

< [Party, rights and land transactional primitives: Ownership](#) | [Contents](#) | [Monojural \(negative\) registration of deeds](#) >

This notebook is available on [GitHub](#) under a [CC-BY-4.0 licence](#).

# The effect of indefeasibility and error correction on the registration process

Anthony Beck

Duncan Moss

# What happens when things go wrong?

What happens if a *transactional instrument* is registered and "*subsequently determined*" to be **defective**?

There is an **error** due to a **defective instrument**.

# What is a *defective instrument*

There are two broad categories of defective instrument:

Errors that, when detected, result in a **void** deed - Fraud

*In void deeds there is usually no consent from the granter (, s4.7).*

Within general property law a deed can be registered, upon discovery it is void it is overturned (generally interpreted that the void deed never existed):

*it is a strong principle that a person is not to be deprived of property except by consent (, s4.7).*

Errors that, when detected, result in a **voidable** deed -  
Registration Error or Malicious Tampering

In a voidable deed either:

- the grantor gives their consent, even if, in some cases, that consent is induced by unfair means, or
- the legal instrument is tampered with, or
- the registrar introduces an error during registration.

## Transaction errors and competing ownership

**Competing ownership** refers to a legally incorrect transfer of ownership which results in two different parties (the *original owner* and the *purchaser*) believing they are the legal owner at the same time.

Competing ownership arises due to a **defective instrument**: *registration error, malicious tampering or fraud*.

# Defeasibility, and indefeasibility

*A title is 'indefeasible' if it is immune from competing claims, whether from a competing owner or from the holder of some derivative right such as a mortgage. (, s4.2.1)*

**Defeasibility** is where the *chain of title* has the **potential** to contain legal ambiguity: there may be *competing ownership*.

# Resolving defeasibility issues

Whilst title indefeasibility is important, **a registrar needs to master the legal processes that are deployed to resolve defeasibility issues in a *chain of title*.**

*The truth is that, while a system of land registration can allocate defeasibility, it cannot eliminate it.*

*Instead, it must deal as best it can with the instruments served up to it by fallible human beings.*

*Defeasibility is caused by human error or fraud, and no legislation can prevent error or fraud, although it can and should put systems in place to discourage them.*

(, s4.2.2)

# When to resolve defeasibility

There are only two logical outcomes to the resolution of a defeasible title (see , s4.2.3):

## 1. *Deferred indefeasibility*:

- the *original owner* is preferred and the invalid registered legal instrument, once detected, is overturned.
- this tends to be the solution under a *common law* deeds registration system.

## 1. *Immediate indefeasibility*:

- the *purchaser* is preferred and the invalid registered legal instrument is upheld.
- this tends to be the solution under a *Torrens* title by registration system.
  - where the *purchaser* is preferred over the *true owner* compensation may be paid (hence, the insurance principal).

The labels focus on how long it takes the the register to either resolve, or embrace, an invalid legal instrument.



# Defects and registration systems

The majority of registered legal instruments and associated titles are good.

What happens in the rare cases where the legal instrument is defective and results in a Title which is not good?

Initially we need to determine if the system is:

- Monojural (deeds system) or
- Bijural (title by registration (Torrens) system)

< [What happens when things go wrong?](#) | [Contents](#) | [Bijural \(positive\) registration of title](#) >

This notebook is available on [GitHub](#) under a [CC-BY-4.0 licence](#).

## Monojural (negative) registration of deeds

Negative registration **reflects the ordinary rules of property law.**

*A "negative" system operates within the normal rules of the law of property.*

*Registration, although usually necessary, is not a sufficient step for the creation of a real right.*

*There must also be a valid deed granted by a person with title to grant.*

*(, section 1.9)*

A person acquires ownership if and only if (after , s5.1):

1. the grantor owns the land
2. the transfer itself was properly carried out.

*Title thus flows from the register only in the sense that registration marks the final stage in the process of transfer;*

*and the **registration of a conveyance which is forged or granted a non domino confers no right at all.***

*(, s1.9)*

The Title is a **relative title** as it is derived from the legal instruments.

