THE MEXICAN LAND REGISTRY: A CRITICAL EVALUATION*

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From ancient times, formalities have always been required in the acquisition, transfer, modification and extinction of rights over immovable property.[1] Initially, the formalities were intended as reminders of the transaction to those present,[2] but they gradually acquired the additional purpose of publicizing the transaction to other parties. The presence of weighing scales, a weigher and five witnesses in the preclassical Roman *mancipatio* sale, for example, was a rudimentary form of notice.[3] The present real property recording practices in Mexico and other civil law countries, however, find their antecedents not in Roman law but in the practices which developed during the Middle Ages, particularly in Germany.

The first section of this article will describe briefly the development of the land registry in the European countries that served as models for

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[1] As the contracts and conveyances known to ancient law are contracts and conveyances to which not single individuals but organized companies of men, are parties, they are in the highest degree ceremonious; they require a variety of symbolical acts and words intended to impress the business on the memory of all who take part in it. H. MAINE, ANCIENT LAW 263 (10th ed. 1963).

The expression "rights over immovable property" as used in the text describes a type of rights within a class referred to in civil law countries as in rem. In rem rights, also known as "real rights," are those present in a fee simple absolute and in lesser fees, such as the life estate, as well as in the security of a mortgagee or pledgee. Their main characteristic is that their holder enjoys a power over the thing, which could be merely retention as in the case of a pledge, or could amount to disposition or alienation in the case of ownership. In contrast, the holder of a right ad rem (to the thing), is typically a "personal" creditor, or one whose right of action is solely against a debtor, and whose powers over the debtor's property are dependent upon an adjudication of the debtor's liability.

Land registry law is usually concerned only with the type of in rem rights that is created, modified or extinguished over land or other immovable property. This will be the connotation of the term "rights in rem," used throughout this article.

[2] MAINE, *supra* note 1, at 263.

[3] On the characteristics of the *mancipatio* as a formal transaction and its contrast with the informal tradition, see R. SOHM, THE INSTITUTES: A TEXT BOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 48-51 (3d ed. J. Ledlie transl. 1907).

Mexican law. Subsequent sections will attempt to evaluate the success of the incorporation of the most significant European concepts, principles and rules as components of the Mexican land registry system, particularly in light of contemporary Mexican decisional law.

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SYSTEMS THAT INFLUENCED MEXICAN LAW

Historical Introduction

Under the medieval German *Auflassung* proceeding, a seller and buyer appeared in court to convey title to real property through a relinquishment or *Lassung*. No physical or symbolic delivery by the parties was required because the court decision effected and confirmed the transfer. This proceeding, under which valid title could be acquired from an authoritative source other than the parties, was the basis for the later development of an independent process of land titling.[4]

This method of titling applied not only to consensual transactions but also to other acts such as the unilateral acquisition or transfer of pos-

[4] For a brief history and description of the German law of land transfer and recording, see 3.1 L. ENECCERUS, T. KIPP & M. WOLFF, TRATADO DE DERECHO CIVIL 131-286 (32d ed. B. Gonzalez & J. Alguer transl. 1951) [hereinafter cited as WOLFF].

session when the intention of one party, overtly manifested, determined the creation of a right in rem. Indeed, one of the most important functions of the German land registry was to supplant proof of physical control or possession (*Gewere*) as the most common means for transferring land.[5] As summarized by Professor Hedemann, judicial investiture or titling required the maintenance of official records and books, some of which date back to the 12th century. In time, any change in the legal status of land requird an *Auflassung* and recording.[6] The recording established a presumption of the grantee's ownership, and anyone relying on it in good faith enjoyed a protection similar to that now given to a person who relies on possession as an indication of title to personal property.[7]

Land registry statutes, embodying various systems of rights and duties for recording as well as nonrecording parties, are a comparatively recent phenomenon. The model enactments in civil law countries date back only to the middle and late 19th century.[8] The German, French and Spanish statutes and regulations were among the most influential on the Mexican *Civil Code for the Districts and Federal Territory of 1928.*

Prior to examining some of the basic features of these land registry systems, the common law student should perceive the significance that these jurisdictions attach to the classification of property as movable or immovable. Although this classification was not of cardinal importance in Roman law,[9] it was most influential on 19th century code rules, especially the French, Spanish and subsequently Latin American civil codes. Article 517 of the French *Civil Code*, for example, classified property as immovable "either because of its nature, its function or because of the

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[5] *Id.* at 6, where it is pointed out that, in contrast with Roman law under which only a closed number of rights in rem could be created, Germanic laws allowed the creation of new varieties of rights in rem through the use of *Gewere* as security for obligations involving specified property.

[6] J. HEDEMANN, TRATADO DE DERECHOS REALES 75 (Spanish transl. 1955), *cited in* N. LOPEZ DEL CARRIL, PUBLICIDAD DE LOS DERECHOS REALES 6 (1965). Article 873 of the German *Civil Code (Bürgerliches Gesetzbuch)* (Sebald 1910) [hereinafter cited as BGB] states:

> For the transfer of ownership over movable property, as well as for the creation of a lien thereon, or for the transfer or encumbrance of this lien, it is necessary to have an agreement [*Einigung*] embodying the change in rights [*Rechtsänderung*] between the grantor and the grantee and a recording of the mutation in the Land Registry except when the law provides otherwise.

[7] WOLFF, *supra* note 4, at 6. The most famous and influential formulation of the principle of protection to the possession of movable property is found in the proverbial rule of article 2277 of the French *Civil Code*: "In matters of movables, possession is the equivalent of title."

[8] *See, e.g.*, in France, the Law of March 23, 1855; in Germany, the Land Registry Law (Grundbuchordnung) [hereinafter cited as GBO] of March 24, 1897, *as amended* Aug. 5, 1935; in Spain, the key statute was the Law of February 8, 1861, *as amended* Feb. 8, 1946, better known as the *Ley Hipotecaria* (Mortgage Law) [hereinafter cited as Spanish Mortgage Law], in 9 E. ARANZADI, DICCIONARIO DE LEGISLACION Y JURISPRUDENCIA 865 (1951).

[9] *See* R. LEE, THE ELEMENTS OF ROMAN LAW 107-08 (1952) (quoting from Gaius' Institutes). *See also* SOHM, *supra* note 3, at 143.

object to which it [was] attached,"[10] and then enumerated a number of objects which met these criteria. Although it did not set forth express criteria, article 334 of the Spanish *Civil Code* also listed various types of immovables. With only a slight variation, the Spanish enumeration is found in article 750 of the Mexican *Civil Code*.[11]

The legal consequences of this classification are far-reaching and determine the rules applicable to the acquisition, modification and extinction of rights in such property. Not only will different statutes of limitations, rules of adverse possession and protective remedies be applied,[12] but the recordation of some transactions will not be allowed at all. Article 3002 of the Mexican *Civil Code*,[13] for example, limits instruments that may be recorded in the land registry to those "by which the ownership of, possession of, or other rights in rem on real property are acquired, transferred, modified, encumbered or extinguished."

The contrast with a contemporary United States enactment such

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[10] C. Civ. art. 249 (79th ed. Petits Codes Dalloz 1968-69).

[11] C. Civ. Dist. y Terr. Fed. art. 750 (Porrua 1970) classifies the following as immovable property:

I. The soil and buildings attached thereto;

II. Plants and trees, so long as they are attached to the ground, and the fruit hanging from said trees and plants, so long as they are not separated therefrom by harvest or regular cutting;

III. Everything which is attached to real property in a permanent manner, so that it cannot be separated without deterioration of the real property or of the object attached thereto;

IV. Statutes, bas-reliefs, paintings and other ornamental objects placed in buildings or on land by the owner of the immovable in such a way as to show an intent to attach them to the immovable in a permanent manner;

V. Dovecotes, beehives, fishponds, or analogous breeding places, when the owner preserves them with the intention of maintaining them attached to the realty and forming part thereof in a permanent manner;

VI. Machines, receptacles, instruments or utensils, intended by the owner of the real property directly and exclusively for the industry or exploitation of the same;

VII. Fertilizers intended for the cultivation of an estate, which are on the lands where they are to be utilized, and the seeds necessary for the cultivation of the estate;

VIII. Electrical apparatus and accessories attached to the soil or buildings by the owner of such soil or buildings, unless otherwise agreed;

IX. Springs, ponds, cisterns, and water currents, as well as aqueducts, and pipe lines of any kind which serve to conduct liquids or gases to a property or to extract them therefrom;

X. Animals which are raised on rural property used in whole or in part for the raising of cattle and other stock, as well as the working animals indispensable for the cultivation of the land, so long as they are used for that purpose;

XI. Dikes and constructions which, although floating, are destined by reason of their object and conditions to remain at a fixed point of a river, lake or coast;

XII. Real rights over immovables;

XIII. Rolling stock of railroads, telephone and telegraph lines, and fixed radio-telegraph stations.

The basic difference between the Spanish and the Mexican list is that article 334(10) of the Spanish *Civil Code* lists adminstrative concessions as immovable property.

[12] *See, e.g.*, C. Civ. Dist. y Terr. Fed. arts. 1152-53, 1156 (Porrua 1970).

[13] Translated in note 63 *infra*.

as the *Uniform Commercial Code* (UCC) is striking. The UCC reflects how thoroughly unconcerned draftsmen were with the problem of a detailed classification of property. Personalty is neither carefully defined nor contrasted with realty despite the fact that article 9 is devoted to secured transactions in personal property. Similarly, goods are defined in article 2 on the tautological basis of their "movability."[14] Consequently, there is uncertainty as to whether a real estate mortgage used as collateral is subject to recording under article 9 or whether its perfection is governed by real property registration rules or both.[15] By contrast, article 3002 of the Mexican *Civil Code* leaves little doubt that the perfection of a security interest affecting immovable property will be governed by land registry rules.

The French or Declarative System[16]

Article 1138 of the French *Civil Code of 1804* set forth the general principle of consensuality: "The obligation to deliver a thing is perfected by the mere agreement of the contracting parties."[17] Under the Code parties could create, transfer, modify or extinguish rights over immovable property without recordation of the transaction in a land registry. The act itself bound the contracting parties and until 1855 could, in the case of transfers of title, affect the rights in rem of third parties.

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[14] *See* UNIFORM COMMERCIAL CODE §§ 9-102, 9-103(3) & 9-313(1). Section 9-313(1) defers to "applicable law," presumably without the UCC, in order to determine whether "a structure remains personal property." *See also id.* § 2-105, Comment 1 (definition of "goods").

[15] *See* UNIFORM COMMERCIAL CODE §§ 9-104(j), .9-102(3) & Comments to § 9-102. Professors Speidel, Summers and White pose the same problem alluded to in the text. R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL TRANSACTIONS 92 (1969).

[16] *See generally* J. PEREZ LASALA, DERECHO IMMOBILARIO REGISTRAL 35 (1965); O. SALAS, TEORIA Y CRITICA DEL REGISTRO PÚBLICO EN COSTA RICA 7 (1969); WOLFF, *supra* note 4, at 133.

[17] It is important that the United States reader understand the exact connotation of the principle of consensuality in civil law countries. In contrast with the loose meaning attached to consensual transactions in contemporary American legal parlance, which equates the term consensual with contractual or voluntary transactions, the civil law concept addresses itself to what constitutes perfection of an act or contract. In certain obligations, consent alone should suffice. A man should be allowed to bind himself by his sole consent (*solus consensus obligat*). S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE—OBLIGATIONS 493 (1969).

Moreover, in certain agreements, such as sales, the principle could be taken to mean not only that the parties are bound as of the moment of consent but also that title has been transferred, regardless of the delivery of the object, which is then regarded as a mere formality. Consensual contracts, therefore, are subject to different rules on perfection than more formal agreements, particularly the so-called "real" agreements, *i.e.*, agreements that require the delivery of an object before the parties are deemed to be bound.

The contrast with the terminology used by the draftsmen of the *Uniform Commercial Code* is striking. In the statement of purposes to section 9-102, the the Board states that "[t]he purpose of this Section is to bring all consensual security interests in personal property and fixtures . . . under this Article . . . ." Thus, possessory security interests, such as the traditional pledge which requires delivery of possession for perfection, are also deemed consensual transactions. One wonders what the UCC would regard as a non-consensual contractual relation.

For example, prior to 1855, the right of a mortgagee who obtained a security interest on property recorded in the name of the mortgagor would be subject to an earlier unrecorded sale of the property.[18] A mortgage, however, to have effect against a subsequent sale would have to be recorded.

Secret transfers and liens became a fact of life which not only lead to uncertainty in the law of secured transactions but also to meager collections of the recording stamp taxes. This fiscal consideration was apparently decisive in the enactment of a list of transactions that had to be recorded to affect third party rights.[19] The list, which included mortgages and other liens, judgments, sales, easements and life estates, was set forth in a March 23, 1855 enactment and subsequently revised to include an ever growing number of *inter vivos* transactions.[20]

Thus the characteristics of the Freanch system of land registry could be said to have been fixed since 1855. It was still a declarative system in the sense that recordation in itself did not create any rights. As was true prior to 1855, rights in rem could be created, modified or extinguished between contracting parties without the need of recording, but since 1855 a number of transactions had to be recorded in order to affect third party rights.

The mechanics of the revised French system first involved a transcription of deeds and later the filing of a copy of the deed in the registry.[21] Neither of these recording methods, however, accounted for the fact that the French registry was not a tract registry, but one of deeds. The key for searching the registry was the alphabetical list of the parties in recorded transactions.[22] One could not, by identifying the lot in question, obtain an orderly and sequential picture of its previous status.

The registrar had very little to say about the validity or sufficiency of documents brought for registration other than their formal compliance with certain extrinsic standards. More recent legislation effected a gradual shift toward a tract or parcel type of recording by instituting a real estate archive (*fichier immobilier*).[23] It has also made recording more necessary in light of third party rights based upon earlier recordings.[24]

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18 1:3 L. JOSSERAND, DERECHO CIVIL 273 (S. Cunchillos y Mantarola transl. 1950).

19 *See* 1:2 M. PLANIOL, TREATISE ON THE CIVIL LAW §§ 2610-11, at 544-46 (Louisiana State Law Inst. transl. 1959).

20 For additions to the 1855 list through 1938, see JOSSERAND, *supra* note 18. For later additions, see C. CIV. arts. 1039-45 (79th ed. Petits Codes Dalloz 1968-69).

21 JOSSERAND, *supra* note 18.

22 *Id.* at 278.

