not required to engage a handwriting expert in respect of deeds which have been submitted for registration. Indeed, he must examine the applications in a timely manner. Nevertheless, the result remains an entry which is unlawful from an objective point of view, for which compensation must be paid.⁶⁷⁸ To support his view, Auer adds that Huber had been inspired by the Torrens system in Australia (which provides compensation for fraud) in putting into an earlier draft the Torrens concept of a mandatory fund for compensation financed by registration fees.⁶⁷⁹ The latter is true, but not very convincing in relation to the question of liability, because Huber made use of only this one aspect of the Torrens system in an eclectic manner. The Torrens system as a whole, he clearly judged, would not fit Swiss need and custom.⁶⁸⁰

The newer commentaries of Schmid and Mooser, however, deny state liability for such cases.⁶⁸¹ Schmid states that there is no illegal act if the administrator attended to his auditing duties but was not able to determine the defect.⁶⁸² He is certainly right to say that the administrator is not entitled to undertake a thorough examination, but that does not necessarily mean that he has no responsibility for registering a forgery which he failed to detect.⁶⁸³ The administrator is clearly not at fault, when he is unable to detect a good forgery. But, as Deschenaux argues, Art. 955 CC does not impose a fault-based liability, it imposes strict liability. This applies not only in the theoretical example of a mentally ill administrator (who does not act culpably), but also in the case of a wrong entry in the register, which is based on a forged power of

⁶⁷⁸ Auer, *Die Prüfungspflicht des Grundbuchverwalters* (n 677), 26.

⁶⁷⁹ Auer, *Die Prüfungspflicht des Grundbuchverwalters* (n 677), 27.

⁶⁸⁰ Huber, *Erläuterungen*, 397-399.

⁶⁸¹ Schmid, Art. 955 N. 13; Mooser, Art. 955 N. 12.

⁶⁸² Schmid, Art. 955 N. 13.

⁶⁸³ Schmid, Art. 955 N. 13.

attorney. The administrator's power to review comprises the verification of the authenticity of documents. He has full power to assess the outer appearance of the deed and is to reject the application not only in cases, where the voidness is obvious, but also in cases where it could potentially lead to a void right in land.⁶⁸⁴ If he fails to detect the forgery, his official duty (*Amtspflicht*) is infringed from an objective point of view.⁶⁸⁵ Mooser on the other hand, while not addressing the case of fraud directly argues that if a deed is void due to a reason that the administrator cannot know, liability is excluded.⁶⁸⁶

Both Schmid, and Mooser refer to Deschenaux to reinforce their argument. However, the present writer's view is clearly in favour of state responsibility for wrong entries induced by forgery. The illegality of such a wrong entry is an objective reality. The question of whether the state is to be held liable for it is discussed by Deschenaux in the context of 'justifications' (*Rechtfertigungsgründe*). Some actions of the administrator can be regarded as justified, that is if he follows (unlawful) binding instructions of the supervisory authority. In that case it is the supervisory authority that becomes liable instead. But it can be argued that a wrong entry induced by fraud by a third party is not justified and therefore gives rise to state liability provided that loss can be shown.⁶⁸⁷ The state has a right of recourse against the fraudster and can require the compensated person to cede his claim against that person.⁶⁸⁸

While the whole issue seems not to be satisfactorily resolved in the literature, it is interesting to mention one comment of Auer: in almost all cases of state liability within Art. 955 CC, the loss has been caused by a culpable administrator in breach of his duties. What purpose would a strict liability serve, if it was only established for the unlikely example of the mentally ill administrator? It would hardly be any better

⁶⁸⁴ C Brückner, 'Sorgfaltspflicht der Urkundsperson und Prüfungsbereich des Grundbuchführers bei Abfassung und Prüfung des Rechtsgrundausses', in *ZBGR (Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht)*, vol. 2 (1983), 68.

⁶⁸⁵ Deschenaux, *Das Grundbuch, Erste Abteilung*, 230.