# Correction under a monojural system

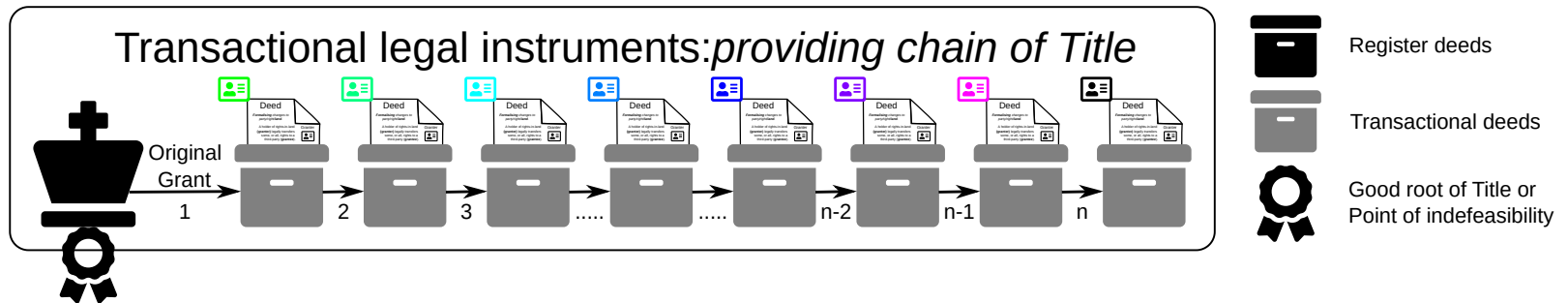
Is simple: there is only one option:

1. The view based upon the the *common law*
  - **"You can not sell what you do not own"**

If a deed is wrong it is either:

- made void (it never existed)
- or corrected

# An Idealised Register of Deeds



In such a scenario a **good root of Title** is followed by **transactional deeds**.

A **transactional deed** has an **error** (a **transactional error**): **this can be corrected**.

The next time Title is derived back to the **good root of Title** these corrections will be re-interpreted.

This re-interpretation can be perceived to be costly:

*The virtue of the common law was that it provided security of ownership to a very high degree, and the vice was that it did so at the expense of the facility to transfer.*

*(, p. 41)*

< [Monojural \(negative\) registration of deeds](#) | [Contents](#) | [Types of error: register and transactional](#) >

This notebook is available on [GitHub](#) under a [CC-BY-4.0 licence](#).

## Bijural (positive) registration of title

In Positive registration the ordinary rules of property law are set aside (see , secs 1.9 and 5.2):

- Title flows from the Register and not from the transferor's conveyance.
- A person entered as owner on the Register is the owner.
  - There is no need to interpret *chain of title*.
- If the conveyance was good, the title so conferred is absolutely good.
- If the conveyance was bad, the title is good but voidable.

*A "positive" system confers the right in question by the very act of registration, and without regard to the validity of the underlying title.*

(, s1.9)

As a general rule a positive system does not admit the possibility of void titles.

# A bijural innaccuracy

Hence, it is possible to get two views on how to resolve an *invalid legal instrument*

1. The view based upon the the *common law*
  - **"You can not sell what you do not own"**
2. The view based upon *registration law* (which may override common law)
  - **"The act of registration makes an indefeasible title"**

This conflict is called **bijural inaccuracy**.

The issue is which legal framework takes priority and what is the redress.



# Defective registration in a bijural system

In a bijural system the law needs to frame two issues:

## 1. who to protect

- The choice of *who to protect* is a choice between
  - A. the person seeking to acquire the property right and
  - B. the person who owns the land (, p.4).

## 2. how to protect

- The choice of *how to protect* lies between
  - A. protection which is deferred and
  - B. protection which is immediate and indefeasible (but may lead to bijural inaccuracy).

Since the *who* is a matter of policy and the *how* of technique, *who* takes precedence.

