

TRANSFER OF IMMOVABLES AND SYSTEMS OF PUBLICITY IN THE WESTERN WORLD: AN ECONOMIC APPROACH

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ABSTRACT

This paper aims to analyse the norms pertaining to the transfer and publicity of property rights from an economic perspective. It is a characteristic of this analysis that it puts the rules that regulate these rights in relation with their associated negotiation costs. This offers a new approach to the examination of the definition, content, and transfer of these rights. Legal norms that minimize the problem of conflicts of ownership increase the value of property in the hands of its owners. One of the instruments oriented to reduce uncertainties of this type is the Land Register, which promotes the exchange of rights, and acts in areas that are fundamental to the economic system, such as the delimitation, attribution, and protection of property rights. In Europe, different models for the regulation of the transfer of property rights coexist, along with different models for the registration of property, so although the underlying conflicts of interest are similar throughout Europe, the way in which each legal system attempts to achieve the greatest degree of efficiency possible varies.

I. GENERAL QUESTIONS: THE ROLE OF PROPERTY RIGHTS FROM THE PERSPECTIVE OF ECONOMIC THEORY

The regulation of private property provides a legal framework for the distribution of wealth in each State. This article will attempt to analyse these rules from an economic perspective, an analysis that, in the words of Posner, is fundamentally a common-sense approach to the question.¹

The classic theorem of Coase² is well known in the field of economic-juridical science. According to this theory, if property

1. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

2. This thesis is expounded in his well-known works, Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON 1 (1959); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1 (1960).

rights are well defined and there are no transaction costs, then the market will be in a perfect, efficient state of equilibrium. By well-defined property rights, Coase was referring to a hypothetical situation in which all goods and resources would have a titled owner, and the title would clearly specify the limits to ownership and the steps that would be necessary to remove these limits. By the absence of transaction costs, Coase meant that there would be no costs attached to an agreement that transferred a right from one holder to another. The costs that derive from transfer agreements can be grouped into three different types: (1) costs associated with the search made by those interested in acquiring property rights, or made to find a subject interested in acquiring property rights; (2) negotiation costs, or costs that derive from the design of the content of the transaction; and (3) execution costs, in case the agreement has not been complied with and needs to be enforced.

According to Coase, the law can facilitate negotiation by reducing the costs of transactions, and reduced transaction costs encourage the transmission of property, which in turn allows for the growth of a nation's wealth. The voluntary exchange of goods redistributes property, as it changes hands from those who attribute to it one value, to those who attribute to it another, higher value. Therefore, the rules that govern the exchange of property maximize wealth by protecting and encouraging the voluntary exchange of goods. The same rules also maximize wealth by permitting owners to claim the benefits derived from the use of a resource.³

The economic analysis of property rights is an interesting approach to their study, because it places property rights in relation with the costs associated with their transfer. This offers a different perspective from the traditional approach to their analysis that normally centres on the definition, content, delimitation, and forms of transmission of property rights, and it is also recognition of the

3. Concerning this question *see* R. COOTER & T. ULEN, *LAW AND ECONOMICS* 113 (4th ed., Pearson Education 2004).

fact that these elements are not independent from the costs and the practicalities of their commercial transfer.⁴

Property rights have a fundamental effect on decision making processes concerning the use of resources, and therefore have a profound impact on economic activity. They determine the identity of economic agents and define the distribution of wealth in a society. There are, therefore, clear advantages to having a secure system of property rights within a legal system. States pursue this objective of economic efficiency by regulating the transmission of property and by establishing mechanisms which provide publicity of property rights, both of which favour property transfer.

In economic theory, ownership is defined as the freedom or the capacity to adopt decisions over goods and these decisions may affect how goods are used, to whom their benefits should belong, and whether to effect changes in their form or substance.⁵ It is these same faculties that are conferred on a subject by the right of ownership according to the traditional definition given by article 348 of the Spanish Civil Code. There are essentially three characteristics that property rights need to have in order to be efficient:

1) They need to be universal. All goods and resources should be owned, with the exception of those that are so abundant that they can be freely consumed without becoming scarce.

2) They need to be exclusive. This means that it must be legally possible to exclude others from using or consuming them.

4. Fernando Pomar Gómez, *Derechos de propiedad y costs de transacción: ¿qué puede enseñar Coase a los juristas?*, 51 ANUARIO DE DERECHO CIVIL [ADC] 1035, 1067 (1998). In the Common Law tradition, see YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 2 (1st ed., Cambridge University Press 1989), who makes a connection between the concept of property rights and transaction costs.

5. O.E. WILLIAMSON, *THE ECONOMIC INSTITUTION OF CAPITALISM* 27 (The Free Press 1985).

3) They need to be transferable. This allows goods and resources to be passed on to users that are more efficient.⁶

A. Transaction Costs

Coase was one of the first economists to draw attention to the importance of the role played by transaction costs. Transaction costs may be defined as “the cost of transferring property rights.”⁷ Property rights always entail a cost, as our freedom to use goods and resources is always limited. Economic transactions are transfers of property rights. Transactions require a series of mechanisms to protect the agents that participate in them from the risks inherent in the exchange. The function of contracts is to plan an agreed response to future events that might affect the object of the transaction. All transactions involve costs. These costs often stem from the search for information. This search for information may relate to the object of the transaction, it may be a search for the best purchaser, or it may be a search for information about the purchaser’s circumstances and conduct. Negotiating an agreement to determine the positions of the parties and the price of the transfer results in costs, and so does drawing up a contract. Once the precise content of the agreement has been clearly defined, there is still the possibility that further costs will be incurred if one of the parties does not comply with its terms voluntarily and it is necessary to enforce the agreement.

When subjects agree to exchange goods, they do so because they believe that what they will obtain from the exchange is worth more than what they offer in return. The exchange of goods would have no costs if each party knew exactly what it wanted from the exchange (that is the use expected to be obtained from the goods to be exchanged) and to what extent these goods had the qualities that

6. Cándido Paz-Ares, *La economía política como jurisprudencia racional (Aproximación a la teoría económica del derecho)*, 34 ADC 601, 645 (1981).

7. Coase, *supra* note 2, at 18.

each sought to acquire.⁸ In the opinion of Barzel, in order for property rights to be clearly defined, it is necessary that both their owner, and any other party interested in their acquisition, should have access to information detailing the properties of the goods in question.⁹ This is more difficult in the case of goods that are unique (such as immovable goods) than in the case of standardized goods, and therefore negotiations over unique goods are more complex than negotiations over fungible goods. Cooter and Ulen comment that the negotiations over the sale of a melon are quite simple as there is very little that one needs to know about the melon.¹⁰ However, the negotiations necessary for the acquisition of a house are much more complex as they often include looking for finance, compiling information about the state of the property and settling on a price. The seller of a property is obviously far better informed about its condition than the purchaser is, and the purchaser is in a far better position to assess the likelihood that he will obtain the necessary finance for the purchase. It is for this reason that the rules on property rights create instruments that publicly state the ownership of goods, such as Land Registers. These are legal mechanisms that reduce the costs of the transfer of property rights.