23 Decree of January 4, 1955.

24 Article 3 of the Decree of January 4, 1955 states, "No act or judicial decision subject to recording in a Mortgage Registry may be recorded in the Real Estate Archive if the grantor's title is not previously recorded in accordance with this decree . . . ." Article 28 lists those acts or contracts, other than liens or mortgages, that are subject to recording, and article 30 states in part:

The acts and judicial decisions subject to recording by application of

Despite its modifications, the French system remains declarative. A nonregistered act or contract, such as a sale of land, can still have full effect between the contracting parties without need of registration.[25] Acts or contracts that are unrecorded at the time that a third party register his rights in rem will not affect him.[26] A registered act or contract will affect third party rights when its recording is prior to the recording of third party rights,[27] but registration will not validate a void or voidable act.[28]

The operation of the present French registration system may be illustrated. *S* sells Blackacre to *B* on April 21, at which time *B* acquires ownership without registration. *B* registers on May 1 and mortgages Blackacre to *M* on August 1. The mortgagee does not register his mortgage, but nevertheless acquires his right in rem from the execution of the mortgage deed. *B*, on September 1, sells Blackacre to *T*, a third party, without giving him notice of the existing mortgage. *T*, registering his deed, is not charged with notice of the mortgage and consequently acquires the property unencumbered by it. Had *M* recorded his mortgage, *T* could not allege lack of notice of the mortgage.

Suppose now that *S* was a minor and consequently that the sale to *B* was void. Because *B* did not acquire ownership, he could not transfer it to *T*, and neither *T* nor *M* acquired anything because registration cannot validate a void title.

The German Constitutive System

In order to acquire, modify, transfer or extinguish rights over immovable property under the German system, the act or contract must be registered.[29] Without registration, in rem effects are not even created be-

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Article 28 are, if unrecorded, not applicable to third parties who have acquired, over the same immovable property and from the same grantor, competing rights. . . . [These acts] are equally not applicable, even though recorded, if the acts or decisions invoked by the third parties are previously recorded.

Since the enactment of this decree, the registrar has also acquired more significant powers and responsibilities of evaluation. He may, for example, require that the act or contract be executed in a public deed; he must ascertain the regularity in the sequence of conveyances; he must determine whether the act or contract is one of those subject to recording, excluding acts or contracts involving rights on just movable property. He still is not empowered to determine the intrinsic validity of the transactions. *See* H. PERRET, DROIT CIVIL 148 (3d ed. 1967-68), *cited* in SALAS, *supra* note 16, at 7.

25 C. CIV. art. 1138 (79th ed. Petits Codes Dalloz 1968-69).

26 *See id.* arts. 1036-41.

27 *Id.*

28 *Id.*

29 BGB § 873 (Sebald 1910). *See also* GBO § 3 (C.H. Beck 1957). For an introductory description of the German land registry system, see C. CREIFELDS, RECHTSWÖRTERBUCH 474-75 (1968); WOLFF, *supra* note 4. For an authoritative comment, see HESSE-SAAGE-FISCHER, GRUNDBUCHORONUNG (1957). A useful summary of the land registry methods of recording, including graphic illustrations, may be found in Baeck, *The Ground Book (Land Register) in Europe*, in A.B.A. INT'L & COMP. L. PROCEEDINGS 138 (1962-63).

tween the contracting parties, and only personal rights are created, modified or extinguished.[30] German law, therefore, embodies a conceptual division of the sale of immovable property into a purely contractual stage between the parties, and an in rem stage vis-à-vis the world at large commencing with recordation. This second stage may be described as "abstract" in the sense that it produces self-supporting rights which are enforceable despite deficiencies or nullities in the chain of title. Thus, unless the facts giving rise to the nullity appear in the registry, the recorded document will be given effect as against a third party.[31]

In contrast with the earlier example of the operation of the declarative system, if the minority of *S* does not appear in the registry, it will not affect *T*. Similarly, because *M* did not record his mortgage and consequently did not acquire any right in rem, *T* would have acquired a good title in Blackacre from *B*.

In sharp contrast with the French system, the German system imposes a duty of evaluation on the judge-registrar. This decision may be appealed.[32] Since only rights in rem and restraints against alienation and acquisition may be recorded, the judge must decide whether a given transaction is recordable according to its movable or immovable nature.[33] Thus, a transaction purporting to create only personal rights will be rejected.[34]

The recordings in the German land registry are the result of an ex parte proceeding.[35] After it is determined that the petitioner may request the recording, the court evaluates whether a permanent or a temporary inscription is in order. Here, the German judge's powers and duties of investigation far exceed those of registrars under a declarative system. If it appears that the power cannot in fact or in law be exercised, the petition must be rejected. It is not enough, however, for a judge to confine his inquiry to facts appearing in the registry. The German judge

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30 *See* note 29 *supra*.

31 BGB § 892 (Sebald 1910):

> The recordings in the land registry are deemed valid for the benefit of the one who acquires by a legal transaction a right over immovable property or a right over such a right, unless a given recording is contradicted by a subsequent recording entered for the purpose of correcting the former [*Widerspruch*] or when the invalidity or inexactitude is known to the third party. If the grantor of a given right is subject to limitations concerning his power of disposition whereby he can only transfer to certain grantees, this limitation will only affect the third party if it appears patently in the land registry or if it is known by the third party. If for the acquisition of the right it is necessary to record the transaction, for the imputation of knowledge to the third party, the decisive moment is that of filing of the application for a recording, or the moment of execution of the agreement referred to in Article 873 if it takes place after the recording.

32 *Id. See* GBO §§ 73-77 (C.H. Beck 1957); WOLFF, *supra* note 4, at 135.

33 *See* GBO § 13 (C.H. Beck 1957) (formal requirements of the recording). *See also* WOLFF, *supra* note 4, at 152-56 for references to German case law on recordable transactions.

34 *See* WOLFF, *supra* note 4, at 153.

35 *See* GBO §§ 13-15, 30 (C.H. Beck 1957).

must also consider extra-registral facts.[36]

If in rem rights in other property are affected by its decision in a particular petition, the court may order any recording necessary to reflect that change. Before doing so, however, consent must be obtained from any parties whose in rem rights are affected. Thus, if the cancellation of the recording of an easement on a subservient tenement would adversely affect the mortgagee's security interest in the dominant tenement, the consent of the mortgagee must be obtained.[37]

Until 1900, the German judge-registrar was personally liable for wrongful or negligent acts or decisions in registration. Article 12 of the German *Land Registry Law (Grundbuchordnung), h*owever, has made it the responsibility of the state to indemnify victims of registral malfeasance, nonfeasance and misfeasance. The state's responsibility is measured by the standards in the *Civil Code* for actions against government employees.[38]

The Spanish "Hybrid" System

In Spain, as in France, rights may be created, modified, transferred or extinguished between the parties without need of recording. Mere agreement in compliance with essential formalities required by law will suffice.[39] Unlike the French or declarative system, however, certain rights in rem, such as those secured by a mortgage, require recording to be valid even among the contracting parties.[40] Thus, in the Spanish as in the French system, if the owner of Blackacre transfers it to *B* and then to *C*, *C* will prevail if he registers his title earlier than *B*.[41]

The German system is followed, however, with regard to the effect of nullities in underlying transactions which would render the recorded

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[36] *See* WOLFF, *supra* note 4, at 164 & 174, where the authors qualify the description of the registrar's powers of evaluation by stating: "The Judge Registrar is not empowered to conduct *ex officio* investigations, but if he acquires knowledge of certain facts he must take judicial notice. For example, if he knows that the person upon whose title a new recording is sought is dead, he must deny the inscription."

[37] "If a right over an immovable property is subject to a lien or encumbrance held by a third party, it is necessary to obtain the third party's consent for the extinction of the right." BGB § 876 (Sebald 1910). *See also* GBO § 19 (C.H. Beck 1957).

[38] BGB § 839 (Sebald 1910):

> If an employee negligently or intentionally neglects his professional duties toward a third party, he shall indemnify this party for the damages caused by his conduct. If the employee is only chargeable with negligence and not intentional wrongdoing, an action against him will lie only if the plaintiff has no other means for obtaining redress.

[39] Spanish CIVIL CODE arts. 606, 609, 1278 & 1450. All references to the Spanish CIVIL CODE will be to the *Code of 1889*.

[40] Spanish MORTGAGE LAW art. 146. The language used in this statute is quite similar to that of article 873 of the *Bürgerliches Gesetzbuch*: "For voluntary mortgages to be perfected, it is necessary (1) that there is an agreement expressed in a public deed, (2) that the deed be recorded in the Land Registry set forth in this law."

[41] Spanish CIVIL CODE art. 1473.

title void or voidable. Accordingly, nullities will not affect the third party's acquisition if they do not appear in the registry.[42] Third parties will be presumed to have acted in good faith unless it is shown that they had actual knowledge of the invalidity or inexactitude in the land registry recordings.[43]

The Spanish registrar is required to conduct a careful evaluation of the form and substance of the proposed recordings[44] in much the same manner as is demanded of the German judge-registrar. Moreover, the Spanish registrars, who are not judges but as a rule are highly trained lawyers, may in their evaluation of the validity and sufficiency of recordable documents reject even those emanating from judicial authorities.[45] Spanish registrars are personally liable for damages caused by their negligence or wrongful discharge of duty. For this purpose, they must post a bond sufficient to assure at least a minimum amount of recovery.[46]

THE LAND REGISTRY IN MEXICO

Introduction

Mexico's land registry, like Spain's, is a hybrid system of rights and duties.[47] On the one hand, it resembles the French or declarative system in its recognition of rights in rem created between the original parties out-

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[42] Spanish MORTGAGE LAW arts. 33 & 34.

[43] *Id.*

[44] Article 18 of the Spanish *Mortgage Law* describes the evaluation as:

> The Registrars shall evaluate, subject to personal liability, the validity of all classes of documents upon which recordings are sought and the capacity of the parties in light of what is sought to be accomplished by the deeds; and of the recordings in the Registry.

A very significant change appears in the present text of article 18. In its former version, found in the Law of July 14, 1893, the registrar was required to evaluate "the validity of deeds." Clearly, in extending the evaluation function to "all classes of documents," the law presently in force has considerably broadened the screening function of the Spanish registrar.

[45] *Id.*; Resolución de la Dirección General de los Registros y del Notariado, March 29, 1944, in ARANZADI, *supra* note 8, at 862.

[46] Articles 282, 283, 296 and 299 of the Spanish *Mortgage Law* and articles 570 and 563 of its Regulations (as amended by Decree of February 14, 1947) deal with the bond that registrars must post.

[47] The system referred to as Mexican is the one in force for the Federal District and Territories which, as a model statute and with very slight variations, is in force throughout the country. On the Mexican land registry system, *see generally* L. CARRAL Y DE TERESA, DERECHO NOTARIAL Y REGISTRAL (1965); R. ROJINA VILLEGAS, DERECHO HIPOTECARIO 118 (1945).

See also Carral y de Teresa, *The Public Authority of the Acts of Notaries and Registrars in Mexican Law*, 4 MIAMI L. REV. 449 (1957); F. Villalon Ugartua, *The Public Registry of Property in Mexico*, 11 MIAMI L. REV. 457 (1957). The reader should be alerted to the fact that statutory references in these two articles are misleading as a result of the enactment and later suspension of a set of statutory rules and regulations purporting to apply to the land registry. The same difficulty appears in the 1958 supplement to Schoenrich's translation of the Mexican *Civil Code*. Readers using this source should discard the supplement amendments and use the original rules in the main body of the Code. The Regulations used in this article are those published in the *Diario Oficial* of July 13, 1940, which are also found in Andrade's 1970 statutory compilation.

side of the registry.[48] Accordingly, immovable property may be sold, transferred or mortgaged without need of recording. On the other hand, it purports to follow the German system in protecting third parties' rights where the infirmity in their title does not appear clearly in the registry.[49] Unlike German and Spanish law, however, Mexican law does not entrust the registrar with any significant powers of evaluation.[50]

The Mexican land registry is part of an all encompassing institution named the Public Registry (*Registro Publico*)[51] which also includes a Registry of Personal Property (*Registro de Bienes Muebles*)[52] and a Reg-

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[48] C. CIV. Dist. y Terr. Fed. art. 3003 (Porrua 1970): "Documents which, according to this law, shall be registered and are not registered, shall produce effects only between those who execute them; but they cannot injure a third party, who, however, may take advantage of them in so far as they are favorable to him."

The Mexican Supreme Court, as well as appellate federal and state courts, has also adhered to this declarative feature. The following statement has appeared in several Supreme Court decisions: "Recordings entered in the land registry have declarative and not constitutive effects, so that the parties' rights are derived from their contracts and not of the recording." *See* Emilio Ortíz, 45 Semanario 6th 87 (A.D. 5438/60); A. Roberto Perez, 43 Semanario 6th 78 (A.D. 5036/55); Simon Garcia, 19 Semanario 6th 215 (A.D. 6604/57); Maria Matamoros, 15 Semanario 6th 275 (A.D. 103/57); Carlos Lagunas Govantes, 15 Semanario 6th 263 (A.D. 3649/56). *See also* Ardiaz Ramirez, (A.D. 9768/50) (interpreting the law of the state of Puebla), in JURISPRUDENCIA DE LA SUPREMA CORTE 923 (1965). On the law of the federal-district and territories, see José Asunción Ramirez Gonzales, 122 Semanario 6th 461 (A.D. 3472/54); Gregorio Figueroa, Semanario 1956 Supp. at 415 (A.D. 4372/43).

[49] Article 3006 of the Mexican *Civil Code* states: "Recording does not validate acts or contracts which are void in accordance with the laws." Yet, article 3007 of the same *Civil Code* states:

> Notwithstanding the provisions of the preceding article, acts or contracts done or executed by persons who appear empowered according to the registry shall not be invalidated with regard to a third party acting in good faith, after they are recorded, although the right of the party executing them be later annulled or rescinded by virtue of an unrecorded earlier document, or by virtue of causes which do not clearly appear from the registry.
>
> The provisions shall not apply to gratuitous contracts, nor to acts or contracts executed or made in violation of a prohibition or a public policy provision.

The German-Spanish influence has also been clearly perceived. For example, in *Gumersindo Zaldivar*, (A.D. 2748/52), the Third Branch of the Supreme Court of Mexico stated:

> Article 2833 of the Civil Code of Michoacan, similar to Article 3007 of the Federal District and Territories, was copied from Article 34 of the Spanish Mortgage Law, which in turn partially followed the German land registry system. . . . Under [the German system], the Registrar must evaluate the act sought to be recorded. That is to say, he must judge the jurisdiction of a court, if a court ordered the recording, the qualification of the Notary Public, the capacity of the parties, the nature of the land, etc., and his decisions have the force of a court decision. In Mexico, the registrar does not evaluate or judge, he merely records. Such inscriptions because of lack of scrutiny may turn out to be erroneous or defective, as is frequently the case . . . as when a person who is not the owner transfers to a third party.

[50] *See* note 49 *supra.*

[51] *See* C. CIV. Dist. y Terr. Fed. arts. 2999-3044 (Porrua 1970).

