EFFICIENCY IN REGISTRATION SYSTEMS: A COMPARATIVE STUDY

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ABSTRACT.

Real estate transactions require an accurate knowledge of the legal situation of the land. However, it is impossible to know it just by the physical examination of property. It is necessary to establish a mechanism of disclosure of property rights, and for this reason, every country has set up its own system and provides the desired information in a different way. Not all systems work in the same way nor achieve the same results. Traditionally, these systems have been classified in Europe as title registration and register of deeds. The last one exists in United States too, but has been combined with insurance (title insurance). Every system has advantages and disadvantages. A comparative examination of all of them reveals their weak points and helps to improve all of them with elements coming from other systems. The purpose now is to compare the title registration existing in Europe and the American title insurance.

1.- INTRODUCTION.

The determination of the value of a property interests both the buyer and the seller; the first one does not want to pay more than the fair market value, and the second one does not want to receive less than this value. Also, the lender and the borrower are interested in it when the collateral of the loan is a mortgage because the value of the mortgaged property must be enough to cover the value of the loan. Given that the loan is one of the main sources of investment, and very frequently there is a mortgage attached to it, the importance of this matter becomes clear.

In order to know the value of a property, we can try to estimate it according to its physical conditions, like the geographical situation, the size and characteristics of the
land, the existence of minerals in it, or, in case of a building, the materials employed for the construction, the time since it was built, or its size. For instance, a new big house near the sea would be more expensive than an old small apartment in a suburb. This valuation is based on an external examination of the property.

Legal issues also have a great impact on the value of the property, although it is not always easy to know them. In this respect, the new big house near the sea might have a considerably lower value than we thought before when looking only at its physical conditions. This might be the case if we knew that there is a mortgage on it. The buyer would not pay much for it. And the lender would not accept it as collateral if he knew that the seller or borrower is just the possessor, but not the real owner of the house. It might turn out that the value of the old small apartment is higher than the new big house due to these legal issues. It is very difficult to gain a correct understanding of these legal aspects of the property, because they are not visible; thus, they cannot be checked through an external examination of the asset.

In an attempt to provide accurate information of the legal situation of properties, Land Registries were established in a large number of countries. This movement grew in Europe in the nineteenth century due to the interest of the bourgeois in real estate transactions as contrasted with the traditional attitude of the Church and the nobility which kept land in their own hands for centuries. It became necessary to know the holder of the property and any encumbrances or mortgages on it in order to obtain security in land transactions. If not secure, then the property buyer might sue the seller.

Different models of Registries were set up across Europe, with different characteristics and effects. All of these systems can be categorized into two main groups: title registration and register of deeds. The first one is considered to be cheaper, easier and faster, and provides a higher level of security in land transactions. The latter one also exists in the United States, where, in order to obtain a high level of security, in spite of the deficiencies of public records, it is possible to buy an insurance which covers title defects. This technique, introduced in the American system, can provide similar protection to the title registration system but has a different way of operating.

The purpose of this article is to compare, title registration and title insurance, from the point of view of the protection of rights. This is not going to be simply a comparison of costs and time because we must kind in mind that the goal of every registration system is security in land transactions. Let us see, then, how this security is obtained by each system, i.e., a legal and non economical analysis of the registration systems, focused on the protection of property rights.

2.- OVERVIEW OF TITLE REGISTRATION.

The title registration system is not identical in every country where this model has been adopted. Contrary to this idea, we can find deep differences among the legislation enacting title registration. For instance, in several cases (Germany, Austria,
Switzerland) a registration is needed to acquire the right; the grantee does not become the holder of the right until the registration takes effect. In Spain, this situation works only for mortgages, whereas other rights and encumbrances do not need registration to be conveyed. However, the registration of the right provides special protection and effects, which encourage the grantee to register the right.

In this respect, in Spanish law, the buyer of a property becomes the owner even if he does not register the acquisition, but the lack of public information of the right reduces the owner’s protection. If a subsequent buyer of the same seller buys the same property ignoring the preceding sale, and registers his right, he becomes the real owner even though the seller was no longer the holder of the transferred right; and the first buyer loses his right.

Let us focus on the Spanish system because this possibility of acquiring a right without registration is also a common rule in systems where a registry of deeds is established. In addition, this circumstance makes it easier and more suitable to compare both systems as far as protection of rights is concerned. With similar rules for property rights’ conveyance, a higher or lower level of protection would be due to the different registration system adopted and not to the conveyance system, which is nearly the same.