# Who to protect?

Under general property law *security of ownership* gives **preference to the grantor**:

*The traditional answer is not in doubt.*

***A transfer which is radically defective is no transfer at all.***

*Ownership, therefore, remains where it was, and the would-be acquirer must go without.*

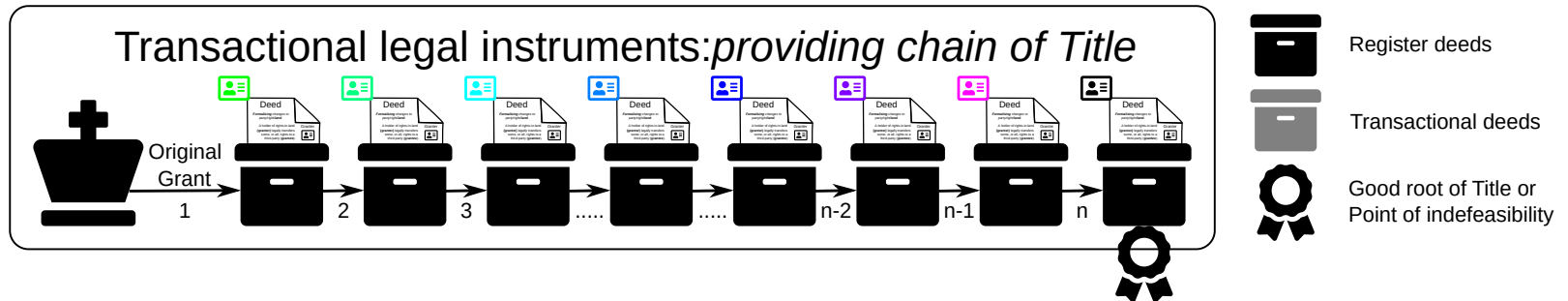
*(, p.5)*

Under positive registration law *facility of transfer* gives **preference to the grantee**:

*but if the land is on a register of title it is only necessary to check that the seller is the person listed on the register as owner.*

*(, s1.7)*

# An Idealised Register of Title



In such a scenario a **good root of Title** is not followed by **transactional deeds**: all deeds are **register deeds**.

When a **register deed** has an **error** (a **register error**): this **can not be corrected**.

Title by registration is **indefeasible** always providing a **good root of Title**.

< [Bijural \(positive\) registration of title](#) | [Contents](#) | [Hybrid approaches and digital registration](#)  
>

This notebook is available on [GitHub](#) under a [CC-BY-4.0 licence](#).

# Types of error: register and transactional

We have defined two types of error:

## 1. transactional error

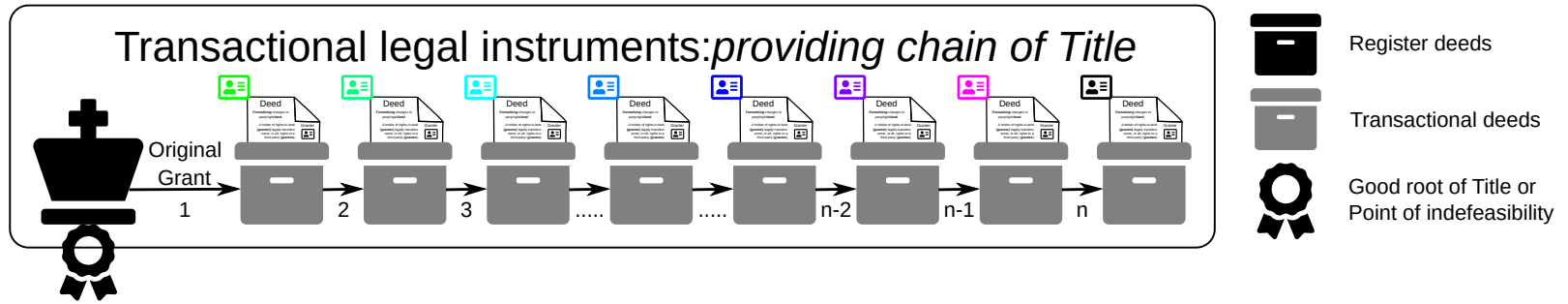
- occurring **after** good root of Title
- this can only be resolved under *general property law*.