[52] *Id.* On transactions affecting movable property, *see id.* arts. 2310(II), 2312(II), 2857, 3002(IV) & (V); REGLAMENTOS AL REGISTRO PUBLICO DE LA PROPIEDAD DEL DISTRITO FEDERAL DE MÉXICO arts. 69-71 (Andrade 1940) [hereinafter cited as Regulations].

istry of Juridical Persons (*Personas Jurídicas*).[53] Registrars are government employees and are not always required to have legal training; they are nonetheless made personally liable for the wrongful or negligent discharge of their duties.[54]

Public registries correspond to territorial subdivisions within the various states and municipalities following the model of the Federal District and Territories set forth in the *Civil Code of 1928*. The recording process usually begins with a notary public who is responsible for the formal validity of the public deed executed before him.[55] In order to ascertain the grantor's power and to establish the accuracy of the description of what is being conveyed, the notary must establish that the previous recording indicates that the grantor has title. It must be emphasized, however, that such a determination amounts to nothing more than a verification of the last recording and is far from being a thorough evaluation of the chain of title.[56]

Upon execution of the deed, either the parties or the notary acting on their behalf will present it to the registrar who, after a perfunctory examination, will either record it or reject it specifying the necessary amendments.[57] If recorded, it will be cross-referenced to the last inscription relating to the immovable property. The inscription itself is a condensed version of the deeds, recitals and clauses prepared by the registrar.[58] If the registrar refuses to record the document, an appeal may be taken first administratively to the director of the registry and subsequently in the regular state court system.[59]

It is important to note that titles appear not by tract, estate, lot or parcel number, but chronologically in order of filing. Cross-reference from one book to another is made possible only by the use of marginal notes at each inscription. This method, as is readily apparent, is quite cumbersome, especially since the registry has several sections each having numerous sets of books.[60] Consequently, if one wishes to examine, for ex-

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[53] *See* C. Civ. Dist. y Terr. Fed. art. 3002 (VI) (Porrua 1970); Regulations art. 72.

[54] Under article 4 of the Regulations, land registrars must be lawyers with three years of practice. No legal training is required for clerks. Yet, in interviews with Sonora lawyers, it appears that registrars in that state frequently are neither lawyers nor legally trained. The author has been unable to trace the legislative authority for such a state of affairs. For the general principles on the liability of registrars, see C. Civ. Dist. y Terr. Fed. arts. 3016 & 3019 (Porrua 1970).

[55] C. Not. art. 34(3) requires that when the transaction involves immovable property, "the notary shall relate, at least, the last deed of transfer of ownership and its recording in the land registry, or shall express the reason for the lack of recording."

[56] *Id.*

[57] C. Civ.-Dist. y Terr. Fed. art. 3013 (Porrua 1970).

[58] *See* C. Civ. Dist y Terr. Fed. art. 3015 (Porrua 1970); Regulations arts. 21-47.

[59] *See* C. Civ. Dist. y Terr. Fed. arts. 3013-14 & 3020 (Porrua 1970).

[60] The first section (articles 48-59 of the Regulations) is devoted to inscriptions of ownership interests; the second (articles 60-68) to mortgages, liens and encumbrances; the third (articles 69-71) to personal or movable property; the fourth

ample, ownership and liens affecting Blackacre, one would have to examine various sections and, once relevant recordings were located, different series of volumes in order to discern the current status of the property.[61] To be sure, there are indices to facilitate the search, but, according to the opinion of Mexican notaries public, even the indices in the best organized registries, such as in the Federal District, are quite deficient. As reported by a team of United States urban development experts:

> A tract index and a vendee index are used in the registry. A tract index lists all properties in the jurisdiction according to their location and refers title searchers to the documents by which a given parcel was transferred to its present owner. A vendee index lists alphabetically all transferees of property within the jurisdiction and refers title searchers to the document by which a given person acquired his property. . . . The absence of a vendor index makes it impossible to check a vendee's subsequent resale of his property, except through such marginal notes as were made by the registry. . . . Furthermore, cursory examination of these indices suggests that, while the vendee index is reasonably accurate, the tract index is not always current on street changes and property divisions.[62]

In order to evaluate the performance of Mexican land registry institutions, it will be useful to ascertain the extent to which certain basic principles which characterized land registration in the German and Spanish statutes are operative in Mexico.

Principle of Publicity

1. *The Recording.* Under the principle of publicity, for rights in rem to be effective against third parties, the operative title of acquisition, whether it be "original," as in the case of the first possessor or "derivative" as in the case of a transferee, must be recorded.[63] There are two ways in

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(articles 72-76) to legal and artificial entities; the fifth (articles 102-129) to indices for grantors, grantees and tracts; the sixth (articles 136-142), and seventh (articles 143-149) to records of admissibility of private deeds and to administrative decisions.

[61] *See* text accompanying notes 83-91, *infra,* for a discussion of the degree of diligence required of the searcher who claims the status of a third party in good faith.

[62] O. OLDMAN, H. AARON, R. BIRD & S. KASS, FINANCING URBAN DEVELOPMENT IN MEXICO CITY 130-31 (1967). *See also* cases 5-8 of the case law appendix which illustrates the pitfalls in the search process. It should be noted that the reported absence of a vendor index is in apparent violation of article 134 of the Regulations.

[63] C. Civ. Dist. y Terr. Fed. art. 3002 (Porrua 1970):

> The following shall be recorded in the registry:
>
> I. Documents by which the ownership of, possession of, or other rights in rem on real property are acquired, transferred, modified, encumbered or extinguished;
>
> II. The constitution of the homestead;
>
> III. Contracts of lease of real property for a period longer than six years, and those in which there are advances of rents for more than three years;
>
> IV. The condition subsequent in the sales referred to in sections I and II of article 2310;

which the contents of a recording are made public. Any person may search the records of the registry on his own[64] or the registry may issue a certification of ownership, liens or encumbrances.[65] When appropriate, this certification may be a statement that there is no finding of ownership, lien or encumbrance. Mexican law provides for both methods.

2. *What may be recorded.* The acts or contracts entitled to publicity are those which refer to or affect a right in rem on immovable property.[66] In certain cases, rights traditionally considered as rights in personam may be registered if a statute expressly so provides, thereby granting to rights in personam recording effects similar to those enjoyed by rights in rem. Leases for a period of more than six years or those in which rents have been anticipated for more than three years are within this category.[67] Hence, many acts or contracts which produce only in personam rights are, as in Germany and Spain, kept out of the registry.[68] And, as will be seen in a later section, the fate of yet another category, that of judgment liens emanating from in personam actions is quite uncertain under Mexican law.

Registerable rights are usually embodied in the so-called titles or *títulos*.[69] Recordable titles may be in the form of documents executed before a notary public,[70] issued by courts, judicial authorities,[71] or administrative authorities[72] or, in a small number of specified cases, private

V. Contracts of pledge mentioned in article 2859;
VI. Articles of incorporation of civil companies and amendments thereof;
VII. Articles of association and amendments thereof;
VIII. Private charitable foundations;
IX. Judicial decisions or resolutions of arbitrators or adjusters which produce any of the effects mentioned in section I;
X. Wills, as the result of which ownership of real property or of rights in rem is devised, the record being made after the death of the testator;
XI. In cases of intestacy, the resolution declaring who are the legal heirs and the appointment of the definitive administrator;
In the cases designated in the preceding two sections, a note shall be made of the record of death of the author of the inheritance;
XII. Judicial resolution declaring an insolvency or admitting an assignment of property;
XIII. Certificates of perpetual memory proceedings carried on and protocolized in accordance with the provisions of the Code of Civil Procedure.
XIV. Any other titles expressly ordered to be recorded by law.

64 *Id.* art. 3001; Regulations art. 119.
65 C. Civ. Dist. y Terr. Fed. art. 3001 (Porrua 1970); Regulations arts. 104-19.
66 C. Civ. Dist. y Terr. Fed. art. 3002(I)-(IV), (IX)-(XIV) (Porrua 1970).
67 *Id.* art. 3002 (III).
68 On the various German provisions, see WOLFF, *supra* note 5, at 151-53. The operative rule in Spain is found in article 2 of the Spanish *Mortgage Law*. The present section is merely intended as a general description of the recording system. *See also* text accompanying notes 91-103, *infra*.
69 C. Civ. Dist. y Terr. Fed. art. 3011 (Porrua 1970).
70 For the documentary requirements in sales, for example, see *id.* arts. 2317, 2319 & 3018.
71 *Id.* arts. 3002(IX), (XI), (XII), (XIII) § 3005.
72 Regulations arts. 48(XIII), 58 & 63.

or informal documents which are subject to authentication by a registrar, municipal authority or a judge.[73]

3. *Types of Recordings.* There are three types of registry recordings, each producing different effects. The most basic is the ordinary or definitive inscription[74] which produces full effects as of the time of first recording.

The second type known as preventive inscriptions,[75] are for cases when the registrar refuses the requested registration. The preventive inscription thus affords the interested party an opportunity to resort to the courts requesting first an evaluation of his title and thereafter the issuance of an order directing the registrar to enter an ordinary inscription. Preventive inscriptions last for only three years, and are thereafter automatically cancelled.[76] If, however, during the "preventive" period the registrar receives a court order directing him to enter the registration, it will have a retroactive effect from the date and hour of the first presentation of the title or titles to the registrar.[77]

The third variety is the marginal annotation or note,[78] found in the space reserved on the margin of the pages in which the ordinary and the preventive inscriptions are entered. These notes may be of four types.[79]

Protection of Third Parties

1. *Publicity.* Clearly, the Mexican law pays homage to the principle of publicity when it asserts that "documents which, according to this law, shall be registered and are not registered, shall produce effects only between those who execute them; but they cannot affect a third party adversely but a third party may take advantage of them."[80] This formula-

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[73] *See* C. CIV. Dist. y Terr. Fed. art. 3011(III) (Porrua 1970); Regulations arts. 60, 136 & 142.

[74] *See* C. CIV. Dist. y Terr. Fed. art. 3013 (Porrua 1970); Regulations art. 21.

[75] C. CIV. Dist. y Terr. Fed. art. 3014 (Porrua 1970); Regulations art. 33.

[76] *Id.*

[77] *Id.*; Regulations art. 37.

[78] C. CIV. Dist. y Terr. Fed. art. 3018 (Porrua 1970); Regulations art. 79(a).

[79] Preventive annotations, not to be confused with preventive inscriptions, are entered by the registrar upon receipt of a written notice by the notary public stating that a deed or document affecting a certain piece of property has been signed before him. This note is in effect for one month. If the notarial title arrives at the registry during this period, it will have a retroactive effect from the date of recording of the note. If no title arrives during the month, the note will cease to be operative. C. CIV. Dist. y Terr. Fed. art. 3018 (Porrua 1970). *See also* Regulations arts. 79 & 80.

Second, are the annotations of suretyship agreements in which immovable property has been designated as security. C. CIV. Dist. y Terr. Fed. art. 2852 (Porrua 1970). Third, are the notes of provisional or permanent suspension of the consequences of a registered act of contract which are entered by a court order in a writ of appeal (*amparo*). *See* art. 3043(VIII) of the Abrogated Amendments to C. CIV. Dist. y Terr. Fed. in O. SCHOENRICH, THE CIVIL CODE OF MEXICO 27 (Supp. 1958).

The final category are the cross-reference notes to other inscriptions relating to the principal ones that appear on the right column of such notes. *Id.*

[80] C. CIV. Dist. y Terr. Fed. art. 3003 (Porrua 1970). *See also id.* art. 2919 (with regard to mortgages).

tion, however, is only a meaningless rule if the concept of a third party is either so narrowly construed that in most cases it prevents characterization of third party rights or so broadly that virtually everyone becomes a third party.

The task of defining the third party for the purpose of registry protection has troubled the Mexican legislature, doctrinal writers and courts. In accordance with article 3007 of the *Civil Code*, the third party must acquire his rights in rem from persons who appear empowered to transfer them. In addition, the acquisition must be in good faith, for value, not in violation of law or public policy, and be recorded.[81] Any of these requirements, however, are subject to varying and frequently contradictory interpretations. First, it is necessary to examine the requirement that the third party acquires "from persons who appear entitled to transfer."

2. *The Third Party and the Recorded Transaction.* Professor Rafael Rojina Villegas, a Justice of the Supreme Court of Mexico and author of a leading monograph on land registry law, singles out as a definition commonly used by courts one in which a third party is anyone who is not a party to the recorded act or contract.[82] This definition obviously could not include the contracting parties' principals, otherwise a party could obtain registry protection as a third party by acquiring a right, however imperfectly, recording it and then transferring it to a principal.

On the other hand, unless the crucial recording—the one which characterizes him as a third party by reference to his grantor—is clearly identifiable, confusion could cause injustice for purchasers and mortgagees who, while they are contracting parties vis-à-vis one recording, are third parties with regard to others.

For example, in the case of a sale of the same property by *A* to *B* and later to *C*, either *B* or *C* could claim the status of third party against the other if an unrecorded deed of transfer were used by *B* in an attempt to defeat an earlier inscription by *C*, or vice versa. Yet, with regard to a mortgage between *A* and *M*, later in time of execution, but earlier in time of recording than either the sale to *B* or to *C*, neither *B* nor *C* could claim the status of a third party protected by the registry.

3. *Good Faith.* The first question that arises with regard to the requirement of third parties' good faith in article 3007 is whether the third party will be subject to the standards of good faith imposed by Mexico's law of obligations upon parties who, because of their actual knowledge of an infirmity in their title, are estopped from claiming that the infirmity was not recorded.[83] Or, will third parties only be adversely affected by what

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[81] *Id.* art. 3007.

[82] VILLEGAS, *supra* note 47, at 123 *et seq.* This definition, incidentally, is the same as found in article 27 of Cuba's Mortgage Act, enacted by Spanish Royal Decree of May 26, 1873: "For the purpose of this law, a third party is one who has not been a party to the recorded act or contract."

[83] An application of the estoppel principle may be found, for example, in article

appears in the registry regardless of their actual knowledge, as seems to be the rule under article 3003 of the *Civil Code*?[84]

Some Supreme Court decisions have disqualified third parties who had extraregistral knowledge of the infirmity of their grantor's title. In the language of a 1956 decision:

> It is evident that one may not allege good faith when through extraregistral means the party has obtained knowledge of acts that should have been registered, for if such a rule were followed, many parties would take unfair advantage of the public faith vested in the registry.[85]

In other decisions, however, the Supreme Court has distinguished between a so-called "civil" third party (*tercero civil*) and a registral third party. It has defined the civil third party as one "who is completely foreign to the act or contract recorded and who, because of the absence of a legal relationship with the parties, is under a general duty to respect [their performance] and abstain from interfering with the act or contract." The registered third party is one "who acquires [rights] based on recordings in the land registry, that is to say, a party defined on the basis of a *given registral content*. . . ."[86]

In addition, other decisions seemed to have ignored extraregistral knowledge of the infirmity of title in determining who had a better title in a possessory action.[87] Even assuming, however, that the good faith of

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2038 of the *Civil Code* which states: "If a debtor is present at the assignment and does not object thereto, or if being absent he has accepted it, and this is proved, the notification shall be considered as made." *See also* C. CIV. Dist. y Terr. arts. 2123 & 2140(III) (Porrua 1970).