On the other hand, given that property rights can exist outside of the Land Registry books, the Spanish registration system answers criticism of the Torrens system in United States. The critics consist basically on giving judicial powers to registrars when determining the rights of adverse parties. In Spain, non registered rights can be recognized by the court as real rights to the detriment of contradictory registered rights. Registration can be the object of a claim by a real holder, so the registrar’s decisions cannot be considered as the recognition of the right with the value of a judicial decision, although registration triggers special protection of rights, as we will see.

What really characterizes the title registration system is the fact that it does not consist merely in a registration of a deed. Rather, this deed is examined by the registrar, who extracts the property rights contained in it and registers them in the Land Registry. However, the registration of the right takes place only once the registrar has checked that there is no obstacle on the deed or from rights already registered in the Land Registry. In this respect, it is a common rule in the title registration system for registering the grantee’s right that the grantor must be registered as the current holder of the right and have the legal capacity to transfer the right, and that there is no apparent breach of law.

According to these rules, when A, a registered owner, sells the property to B, who does not register the right, B becomes the owner and can convey it to C. C cannot know that B is the owner through the Land Registry books because he is not registered as the owner, but B can prove the existence of the right through the deed granted by A. C, the current holder, is interested in the Land Registry’s protection, but when he applies for

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the registration, it will be denied because his grantor is not registered. B would need to register before C can be registered. This is an inconvenience for C and delays protection from the Land Registry because C’s right cannot be registered immediately. However, this kind of control provides a greater trust in registered rights: when a right succeeds in being registered, it is because it has passed the filter of the registrar’s control. Therefore, it is quite sure (although not completely sure) that the right which is going to be registered really exists. This action does not happen in the Registry of Deeds, as we will see later, which makes the search and examination of the title necessary, requiring a large amount of time and money.

Another common rule in countries with title registrations is that the Land Registry is based on the real folio system, which means that all legal information about a piece of property is recorded on the same sheet. This makes the search of the rights on property easier and faster than the personal folio, where that search takes more time and is more difficult. Consequently, the personal folio system becomes more expensive. There is also a higher risk of mistakes in determining the legal situation of the land, increasing the possibility of the simultaneous existence of contradictory titles in the Registry which are not always noticed. Nevertheless, this error can never happen in a real folio and title registration system: a right contrary to the intended registered rights can always be detected. If the owner sells his property twice, the buyer who applies for registration first will be registered because the registrar cannot know the seller’s fraud. But when the other buyer, who has a contradictory title from the registered title, applies for the registration, the registrar must deny it. The court must first resolve which one of them is valid and which one is void because it is impossible for both to exist at the same time. If the registered right is considered void in a judicial decision, then the registration will be deleted from the Registry and the second applicant will be able to register his right.

Once the right has been registered, special protection is obtained as compared to non registered property rights. Two aspects can be described in this respect.

a.- First, the recorded right can be known by everybody because it is published in the Land Registry and there is public access to the Land Registry books. This fact means that nobody can allege ignorance of the right when it is contrary to his own interests. For instance, if there is a registered mortgage or easement on a property and a third person buys it ignoring the existence of the encumbrance because nobody told him and he did not look in the Land Registry, he has to accept the existence of the mortgage or easement even if he agreed to pay the price thinking that there were no encumbrances on the property. Maybe if he had an accurate knowledge of the legal situation of the property, he would not have bought it, or he would have bought it for a lesser price. But, he cannot claim ignorance because the encumbrance was published and there is constructive notice of it.

b.- The other issue, which really distinguishes title registration from record of deeds is that the registration of a right can give this right, under some circumstances, to the registered holder even if he was not the real holder. There is a general rule in law
which states that nobody can transfer what he does not have. Let us assume that A has a void title, but he obtains registration of the right because the registrar did not discover it through the Land Registry books, nor through the deed. Even though A has been registered as a holder of the right, the real holder can prevail if he proves in court that A’s title is void. If A sells the property to B, the grantee would not become the holder, because the grantor has no title to convey. But this rule is modified through the title registration rules under certain circumstances. As the grantor’s right was registered, he seemed to be the holder. The grantee, trusting in the Land Registry books, will be protected if he bought the property in good faith, relying on the rights registered in the Land Registry if he subsequently registers his right. Now the former holder, whose right would have prevailed against A, will not be protected against B.

Why is the former holder deprived of his right without his consent? In the title registration system a logical chain of title is established in the Land Registry books by rejecting contradictory titles and through the registrar’s control explained before. Nevertheless, a mistake can occur and it could not be noticed by the registrar. First, the real holder is protected if he proves the registration of a void title. In the example above, he prevails against A. Having provided the appearance of property rights in the Land Registry books, the one who trusts in the registered rights and ignores the mistake must be protected. The discrepancy between rights and Land Registry cannot continue forever. If this were the case, then nobody would trust in Land Registry books in spite of the registering controls. Anyhow, if the registrar could have noticed that the title was or could be void but he registered it, then he will be liable for any damages to the real holder of the right.