## 1. register error

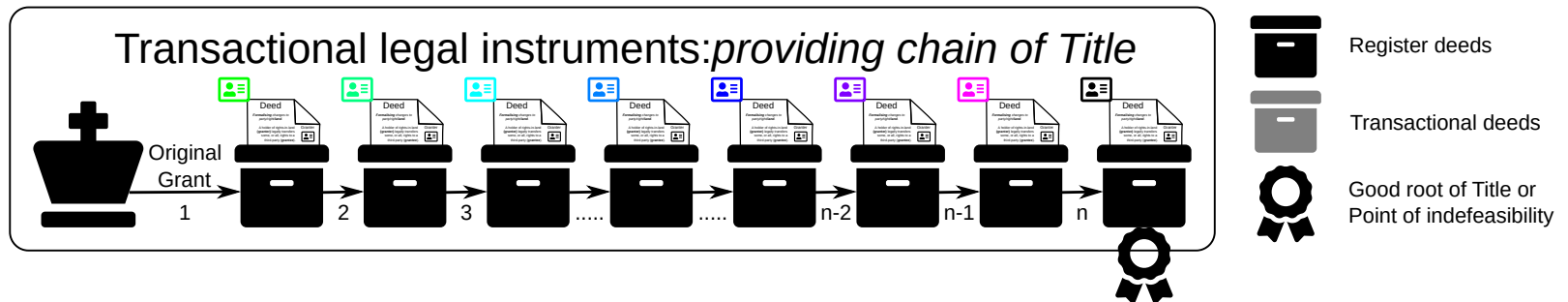
- occurring **before** good root of Title
- this can only be resolved under *property registration law*.

# Idealised Deed and Title Registers are polarised

## An Idealised Register of Deeds



## An Idealised Register of Title



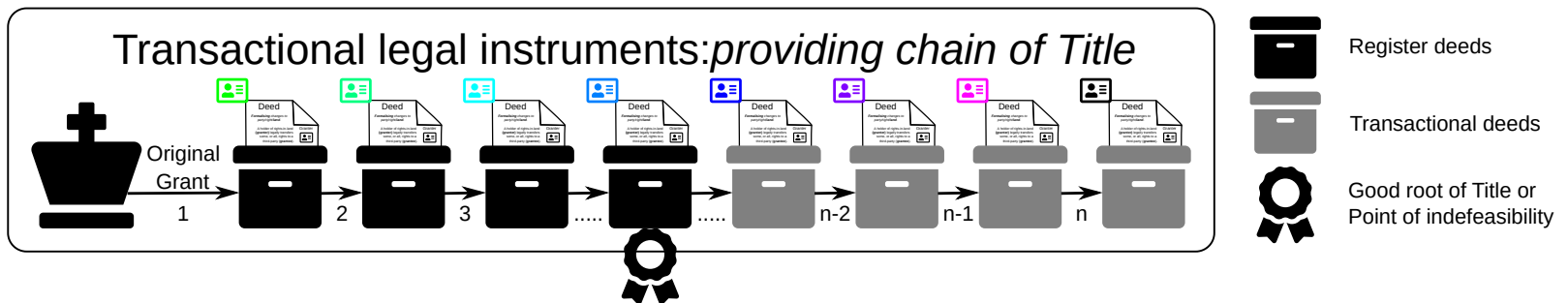
# Hybrid Registration - a third way

**Clearly there is a third way:** move the *point of indefeasibility* from the poles and place it somewhere else in the transactional chain.

If a deed is in error then the approach to correction is dependent upon whether the error is:

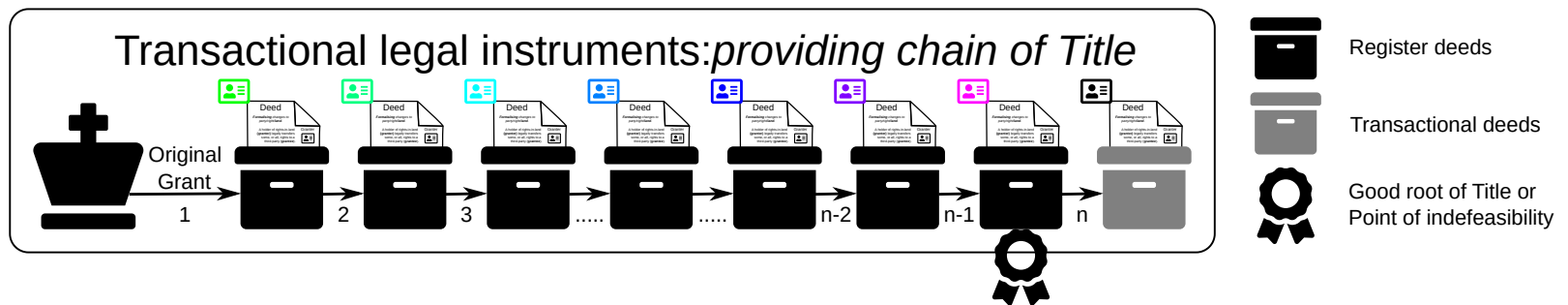
1. a *register error*: **error correction is not allowed** - compensation is the only redress.
2. a *transactional error*: **error correction is allowed** and is resolved under general property law.