B. The Faculty of Disposition and Acquisition a non domino

One of the faculties conferred on the owner of a property is the power of disposition over it. The definitions of the right of ownership provided by the Spanish, Italian and French Civil Codes all refer to this power of disposition over property. These Codes devote a great deal of attention to resolving the problems associated with the transmission of property from one subject to

8. On this subject in Spanish legal doctrine see Jesús Alfaro Águila-Real, *Los costs de transacción* in ESTUDIOS JURÍDICOS EN HOMENAJE AL PROFESSOR AURELIO MENÉNDEZ 131, 143 (Juan Luis Iglesias Prada 1996).

9. BARZEL, *supra* note 4, at 77.

10. R. Cooter & T. Ulen, DERECHO Y ECONOMÍA 411 (E. Suarez trans., Fondo de Cultura Económica 2008).

another. When a subject has the right of ownership, he wants to be certain that he effectively has the power of disposition over the property and have some guarantee that no other subject will appear who claims to have acquired the same right. The owner of the right requires that his title to the property be superior to the rights of the subject that transmitted it to him and any rights that a third party might claim to have over the same property. The information one receives concerning a property can never be fully guaranteed to be accurate,¹¹ and the legal system cannot always protect the interests of both the previous and the present owner of a property at the same time. A rule that prevents individuals from obtaining ownership of a property if there is a non-owner in the chain of transmission will protect the interests of the present owners to the detriment of potential future owners. However, this type of rule also places a burden on the present owners of the property, as it lays the onus on them to demonstrate to any potential buyers that they are in fact the genuine owners. Alternatively, the law can protect the subject that acquires a property from the risk that third parties have a prior legal claim to it (article 34 of the Spanish Mortgage Law is an example of this type of legislation). A law of this kind saves future purchasers the trouble of investigating the authenticity of the chain of transmissions, but the current owner cannot be sure that the property will not be taken away from him without his consent.

Regulation on these matters has to evaluate these risks and must try to minimize them for both parties as much as possible.¹² The law itself influences the quantity and quality of the

11. BENITO ARRUÑADA, *LA CONTRACCIÓN DE LOS DERECHOS DE PROPIEDAD: UN ANÁLISIS ECONÓMICO* 690 (Centro de Estudios Registrales 2004), who argues that:

The supposition that the information available is incomplete is essential. The registry of rights is designed to provide full and accurate information to protect both the previous and the present owner; and, if it is not able to protect the owners in a significant number of cases then its chances of survival are very limited.

12. Douglas G. Baird & Thomas H. Jackson, *Information, Uncertainty and the Transfer of Property*, 13 J. LEGAL STUD. 299, 301 (1984).

information available and therefore affects the distribution of risks. For example, in some States there is a Register in which all past holders of a legal title to a property have had to inscribe their right to the property. A law of this nature reduces the risk that a non-owner appears in the chain of transmissions. However, it also generates costs derived from the upkeep of the register. The law has to determine the information that is necessary for property rights to be delimited perfectly and for the risks to be distributed efficiently between the current owners and future buyers. It also has to strike a balance between providing incentives to increase the amount of information available about a property and the costs that these measures entail. In this way, the law can minimize the problem of conflicts between those who claim a valid title to the property, and increase the value of the property in the hands of the legally guaranteed title holders.

C. Legal Security and Security in the Commercial Transfer of Property

The problem just discussed could be considered part of what has been traditionally perceived as the dichotomy between the principle of legal security and trade security in commercial exchange. Ehrenberg, however, argues that this dichotomy does not really exist, as both principles seek to protect similar interests.¹³ The general idea is that legal security protects the holder of the legal title to a right (the subject that has this right) while the principle of trade security protects the subject that acquires this right (the subject that wishes to have the right). Both principles seek to protect the legitimate owner of a right.

In relation with the right to ownership, the notion of security refers to the ability of the title holder of the property right to exploit the economic value of the resource in question exclusively,

13. Victor Ehrenberg, *Rechtssicherheit und Verkehrssicherheit mit besondere Rücksicht auf das Handelsregister*, JHERINGS JAHRBÜCHER FÜR DIE DOGMATIK DES BÜRGERLICHEN RECHTS 273-338 (1903).

without being exposed to the constant risk that a third-party might dispossess or disturb him in the pacific possession of that right. Obviously, if this protection were only available from the private sector, then individuals would be forced to contract security firms, and the expense would be enormous and, in most cases, prohibitive. It makes sense, therefore, that this protection is provided more cheaply and in a simple manner by the legal system. Article 348 of the Spanish Civil Code grants legal actions to owners to enable them to reclaim property from third parties that have it in their possession and also to declare the absence or inexistence of encumbrances over their ownership rights. In this way, the Spanish legal system reduces the costs implicit in the determination and safeguard of property rights.¹⁴

Legal security tries to guarantee that the title holder to a right has the effective possession of that thing. This means that the title holder can appropriate the value of the use of that right and the value of the exchange of that right. Title holders therefore have the certainty that they alone may use or exchange the goods and resources over which their rights operate. Legal security also aims to prevent title holders from losing or being perturbed in their rights without their consent. The principle of legal security in this case can be equated with the prohibition of expropriation, as the aim is to ensure that the desired transmission takes place and is not frustrated by circumstances that are unknown to the subject wishing to acquire the rights to be exchanged. This is achieved when there are no market failures caused by inaccurate information that elevates transaction costs. When the information available is inaccurate, it results in economic inefficiency.

The price of resources is calculated as a function of the utility that can be obtained from them. If the holder of an ownership title

14. In the opinion of Cándido Paz Ares, *Seguridad juridical y seguridad del tráfico*, 175 REVISTA DE DERECHO MERCANTIL [RDM] 7, 12 (1985), “the creation of legal security allows for economies of scale, because as the volume of production increases there is a notable depreciation in the average cost of production.”

does not consent to its transfer then it is because the offer he receives is less than the benefit he obtains from keeping it under his ownership. If he were to consent to this transfer then this would lead to what Pareto describes as a sub-optimal distribution of resources.¹⁵ However, it might well be the case that an ownership title that has the value of 400 for its title holder X does not pass into the hands of Y, who assigns it a value of 500, because the transaction costs are greater than 100. The aim of the legal system, according to the thesis of Coase, is to reduce transaction costs and, in order to do this, it might sometimes be convenient to expropriate the title from X and assign it to Y, under whose ownership it has a greater value. X would be offered in exchange a price between 400 and 500, the market value. This is the logic behind the rules that govern trade security.

An alternative approach to the rules governing trade security is to make their objective that of avoiding the situation by which the rights of the subject that acquires ownership are negatively affected by circumstances that he could not have known about, due to a lack of information in the market.¹⁶ In this case, the rules of trade security are rules that limit the information necessary to acquire a right. These regulations attempt to reduce transaction costs that could interfere with efficient exchanges. An example of this is article 34 of the Spanish Mortgage Law. This article limits the information considered relevant to a transaction to that published in the Land Register. However, these types of regulations increase the costs incurred by the original ownership title holders in order to reduce the risk that their goods are transmitted without their consent. These regulations can therefore only be considered efficient when they generate greater savings than costs.

15. UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* 202 (Greenwood Press 2000).

16. See Paz Ares, *supra* note 14, at 19.

For an acquisition to be considered valid, the principle of legal security obliges the subject that acquires a title to establish that the subject from whom he acquires it is the genuine title holder, and that his acquisition forms part of a chain of legal acquisitions. However, the principle of trade security limits the information relevant for the valid acquisition of a right, and permits acquisitions *a non domino*. The first rule encourages the subject that acquires a right to verify that the transmitter is the real owner of the title in question, whilst the second rule provides a strong incentive for owners to protect themselves against the threat of dispossession.¹⁷

Four rules of Roman origin have proved to be efficient from the perspective of an economic analysis of the question under consideration. *Ubi rem meam invenio ibi vindico* (the goods may be claimed in the place they are located): this expression means that the legal action to reclaim property may be exercised against third parties in possession of those goods. *Id quod nostrum est, sine facto nostro ad alium transferri non potest* means literally “our goods may not be transferred to another except by virtue of our acts. *Res inter alios acta, aliis nec nocet nec prodest*: a contract cannot affect the rights of those who are not party to it. *Nemo plus iuris ad alium transferre potest, quam ipse haberet*: nobody is able to transmit more rights than those he possesses. These rules are efficient from an economic perspective because they enforce the idea that an economic resource should remain in the hands of its original owner¹⁸ except when special circumstances arise that necessitate a different course of action.

Under exceptional circumstances, it may be possible to permit the temporary expropriation of the goods of a title holder when conditions arise that allow one to suppose that it would be in the interests of the title holder for this temporary expropriation to take place. This can only be the case when the protection afforded by

17. COOTER & ULEN, *supra* note 3, at 151.

18. Concerning this topic see Paz-Ares, *supra* note 14, at 22-23.

trade security allows the subject the disposal of the right and when the benefit obtained from the change of ownership is greater than the value of the use of the right in question.

The rules relating to trade security are rules that transform the normal protection that the legal system gives to the title holder of a right: instead of protecting the subjective value that the right holds for its owner, these rules protect the objective market value of the right.¹⁹

II. INSTRUMENTS FOR THE PUBLICITY OF PROPERTY RIGHTS

When agreements concerning the transmission of rights are made, it is very important for the parties to be sure of the premises on which these agreements are to be based. Among these premises are those relating to the properties of the goods to be transmitted, and the authenticity of the title of ownership of the transmitter of the goods.

Any uncertainty surrounding the authenticity of an ownership title makes the sale of the goods difficult and reduces their value. As a necessary condition for economic efficiency in the transmission of goods, all doubts concerning ownership titles must be eliminated. To this end, the law creates instruments of publicity. A system of publicity can prevent the conclusion of fraudulent agreements.

19. With reference to this subject, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972). In the opinion of these authors, the legal system can protect the property rights of a subject in two ways: by way of property rules or by the use of liability rules. The decision to implement one system or another will depend on the associated transaction costs. If the market functions without any appreciable transaction costs then it is preferable to protect the rights of the subject through property rules, whereas if there are externalities that affect the function of the market then it is preferable to use a system of liability rules.

A. Publicity of Possession

Taking possession of an immovable thing can sometimes be a necessary condition for the acquirer of a property to ascertain the superiority of his right over that of third parties. In some legal systems, as in the Spanish legal system, the handing over of the possession of a property is an integral part of the legal process of transmission. There is no doubt that the handing over of possession constitutes an instrument of publicity for property rights, as it is by this means that the title holder proclaims his legal ownership of the goods in question.

When the transmission of a property takes place but the subject that transmitted ownership retains the possession of the property, then this situation may generate a high degree of uncertainty among third parties as to the genuine owner of the property.

Establishing property rights by means of the possession of things can result in significant costs, for example, the costs occasioned by the need to investigate the chain of ownership. This type of investigation is often difficult to carry out further back than a generation, and this in turn increases the risk that a subject will appear with a legitimate claim and dispossess the purchaser.

Another legal function of possession is that it allows for the acquisition of property rights by acquisitive prescription (*usucapion*). The foundation for this mode of acquiring rights is the inactivity of the title holders: "If the owner sleeps on his rights, allowing trespass to age, the trespasser may acquire ownership of the property."²⁰

The advantages of acquisitive prescription from an economic perspective are that it eliminates doubts over the true title holder of things and allows ownership to be conferred on those that are really using things. The use of this mechanism eliminates the risk of legal actions to reclaim property based on titles held in the distant past. Another economic justification for acquisitive

20. COOTER & ULEN, *supra* note 3, at 154.

prescription is that it prevents the situation in which valuable economic resources are left unused over long periods of time. This is because it gives the “productive” user a means of acquiring the title to a property to the detriment of the “unproductive” user.

There is however, a cost to acquisitive prescription, as property owners have to be certain to safeguard their properties from the risk of losing it and expel any potential usurpers.

B. The Land Register

Given the deficiencies of the publicity mechanism based on possession, land registry systems have developed as the principal alternative to them.

One of the functions of the legal system is to regulate the institutions by which rights are exchanged so that these transactions are secure and foreseeable. One of these institutions is the land register, which collects information on the ownership, content, reliability, and expected revenue associated with rights over immovable property.²¹ The land register therefore operates over a fundamental element of the economic system, the delimitation, attribution, and protection of property rights.

By offering information on property rights, the land register reduces the costs associated with exchanges and favours the circulation of commodities, and it can therefore be described as an instrument in the creation of wealth. This view is endorsed in a report published by the World Bank, in the *World Development Report*.²²

21. See Gómez-Pomar, *supra* note 4, at 1067; Fernando P. Méndez González, *La función económica de los sistemas registrales*, 671 REVISTA CRÍTICA DE DERECHO INMOBILIARIO [RCDI] 857, 881 (2002).

22. World Bank, *World Development Report* 79-84 (2005). See also FROM PLAN TO MARKET. WORLD DEVELOPMENT REPORT 1996, at 89 (Oxford University Press 1996): “For pledging to work, lenders need a cheap and easy way to determine whether a prior security interest exists against the property. Some advanced legal systems do this by maintaining a publicly accessible registry.”

This same argument had been put forward many years before in the explanatory preamble to the Spanish Mortgage Law of 1861:

Our laws on mortgages are condemned both by science and by reason as they neither guarantee property sufficiently nor exercise a healthy influence on public property. Furthermore, they do not establish firm bases for credit secured by real estate, they do not encourage the circulation of wealth, they do not moderate interest on money, they do not facilitate the acquisition of immovable property and they do not provide sufficient assurance to those who lend money on the basis of this guarantee. Given this situation the need for reform is pressing and indispensable for the creation of mortgage banks, to create certainty regarding ownership and other property rights, to combat the effects of bad faith and to free owners from the yoke of merciless usurers.²³

The land register publishes information on the chain of transmissions of a property and reduces the risk of transfers being carried out without the agreement of the title holder. It also offers security to potential acquirers of a property by providing them with information concerning the temporal validity and the legitimacy of the transmitter's title to the property.

To summarize, the land register lowers the risk that the acquirer will obtain an invalid title without increasing the threat to the transmitter that he may lose his title to the property without his consent.