[84] Translated in note 48 *supra*. *See also* the *Romero Feliciano* decision translated in the case law appendix in which it appears that the plaintiff appellee was not affected by his knowledge of defendant's earlier possession.

[85] Josefina Manzur de Hamue, 131 Semanario 5th 170 (A.D. 2139/56), *quoted in* JURISPRUDENCIA DE LA SUPREMA CORTE 924-25 (1965). *See also* Guillermo Francisco Macias, 130 Semanario 5th 234 (A.D. 5169/55); Suc. Miguel Capistrano, 126 Semanario 5th 412 (A.D. 3735/54).

[86] Jorge Mucino, 28 Semanario 6th 280 (Queja 37/58), *summarized in* JURISPRUDENCIA DE LA SUPREMA CORTE 928 (1965) (emphasis added).

The late Dean Agustin Aguirre of the University of Havana School of Law referred to early 20th century Cuban Supreme Court case law in order to support the proposition that there are indeed two different types of third parties under the Cuban and Spanish civil and mortgage law: One, the "land registry third party" (*tercero hipotecario*), whose knowledge and standard of care is to be measured solely by what is recorded in the registry, and another, the "civil third party," a party unrelated to land registry recordings and consequently to its protection as well as to its basic concepts. A. AGUIRRE, DERECHO HIPOTECARIO 30-32 (1939).

While it is important to understand that there may be a diversity of regulation of third party rights and duties, depending on the context of their activities, it does not follow that merely because engaging in the acquisition, disposition or modification of a right in rem over immovables, a special standard of care and of good faith automatically applies. For, ultimately, the label affixed to the transaction would become more important than the parties' acts. This nominalistic view is in sharp contrast with a provision in one of the enactments that supposedly created the notion of the land registry third party, article 892 of the *Bürgerliches Gesetzbuch*, which states in inequivocal language that the third party's actual knowledge, regardless of a recorded notice, will affect his acquisition. BGB § 892 (Sebald 1910) (translated in note 31 *supra*).

[87] *See* note 84 *supra*.

the third party seeking the protection of the registry is only to be judged against what appears in the registry, the question remains, how diligently must the third party search? Does he have to examine exhaustively the recorded history of the immovable property, as some decisions[88] would seem to require? Does he only have to establish whether his immediate grantor appeared with sufficient title to transfer, as one case apparently held,[89] or is there a fixed period of time that must be covered by the search to establish good faith as the Supreme Court also seems to have indicated?[90]

There is, indeed, uncertainty as to what constitutes a third party's good faith in Mexico's land registry law. It must also be noted, however, that it is the type of uncertainty that results from not knowing the degree of diligence required of the third party. In other words, there is not much doubt that the good faith of third parties is no longer the simple absence of bad faith. The burden of proving good faith seems to have been placed squarely on the third party's shoulders, and it is only the scope of such proof that is undergoing continuous reevaluation in terms of what additional element of knowledge or diligence must be shown as being, respectively, absent or present.

Judging from the sheer number of decisions favoring the view, it would seem that there is an unmistakable trend in favor of requiring the third party to undertake an exhaustive search of title. Such a definition of good faith may trouble a reader accustomed to measuring good faith in terms of actual knowledge, or as the UCC refers to it in section 1-201-(19), "honesty in fact in the conduct or transaction concerned."

It is submitted that the mere application of a standard of measurement other than the third party's actual knowledge does not by itself invalidate the definition, so long as the duty imposed by the standard—whether affirmative if requiring an act or negative if imposing a forbearance—can be reasonably discharged. The difficulties encountered in discharging such a duty will be discussed in connection with the principles of legality and sequence.

4. *Rights In Rem.* In 1945, Justice Rojina Villegas described the position of the Mexican Supreme Court as to the type of rights one must hold to be characterized as a third party:

> A third party for land registry purposes is the purchaser of a right in rem who bases his acquisition upon a previous inscription of the right; in other words, one whose relationship with one of the

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88 *See, e.g.*, Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51 (A.D. 8042/63) (translated in appendix); Lauro Marañon Cruz, 101 Semanario 6th 61 (A.D. 8592/60); Andres Silva Cortazar, 40 Semanario 6th 148 (A.D. 4524/59); Dionisio Diaz Rivera, 25 Semanario 6th 267 (A.D. 6024/58); Sucesion de Carlos Guido, 6 Semanario 6th 143 (A.D. 1936/56).

89 *See* Jose Cuellar, [1958] Bol. Info. Jud. 335 (A.D. 3290/57).

90 *See* Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51, 96 (A.D. 8042/63).

> parties is derived from an in rem rather than an in personam relationship . . . .[91]

Justice Rojina went on to suggest that the terminology used by the Court, in sharply contrasting contractual rights to in rem rights, was unsound in light of transactions where the contractual and in rem elements are highly interdependent, as in the mortgage. The justice's more serious objection, however, was that under the prevailing view, "personal" or unsecured creditors could not be deemed third parties in the land registry since it only protected the holders of rights in rem.

According to the Court's definition, even a lien creditor who recorded a judgment lien prior to the acquisition of a right in rem such as a mortgage by another party, could not be considered, at least with regard to that party, as a third party entitled to registry protection. The absurdity of this view, as Rojina Villegas indicated, becomes apparent when one inquires as to what would happen if the lien creditor forecloses at a time prior to the recording of the mortgage. Would the proceeds of the judicial sale have to remain indefinitely subject to a lien in favor of any future right in rem recorded on the property?[92]

A survey of recent Mexican case law indicates that, while Justice Rojina Villegas may have injected some doubts in the minds of some of his colleagues concerning the possible in rem nature of the rights of a lien creditor, he has fallen short of fully dissuading a majority from being as restrictive as in the past, and in the process may have been converted to an opposite point of view himself. In the 1965 case of *Perez Monforte*,[93] the Court, in somewhat ambivalent language, held that:

> Without denying the possibility that a recorded [judgment lien] or attachment of property may confer rights *in rem*, it is important to keep in mind that such rights could arise when the attachment affects property of the debtor; in which case, the lien will follow the property . . . . It will not arise however if, at the time of levy of execution, the property was not in the debtor's estate. In such a case not only will the rights of the attaching party not vest but the attachment itself is invalid . . . . It is also pointless to argue that the sale may not affect the lien creditor because it was not recorded until after levy of execution. The privilege granted by the law to recordings in the land registry only refers to creditors with equal rights, that is, rights in rem. If it is true that a judgment lien limits ownership rights, it may not be invoked against one whose ownership was acquired prior to the levy of execution.[94]

But, in *Cia. Forestal de Oaxaca*, Justice Rojina Villegas seems to

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[91] ROJINA VILLEGAS, *supra* note 47, at 122 *citing* Cia. Mex. Molinera de Nixtamal, 38 Semanario 5th 1092 (1933).

[92] ROJINA VILLEGAS, *supra* note 47, at 124 *et seq.*

[93] 116 Semanario 5th 895 (A.D. 1429/48) *in* APPENDICE JURISPRUDENCIA DE LA SUPREMA CORTE 544 (1965).

[94] 116 Semanario 5th at 895.

have changed his former viewpoint completely, categorically stating, as author of the majority opinion:

> If a mortgage is executed prior to the date in which a commercial action is brought [an action that gave rise to a judgment for plaintiff with an order to levy execution on the previously mortgaged property], the mortgage shall prevail over the recorded judgment, despite its lack of recording. . . . It is only for third parties that the protection of the registry exists . . . [and] this branch has maintained that the definition of who is a third party is not based upon the common or lay meaning but upon land registry rules, which require that the third party be empowered in the recorded act or contract to exercise his rights on the immovable property . . . . Accordingly, the purchaser of immovable property, despite the absence of a recording of the transaction, must be deemed as the owner of immovable property vis-à-vis an unsecured creditor [*acreedor quirografario*] . . . . The attachment by such a creditor is not a right in rem since by virtue of the unsecured obligation the debtor is bound personally, and the specificity which results from the attachment of particular property does not alter the in personam nature of the underlying rights, for it did not exist at the time of inception of the obligation. . . . The mortgage will prevail over the in personam rights [in the attachment] *regardless of its time of recording in the registry.*[95]

In this opinion, Justice Rojina Villegas seems to have echoed a viewpoint expressed in 1967 by Justice Castro Estrada in *Financiera Provincial del Norte*:

> Article 2830 of the Chihuahua Civil Code lists the titles which may be recorded in the land registry. . . . The attachment of property to insure the collection of commercial debts [*aseguramiento*] is not one of the enumerated titles. . . . Nor is it listed as a recordable title under other legislation, as required for titles other than those listed in section XIV of the same article. . . . Consequently, attachments that stem from commercial transactions are notoriously inoperative in determining priorities.[96]

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[95] Cia. Forestal de Oaxaca, 130 Semanario 6th 48, 49 (A.D. 5670/66). Compare the statement in this case with that in ROJINA VILLEGAS, *supra* note 47, at 125-26:

> In our opinion, parties must be deemed third parties for land registry purposes if they have a legal interest in the property, be it by virtue of a right in rem or of an attachment. . . . [T]he mortgage and, in general, other acts or documents that could have been registered and were not cannot affect third parties. . . . In order to strengthen the view that an attaching creditor, once his judgment has been recorded in the registry, must be considered a third party, one should simply reflect on the consequences of a judicial sale of the attached property without mention of an unrecorded right in rem against that property. The holder of the right in rem cannot expect to exercise his priority, since it requires a recording. Similarly, it would be inconceivable for his mortgage recording to have retroactive effects.

[96] 123 Semanario 6th 65 (A.D. 4728/66) (1967). It should be noted that a fair distinction can be drawn between a judgment lien that arises as a result of a final adjudication of the in personam controversy, and a court ordered attachment at the beginning of the law suit, as is common in certain commercial law actions

In sharp contrast with the view in these two decisions, which may be described as absolute denial of the recording of rights in rem other than those expressly listed in statutory law, other Supreme Court decisions have been quoted as saying:

> Unrecorded contracts do not affect third parties' rights . . . and thus, if a sale agreement is recorded after an attachment on immovable property has been recorded, the sale cannot affect the rights of the judgment lien creditor since his rights were acquired prior to its recording.[97]

The Supreme Court decisions on third parties and rights in rem, therefore, fall into three groups. The first, and apparently the most influential, stands for an absolute denial of third party protection to holders of rights other than those described in statutory law as rights in rem. These rights despite their recording in the form of a judgment lien, will be subordinated to unrecorded earlier or later transactions involving rights in rem. The second group is characterized as a qualified denial of third party protection and is typified in the *Perez Monforte* decision. These cases do not deprive the third party creditor-judgment lienor of registry protection simply because his right is not listed as a right in rem, but subordinate the execution of his judgment lien to an earlier unrecorded transfer. The third group, and possibly the least influential, accords to recorded judgment liens that arise from in personam transactions the status of recorded rights in rem.

Given this disparity of views, it is obviously difficult to predict the outcome of the various conflicts between the different types of judgment lien creditors and the purchasers or holders of rights in rem. However, when the recording of the judgment lien is prior to the recording of a transaction involving a right in rem and the judgment lien is likely to be followed by a judicial sale, there would seem to be strong statutory authority favoring the judgment lienor.

Article 3002(IX) of the *Civil Code* supports the argument that the judgment lien, although not the equivalent of the "judicial decision" that ipso facto creates or modifies the right in rem, is an indispensable ante-

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under Mexican law. The recording of the latter as a right in rem may be subject to cancellation within a short period of time if the court finds for the defendant, and consequently an unnecessary obstacle to the free flow of property may be created. Yet, the term used by Justice Castro Estrada to describe the reason for the attachment (*aseguramiento*) can apply either to a preliminary motion as well as to subsequent move to insure that levy of execution is practicable. Moreover, the unqualified tone of the "consequently" clause in the quoted extract adds further weight to the suggested interpretation of his view.

[97] 69 Semanario 3187 & 69 Semanario 4817 cited without dates or indication of Sala, in C. Salinas Pavon, El Sistema Registral Mexicano 212 (1962) (professional thesis). This author has been unable to obtain the texts of these decisions and consequently must accept their evaluation by a secondary source.

A similar viewpoint has been in in Espinosa Quintana, 86 Semanario 5th 1168 (A.D. 7623/44) (1945), in which it was said, "If when the purchaser acquired the immovable property the attachment was recorded, the transfer is subject to the attachment."

cedent for such a decision, and was regarded as such by the legislature which enacted the regulations to the land registry provisions of the *Civil Code*.[98] Quite possibly the counter argument would be based on the reasoning apparent in *Andres Becerril*:

> [T]he validity and effects as to the world at large of the sale cannot be subject to the requirement of registration because the land registry has no constitutive effects. . . . And, if it is true that the Civil Code provides that documents which should be recorded and are not recorded will only produce effects between the parties and will not affect third party rights, such a rule applies only to creditors with the same type of rights enjoyed by the transferees of the sale, *i.e.*, rights in rem.[99]

This reasoning, however, is not only inconclusive by itself but ultimately untenable because of the "open" nature of the assumption in article 3002(IX). It will be recalled that this section provides for the recording of "judicial decisions . . . which produce . . . the effects mentioned in section I."[100] These effects are the acquisition, modification or extinction of rights in rem over immovable property.

Thus, the *Civil Code* does not prejudge which judicial decisions among those that purport to create, modify or extinguish rights in rem are to be recorded. This decision will be made at a later time at the discretion of the court or registrar. In fact, the creation, modification or extinction of the right in rem depends upon the publicity attendant to the judicial decision by the act of recording. For even in the most obvious case of a judicial decision creating a right in rem—a foreclosure by public or judicial sale—it is the publicity or form of the act and not the decision in itself which makes it possible for a buyer to be able to claim the acquisition of a right in rem that would defeat underlying equities.[101]

In this light, the in rem nature of a given decision cannot and should not be determined aprioristically or even less discarded as inconceivable. On the contrary, since in light of article 3002(IX) the judicial decision ordering a public sale creates a right of ownership at a given point in the execution process, the same process certainly must be empowered to create a lesser right in rem, such as a lien.

Whatever the outcome of this conflict of views in future decisions, however, it is apparent that, as with the good faith requirement, there is an unmistakable trend to limit the types of transactions that qualify third parties for land registry protection. It should also be remembered that, given the prevailing definition of a third party, adverse possessors, poten-

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[98] Regulations art. 60(XI) expressly provides for the recording in the second section of the registry of attachments (*embargos*) over immovable property or over rights in rem over such property.