## A Generic Hybrid Register



This is exactly the approach taken in Scots law

# The Scots Hybrid Register



# Hybrid Registration in Scotland

state that Land Registration requires three registers:

## 1. *Register of Plots of Land*

- a spatial index of owned land (cadastral unit register): a "*uniform system for identification of properties*" .

## 1. *Register of Deeds*

- To deliver transactional change and store non-ownership rights for the register.
- As these non-ownership rights are either described using geometry or as verbalizations against a cadastral unit a spatial index can be used to cross reference between the two.

## 1. *Register of Title*

- articulates the parties who hold owned land (i.e. records indexed by the *Register of Plots of Land*).



# Hybrid Registration in Scotland

This allows significant flexibility for the creation, variation and discharge of real rights.

This is especially important for securities (mortgages) and for transactional management in a digital system.

It also provides for a novel approach to error correction.

Scotland places the *point of indefeasibility* prior to the last transaction and introduces a statutory time limit.

# Resolving errors

## Transaction errors

If a registered *transactional error* **is detected** it is corrected under property law (that favours the *true owner*).

## Undetected transaction errors become register errors

If a registered *transactional error* **has been undetected** for over a year and is further *transacted on in good faith* by a new buyer then the *transaction error* becomes a *register error*.

## Register errors

Good faith acquirers are protected against register errors: buyers are reassured that the validity of their possession will not be affected.

If a registered *register error* **is detected** it is **not corrected** and the successful claimant will receive compensation and not the property.

# Determining Indefeasible Title

To be sure of an indefeasible title, the register must be checked to ensure that the seller is named on the register as proprietor, but also that the seller has been in possession for a year.

Further checks are required if the seller has been in possession for less than a year.

This is hardly onerous.

< [Types of error: register and transactional](#) | [Contents](#) | [Torrens' Elusive Title](#) >

This notebook is available on [GitHub](#) under a [CC-BY-4.0 licence](#).

# Hybrid approaches and digital registration

Hybrid and digital registration fully acknowledge core components of digital registers.

This includes the need to represent concepts:

- State
  - Title
- State change
  - Deed
  - Request
  - Application

And to be explicit about error correction in terms of register and transactional errors.

# Register uncertainty

Since the 1990s, there has been a rise in identity fraud affecting registered land systems.

Courts in Australia, Ontario, British Columbia, Malaysia and Singapore have discovered that their statutes, present bijural ambiguity.

*In some of these jurisdictions, statutes which had long been assumed to incorporate either immediate or deferred indefeasibility have been judicially interpreted to embody the opposite rule.*

*(, p.197)*

If law makers can not accurately predict the type of indefeasibility their laws represent then there is significant legal uncertainty.

Identity fraud, and other cyber-security related issues, are realities affecting every register.

By focussing on **primitives, change, error correction and product derivation** a jurisdiction can build a more resilient register that can change with the needs of society.

# Conclusions

*The key is, surely, to have a system that works in the social, economic and political climate that it governs, rather than one that cleaves to preconceived 'principle'.*

*(, p.56).*

The traditional view is that a Land Registration system is either a Deed or a Title system (or *state and state change*): **this is clearly an unhelpful oversimplification.**

We have argued that the critical issue is where a jurisdiction places *good root of Title*:

*the point in the chain of deeds between original grant and current transaction at which the jurisdiction deems the rights to be indefeasible.*

# Conclusions

By recognising that a register needs to represent *state* and *state change* we see that a register requires components that are equivalent to traditional Deeds and Title registers.

We believe this allows policy makers the flexibility to adapt their legal process to reflect social need without changing the registration system.

It adopts the middle ground and provides resilience.