As we shall see a little later in this article, there are several different types of land registers (register of deeds, title register, etc.). Some of them attest to the ownership of a property whilst others offer mechanisms to protect property rights while leaving the question of establishing ownership to the rules governing possession. In some legal systems the land register is the exclusive source of information about the title holders of immovable

23. Spanish Mortgage Law (February 8, 1861), published in *LEYES HIPOTECARIAS Y REGISTRALES DE ESPAÑA. FUENTES Y EVOLUCIÓN. I. LEYES DE 1861 Y 1869*, at 223-395 (1974).

property, while in others the land register functions alongside a system of publicity based on possession.

From the perspective of an economic analysis, the publicity afforded by the land registry is of greater functional value than the publicity given by the mere possession of commodities when these are costly. For other types of commodities, the maintenance costs of this system of publicity exceed the benefits obtained from the reduction of the types of risk we have mentioned. Property registers are also more efficient when the registered items are not subject to frequent transmissions, when they have a long economic life, and when the registered properties are susceptible to economic exploitation by several persons at the same time (for example when it is possible to constitute limited real rights over the properties—such as a mortgage).

A property register is also efficient when the descriptions of the registered property it provides gives more information about it than mere possession can.

III. THE RULES FOR THE TRANSFER OF OWNERSHIP AS A RISK SHARING INSTRUMENT BETWEEN THE PARTIES

As a result of plural legal traditions, several types of systems are currently in use in Europe for the transmission of immovables.

These rules are important as they provide an answer to a series of fundamental questions that arise from the circulation of property rights. Some of the most important are: (1) who has the effective power of disposition over the property sold? (2) Who is responsible for damage caused to third parties by the property? (3) Does the property constitute a guarantee for the creditors of the transmitter or the acquirer of the property? (4) Who supports the risk in case the sold thing perishes? (5) Who has the right to obtain the benefits produced by the property sold?

Broadly speaking, the main systems of ownership transmission in Europe can be divided into the following categories:

1) Legal systems, such as the French and those that developed under its influence (e.g. the Italian, the Portuguese, and the Belgian legal systems), link the transfer of ownership to a contract, meaning that the agreement between the parties actually transfers ownership.

2) Legal systems such as the German and those it has exerted an influence on (e.g., the Austrian, the Swiss, and the Greek legal systems), where the conclusion of a contract must be accompanied by a contract on the actual transfer of ownership and the recordation of the transfer in the land registry.

In most legal systems influenced by the German model, the contract on the actual transfer of ownership has been substituted by recordation.

A characteristic of German law is that the contract on the actual transfer of ownership is disconnected causally from the contract that details the obligations of the parties, in such a way that nullity of the contract detailing the contractual obligations does not affect the validity of the transfer of ownership.

3) The Spanish legal system shares some of the characteristics of both systems previously cited. The Spanish system requires the conclusion of a contract (a title) and the *traditio* (the delivery of possession with the intention of passing ownership, which is the *modo* or correct form). These requirements are an example of how some aspects of the Spanish legal tradition have asserted themselves over the strong influence of the French.

A distinctive characteristic of the Spanish system is the causal relation between the contract and the transfer of title. If the contract is invalid, the transmission of ownership cannot be said to have taken place.

4) The common law system uses a complicated process known as “conveyance” to transfer ownership. This process consists of various stages, and in some countries (such as England and Wales) the acquisition process is only achieved with the inscription of the title in the land registry.

From an economic perspective,²⁴ the optimal system of transfer of title would be that in which a single subject could be said to have: (1) an interest in safeguarding and conserving the physical condition of the property; (2) the legal means to protect the property; and (3) physical contact with the property, so that the title holder would be in a position to see whatever steps might be necessary to take in order to safeguard and conserve it. However, it is not within the power of the legislator to condition the transmission of the property and the actions associated with the transfer in such a way as to ensure that these three conditions always coincide. The legislator is forced to choose between conflicting interests and distribute risk between the parties in one way or another.

The three conditions stated are not met in the solution provided by the French legal system. Sacco describes the French solution as “pseudo consensual”²⁵ and attributes it to an intense dislike on the part of its creators of the obligation to give.²⁶ This obligation is substituted by the automatic effect of the transmission of the property. The obligation to give is characterized by the fact that the creditor, who has an effective interest in the condition of the property, does not have any legal action at his disposal to protect it. The authority to do so is held by the owner, who has a number of legal actions available to him to protect the property (such as the action to recover the property from third parties in possession and the *actio negativa*).

As a consequence, the French legislature considered it advantageous to convert the buyer automatically into the owner rather than the creditor of an obligation to give. However, this consensual system has a weakness. While it transfers the authority

24. See Rodolfo Sacco, *Relazione di sintesi*, in VENDITA E TRASFERIMENTO DELLA PROPRIETÀ NELLA PROSPETTIVA STORICO-COMPARATISTICA ATTI DEL CONGRESSO INTERNAZIONALE PISA-VIAREGGIO-LUCCA, April 17-21, 1990, at 900 (Letizia Vacca ed., Giuffrè 1991).

25. *Id.*

26. *Id.* at 901.

to protect the property into the hands of the buyer, who is naturally the subject interested in preserving the property in good condition, it means that the ability to protect the property is conceded to a subject that does not have it at his disposal. This subject, who does not have the possession of the property in question, is therefore not in a position to detect potential threats to it.²⁷

A part of German legal doctrine has criticised the German model of property transfer. These authors feel that in the sale of immovable property, ownership should be transmitted on the payment of the price stipulated and the handover of the property.²⁸ This is the thesis held by members of the school of Karl Schimdt, who do not favour the current model of property transfer in the German Civil Code. They dispute the necessity to distinguish between obligational contracts and contracts on the actual transfer of property.

The critics of this model draw on a wide range of historical sources to support their critique, including Roman Law, ancient

27. Spanish legal doctrine has come to the same conclusion; *see, e.g.*, MARIANO ALONSO PÉREZ, *EL RIESGO EN EL CONTRATO DE COMPRAVENTA* 254 (Montecorvo 1972). This author considers the rule *res perit domino* to be a deviation from the original *periculum est emptoris* applied in Roman law, and claims it was a creation of the natural law school of rationalists. This school of thought maintained that it was against the laws of nature and therefore wrong for the buyer to have to assume all the risk of a transaction, as it had traditionally been believed was the case in Roman law, and that in fact Roman law had not actually imposed this burden on the buyer. Hugo Grotius drew attention to several passages from the Roman period that he felt clearly showed that ownership was able to be transmitted, even without the act of placing the property in the possession of the buyer (the *traditio*), by the mere consent of the parties. However, even the consecration of the maxim *res perit domino* does not eliminate the injustice of the rule *periculum est emptoris*, because making the buyer the owner of a property without handing over to him the possession and the use of it is effectively the same as making him a creditor of the right to the property. In both cases the property perishes to the detriment of the subject who has to pay the price.