[99] Andres Becerril, 22 Semanario 6th 356 (A.D. 3955/58), in JURISPRUDENCIA DE LA SUPREMA CORTE 924 (1965).

[100] C. CIV. Dist. y Terr. Fed. art. 3002(IX) (Porrua 1970).

[101] *See id.* arts. 3002(IX), 3011(II) & 3017.

tially a very significant category, are not protected. Despite the fact that the Code deems possession itself a right in rem,[102] the status of third parties would be denied to adverse possessors since they do not acquire their rights in rem from "a person who appears entitled to tranfer," but rather *against* such a person.[103] Moreover, it has become apparent that the principle of publicity, although designed to encourage reliance on the registry, has been curtailed considerably by reducing its scope of application to gradually narrower categories of third parties.

Principle of Legality

The principle of legality requires that only valid titles be registered. In theory, therefore, the registrar should examine and evaluate each document brought before him.[104] The evaluation of titles performed by the Mexican registrar is quite limited, however, particularly when compared to the examination conducted by the German or Spanish registrars.

In Mexico, the registrar must first determine if the person who creates or transfers the right appears in the registry as having the power to do so.[105] For example, *A* is the owner of a building and *B* sells it to *C*. The inscription in favor of *C* must presuppose the cancellation of *A*'s inscription based upon *B's* acquisition, otherwise the same right would appear in the name of *A* and in the name of *C*. Thus, to comply with article 3009, the registrar must refuse the inscription in favor of *C*.[106]

Second, the registrar must determine the legal capacity of the parties who signed the deed or document and require evidence of valid representation of other parties when there is an agency in fact or in law. Hence, the parties must produce their powers of attorney or other evidence of authority, for example, the by-laws of a corporation empowering an officer to sign in its name.[107] Third, the registrar must determine that the document contains the required external formalities.[108] Finally, he must iden-

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[102] *See id.* arts. 790, 791 & 825.

[103] *Id.* art. 3007.

[104] *Id.* art. 3013:

> The registrar shall make the inscription if he finds that the document presented is one of those which should be recorded, and that it complies with the extrinsic formalities required by law and contains the data mentioned in article 3015. In the contrary case, he shall return the document without registration, and a judicial resolution shall be necessary in order that the registration be effected.

[105] *Id.* art. 3009: "Real property or rights in rem imposed thereon cannot appear recorded at the same time in favor of two or more different persons, unless they be co-owners."

[106] *See* Regulations arts. 31-33.

[107] *See id.* art. 32.

[108] *Id.* art. 31. C. CIV. Dist. y Terr. Fed. art. 3015 (Porrua 1970):

> Every inscription made in the registry shall set forth the following particulars:
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> I. The nature, location and boundaries of the real property which is the subject of the inscription or which is affected by the right which is to be recorded; its area, name and number, if the same appear in the document, or the reference to the preceding record where such data appear; likewise it

tify the piece of property to which the title refers.[109]

The Mexican registrar, however, does not evaluate the intrinsic validity of the act or contract sought to be registered as the German and Spanish registrars must, and consequently, the registry in Mexico is crowded with recordings of void or voidable transactions.[110] Frequently, the nullity of the title results from the absence of basic elements in one of the conveyances, such as a remote grantor's incapacity to transfer. Such a flaw could be detected without too much difficulty by a trained registrar. For example, a recurring situation is one where the remote grantor was a partnership whose life, according to a charter recital, had expired, or had been voluntarily dissolved, but still appeared as the party transferring title or being sued in an action on adverse possession.[111]

The perfunctory nature of the registrar's evaluation is also strikingly illustrated by the issuance of some patently defective certificates of title in *ad perpetuam* proceedings. In an *ad perpetuam* proceeding, the plaintiff seeks to prove his uninterrupted possession of property of which there is no recorded owner. Usually the civil code of the state, following the rule of the *Civil Code of the Federal District*, requires that the plaintiff in such an action produce a certificate of the land registry showing the

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shall be mentioned that the plan or sketch has been added to the respective file;

II. The nature, extent, condition and charges of the right which is constituted, transmitted, modified or extinguished;

III. The value of the property or rights referred to in the preceding sections. If the right should not be valued at a specific sum, the interested parties shall express their estimate thereof in the document;

IV. In the case of mortgages, the time when the payment of the secured principal may be demanded, and, if it bears interest, the rate or amount thereof and the date from which the same shall begin to run;

V. The names, ages, domiciles, and professions of the persons who personally or through representatives made the contract or executed the act subject to record. Artificial persons shall be designated by the official name which they bear, and companies by their firm name or denomination;

VI. The nature of the act or contract;

VII. The date of the document and the official who authorized it.

VIII. The date and hour of presenting the document in the registry.

See also Regulations art. 28.

109 Regulations arts. 24-28.

110 In 1963, interviews with Mexican lawyers and registry employees from the Federal District and from various states placed the amount of void or voidable recordings between 5 and 20 percent of the total recordings. The largest number of these recordings assertedly was found in the rural areas. For an empirical study on the validity of recorded documents in Costa Rica, see SALAS, *supra* note 16, at 63-70, especially at 69 where Professor Salas found that one of the major reasons for the lack of substantial evaluation in the Costa Rican land registry was the preoccupation with ascertaining the payment of real estate transfer taxes, a task that absorbs a great deal of the time that could go to functions more akin to the nature of a land registry.

For related complaints on the lack of substantive evaluation in the land registries of Venezuela and Colombia, see F. GARCIA, EL REGISTRO DE LA PROPIEDAD Y EL CATASTRO PARCELARIO EN VENEZUELA Y COLOMBIA 51-56 (1969).

111 *See* Colonia Calzada Vallejo, (A.D. 6978/46), in JURISPRUDENCIA DE LA SUPREMA CORTE 928 (1965); Dionisio Diaz Rivera, 25 Semanario 6th 267 (A.D. 6024/58); Franco Hernandez, 31 Semanario 5th 2452 (1931) (translated in appendix).

absence of a recording of ownership.[112] Yet as is apparent in *Sucesión de Carlos Guido*,[113] if the registrar fails to report an existing recording of ownership, the certificate may be meaningless.

In one decision, the Supreme Court held that the third parties who had relied upon the erroneous description had the responsibility of conducting their own exhaustive search. In other words, to have relied on the registry's determination was tantamount to negligence. The unreliability of registrars' certificates is also apparent in another decision where the Court found it necessary to warn that:

> land registry certificates are not apt to show or prove ownership of property; [they] only prove the existence of a recording in the books of the registry. . . . [They] do not prove the existence of the act or contract [alleged to have been recorded] . . . such a proof must be obtained by examining the instrument itself.[114]

Thus, decisional law has shifted the burden of evaluating the recordability of documents to the parties' lawyers or notaries public and ultimately to the courts themselves.

Since the notary public's search usually ceases whenever he establishes that the grantor had sufficient title according to the last recorded transaction, an exhaustive investigation on the state of title must be undertaken by the parties' lawyers. Similarly, judicial determination of validity or sufficiency is based, as a rule, on very specific issues, such as whether the registrar should have recorded an alleged adverse possession or a purported deed of transfer. And, unless the questions raised during trial involve the validity of an asserted sequence of acquisitions such matters may well remain undisturbed by the court decree.[115] Moreover, not infrequently an appellate court will reverse a lower court's decision which ordered a given recording on the grounds that the registry was not adequately examined.[116] The basis for third party reliance retroactively disappears with the cancellation of the recording,[117] and, thus, the issue of validity of title can very seldom be considered as fully settled by Mexican courts.

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[112] *See, e.g.*, C. CIV. Dist. y Terr. Fed. art. 3023 (Porrua 1970) and C. CIV. VERACRUZ art. 2956 which state:

> The possessor of immovable property during the time and under the conditions required for acquisition by adverse possession and who does not have a title of ownership . . . because of the fact that the property is recorded in no one's name . . . may bring an action . . . which will have to be supported by the following documents: I. A certificate issued by the registry showing the absence of a recording.

[113] 6 Semanario 6th 143 (A.D. 1936/56) (translated in appendix).

[114] Margarito Zagal, 5 Semanario 6th 115 (A.D. 5673/54), in JURISPRUDENCIA DE LA SUPREMA CORTE 923 (1965).

[115] *See* Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51 (A.D. 8042/63) (translated in appendix); Sucesion de Carlos Guido, 6 Semanario 6th 143 (A.D. 1936/56) (translated in appendix).

[116] *See* Dionisio Diaz Rivera, 25 Semanario 6th 267 (A.D. 6024/58); Sucesion de Carlos Guido, 6 Semanario 6th 143 (A.D. 1936/56).

[117] *See* cases cited in note 115 *supra*.

Why, then are the registrars not required to be more thorough in their search, at least in the issuance of certificates of title. The answer is circular. Frequently even the most careful of registrars is unable to issue a certificate that is an accurate reflection of the true state of title since recordings are often based upon invalid, erroneous or insufficient statements. The *Civil Code*, in fact, expressly exempts from liability the registrar who issues a certificate in such a case.[118] Liability is imposed upon the registrar only if it can be proved that he or other registry employees acted negligently or wrongfully in recording the document or in interpreting its import when drafting the certificate.[119] The inescapable conclusion is that the principle of legality in Mexican land registry law is plainly inoperative.

Principle of Specification

Every recorded right in rem must clearly specify the property involved, the nature of the obligation created, and the type of ownership asserted.[120]

Until the late 18th century, it was a common practice under Spanish law to create mortgages on all the property of a debtor including after acquired property.[121] The enactment of the 19th century mortgage laws prohibited such practices by requiring that all immovable property affected by a right in rem be precisely described in the recording of the lien.[122] The same rule appears in article 2895 of the *Civil Code*. Similarly, it is generally no longer possible to affect two or more immovable properties by a single right in rem. It is now necessary to allocate clearly the amount of the lien to each piece of property.[123]

It cannot be overemphasized that the successful operation of the principle of specification depends upon a precise physical description of the property. Frequently such accuracy does not exist and consequently the tract index, by failing to incorporate information as basic as changes in street names or in the dimensions of property, mislead third party creditors who rely on a given description.

Principle of Priority

Article 3017 of the *Civil Code* states that the priority of recorded rights in rem is determined by the time of initial filing in the registry.

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118 C. Civ. Dist. y Terr. Fed. art. 3019(III) (Porrua 1970).

119 *Id.* arts. 3016, 3019. Registrars are not required to be bonded either by the *Civil Code* or the Regulations. Needless to say, the chances are remote that a substantial sum of damages could be recovered from registrars or their employees.

120 *Id.* arts. 3015(I), 2895, 3015(II), 2912, 2913, & 3015(V).

121 *See* Rivera, *An Introduction to Secured Real Estate Transactions in Mexico*, *supra* at 290.

122 Spanish MORTGAGE LAW arts. 119 & 120.

123 C. Civ. Dist. y Terr. Fed. art. 2912 (Porrua 1970).

Thus, the first to be filed will prevail unless, of course, the filing is voided by the registrar or by the courts.[124]

The implementation of the principle of priority is set forth in article 3018 of the *Civil Code*:

> Upon the execution of an instrument in which the ownership or possession of real property is acquired, transmitted, modified or extinguished, or which declares the priority of a right from the time of registration, the notary authorizing the document shall notify the registry of the following facts: the property description; that its ownership has been transmitted or modified, or that a right *in rem* thereon has been constituted, transmitted, modified or extinguished; the names of the parties to the transaction; the dates of execution and entry into the notary's records; and a reference to the number, volume and section where the property is recorded in the registry. The registrar, upon notice from the notary and without collecting any fee, shall immediately make a temporary annotation in the margin of the ownership record. If within one month after the date of the instrument's execution, the respective notarial certification is presented, the inscription thereof shall have effect against third parties from the date of the temporary annotation which later shall be quoted in the definitive registration. If the notarial certification is presented later, its registration shall have effect only from the date of presentation.[125]

In addition, the registrar must enter a preventive inscription when he refuses to record a document in order to preserve its priority if his decision is overruled.[126]

Such requirements would seem to provide a rather precise method for the resolution of controversies: with regard to double sales or transfers there is no doubt that the first recorded is to prevail. Priorities, however, are not determined that easily. For one thing there may be a problem of nomenclature, *i.e.*, what can be deemed a true recording of ownership over a right in rem?

If, for example, *A* quitclaims Blackacre to *B* by way of an assignment of rights in a lawsuit (*cesion de derechos litigiosos*) and conveys his fee simple absolute (*dominio*) to *C*, are the recordings of the respective acquisitions by *B* and *C* going to be treated as recordings of ownership? In a decision basically involving this situation, the Supreme Court, without expressly stating it, assumed that the double sale and the following recordings had been of "ownership."[127] Yet, some qualifications on the nature of the rights imposed by the grantor might have easily prompted an opposite finding. Moreover, recent Supreme Court decisions have

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124 *Id.* art. 3013 translated in note 104 *supra*. For a decision establishing priority as of the moment of first filing, Esteban Castorena, 35 Semanario 5th 155 [undated], in JURISPRUDENCIA DE LA SUPREMA CORTE 910 (1965).

125 *See also* Regulations art. 37.

126 C. Civ. Dist. y Terr. Fed. art. 3014 (Porrua 1970).

127 *See* Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51 (A.D. 8042/63).

raised serious doubts as to whether the prior recording of rights in rem of lesser rank than ownership may prevail upon the subsequent recording of a transfer of ownership.[128] As will be recalled, the court in the same decision refused to be on record as denying to judgment liens their in rem nature which permits the inference that the court may in some cases discriminate between rights in rem based not upon their time of filing or perfection but upon their rank.

Clearly, an interpretation that would subordinate earlier recordings of mortgages or other traditionally recognized rights in rem, such as easements or servitudes, to a subsequent transfer and recording of ownership would be untenable in light of the very purposes of mortgage and land registry law. But the doubt lingers in cases where, as with judgment liens or concessions for the exploitation of minerals, the in rem nature of the right is not universally recognized.[129]

Finally, it should be kept in mind that possession for a sufficient period by an earlier transferee of an unrecorded transfer may tip the priority balance in his favor. In what seems to be the established case law principle the Supreme Court has stated that:

> When the plaintiff in a recovery action has title of ownership and the defendant has none, plaintiff's title will suffice in order to establish the plaintiff's better right, so long as the defendant's possession is not prior to plaintiff's title. In such a case, it is necessary for the plaintiff to introduce a title acquired prior to defendant's possession.[130]

Thus, if grantor *A* were to have transferred possession of Blackacre to *B* on the basis of a short term and unrecorded lease and thereafter *B* continued to possess for the statutory period required for adverse possession, *A's* subsequent transfer of ownership to *C*, despite its recording, could be subordinated to *B's* possession. It is true that in the same decision the Supreme Court distinguished between parties that acquired their ownership from the same and from different grantors.[131] With regard to purchasers or transferees from the same grantor, it said that sequence of recording will determine the priority. But it is arguable in our hypothetical situation, that the determining factor in the acquisition of *B's* rights was not *A's* transfer of possession in the unrecorded lease agreement—a transfer otherwise ignored by the land registry system as involving basically only in personam rights—but *B's* adverse possession.