⁶⁸⁶ Mooser, Art. 955 N. 12.

⁶⁸⁷ Deschenaux, *Das Grundbuch, Erste Abteilung*, 230.

⁶⁸⁸ The rules of Art. 50 and 51 OR apply; Deschenaux, *Das Grundbuch, Erste Abteilung*, 242 f.

than a fault-based liability, which other countries⁶⁸⁹ provide in the area of land registration.⁶⁹⁰

2. Comprehensiveness versus brevity in legislation

The Scottish concept of the dualism of the Keeper's warranty⁶⁹¹ plus the special liabilities of the Keeper, in particular the one for realignment, appear to be much broader than the brief provision contained in the Swiss Civil Code on state liability for land registration. Further, not every question in relation to that provision has been resolved by the Supreme Court.

The 2012 Act makes the whole matter very clear in listing what is guaranteed and what is not. It even tries to deal with more rare situations, like documents lost by the Keeper and imposes liability for these. This comprehensive approach contrasts with the brevity of the Swiss Civil Code. While the latter might superficially be easier to read and understand, the full meaning has to be discovered from books, articles and – most importantly – from decisions of the Supreme Court. It is questionable, if in a rather technical area of law such as land registration, it is advisable to wait for decisions and to let academic commentators produce literature on open questions. The fewer than 20 known Supreme Court decisions on the state's liability for land registration have not provided light on all the various situations in which such a liability could arise. While earlier commentators were unanimous that Art. 955 CC should be interpreted widely, the case law and the examples which the commentators give are too limited to provide full insight to the scope and potential of the provision. The Scottish 'elaborative' legislation is much more likely to inform a prospective claimant fully on the issue at a glance, which seems the appropriate thing to do, because legal certainty is achieved by the clear drafting of the relevant legislation.

⁶⁸⁹ Such as Germany (Art. 34 Grundgesetz für die Bundesrepublik Deutschland, GG and § 839 BGB) and Austria (§ 1 Amtshaftungsgesetz, AHG); Deschenaux, *Das Grundbuch, Erste Abteilung*, 214 f.

⁶⁹⁰ Auer, *Die Prüfungspflicht des Grundbuchverwalters* (n 677), 28.

⁶⁹¹ I.e. the guarantee that the title is good and that there are not more encumbrances than shown.

VI. Concluding Remarks

This thesis has two general conclusions.

First, the questions which arise regarding the protective functions of the land registers in Scotland and Switzerland, whether in relation to rectification, realignment or indemnity, are perhaps unsurprisingly similar. In relation to rectification, both legal systems confer on the Keeper/administrator an administrative role without judicial powers. Both struggle with the fundamental problem that the administrator/Keeper cannot decide questions of law. Both try to solve the question, of how - against all odds - the administrator/Keeper can be given sufficient powers, in order to avoid the courts having to be concerned with trivialities. With regard to realignment, both countries recognize that the principle of public faith of the records needs a careful balancing of different, presumably opposing interests. Here, in both legal systems, the question arises as to whom (the true owner according to property law or to the acquirer in good faith) ownership of the land should be given. In relation to indemnity, both legal systems accept that the state has financial liability for certain errors in the land register, as an offset for requiring everybody to make use of this technical vehicle for acquiring real property rights. Both countries grapple with the question of how far compensation should go, i.e. if indemnity should only be paid where somebody was deceived by an entry in the land register or if the state should also indemnify loss which occurred during the process of conveyancing.

Secondly, as regards the answers to these questions, it appears that there is no compelling logic which leads to the 'correct' findings. Appreciation of local values, needs and custom can all lead to different answers in different jurisdictions. Nevertheless, the fundamental problems in relation to the protective functions of the land register arise in every jurisdiction. Comparative studies in this field facilitate the development of a critical approach towards one's own jurisdiction and the fostering of a creative attitude towards jurisprudence as a science, enabling the evolution of new ideas and views. It is hoped that for Scotland and Switzerland this thesis has made a helpful contribution in this regard.

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