28. This is the opinion of Hans Brandt, *Eigentumserwerb und Austauschgeschäft, der abstrakte dingliche Vertrag und das System des deutschen Umsatzrechts im Licht der Rechtswirklichkeit*, 120 LEIPZIGER RECHTSWISSENSCHAFTLICHE STUDIEN 322 (Th. Weicher 1940) which has been criticised by, Heinrich Lange, *Rechtswirklichkeit und Abstraktion*, 148 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [Acp] 188 (1943).

Germanic Law, natural law philosophy and nineteenth century Prussian Law.

Another controversial issue in the German system of property transfer is the principle of abstraction. This principle states that contracts on the transfer of property are independent from their cause, which means that they produce effects even if the accompanying obligational contract proves to be invalid. The decision to incorporate the principle of abstraction in the legal system is a political decision taken by the legislator in an attempt to balance the conflict of interests generated between the transmitter of the property, the acquirer and his creditors, the successors of both parties and the interests of commerce.²⁹

The principle of causality and the principle of abstraction are techniques used to distribute risk between the parties to a contract. The principle of causality better protects the interests of the creditors of both parties, because only the patrimony of their debtor is placed at their disposition and it does not protect the good faith of the acquirer's creditor based on the appearance of the situation created. In this way, a subject that has commodities at his disposal is able to retrieve them from the patrimony of a third party, without his interests being secondary to those of the acquirer's creditors.

The principle of abstraction guarantees equality between the parties, because both the subject that transmits the property and the subject that acquires it, and only them, have legal actions based on their contractual obligations. According to the principle of causality this would not be the case, as there exists a danger that the seller might stake a claim to the property by means of the revendicatory action (*reivindicativo*) (which is used to defend a property right), while the purchaser of the property would only

29. This principle was included in the German Civil Code due to the influence of Savigny. The celebrated German jurist considered just cause to be the agreement that the parties reach over the transmission of property whilst the property agreement itself (*Einigung*) is a separate legal act that does not depend on a contract outlining the obligations of the parties.

have legal actions based on the other party's contractual obligations.

In the opinion of Lange, the best property transfer system would be that which combined the principle of causality with a system of acquisition of property *a non domino*.³⁰ This would afford the parties protection against any possible defects in the underlying legal agreement and would also protect the interests of commerce.³¹ This is the solution that Spanish legislators have opted for. While the Spanish system of property transfer is causal it also protects those that acquired their right from a subject that appeared in the land register as the title holder of the property by maintaining the validity of their acquisition, even when the transmitter was not really the legitimate owner. It also protects the acquirer from any other resolution or revocation of rights that did not figure in the land registry at the time of transfer (Article 34 of the Spanish Mortgage Law).

IV. THE ECONOMIC FUNCTIONS OF THE LAND REGISTER: A COMPARATIVE ANALYSIS OF THE DIFFERENT LAND REGISTRATION SYSTEMS

A. Systems of Land Registration in Europe

The legal systems of Europe differ not only in the rules they employ to regulate property transfer but also in the organization and efficiency of their respective land registries.

In Germanic systems, the land registry is designed as a register of title. The land register has a fundamental role to play in transactions over immovable goods, as inscription in the registry

30. Lange, *supra* note 28, at 188.

31. In the words of Lange, *supra* note 28, at 226: *Ich habe deshalb stets gegen das Abstraktionsprinzip gekämpft und halte diesen Kampf auch heute noch aufrecht, obwohl ich die Begründung aus der Unvollständigkeit dieses gebildes heraus nicht mehr für zutreffend halte* ("That is why I have always fought against the abstraction principle and I maintain this fight even today, although I do not longer consider right the justification of the elimination of this institution").

has replaced the *traditio* or the act of handing over the physical possession of the property. In Germany, inscription in the land registry has to be preceded by an agreement over the act of transferring the property (abstracted from the separate agreement over the obligations of the parties). In Switzerland, however, the law requires a causal contract that has the specific aim of transferring ownership.³² In both systems inscription is necessary, as without inscription neither the agreement to transfer property nor the causal contract produce the effect of transmission.

In other European countries the land register is organized as a register of deeds. There are several types of registers of deeds; some of them are simple, rudimentary collections of unorganized deeds like the ones that exist in many parts of the U.S. Nevertheless other are well organized, improved like the French, the Scottish or the Dutch registers.³³

1. The Scottish Land Register

Registration has been mandatory in Scotland since 1617, in the sense that it is the final and essential step in the transfer of ownership of land.³⁴ As a result, virtually all land is registered, and the register is (and always has been) open to the public without restriction. The original register of 1617, known as the “Register of Sasines”, was a register of deeds, but it is now being phased out and replaced by a new register, the Land Register of Scotland, which operates as a system of registration of title.³⁵ Today, when

32. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE], arts. 657 (1) and 665 (1) (Switz.).

33. ROWTON SIMPSON would also consider them as “Title Registration”. STANHOPE ROWTON SIMPSON, *LAND LAW AND REGISTRATION* 22 (Cambridge University Press 1976).

34. Registration (Scotland) Act, 1617, c. 16.

35. The relevant legislation is the Land Registration (Scotland) Act, 1979, c.33. The 1979 Act is itself under review by the Scottish Law Commission, and there are likely to be major changes. See the Commission's Final Report on Land Registration (Scottish Law Commission, *Report on Land Registration*, report nr. 222 (February 2010, 2 v.), available at www.scotlawcom.gov.uk/download_file/view/186/ (vol. 1), and

land is sold, the transaction must be registered in the new register. As a result, the title to some 50% of properties is held in the Land Register, and the numbers are rising rapidly. Both registers are administered by Registers of Scotland, a government agency.³⁶

The Land Register is held in electronic form. For each property, there is a separate title sheet which shows the boundaries, the name of the owner, and the other real rights (such as rights in security “mortgages”) to which the property is subject. As a matter of law, the person named as owner on the title sheet *is* the owner.³⁷ So if the house in which A is interested is already on the Land Register, all A has to do is to consult the relevant title sheet. This can be done in person, by using an internet-based inquiry service,³⁸ or by employing a firm of professional searchers.³⁹

2. The English Land Register: The Journey to Title Registration

In England, in the early eighteenth century, systems of deed registration were introduced for some very limited areas of England. Title was based on the production of deeds, showing the owner’s and his predecessors’ entitlement to the land. A register of deeds made ownership more secure by removing the risk of lost

www.scotlawcom.gov.uk/download_file/view/187/ (vol. 2)), which contained a draft Bill that, if enacted, would repeal and replace the Land Registration (Scotland) Act 1979. The Land Registration (Scotland) Bill was introduced in the Scottish Parliament on 1 December 2011. The main objectives of the Bill are to reform and restate the law on the registration of rights to land in the land register; to enable electronic conveyancing and registration of electronic documents in the land register; to provide for the closure of the Register of Sasines in due course; to allow electronic documents to be used for certain contracts, unilateral obligations and trusts that must be constituted by writing; to provide about the formal validity of electronic documents and for their registration and for connected purposes.

36. See www.ros.gov.uk (last visited Apr. 12, 2013).

37. Land Registration (Scotland) Act, 1979, c.33, s.3(1)(a).

38. Known as Registers Direct. See www.ros.gov.uk/registerdirect (last visited Apr. 12, 2013).

39. See Kenneth Reid, *Report for Scottish Legal System*, TRANSFER OF IMMOVABLES. THE COMMON CORE OF EUROPEAN PRIVATE LAW (pending publication).

deeds, and the deeds registration statutes provided that unregistered deeds would have no effect upon a purchaser of the land (while remaining valid against the parties to them).