In sum, the operation of the principle of priority, aided by the use of temporary or preventive recordings, is, in the area of double sales or transfers, subject to uncertainties. Some of these uncertainties are the re-

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128 *See* text accompanying note 93 *supra*.

129 For an argument against the characterization of the concession as a right in rem, see Perez, *The Mexican Mining Concession—Its Features, Regulation and Practice, infra* at 356.

130 JURISPRUDENCIA DE LA SUPREMA CORTE 1917-1965, at 45 (1965).

131 *See* Terrazas Simona, 35 Semanario 5th 91 (1932) (translated in appendix).

sult of the application of ambiguous nomenclature to the transfer and recording of ownership and other rights in rem. Other uncertainties are caused by the preeminence of an unrecorded fact, that of possession. But these uncertainties, as will be seen in our subsequent examination of the principle of sequence, are not the only or the most serious ones to plague the priority of recordings.

Principle of Sequence

The principle of sequence requires that the recordings on a given piece of property be linked in chronological order so that each grantor's powers of transfer appear warranted by the preceding recording except, of course, in cases of an original inscription of possession or state land grants. Thus, when the title to property has already been registered, a party seeking recordation must show his grantor's title in his deed of acquisition.[132] If the title to the property has not been registered, because it is an original possession, proof of possession for the statute period will suffice.[133]

The Supreme Court, however, has imposed an additional, and cumbersome requirement upon parties who obtain a recording and then find their title questioned in actions for recovery of the land or for the invalidation of their title of acquisition.[134] A third party seeking the protection of the land registry must be able to prove not only that he acquired from someone empowered to transfer according to the registry but also that all previous transferors in the chain were equally empowered. This requirement was described by a litigant as "diabolical."[135] And indeed, as early as 1932, the Supreme Court itself stated that:

> Our doctrine . . . rejects the rigorous application of principles under which a recovery action can only succeed when the plaintiff asserts not only his title but also the titles which supported his line of grantors. Authors have rightfully criticized this requirement as 'diabolical,' and we reject it in favor of a much more reasonable proof—that which shows that plaintiff's rights are superior to defendant's or, stated differently, one whose facts and circumstances give rise to a presumption of ownership in favor of the title holder.[136]

Yet, in examining the various "facts and circumstances" that would give rise to a presumption of ownership, the Supreme Court did not appear as eager to do away with the diabolical requirement as it might have

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132 C. NOT. art. 34(III); C. CIV. Dist. y Terr. Fed. art. 3015(I), (II) (Porrua 1970).

133 C. CIV. Dist. y Terr. Fed. art. 3023 (Porrua 1970); Regulations art. 55.

134 For brief descriptions of the recovery, possessory and nullity actions, see Romero Feliciano, 34 Semanario 5th 1527 (A.D. 3736/29) (1934); Franco Hernandez, 31 Semanario 5th 2452 (1931); Velasquez Abraham, 26 Semanario 5th 2044 (1929) (translated in appendix).

135 Dionisio Diaz Rivera, 25 Semanario 6th 267 (A.D. 6024/58).

136 Terrazas Simona, 35 Semanario 5th 91 (1932).

seemed. After distinguishing between three basic situations (1) one party with title and the other without it, (2) both parties with title, and (3) neither with title, it outlined its reasoning. In the first case, the party with title will obviously prevail so long as his title was acquired prior to the other's adverse possession; in the second case, if both titles emanated from the same grantor, the first to be recorded would prevail, but, if the titles emanated from different grantors, the determination as to priority would depend on the priority of the grantors.

Clearly what such a determination implied was a new "diabolical" proof of the parties' grantors' rights, except in situations where only one party has title or both trace their title to the same grantor. In the latter case, if one of the immediate grantors recorded earlier than the other or had an earlier possession, his proof need not go further. But, where the immediate grantors had acquired from the different remote grantors, or where the immediate grantors had no title, the proof had to continue backward in time. Thus, what appeared to be proscription of "diabolical" proof in *Terrazas Simona* was in fact nothing more than a restatement of its scope.

A study of contemporary decisions by the Supreme Court of Mexico leaves little doubt that the principle of sequence has by now become the overriding principle of land registry law at the expense of other principles, such as those of legality, priority and publicity. As interpreted, the principle of sequence imposes upon the recording parties the duty of exhaustive search and evaluation that in other registry systems, and under the principle of legality, belongs to registrars themselves. Indeed, the language in the Spanish land registry regulations and court decisions concerning the registrar's functions and in recent Mexican Supreme Court decisions refering to third parties' duties is strikingly similar. Article 18 of the Spanish regulations requires registrars to evaluate "all classes of documents for which a recording is applied, as well as the capacity of the parties and the validity of the [previous] transfers . . . on the basis of *what is stated in them and on what appears in the Registry*."[137]

The Mexican Supreme Court assertedly will protect rights acquired by a third party in good faith and recorded in the registry even though the right is later annulled, "except when the cause of nullity appears clearly in the registry or when the acquisition was not for value."[138] In order to qualify as a third party in good faith, however, one must prove that there was an uninterrupted sequence of transactions or a continuity of grantors to support the validity of his title. The search required of a third party may encounter all sorts of recordings, including assignments of rights in

137 *See also* ARANZADI, *supra* note 8, at 861 containing copious citations to Spanish decisions which impose upon the registrar the duty to relate the purported recording to "all its antecedents." *See also* note 44 *supra*.

138 *See, e.g.*, Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51, 84 (A.D. 8042/63) (1966).

lawsuits, probate decisions, decisions in adverse possession actions, actions in nullity and recovery, and court ordered cancellations of inscriptions. And, according to Justice Rojina Villegas "ignorance of the law cannot benefit the purported third party."[139]

But what if after the most thorough search a third party concludes that he can acquire based upon the recording of an apparently final court decision which awarded title to his grantor, only to have such a recording subsequently set aside by another court before or after the adjudication of the third party rights? Does the third party's good faith require not only a thorough search but also legal clairvoyance? Certainly, the nature of "good faith" required in such a case amounts to the imposition of an impossible condition.

It seems manifestly unfair to require third parties to be as diligent as Spanish registrars in the evaluation of recordings. Moreover, one is puzzled as to the meaning of the term "clearly" (*claramente*) in article 3007 of the *Civil Code* and as used by the Supreme Court in describing the manner in which an infirmity must appear in the registry in order to affect third parties.[140] If under article 3007 a third party was intended to be as thorough and knowledgeable in his search as the Spanish registrar is expected to be in his, the language could have been phrased in as unequivocal terms as it is in article 18 of the Spanish regulations.[141]

The application of such strict standards in regard to the principle of sequence, similarly affects the principles of priority and publicity. It is no longer possible to say that under Mexican law if grantor *A*, the immediate grantor of *B*, recorded earlier than grantor *C*, the immediate grantor of *D*, *B* will prevail. Instead, for *B* to prevail he must prove that there was no earlier transfer from the common remote grantor, to *D's* chain.[142] Similarly, the publicity attendant to the recording of a final judicial decision may be denied if there was an earlier infirmity because of a negligent or non-existent recording.[143]

In sum, the construction given by the Supreme Court of Mexico to the principle of sequence narrows the third party categorization to a most exclusive group of transferees thereby ignoring the purpose behind the principles of priority and publicity.

CONCLUSIONS

The eclectic nature of Mexico's land registry system, partly declarative and partly constitutive, is clearly and cogently formulated in rules set forth in the *Civil Code for the Federal District*, as well as in the various

139 *Id.* at 95.
140 C. CIV. Dist. y Terr. Fed. art. 3007 (Porrua 1970) (translated in note 49 *supra*); Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51 (A.D. 8042/63) (1966).
141 Translated in note 44 *supra*.
142 Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51 (A.D. 8042/63) (1966).
143 *Id.* at 84-85.

state codes. Transactions are valid betwen the parties even if not recorded. Recording is necessary, however, to put third parties on notice and thereby affect their rights. Third parties who purchase in good faith and for value are entitled to rely on what is found in the registry even if the recording is later annulled, unless the grounds for invalidity clearly appear in the registry.

This system is intended to incorporate what the Mexican legislature deemed as the most desirable features of the French, German and Spanish prototypes. There is no logical inconsistency in adopting French declarative features in combination with the German constitutive tenet of third party protection. The same approach is apparent in Spanish law and has succeeded in denying significant numbers of void or voidable documents access to the Spanish registry.[144] The key to the success of the Spanish system, however, is not found as much in the quality of the statutory provisions or administrative regulations that govern the land registry as in the policy behind them—an ever expanding scope of the land registrar's duty to evaluate titles.

The preeminent role attributed to the principle of sequence by the Mexican Supreme Court by qualifying third parties' rights on the basis of the thoroughness of their search precludes the registry's protecting third parties who can no longer rely on the principles of publicity and priority but are expected to fulfill the functions of trained registrars. The emphasis on sequence indicates a failure of the principle of legality and a trend to attribute less importance to the evaluative functions of the land registrars. The uncertainty of title, as admitted by the Supreme Court itself and by notaries public and lawyers in Mexico, is serious and self-perpetuating.[145] A narrowing scope of evaluation inevitably brings about more invalid or potentially invalid recordings, thereby reducing the number of third parties. With the deterioration of its protection must come the demise of the land registry as a viable institution.

Although the Supreme Court has not articulated its policy, the importance it has attributed to the principle of sequence, as well as to the a priori in rem nature of the recorded rights, indicates to this writer an attitude best described by the expression "holding action." The court seems to want to deny registration to new categories of titles, such as judgment liens, on the basis of their aprioristically determined in personam nature, and seems intent on restricting the access of third parties to the registry's protection by requiring their compliance with a most cumbersome principle of sequence. The court's hope may be that if the present standards and qualifications are left undisturbed impending chaos may be avoided. Unless, however, the registrar's evaluation were to become more thorough the uncertainty of title will increase.

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144 *See* notes 16 & 110 *supra.*
145 *See* notes 49 & 110 *supra.*

In the early 1950's, a group of Mexican notaries public felt the situation was serious enough to propose a significant revision of the statutory and institutional basis of the Federal District land registry which lead to the adoption of the short-lived 1952 regulations and statutory changes.[146] Considering the magnitude and pervasiveness of the problems which exceed by far what judicial and administrative mechanisms can handle, the call for legislative reform is now all the more urgent.

The Supreme Court's present presumption as to third parties' good faith can no longer be allowed to stand. Third parties must be presumed to act in good faith unless it is proven that they were aware of the invalidity or insufficiency in their titles of acquisition.[147]

APPENDIX

This appendix is intended to be both a source of illustrative documentation for the preceding article and a set of judicial materials with independent informational value. It is hoped that in it the reader will be able to discern not only certain rule making trends that bear out earlier assertions on real property and land registry law but also some basic features of Mexican judicial law making that are frequently ignored by those who do not read Mexican appellate decisions. It is commonly heard, for example, both in Mexico and abroad, that Mexican courts do not make law. A first reading of *Terrazas Simona*[148] and following decisions will suffice to set the record straight on who has actually shaped the law on at least three different types of title controversies.

Equally significant is the conceptualistic approach that characterizes Mexican judicial reasoning. As heirs of a tradition which is more indebted to the scholastic methods in vogue among the mediaevil commentators than to the Roman classical jurists, the Mexican judges make ample use of abstract definitions, classifications, dichotomies and principles of interpretation. This frequently leads to a formalistic approach quite reminiscent, in common law terms, of English decision-making during the heyday of forms of action pleading. Thus, a recovery action (*acción reivindicatoria*) may be denied when it alleges that defendant's title of acquisition was null and void if an action or a special pleading on nullity has not taken place.[149] Similarly, a seller is said to be unable to bring a recovery action because this action is deemed inconsistent with his duty to guarantee against eviction.[150]

146 *See* Reglamento del Registro Publico de la Propiedad para el Distrito Federal, in DIARIO OFICIAL (Dec. 15, 1952), *suspended by* DIARIO OFICIAL (June 20, 1953).

147 The presumption suggested in the text is in fact similar to that in article 34 of the Spanish *Mortgage Law*.

148 26 Semanario 5th 2044 (1929).

149 Franco Hernandez, 31 Semanario 5th 2452 (A.D. 1323/26) (1931).

150 Eufrasia Rodriguez de Ibarra, 105 Semanario 6th 51, 80 (A.D. 8042/63) (1966).

Unlike their English colleagues, however, Mexican judges do not set forth the relevant facts prior to writing the decisional portions of their opinions. Facts and law are frequently so inextricably interwoven that often the best an analyst can do in reconstructing the events which came to trial is to guess what took place. Thus, in transcribing relevant extracts of some decisions it was felt necessary to provide the reader with a synopsis of facts, portions of which occasionally had to be deduced by the editor. For ease in reading the cases, initials were substituted for the actual names of the parties.

The order in which the cases have been placed is explained by their topical headings. Accordingly, the first three cases are concerned with describing the basic features of the most important real property actions and also with illustrating the important role of certain formal institutions such as the public deed. The fourth case illustrates the conceptual framework for decision-making in the area of competing recorded and unrecorded titles, as well as a rejection of the so-called "diabolical proof of title" in real property actions. The fifth decision was selected because it represents an attempt to protect third party rights on the basis of the constitutive nature of certain types of recordings vis-à-vis a party who can qualify as a third party in good faith. It implicitly adheres to the previous decision's rejection of diabolical proof. The sixth case bears witness to the reinstatement of diabolical proof, now described as a diligent search in the land registry, where one can allegedly "easily trace the history of a title . . . ." How difficult the search can be and how diligent the third party must be is illustrated in the seventh and eighth cases.

These cases involve situations where the same property has been acquired by different parties with conflicting chains of title resulting in inconsistent recordings in the land registry. The eighth case contains a most unusual invocation of authority by a civil law court. There, the Supreme Court relied on court decisions as a primary source of law as the basis for its reversal of a commonly accepted presumption in land registry law. An acquisition by a third party will no longer be presumed to have been in good faith. Rather the court established a presumption that a party seeking the protection of the land registry has acted in bad faith. To overcome the presumption the party must show that any defect in his title would not be revealed by an exhaustive search of the registry. Individuals are thus held to a higher standard than is the registrar himself. These cases clearly reveal the uncertainty that prevails in present day Mexican land registry law.

