



Real estate publicity: a never-ending story

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Overview

- **Core:** studying the past to understand the present and predict the future
- **Content:**
 - I. The origins of land registers
 - Roman law
 - Romanic tradition
 - Germanic tradition
 - II. Contemporary evolutions
 - III. What the future brings us ...

I. The origins of land registers (1)

- Roman law

- *Mancipatio* (only for *res Mancipi*)

- Formal transfer: 5 witnesses and a *libripens*, formal wording, buyer ticking the scales and giving brass to the seller
 - Form of publicity: *libripens*, witnesses, seller can be called into court with *actio auctoritatis*
 - Out of use in classical period (replaced by *traditio*)



- *In iure cessio*

- Formally a trial: formal wording, *praetor* present
 - Form of publicity: *praetor*
 - Rarely used in classical period (mostly replaced by *traditio*)

I. The origins of land registers (2)

○ *Traditio ex iusta causa*

- No formal requirements: just giving a good to another person, symbolic gestures for immovables, *brevi manu* also possible
- Publicity: *traditio* itself, but could mean all kinds of things (ownership? usufruct? detention?) and may be very silent (*brevi manu*)
- Most frequently used; only remaining form in post-classical period: *traditio* becomes ever more silent (occult!)



○ Other forms of real estate publicity in Roman law:

- *Censor* keeps a cadaster: tax purposes
- Private registers of *paterfamilias* (in some cases used as proof)

➔ **No general publicity measures in Roman law: leads to occultism**

I. The origins of land registers (3)

- Romanic tradition

- Feudal times:

- *Saisine* essential (facts); *dominium utile/directum* only from 12th century onwards
- Needed to pass *saisine* to someone else: some form of publicity
 - For feodal lands: **investitura** (formal or less formal, after time in written form)
 - Can be considered a form of explicit *traditio*
 - Strongest in *pays de droit coutumier*
 - Sometimes: registers (polyptics)



- In *pays de droit écrit*: Roman law lives on

- *Traditio*, but becomes ever more occult, e.g. only in written form
- Notaries (!)
- *Saisine-dessaisine* clause included, after time the act alone is sufficient for rights to pass (origins of consensualism, Grotius, Pufendorf, *contra*: Pothier)

I. The origins of land registers (4)

○ In *pays de droit coutumier*: *investitura* lives on

- However, different forms
- Brittany: *appropriances par bannies*
- *Pays de nantissement* (!)
 - E.g. Reims, Lille,, Senlis, Sedan, Péronne, Flemish cities
 - Customary law from 16th century onwards: transfer of ownership via deed in front of judge, registered in a public register, constitutive publicity



- Authorities in favour, e.g.:
 - Charles V and Philip II in the Southern Netherlands: edicts of 1518, 1527, 1529, 1530, 1538 and 1586 imposing registration
 - France: Ordonnance of Villers-Cotterêts for donations (1539), edicts of 1553 (Henry II) and 1581 (Henry III) for all transfers of immovable rights, edicts of 1606 (Henry IV), 1673 (Louis XIV) and 1771 (Louis XV) for mortgages, etc.
 - Major incentive: centralisation and taxation ☺

I. The origins of land registers (5)

○ French Revolution:

- Generalisation of *nantissement*
- Decree of 9 Messidor An III (1795): enters never into force
 - Constitutive publicity
- Decree of 11 Brumaire An VII (1798): *Code hypothécaire*
 - Transfer of property and constitution of mortgage: consensualism
 - Publicity: *ad opposandum*
 - Difference with contemporary law: *bona fides* is of no importance (Cass. fr. 16 October 1810)



I. The origins of land registers (6)



○ *Code civil* 1804

- Consensualism and occultism (art. 1138 CC, art. 1583 CC)
 - *Nemo plus*-principle determines all situations
 - Exception: transcription, if purgation required for sale of the immovable (art. 2167 and 2181 CC)
- Main exception: inscription *ad opposandum* for conventional mortgages (art. 2113 and 2134 CC)
 - But: occultism remains for certain legal mortgages and privileges
- Other exceptions:
 - Publicity for immovable privileges (art. 2106 CC)
 - Publicity for donation of immovables (arts. 939-941 CC)
 - Publicity for *fideicommissum* (arts. 1069-1072 CC)
- **But: much criticism ...**



○ Solution: generalisation of publicity requirements

- Belgium: 1851
- France: 1855
- Both: negative registers

I. The origins of land registers (7)

- Germanic tradition

- Old Germanic law: *sala* (consent to transfer) and *gewere* (*investitura*)



- German cities, 10th-12th century:

- *Gewere* before an official authority, who writes *Urkunde*
- Registers (!) (older registers known, back to 800 AD)



- Examples:

- *Traditionsbücher* (ca. 1000)
- *Kölner Schreinsbücher/Schreinswesen* (1135) (constitutive publicity in 15th century)
- *Danziger Erbbuch* (1357) (probably first real *Realfolium*)
- Other cities: Magdeburg (1215), Hamburg (1248), Lüneburg (1303), München (1347), etc.

I. The origins of land registers (8)

- Influence of Roman law (occultism)?
 - Yes, but to a lesser degree
 - Some registers remain in use: *Müncher Grundbuch* until 1900, *Kölnisches Schreinswesen* until 1798
- 18th-19th century: market needs (real credit)
 - Prussia: *Allgemeine Hypothekenordnung für die gesamten königlichen Staaten* (20 December 1783): constitutive publicity for mortgages
 - Bavaria right of the Rhine: *Hypothekengesetz* (1 June 1822) introducing a *Hypothekenbuch*
 - Saxony, 1843: true *Grundbuch*, constitutive publicity for all real rights
 - Prussian *Eigentumsgesetz* (8 May 1872): *Grundbuch* *Länder*, but variety of forms ...

I. The origins of land registers (9)

- *BGB* (1896/1900) and *Grundbuchordnung* (1897/1900)
 - Core of real estate publicity in Germany
 - *GBO*: rather limited objective, only basic rules, lot of freedom for *Länder*
 - Problem: variety of formal rules in *Länder*
 - Already: positive publicity (*Verkehrsprinzip!*)
- *Vereinheitlichungsgesetzgebung* (1935)
 - One *Grundbuch* for Germany
 - Same procedural rules
 - Exception: in Bavaria, notaries fulfill the function of *Grundbuchamt* (ends in 2018)
 - Some exceptions when material law varies, e.g. *Fischereirechte* in Bavaria



II. Contemporary evolutions

- Pressure on lacunar nature of French and Belgian register
 - E.g. transfers *causa mortis*
 - Belgium: attempts, but failed (new attempt pending)
 - France: 1935 and 1955
- From negative to positive
 - France: *la propriété apparente*
 - Belgium: remains negative, but ...
 - Relative nature of termination grounds
 - Third complicity in case of contractual violation
 - ...

III. What the future brings us ...

- Legislative projects in Belgium
 - Call for new Code for Estate Administration recently launched
 - Belgium: new Civil Code (Book II, Property Law)
 - Stronger role for margin notification (less negative system)
 - Fills up certain gaps (transfers *causa mortis*, acquisitive prescription)
- Digital (r)evolution
 - ISO 19152
 - Blockchain land registers?



Thank you for your attention!



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