In the first half of the nineteenth century one of the reforms that were called for was the introduction of title registration. Title registration is an independent record of ownership wherein the state of the title can be consulted without the necessity for further investigation.

In 1862, a title registration statute, the Land Transfer Act, was enacted. The system failed, however, in part because the registration was not made compulsory: once a title was registered, off-register dispositions were allowed, preventing the register from remaining up to date.

Later, in 1925, the Land Registration Act configured a workable and efficient land registration system, which was modified by a 2002 statute. The act of inscription is currently a constitutive act in England and Wales, since the Land Registration Act 2002 came into force.

3. The French Land Register

In the so called “Latin” legal systems (such as the French, the Italian and the Belgian) inscription in the land registry does not form part of the mechanism of transmission, and the function of the land registry in these countries is primarily to give publicity to titles over property. The inscription of a right over an immovable is therefore only useful when a subject wishes to invoke that right against third parties.

In France as in the Netherlands, the registries of properties, which technically have the same function as a title register, are part of the *cadastre*. Both of them, for historic and fiscal reasons, are connected with the Ministry of Finance. The control of the

formalities is thus restricted, consequently limiting the legal impact of the land registration and of the *cadastre*.⁴⁰

The land registration is organized by a decree of January 4, 1955.⁴¹ It organizes the publicity of the diverse acts and facts that modify the legal status of an immovable property, in order to improve the information available to third parties. The core of this system consists in the obligation to publish acts, judicial resolutions and legal facts (such as the death of a person) which create or transfer any real right on an immovable. The act must be filed at a local office called “land registry”, under the responsibility of a Ministry of Finance officer, called a “land registrar”, who also collects taxes. The land registrar records acts on a logbook on a chronological basis, which allows establishing the order of publication of acts. He has to draw a record listing excerpts of the registered acts, by owners (personal index cards) and by properties (real index cards). This mixed system thus allows obtaining information either on the real rights of a given person, or on the rights and charges that pertain to a given property. To allow the establishment of the real index cards, the decree of January 4, 1955, created a correlation between the land registration and the *cadastre*, even if they are managed by two different services.

French law has no system of perfect proof of ownership, except by way of acquisitive prescription. Proof can be established by any means (title, possession, etc.), left to the sovereign estimation of the courts. The French land registration system (*publicité foncière*),

40. See Frédéric Planckeel, *Report for French Legal System*, in TRANSFER OF IMMOVABLES. THE COMMON CORE OF EUROPEAN PRIVATE LAW (forthcoming, Cambridge Univ. Press 2013).

41. Décret 55-22 du 4 janvier 1955 portant réforme de la publicité foncière [Decree nr. 55-22, of January 4, 1955, regarding the reform of land registration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], January 7, 1955, p. 346; and by Décret 55-1350 du 14 octobre 1955 pris pour l'application du décret n° 55-22 du 4 janvier 1955 portant réforme de la publicité foncière [Decree nr. 55-1350, of October 14, 1955, applying the Decree nr. 55-22, of January 4, 1955, regarding the reform of land registration], J.O., October 15, 1955, p. 10125.

contrary to the German land register, is not attributive of ownership. According to French law, land registration is limited to proving against third parties that B acquired his right from A (*opposabilité du titre*), not to prove that A was himself the owner. The land registrar does not verify the content of the transferring contract: those who want to deal with B must know that his title can be challenged in an action in nullity, which may invalidate the act of disposition concluded with B.⁴²

Compulsory land registration has an incidental impact on the effects of contracts transferring immovable property. On the one hand, the contract must be certified by an authentic act for its publication, making the intervention of a notary necessary, often to reiterate a transfer already agreed on in a contract. On the other hand, the publication conditions the possibility of making the transfer effective as against interested third parties: the particular assignees of the same assignor, or of a common assignor, who would claim to have on the property a competing real right.⁴³ For example, A sells to B, then A sells again to C. B can make his transfer effective against C only if he publishes first. C will prevail over B if he publishes first, at a moment when A still appeared in the register as being the owner.

This rule offers limited protection. For instance, land registration does not protect the purchaser against a competitor who claims to have acquired his right from a third party having sought no registration of his title: it protects him only against the existence of occult transfers by his assignor. Furthermore, the Court of Cassation introduced an important adjustment based initially on fraud, and later extended to civil liability:⁴⁴ if C

42. Art. 28 of the decree of January 4, 1955, *supra* note 41, mitigates this inconvenience by imposing the publication of claims in nullity or termination of contract or act of disposition.

43. The heirs are not considered as third parties and are compared to their assignor.

44. Cass. 3e civ., January 30, 1974, D. 1974, 427 (note J. Penneau); Cass. 3e civ., January 30, 1974, JCP 1975, II, 18001 (note M. Dagot).

registers first a right that he has acquired from A knowing that A had already transferred it to B, C's fault deprives him of the benefit of land registration. However, if C resells to D, and D registers before B, D loses the benefit of land registration if he bought with full knowledge of the facts.⁴⁵ This application of civil liability thus restrains the automatic character of publicity.

Although its extent is thus limited, it is admitted that land registration provides sufficient security, because the conflicts settled by the decree of January 4, 1955 are the most common in practice.⁴⁶

The French reform of 1955 aimed at making registration an efficient instrument to help guarantee commercial security. The reform made it obligatory to register the creation or transfer of real rights in the land register but stopped short of making registration a constitutive act.⁴⁷

4. *The Spanish Land Register*

Spanish law differs from the French model in various ways as it incorporates a number of aspects of the German property transfer system. As in the French system, inscription is not a constitutive act, it is a declarative act. Transmission of property requires a

45. Cass. 3e civ., June 11, 1992, D. 1993, 528 (note A. Fournier).

46. MAZEAUD ET AL., III LEÇONS DE DROIT CIVIL, at 534 et seq. (2d., Montchrestien 1963); GABRIEL MARTY ET. AL., DROIT CIVIL LES SÛRETÉS LA PUBLICITÉ FONCIÈRE 324 (2d ed., Sirey 1987); PHILIPPE THÉRY, SÛRETÉS ET PUBLICITÉ FONCIÈRE 401 (PUF 1988); JEAN-PIERRE CHENU, DE LA TRANSCRIPTION À LA PUBLICITÉ FONCIÈRE 72 (Bordeaux Imprimeries Delmas 1960); PIERRE LECHÊNE & PATRICK STEINMANN, PUBLICITÉ FONCIÈRE: CONSERVATION DES HYPOTHÈQUES: SIÈGES ET RESSORTS DES BUREAUX, FORMALITÉS D'ENREGISTREMENT, TARIF ET SALAIRE DU CONSERVATEUR DES HYPOTHÈQUES 5 (2007).