1. *The Significance of a Public Deed in a Recovery Action*

Velazquez, Abraham y Hermenegildo
Supreme Court of Mexico
August 13, 1929
26 Semanario 5th 2044 (1929)

SYNOPSIS OF FACTS: *C*, through an agent, sold to appellants *A* and *H* two lots, executing the draft (*minuta*) of a public deed of transfer. Subsequent to the execution of the draft, however, *C* alleged that the purchasers were in effect substantially altering the terms of the sale by varying the location of the lots and the agreed upon price in the text of the final draft of the public deed. Accordingly, *C* refused to sign the final draft of the deed and brought an action to recover ownership (*accion reivindicatoria*) against the purchasers *A* and *H*, who were in possession of the lots. From a decision in favor of *C*, *A* and *H* appealed.

OPINION OF THE COURT: The appellants assert that the decision below departs from a wrong assumption when it finds that a recovery action lies under the circumstances. It was shown, and it appears in the record, that *C* entered into a sale agreement with *A* and *H*, transferring first a lot found in the Hacienda San Jose for the sum of 11,300 pesos, as apparent in a draft of a deed (*minuta*) in the possession of the notary public, and later selling another lot belonging to the same Hacienda for the sum of 5,000 pesos.

It has also been shown that *C* received part of the price involved and that he voluntarily relinquished possession of the land and consented to its separation from the rest of the Hacienda; to the erection of landmarks; and to the preparation of new maps.

The lower appellate court should have rejected the recovery action. It failed to recognize that the sale was finally executed in a public deed that was signed by the appellants (the buyers), the other party refusing to sign on the grounds that the terms of the draft had been altered. [Under these circumstances,] Article 2818 of the Civil Code on perfection of sales agreements applies because there has been agreement on the subject matter of the contract and on its price, and, there has been delivery of the land by the seller. . . . Relying on the validity of the transfer, the appellants entered into resale agreements with third parties, and, since they have not been able to fulfill these agreements, they have already experienced the loss of profits. . . .

III. [This court finds that] . . . the contracts entered into between *C* and the appellants *A* and *H* are invalid because they do not comply with the formal requirements set forth in the Civil Code. In accordance wtih Article 1924 of the Civil Code, when the value of immovable property exceeds the sum of 500 pesos, the sale must be executed in a

public deed. If such a requirement is not met, the contract is null and void since the form of such an agreement is of the essence, as also stated in Articles 2920 and 1279(4) of the Civil Code.

In the instant case, neither draft was executed as a public deed. A draft of a deed, in accordance with the Notarial Law in force, binds only the contracting party who does not fulfill his side of the bargain to execute the deed or to pay damages for failure to do so. . . . [I]t does not transfer title and consequently it does not prevent the exercise of the recovery action by *C* . . . .

2. *Formal Pleading in a Recovery Action: When Nullity is a Prerequisite*

Franco Hernandez Ramon
Supreme Court of Mexico, A.D. 1323/26
April 25, 1931
31 Semanario 5th 2452 (1931)

OPINION OF THE COURT: II. The case in question arises from the following facts: *AA* sold some lots to the *HH* partnership, represented by its managing partner *CH*. *HH* subsequently sold the lots to *RF*. The first transfer [from *AA* to *HH*] was executed in a public deed; the second [from *HH* to *RF*] was executed in three private documents.

AA now brings a recovery action against *RF* claiming that he has only received 2,000 pesos out of a total purchase price of 12,600 pesos and that, very suspiciously and possibly fraudulently, the same property he sold for the above sum is being resold by *HH* to *RF* for the sum of 1,500 pesos. Appellant contends that this latter transaction is a simulation. [*i.e.* that *HH* and *RF* are not acting at arms length and their sole purpose is to defraud *AA* by transferring to *RF* who will thereby obtain third party protection]

Moreover, appellant alleges that the partnership *HH* was created in 1915 for the exact duration of five years, whereas the transactions in question took place after 1920. Thus, the sale from *AA* to *HH*, having taken place in 1921, is absolutely null and void since *CH*, who acted on behalf of *HH*, had no power to do so, and since *HH*, having been dissolved in 1920, could not have ratified the acts of any agent.

III. The decision below decreed the recovery of the land in question and, in doing so, accepted the nullity of the transactions between *RF* and *HH*. [Viewing the facts most favorably for appellant,] since there was no specific finding of nullity, the lower court erred in decreeing the recovery.

In order for the recovery action to have lied in this case, there must have been a previous declaration of nullity in a separate nullity action, or the plaintiff would have to have successfully alleged a nullity in the pro-

ceeding below in conjunction with his recovery action. There does not appear to have been such a declaration or specific pleading in the record below. Accordingly, the lower court erred in granting the recovery action.

3. *Possessory Actions, Recovery Actions and Interdicts*

Romero Feliciano
Supreme Court of Mexico, A.D. 3736/29
March 3, 1932
34 Semanario 5th 1527 (1934)

SYNOPSIS OF FACTS: Plaintiff-appellee *RF* purchased a lot from *R* who derived his ownership from an adjudication in the probate of *A's* estate. Plaintiff's public deed (in which it appeared that he acquired from *R*) was recorded in the land registry on November 18, 1926.

Defendant-appellant claims that he acquired the same property from the executor of *A's* estate at a much earlier time. Defendant produced a draft of a deed executed in July 1921 by the executor of *A's* estate and agreeing to transfer title to defendant. In addition, defendant alleged that he was in possession of the property from 1921 until the time of the present action (March 1932). Defendant also alleges that his possession was only interrupted for a period of seven months due to an eviction proceeding in 1926 which arose from a third party action. In a separate lawsuit, defendant successfully brought an *amparo* writ to be reinstated in his possession. The present lawsuit was decided in favor of plaintiff by the lower court.

The defendant's argument is that the lower court should have ruled that the possessor of property had the presumption of good faith in his favor instead of deciding, as it did, that by not having a proper title the possessor, defendant, was necessarily in bad faith; that inasmuch as defendant's possession was recognized in the law and specifically in the *amparo* proceedings that reinstated his possession, any possibility of an allegation of violence against him was eliminated; that the lower court erred in deciding the controversy as if it were based upon a recovery action (*acción reivindicatoria*) requiring defendant's proof of ownership when in reality it involved only a possessory action which requires the court to decide whose possession was best, and finally, that since plaintiff obtained his title after defendant had brought his *amparo* against third party creditors, defendant's title should have prevailed. The Supreme Court affirmed the judgment for the plaintiff.

OPINION OF THE COURT: The *actio publiciana* is an action in rem which can be exercised by the possessor of property against the one who, without title or with lesser title than the plaintiff, has deprived him of possession. In order for the plaintiff to regain possession of the object with all its fruits, accessions and payment of its deterioration, he must be

legally entitled to possession of the property and the defendant must have no right to retain the property, or have a right inferior to plaintiff's.

As can be seen, there are similarities between the possessory (*publiciana*) and the recovery (*reivindicatoria*) actions, but there are nevertheless important differences. One of these differences is that, unlike a recovery action, a possessory action does not adjudicate ownership and thus a decision in a possessory action is not res judicata in litigation concerning ownership.

In the present case, it is evident that the plaintiff in his possessory action based his right upon the fact that he was entitled to the property under the July, 1926 public deed even though he did not have physical control over it. Accordingly, the lower court when deciding the possessory action had to determine which of the parties had the better title in order to decide the right of possession, and it did not need to consider the question of actual possession or physical control which is of relevance in possessory interdicts (*interdictos*) [where the court provides injunctive relief to whoever can show that he was deprived of his possession of property.]

Furthermore, even if the lower court had considered this action as a recovery action would not have modified the essence of the complaint nor the essence of the decision in that the lower court could have examined the titles of the two parties and justifiedly found as it did in favor of the plaintiff. There is no right to be derived from an informal writing (such as the July, 1921 executor's purported transfer) other than the right to bring an action against the promisor for the specific performance of the sale agreement.

4. *The Proscription of the Diabolical Proof*

Terrazas Simona
Supreme Court of Mexico, A.D. 1533/30
May 6, 1932
35 Semanario 5th 91 (1932)

SYNOPSIS OF FACTS: In a recovery action brought by *JP*, widow of *T*, and executrix of his estate, the lower court decided in favor of the defendant *MV*. Defendant is in possession of the land in question. Plaintiff-appellant alleges that in the public deed which inventoried and distributed the estate of *VT*, executed on April 23, 1919 and recorded on June 3, 1919, it appears that *T* received real property known as El Rosal as part of his inheritance.

The lower court's decision against the plaintiff was based upon the determination that plaintiff's title was insufficient in that she proved only that she received El Rosal as part of the estate of *VT*, but not that *VT* was the true owner of El Rosal. Furthermore, even though the public

deed refers to *ad perpetuam* proceedings,[151] these proceedings were not proven to have taken place and therefore it could not be known how *VT* had acquired the property.

Plaintiff alleged that in the public deed containing her title, the notary public asserted he had examined the records of the land registry and that the records of the land registry included the decision in the *ad perpetuam* proceedings undertaken by *VT* showing that he had been in possession for 25 years. This possession, tacked to the plaintiff's possession of more than 15 years after *VT's* death (until January 1, 1927), covers a period of more than 40 years, sufficient time for plaintiff to have acquired the property by adverse possession if no other title is considered.

OPINION OF THE COURT: The first allegation of error is sustained on the basis of a doctrine formulated by this Court in several of its decisions. Our doctrine, based upon practical considerations, rejects the rigorous application of principles under which a recovery action can only succeed when the plaintiff asserts not only his title but also the titles which supported his line of grantors. Authors have rightfully criticized this as diabolical, and we reject it in favor of a much more reasonable proof—that which shows that plaintiff's rights are superior to defendant's or, stated differently, one whose facts and circumstances give rise to a presumption of ownership in favor of the title holder.

According to this general principle, three types of cases may be distinguished in doctrinal and decisional sources: (1) the case in which plaintiff has title and defendant does not; (2) when both parties have titles; and (3) when neither has title. In the first case, we believe that the right of the plaintiff should prevail over the rights of the defendant so long as defendant has not adversely possessed prior to plaintiff's acquisition of title. The reason for this rule is that the existence of a title is a presumption of ownership in all cases except where possession has itself become the equivalent of title.

In the second case, if defendant's and plaintiff's title emanate from the same grantor, the first title to be recorded shall prevail or, in the absence of registration, the title earlier in time shall prevail. If the titles emanate from different grantors, we must examine the rights of each grantor in order to decide which would have prevailed if a dispute had arisen among the original grantors. In the latter situation, the court must balance the facts and equities in each case, letting the better of the remote grantors prevail. Specifically, absent proof of adverse possession, the judicial discretion is sufficiently broad to allow ample examination of the presumptions of ownership in each case.

These presumptions according to doctrinal writings rank as follows: (a) proof of some sort of title, (b) proof of possession, (c) proof of fac-

151 *See* text accompanying notes 111-13 *supra.*

tual circumstances, including the condition of the property, signs erected therein, land survey descriptions, and payment of taxes. . . . In the present case, the plaintiff, in order to justify her recovery action, showed the deed of division of the estate of *VT*. In the learned treatise by Baudry Lacantinerie and Cheveau on Civil Law, p. 186, § 297, the authors state:

> The judge may attribute presumptive value not only to deeds of sale or transfer of title but also to deeds of partition and judicial decisions effecting the partition. The deeds of partition at least indicate that one of the grantors . . . must have been considered as a legitimate owner.

In the present case, there is a properly registered partition deed. Furthermore, even assuming . . . that this evidence was insufficient to prove plaintiff's grantor's title, the statements by the notary public on the state of the registry inscriptions should give rise to a presumption in favor of plaintiff's title, thus the lower court erred, and we reverse it.

5. *Unrecorded Transactions and Third Party Protection*

Colonia Calzada Vallejo, S.A.
Supreme Court of Mexico, A.D. 6978/46 (1956)
in JURISPRUDENCIA DE LA SUPREMA CORTE DE LA NACIÓN 928 (1965)

SYNOPSIS OF FACTS: The property which was the subject of this adverse possession action was recorded in the land registry in the name of a partnership. The partnership had been dissolved, however, and the dissolution was recorded only in the commercial registry. Before its dissolution, the partnership sold the property to an unnamed third party, yet in the dissolution agreement the property was awarded to one of the partners.

This adverse possession action was brought against the individual partner-assignee. The trial court decided in favor of the adverse possessor, but, on appeal, the Supreme Court reversed.

OPINION OF THE COURT: The Civil Code requires that an adverse possession action be brought against the property owner of record in the land registry. Thus, this adverse possession action should have been brought against the registered owner [the partnership] and not against the individual partner who acquired the partnership's rights in the property upon its dissolution.

Moreover, the dissolution of the partnership could not have affected the rights of the third party transferee unless it was recorded in the land registry before he recorded his acquisition of title. It is a principle of our land registry law that . . . the following transactions involving real property, even though fully valid between the parties, will not affect third parties in good faith until the time of their recording in the registry: the

rescission of the sale contract by which the grantor acquired his ownership because of lack of payment of the purchase price; the previous assignment by the grantor of his rights [in the property]; double sales or double leases; conditional sales; or [as in this case] the partition of commonly held property.

6. *The Principle of Sequence: Reinstatement of Diabolical Proof*

Díaz Rivera Dionisio
Supreme Court of Mexico, A.D. 6024/58
July 23, 1959
25 Semanario 6th 266 (1959)

SYNOPSIS OF FACTS: *DRD*, appellant, derived his title to the property in question from a chain which could be traced to *VLV*. *VLV* acquired his title through an adverse possession action against a partnership, *SCV*, which was recorded in the land registry. The present plaintiff-appellee acquired her title to the same property from a party whose title was acquired from *SCV* and recorded before *VLV* brought the adverse possession action against *SCV*.

Plaintiff in the present case brought a recovery action against *DRD*. From a decision below in plaintiff's favor, *DRD* appeals.

OPINION OF THE COURT: III . . . . [The appellant submits that] the lower court's decision in effect requires the so-called diabolical proof of title. He argues that, as is well known, this Court has repeatedly stated that it is not necessary to demonstrate that the purchaser's grantor has acquired legitimately from his grantor, and even less that the grantor has possessed the property without interruption for the necessary period of time in order to acquire that property through adverse possession. This doctrine allegedly can be found in Amparo Directo 3290 of 1957 in the case of Jose Cuellar. . . .

Appellant alleges further that he proved that the title of his grantor [*VLV*] was derived from adverse possession proceedings, the decision in which declaring *VLV* the rightful owner, when duly recorded, was enough to grant him title as the last purchaser in a chain of transactions. Appellant argues that this court decision must be presumed valid and may not be revoked except by other court decisions of a higher rank. In consequence, the appellant argues that good faith has been proved and that he is entitled to the protection granted by the land registry. . . .

The court below in the instant case, however, found that the decision in the adverse possession proceeding was in error because it ignored the fact that the defendant in the adverse possession proceeding was the partnership *SCV* which at that time no longer held title to the property, since it already had been transferred by the grantors of the present plaintiff.

Consequently, the appellant does not fulfill the requirement of a third party in good faith. . . .

IV. This Court finds that . . . the decision of the lower court in the instant case did not require the so-called "diabolical" proof. In order to resolve the problem of whether or not the appellant can be deemed a third party in good faith in accordance with Articles 3007 and 3009 of the Civil Code, the lower court invoked two decisions of this Supreme Court whose holdings it viewed as follows: "The third parties that have acquired from a person that unduly appears as owner on the records of the registry may not allege good faith if there is no sequence of transfers that proves that the person from whom they acquired had in turn acquired from a person who was the legitimate owner [citation omitted] . . . ."

[We find such a holding controlling in this case.] Recording in the land registry, as is well known, is of fundamental importance for the publicity attendant to the [creation, extinction or modification] of rights in rem. According to the principle of publicity, society in general is put on notice of the various rights that are acquired on property. The recording avoids the perpetration of frauds and abuses. It also avoids the creation of secret liens, and it renders more certain acts or transactions affecting real property. The registry is so arranged that any person can trace the history of any immovable property, including changes in the status of titles and the divisions of the land, as well as the creation of new mortgages and other liens. According to the principle of sequence, the same property cannot validly be recorded in the name of two or more people unless they are co-owners. . . . This principle is an inviolable rule of land registry law which subjects the validity of all recordings to everything that has previously been recorded [citations omitted]. The decision of the appellate court that the appellant is not a possessor in good faith is correct since the recording in favor of *VLV* was invalid. At the time of *VLV's* recording the property in question was validly registered in the name of plaintiff's grantors.

7. *The Unreliability of the Registrar's Certificate of Title*

Sucesión de Carlos Güido
Supreme Court of Mexico, A.D. 1936/56
August 5, 1957
6 Semanario 6th 143 (1957)

SYNOPSIS OF FACTS: In 1883, a transaction which subdivided real property known as "Los Changos" was recorded in the land registry. In the recorded deed, *CR* received one-fourth of the original tract and that portion retained the original Los Changos name. The remaining three quarters were given other names and awarded to other individuals. *CG* acquired the new Los Changos directly from *CR* and traces his

title to the 1883 recording. The plaintiff in the present litigation, the executor of *CG's* estate, brought a recovery action (*acción reivindicatoria*) against the defendants who trace their title to a 1949 recording of a judicial decision in an *ad perpetuam* proceeding which recognized *ESG* as owner of Los Changos.

There is no defendant in an *ad perpetuam* proceeding and success depends upon the issuance of a certificate by the land registrar stating that there is no recorded owner of the property in question. Despite the 1883 recording, the registrar issued such a certificate. Plaintiff in the present action appeals from a lower court decision in the recovery action in favor of defendants.

[EDITOR'S NOTE: It is not apparent from the Supreme Court's decision whether *ESG's ad perpetuam* action involved the original tract or the subdivided portion which retained the Los Changos name. No doubt the subdivision and retention of the name contributed to the confusion which resulted in the issuance of the registrar's certificate.]

OPINION OF THE COURT: III. The lower court declared in its decision that:

> The Civil Code sets forth several provisions that reveal the legislature's preoccupation with protecting the rights of third parties who acquire in good faith, even when the act from which their rights are derived is a nullity. The legislature considered this protection to be so important and the social interest protected to be so vital that it has relaxed one of the most established and respected principles of private law: that judicial acts which are void, either because of the lack of consent of the parties or because of a fatal flaw in the contract have no legal effects whatsoever.
>
> In the implementation of this legislative purpose the Civil Code declares: 'Once an act has been voided, the right in question should be restored to the proper owner together with any fruits or interests, but if the thing or right has been acquired for value by a third party in good faith, no such restitution shall take place.' . . . In light of the relevant articles of the Civil Code, the following rule may be formulated: Any sale or any creation of encumbrances over property by a party other than the owner but who appears as the owner in the registry must be deemed valid with regard to third parties who acquire their rights in good faith and for value. This rule applies to original purchasers as well as to those who acquire from them.
>
> In discussing the meaning of Article 34 of the Spanish Mortgage Law—the model provision for Article 2940 [of the Veracruz Civil Code] the renowned Spanish authors Morrell and Terry state, 'Article 34 is one of the most essential provisions of the Mortgage Law. In it the legislature attributes to the inscription in the registry an effect of tremendous significance by recognizing that even though the recording is not fully independent of the transaction that brings it about, it may have

its own effect regardless of the fact that its underlying transaction is void. In principle, the nullity of the inscription should always nullify all the acts and contracts recorded on the basis of the void act. But the Spanish Mortgage Law departs from the rigor of this principle in order to protect the good faith and trust in the registry of parties who acquired rights in rem from grantors who appeared in the registry to be empowerd to transfer them, so long as the acquisition and recordation thereof was prior to the time that the nullity was declared.'

Accordingly, we hold that the defendants in the instant case all acted in good faith and are protected by the registry.

The plaintiff has alleged that because of the original 1883 inscription and subsequent recordings in the registry, the defendants must all be deemed to have acted in bad faith. This court cannot agree with such an interpretation because the purpose of the registry and the purpose of publicity is to provide stability and certainty [in real estate transactions]. This cannot be done without protecting the rights of a third party who has acquired property in reliance upon what is stated in the registry as Article 2940 clearly provides.

For the defendants to have acted in good faith, it was sufficient for them to have established that *ESG*, from whom they acquired their rights, was registered in the land registry as the owner of the property. There is no law, as appellants suggest, that would compel the defendants to investigate exhaustively the chain of title in the land registry. It suffices for third parties to ascertain that the parties with whom they contracted have a right to transfer the property according to the registry. Since *ESG* recorded the judicial decree in the *ad perpetuam* proceeding, the defendants fulfilled all the requirements that were necessary in order to be protected by the registry.

IV. Article 2956 of the Civil Code of Veracruz clearly restricts the use of an *ad perpetuam* proceeding to a situation where there is no recorded ownership of the immovable property in question. When property does have a recorded owner another party seeking judicial recognition of his ownership must bring an adverse possession action against the owner of record. The decree in favor of *ESG* recorded in the land registry in 1949, ignored the 1883 recording of *CR's* ownership when it accepted as valid the registrar's certificate which stated that there was no previous record of ownership of Los Changos.

Article 2939 of the Civil Code of Veracruz states that a recording does not validate void transactions. Article 2940, however, declares that, notwithstanding Article 2939, contracts made by people who appear in the registry as having a right to make them, once they are recorded shall not be invalidated as to a third party who purchased in good faith, even though the title of the grantor may be later voided. The same provision notes that its rule shall not be applied to contracts which are entered into in violation of law or which are against public policy.

The title of the third party is not derived from nor dependent upon the voided title of his grantor. Rather, he prevails because of the need for a land registry system upon which parties can rely. Authoritative commentaries on the Spanish Mortgage Law, which also apply to Articles 2939 and 2940 of the Veracruz Civil Code, make clear that where it appears that the rights of the third party who acquired immovable property in good faith are recorded, the nullity of the title of the third party's grantor can have no effect. What the legislature has done is to replace the principle demanding rigorous evaluation of the effects of transactions on the basis of their validity for the principle of autonomy and conclusiveness of recordings in the land registry. The legislature had to protect third parties who acted in reliance upon what was stated in the registry and ignored what might have occurred outside of it.

In the instant case, however, it appeared clearly from the registry that the *ad perpetuam* proceeding brought by *ESG* was defective in that ownership of the land in question by *CR* had been recorded since 1883. Thus, since the defendants could have discovered the voidable nature of the title of their grantor, *ESG,* knowledge of the defect of that title is imputed to them and they cannot be deemed to be third party good faith purchasers. Moreover, an examination of the registry would also clearly reveal an inconsistency in the sequence of recorded transactions involving the Los Changos property as it was registered in the name of *CR.* Such an inconsistency should have put the defendants on notice that *ESG* had a defective chain of title.

In its decision, the lower court purports to establish the principle that the registry may be relied upon when only the last link in a chain of title is searched. This view ignores the importance of the principle of sequence which is the basic guarantee of the sound operation of the land registry. Consequently, it is not enough for a prospective purchaser of immovable property to ascertain that title to it was recorded in the name of his seller. He must also examine all prior recordings which relate to the property he seeks to acquire, and if continuity is lacking in the chain of titles of the parties that appear in the registry as grantors and grantees of the property, he cannot avail himself of the status of a third party good faith purchaser for value.

Therefore, when the lower court declared in its decision that those who derived their title from that acquired in the *ad perpetuam* proceeding by *ESG* were third party good faith purchasers, it erred in the interpretation of Articles 2939 and 2940 of the Civil Code of Veracruz.

8. *The Presumption of Bad Faith in the Requirement of an Exhaustive Title Search*

Eufrasia Rodriguez de Ibarra
Supreme Court of Mexico, A.D. 8042/63
March 28, 1966
105 Semanario 6th 51 (1966)

SYNOPSIS OF FACTS: As early as 1925, appellant *ERI*, defendant below, held title to land known as El Potrerito. In 1944 *ERI* conveyed El Potrerito to *MAT* who brought several recovery actions (*acciones reivindicatorias*) against various parties who were in possession of portions of the property. Later in a public deed on October 22, 1948, *MAT*, through an agent whom she later claimed had no authority, assigned her rights in these recovery actions (*derechos litigiosos*) to *EAR*. This assignment was recorded on August 12, 1953.

MAT, however, on her own, subdivided El Potrerito into two lots and conveyed them to *HDS* and *EOR* in a public deed dated October 17, 1952. There is no indication in the decision as to when, if ever, these conveyances were recorded.

The recovery actions were successful and, on November 27, 1953, *EG*, the widow of *EAR*, after receiving El Portrerito in the probate of *EAR's* estate, conveyed it to *ERI*, the original owner. This conveyance was recorded on April 5, 1954. *ERI* then brought an action against *MAT* as grantor, joining *HDS* and *EOR*, to annul the transfers to *HDS* and *EOR*. A final decision in favor of *ERI* was rendered in that proceeding in 1958. In July of 1956, however, *HDS* and *EOR* conveyed their interests in El Potrerito to *EBG* who then brought a recovery action against *ERI* and succeeded in the trial and lower appellate courts. It is the lower appellate court decision in that action that *ERI* now appeals to the Supreme Court.

OPINION OF THE COURT [Justice Rafael Rojina Villegas]: X. Appellant's second allegation of error is particularly sound. When the chain of title upon which plaintiff [*EBG*] bases his recovery action is compared with that of the appellant, one concludes that . . . the appellant's title prevails because it has as its origin the public deed of October 22, 1948, through which *MAT* granted to *EAR* all her rights in the litigation (*derechos litigiosos*) concerning El Potrerito. . . . Moreover, in making the same comparison it is obvious that appellant's title is superior to plaintiff's because the final court decision in *ERI's* action against *MAT, HDS* and *EOR* voided the title of plaintiff's grantors and is res judicata (cosa juzgada.)

Consequently, since prior to *EBG's* acquisition of title there was a recording [on April 5, 1954] of appellant's acquisition of title, in order to defeat appellant's title plaintiff would have to have brought an action

against [appellant's grantor] who appeared in the land registry attempting to annul *EAR's* title. Since this was not done plaintiff's title is vitiated and . . . the following rule applies: When two parties to a recovery action have title recorded in the land registry and both trace their titles to the same grantor, the priority of recording in the land registry will control.

In the present case, there is the additional consideration that appellant's original possession began much earlier than the title alleged by the plaintiff in the recovery action . . . and thus, taking into account what has been decided by this Supreme Court [citation omitted], it must be held that the plaintiff in the recovery action has no right to invoke the title of his immediate grantor. . . . This deed cannot be considered because the appellant had [once] been in possession before the acquisition of title by plaintiff's immediate grantor. . . .

XI. A further reason for the denial of plaintiff's recovery action may be found in a 1965 decision of this Court:

> The land registry protects rights which are acquired by a third party in good faith and recorded even though the contract or the right that was acquired by the third party is later annulled, except when the reason for the nullity appears clearly in the registry or when the acquisition was not for value or when the acts or contracts violate public policy. According to these legal principles the cases in which good faith cannot be invoked and thus an acquisition cannot be protected include the following cases: when an adverse possession has been irregularly acquired and the irregularity appears in the registry; when the third party knew of an irregularity in his title; when there is no continuity of grantors which proves that the person from whom the third party acquired had in turn acquired from someone who had a power to transfer; and when the grantor's title is annulled because it was obtained through a tortious or criminal act, such as forgery or the impersonation of a contracting party.

Thus, it is clear that the interpretation by the lower court [in the present case] of the Civil Code of the state was erroneous, especially when one considers that when *MAT* sold the land in question to *HDS* and to *EOR* on November 17, 1952, she had no right to dispose of the property. . . . Consequently, when the plaintiff below bought from *HDS* and *EOR*, in July of 1956, *MAT* had already violated land registry laws . . . and, even more, she was guilty of fraud which is committed whenever a person, for consideration, knowingly purports to convey an object that belongs to someone else. . . . Under these conditions, it is clear that *MAT* or *MAT*'s grantees cannot invoke the protection [of the registry] as third parties. [Citation of cases omitted]. . . .

It is not enough for a purchaser to ascertain that the property was registered in the name of his grantor. He must examine all the registral antecedents and if there is no continuity in the chain of titles that appears

in the registry, he will not prevail over parties who can show such a sequence in their chain of title. Sucesion de Carlos Guido [translated *supra* at 349; other citations omitted.]

According to the principle of sequence, the recordings must form an uninterruped chain in such a manner that the last inscription establishes the rights of the parties to the transaction in question. . . .

XII. The plaintiff below must be deemed a purchaser in bad faith. He could have learned from the land registry that the assignment of rights [by *MAT* to *EAR*] had been made with ostensible authority [in 1948]. . . . He could have ascertained that the later assignment [from *EG*, widow of *EAR*, to *ERI*] took place on November 27, 1953 and that the first of these two transactions took place four years earlier than the sale *MAT* made to plaintiff's immediate grantors *HDS* and *EOR* on October 17, 1952. In effect, the assignment of rights to *EAR* appears recorded in the land registry as of August 12, 1953 and the conveyance to appellant on November 27, 1953 appears recorded as of April 5, 1954. Consequently, it is obvious that the source of the nullity of plaintiff's title appears in the land registry itself. . . .

To avoid a presumption of irregularity (*ligereza*) or bad faith in the acquisition of immovable property, a party seeking the protection of the registry must be able to prove that he had exhaustively searched his chain of title. This is required by Supreme Court decisions, statutes, and doctrinal writings. Ignorance of the law is not an excuse for non-compliance . . . with this obligation. Sucesion de Carlos Guido [translated *supra* at 349; other citations omitted.] Even though a third party who ignored the infirmity of his title has acted in what may be described as [subjective] good faith, he will not be protected. For a party to be able to invoke the protection of the registry, he must prove that he has been diligent and extremely careful in examining the recordings for at least 10 years prior to the time of his acquisition.