47. The same obligation exists in Belgium, Luxembourg, Italy, and Sweden, where notaries and other public officials have to file for registration within a three month period starting from the date on which the document was presented. In France, this obligation appears in art. 33, decree of January 4th, 1955, *supra* note 41. In Sweden the same obligation is contained in Jordabalk [JB][Land Law Code] 20:3 (Swed.); in the Swedish system, if the required documents are not presented to the Registrar within three months, the party responsible may be fined, but the sale is valid and the effects of the transmission will have been consolidated.

contract to transfer ownership (or another type of valid title) and the act of handing over possession of the property (known in Spanish Law as the theory of title and mode). The effect of registration is threefold:⁴⁸

a) First, like in France, a person recording an act in the land registry cannot see his right opposed or adversely affected by any act of the transmitter that creates another, incompatible right.

b) Second, and this goes one step beyond the French model, when a right has been registered for at least two years (articles 28 and 207 Spanish Mortgage Law), the title holder is empowered, by virtue of registration, to exercise and enforce the registered right *erga omnes*.

c) Third, according to the principle of public good faith in the register, when a person registered a right acquired from an apparent title holder, his title will be upheld even if the transmitter was not the genuine title holder. This principle also protects the holder of the registered title if his title is threatened by a cause of termination that does not appear in the registry (article 34 of the Spanish Mortgage Law).

B. Systems of Land Register in the United States

In the U.S., the Land Registration systems vary widely from state to state regarding what has to be recorded, the way it is recorded and the legal consequences of it.

Some attempts to introduce more uniformity failed, such as the Uniform Simplification of Land Transfer Act of 1976. Due to the archaic and incomplete character of many official recordation institutions, the private insurance sector developed title insurance, providing purchasers with additional certainty in return for compensation. The introduction of the so-called “Torrens system” provided an

48. Regarding this matter, see Antonio Gordillo Cañas, *La inscripción en el Registro de la Propiedad (su contenido causal, su carácter voluntario y su función publicadora de la realidad jurídico-inmobiliaria o generadora de su apariencia jurídica)* in 1 ANUARIO DE DERECHO CIVIL 11 (Boletín Oficial del Estado 2001).

alternative to this combination of an official recording system with title insurance. The “Torrens system” became popular in the United States during the late nineteenth century. More than 20 states passed enabling acts for a Torrens system during the period 1895-1915. Prompted by the failure of three of four insurance companies in the state of New York during the 1930s, the New York Society engaged R. Powell of Columbia University in order to study an eventual introduction of the Torrens system in the state of New York. His report was highly critical about such an introduction stating that the recordation system, then prevailing in the state of New York and in 16 other states operated at lower cost than the Torrens system. His report gave a fatal blow to the hopes that the Torrens system would be generally accepted in the U.S. Many states which had adopted the system repealed the statutes. The discussion about the effectiveness and efficiency of both systems still looms in legal literature.⁴⁹

In the majority of U.S. legal systems, transfers of ownership of real property are not effected by contract, but by the execution and delivery of a deed. Deeds are formal documents that must contain specified information and declarations, and are often recorded or filed with a local land records office.

Most transfers of real property are preceded by a contract of sale, in which the seller agrees to transfer title at a later date in exchange for a payment by the buyer. Because they concern the transfer of real property, such contracts are subject to the writing requirement, according to the Statute of Frauds in force in some states.⁵⁰

49. BOUDEWIJN BOUCKAERT, *PROPERTY LAW AND ECONOMICS* 193 (Edward Elgar 2010) (on the other side, there is still discussion about the effectiveness of each system). See Matthew Baker et al., *Property Rights By Squatting: Land Ownership Risk And Adverse Possession Statutes* in 77 *LAND ECONOMICS* 360 (University of Wisconsin Press 2001) (who developed research on the optimal title search under recording system in the U.S. Although the focus of their research is not on an efficiency comparison between recording and registration systems, the result of their research strengthens the efficiency argument in favour of the recording system).

50. GREGORY KLASS, *CONTRACT LAW IN THE USA* 91 (Kluwer Law Int'l 2010). Contracts for the sale of land are to be distinguished from conveyances of land—that is, transactions in which title or ownership passes. Conveyances are governed by additional statutes, and are generally considered subject to property

Contracts for the sale of real property generally precede the buyer's investigation of title and often also his securing of financing for the purchase.

The buyer's obligations under such a contract of sale are therefore typically conditional first, on a satisfactory title report by a third party and second, on the buyer being able to obtain financing.

In the majority of states, the chain of title review is usually performed by a professional title abstractor or attorney, and the clear title is guaranteed either by a title insurance company or by an attorney, subject to some exclusions, which may be quite significant.

In many states, deeds or related documents are being recorded in land registration offices (which have different names: office of the recorder, country vault, recording office, land office). In these offices, track of transfers of property can be established by inspecting the land records. The offices are governmental organizations at the lowest governmental level, the county. Almost all U.S.-counties have two main complementing registrations: for property, the warranty deeds (for conveyances) and the deeds of trust (for mortgages). Cadastral mapping is carried out in a basic way or sometimes not at all. Project developers sometimes prepare maps of large tracts of land to be split up in parcels that are individually sold and these maps can be used in the land offices as a kind of geographical description of the newly formed individual lots.

law, as distinguished from the law of contract. The Statutes of Frauds applies to the transfer of any interest in land, which section 127 of the Second Restatement of contracts defines as "any right, privilege, power or immunity, or combination thereof, which is an interest in land under the law of property." This capacious definition includes not only the simple ownership (or a fee simple estate) of real property, but also options to purchase or sell The wording of some states' Statutes of Frauds makes it unclear whether the requirement applies only to promises to transfer an interest in land, or also to promises to buy such an interest. Most courts have held that it applies to both, which is the position adopted by the section 125 of the Second Restatement.

The fact that the public in general has to present documents for registration is one of the weak points in any land registration system. A land registration that is not updated by a constant flow of data to renew existing records will fail. To ensure that documents regarding conveyances are actually presented at the offices to be recorded as soon as possible, recorded facts get priority over unrecorded ones. This incentive to register is expressed in the recording statutes of the various states in the U.S. There are three types of statutes: race, notice, and race-notice statutes. In race statutes priority depends on the order in which documents and other instruments are registered. The winner of the race to registry gains priority even if he or she knew of a prior unregistered conveyance. Knowing this could lead to fraudulent practices, some states in the U.S. adopted the notice statute, in which case no premium is placed on the race to the registration office. The focus here is on whether the purchaser had notice of a prior conveyance or not. A *bona fide* purchaser will always win as long as he or she is without notice. The “race-notice” statute is composed of elements of both “race” and “notice” statutes. A purchaser can purchase without actual or constructive notice of an earlier claim and he or she must register first.⁵¹

In the United States, there is no nationwide or uniform system for the identification of properties.

For references to location of parcels the majority of states use the Federal Rectangular System (FRS). After the declaration of independence the federal state found itself with vast tracts of undeveloped and hardly inhabited land. There were few monuments suitable for the usual surveys and it was determined to devise a system that would facilitate location of land parcels. A commission headed by Thomas Jefferson evolved a plan for dividing the land in a series of rectangles which Continental Congress approved in April 1785. In this system a chosen baseline and a principal meridian form the basis of the reference system. The initial point, varying from state to state to avoid too

51. Simpson, *supra* note 33, at 96.

complicated referencing, is the point where these lines cross. Along the baseline the reference is made to 6-mile intervals known as ranges and along the meridian these 6-mile intervals are known as townships. The way in which references are made to these various base lines and meridians and the further division of the “squares” in sections that are formed on the bases of the baseline and meridians is similar and unique all over the U.S.

The FRS was a useful tool in granting land to settlers. Newly “discovered” conquered, or traded lands were divided in ranges and townships on the basis of the initial point. After the size of a parcel of land, suitable to feed a family was determined, each applicant could buy a “square” parcel of land of that size, of which the location would be uniquely identified in the FRS. Additional surveys were not necessary. It is remarkable that even today the reference to the FRS is often made in the registration, although, most of its initial usefulness is lost.

With the increasing urbanization the FRS system becomes often too coarse to serve as a good indicator for the small parcels of land that are common in urban areas. Nevertheless, references to the FRS system are maintained as much as possible as reference to the location of the parcels.

The FRS system is in use in 30 of the 50 states of the U.S. (and in provinces in Canada). There are 32 base lines and 35 meridians in the U.S. The original colonial states (mainly on the East coast and New England), Hawaii, Virginia, Kentucky and Texas do not use the FRS system (Florida is the only Atlantic coast state using the FRS).⁵²

Taking into account the technology available nowadays for computerizing registration and mapping, after analyzing this system of registration of rights to land in the U.S., it seems to be complex and somewhat unsophisticated. One of the reasons that explain this situation is without doubt the existence of title insurance provided by private insurance companies. For sure, this has reduced the urgency to modernize the land registration system.

52. HENRI A.L. DEKKER, *THE INVISIBLE LINE: LAND REFORM, LAND TENURE SECURITY AND LAND REGISTRATION* 182 (Ashgate Publ'g ltd. 2003).

Title insurance in the United States is indemnity insurance against financial loss from defects in title to real property and from the invalidity or unenforceability of mortgage liens. This type of insurance is meant to protect the financial interest of owners or lenders against losses due to title defects, liens or other matters. It will protect against a lawsuit attacking the title as it is insured, or reimburse the insured for the actual monetary loss incurred, up to the amount of insurance provided by the policy.

C. The Demand for Title Registration: An Economic Approach

According to the way in which registers are organized and the degree of effectiveness attributed to them, it is possible to divide them into two main categories.

1) The registration of deeds system. This type of system is also termed the “opposability system” and is currently used in France, Belgium, Portugal and Italy. The defining characteristic of this system is that documents are registered without the identification of the latest genuine title holder, that is to say the documents are not examined beforehand as part of a process to establish the identity of the title holder, but merely have to comply with certain formal requisites. The content of the register, therefore, only defines a group of possible title holders, and holds a complete set of all the documents pertaining to a property, which may be inspected on request.

Given the resulting lack of certainty of this system in some countries, like in the U.S., it is quite common to contract “title insurance” to provide holders with an indemnity should they be dispossessed of their title. The negative aspect of this measure is that while the indemnity provides economic security, an insurance contract obviously does not provide any degree of legal security, as the acquirer of the property may lose his title to it. Also, the measure of economic security provided is limited, as the title security does not cover the full value of the property, but only the

purchase price (or a percentage of the purchase price) and not other related costs of the purchase. In addition, the payment of any indemnity is subject to the exceptions and conditions stipulated in the insurance policy.

2) The registration of titles system, which is also referred to as the “the presumption of correctness system.” This system is currently in place in Germany, Austria, Switzerland, Spain and England. In this system, rights are inscribed in the registry, and it does not consist of a collection of original documentation pertaining to the property, as does the registration of deeds system. The registrar is responsible for carrying out a check on the legality of the claims presented and will not permit any inscription that contradicts a right already inscribed in the registry without the prior authorization of its title holder. In this system, the principles of exactness (the content of the Registry is presumed to be a true reflection of the legal situation) and priority (by which a posterior but registered act prevails over a previous but unregistered act) both apply.

Under the registration of deeds system, courts resolve disputes by adjudicating property rights according to the moment in which the deeds were recorded in the register. This creates a strong incentive for people to record the deeds to a property as soon as possible and for the parties or their intermediaries to gain the consent of the title holders of the rights affected in order to do so. In this way, the parties can voluntarily avoid possible future conflicts over the ownership of titles.

In the registration of titles system, private contracts are also accorded priority when recorded. However, the registrar is granted authority that is almost akin to that of a judge and will not inscribe a right if it negatively affects one previously inscribed, unless previously authorized by the title holder to do so. This eliminates a potential weakness of the registry and means that those legal systems that have this type of registry treat inscription as conclusive proof of the existence of the right, and establish a

system of responsibility for those exceptional cases in which there is an error in the register. As a consequence, those who acquire a property in good faith, trusting in the accuracy of the registry, will not be stripped of their rights over the property even if the genuine title holder subsequently appears.

The two registry systems incur different types of expenses and provide different kinds of benefits in terms of reducing the costs derived from the uncertainty and the risk of losing property rights.

The registration of deeds system is certainly cheaper than the registration of titles system, but it is generally considered less effective. The lower cost of the registration of deeds system is due to the fact that the examination of the deeds to establish the legality of the rights contained in them is purely voluntary and, under these systems, services to assess and insure the parties are provided by private companies. This has sometimes been cited as a benefit, because, as this system favours the intervention of the private sector, the resulting competition to provide services tends to minimize the cost of the services they provide.

However, in the opinion of Arruñada,⁵³ these advantages are more illusory than real. The cost of voluntarily insuring a right can be as much as and sometimes even higher than the cost occasioned by the inscription of the right in the public registry. The organization of this type of service by the private sector may also be inefficient in economic terms as they are often provided by monopolies and are normally tightly controlled by state regulations. The fees of a French notary are fixed by the state, and both the notary and the insurance company are subject to legislation that limits entrance to their profession and specifies the “products” they can offer and the procedures they must follow. As a consequence, this duplication of institutions (private companies and the deeds registry) to provide guarantees to the parties in a property transfer is not economically efficient.

53. Arruñada, *supra* note 11, at 70.

The registration of titles system requires a prior examination of the legality of the rights to be inscribed to be carried out by a public official. This requisite obviously increases the costs of the transaction. However, by organizing the property registry in a professional manner along the same lines as the organization of the judiciary, a high level of productivity can be achieved. This level of productivity is even higher when the registrar earns the benefits produced by the registry office (as is the case in Spain).

The costs of the registration of titles system are offset by the greater security it provides,⁵⁴ as it protects those who acquire property in good faith through rules that govern the responsibility for errors in the registry, by which subjects are compensated for losses caused by errors.⁵⁵

54. According to Harold Demsetz, *Toward a Theory of Property Rights* in 57 AM. ECON. REV. 347, 347 (1967) this improvement in the definition of the rights in question is only efficient when the benefits associated with it are greater than the costs it generates.

55. Benito Arruñada, Nuno Garoupa, *The Choice of Titling System in Land*, available at www.econ.upf.edu/docs/papers/downloads/607.pdf (last visited Apr. 12, 2013).