Because of the serious effects from the title registration system and the fact that there is not a mere registration of the deed but of the rights contained in it, the registration of a right does not necessarily mean that this right really exists, in the registered terms. Registrars cannot know the validity of the deed, but only that there is a high probability of it due to the accomplishment of certain circumstances which are controlled by them. If, for instance, there is a vice of consent, which makes the contract avoidable, or if the deed is false and thus void, then the registrar cannot know it just by examining the deed and the Land Registry books. Problems can also be related to boundaries or void licenses from the municipality -in Spanish law any right on a building with a void license cannot be recognized. So, nobody can be considered to be the owner of the building, but only of the land; and it is a prerequisite of registration of a building that building permits have been obtained. For this reason, all registered rights can be subjected to judicial control, and if the court holds that the right is void, then it is deleted from the Land Registry books.

According to the precedent ideas, we can conclude that the title registration system offers a high level of security in land transactions: registered rights are examined by the registrar, it is very easy, cheap and fast to obtain the information through the Land Registry books because of the real folio system; and the holder obtains a special protection when he registers his right against other people with interests in the same piece of property. However, there is always a possibility –though not very great- that even if a
right is registered, it is void. It means that the right does not exist, so it cannot be said that there is a 100% coincidence between the property rights really existing and what the Land Registry shows.

3.- OVERVIEW OF THE AMERICAN SYSTEM OF REGISTRY OF DEEDS.

In the United States, there is only a title registration system in a few localities; for most of the country there is a Registry of Deeds and the possibility of insure the title. Let us first look at the Registry of Deeds and later we will analyze title insurance.

The Registry of Deeds consists only in a collection of deeds related to property rights when they are submitted into the public records (A copy of the actual deed is registered). However, there is no need to record the deed in order to become the holder of the right. This means that the conveyance takes place before and regardless of whether the deed is recorded or not. Thus, a person who appears to be the holder of the right according to information contained in public records may not be the real holder of the right. The holder is another person who acquired the right but did not register the deed. As we will see later, there are some special effects of registration which encourage the holder to register the deed, in a similar way as in the Spanish system, explained before.

The Registry of Deeds is considered to be inefficient\(^3\). Deficiencies in public records are serious and security in land transactions cannot be guaranteed through the Registry of Deeds. There are undeniable problems coming from the organization of public records and difficulties in the search of deeds, whose resolution would require spending a great amount of money.

In these respect, we can point out some points where deficiencies arise:

1.- Instead of gathering all the information related to the same property in the same sheet through the real folio system, information in the Land Registry is organized by indexes of grantors and grantees. That makes the search of the deeds related to a property very complex, and implies a risk that registered deeds might go unnoticed. There could be registered encumbrances about which the grantee does not know, or the grantor might not the real holder of the right, but another person could be who recorded the deed. It is not enough to check that the transferor is registered as the holder of the right to have a high level of certainty about the legal situation of the property –although that is sufficient in the title registration system--. A wider search is required over other registered deeds. Many states limit title search, through marketable title acts, to 30 or 40 years; any claim or interest prior to that date is extinguished\(^4\).


\(^4\) One additional step in this evolution would be protection to the bona fide purchaser in terms expressed in the Spanish system, but its strong effects can be recognized only in a system with more controls in registration than is possible in the American system.
One example of the very complex situation existing in the search through the public records is illustrated in Guillette v. Daly Dry Wall, Inc.\textsuperscript{5} In that case, a recorded deed of a lot in a subdivision referred to a recorded plan and contained restrictions for the benefit of other lots, providing that “the same restrictions are hereby imposed on each of said lots now owned by the seller”. The same grantor conveyed another lot referred to the same plan but not to the restrictions, which were not mentioned in the plan. The grantee acquired the lot ignorant of the restrictions, which were not contained in a deed in the chain of title. He thought that the lot was not bound by the restriction contained in the deed of its neighbors from a common grantor. However, the court held that the deed containing the restrictions was properly recorded and cannot be treated as an unrecorded conveyance. Bearing in mind that the names of grantors and grantees are indexed in the public records, the title examiner cannot ignore deeds given by a grantor in the chain of title; “a search of such deeds is a task which is not impossible”. Even though it is not impossible, we can consider that it is a hard job.

2.- Opposite to the title registration system, the clerk records every deed which is submitted to the public records without examining if there is a logical and apparently correct chain of title. Even if the grantor is not registered as the holder, the grantee can record the deed. However, in the Spanish system we said that whether A, the registered holder, transfers the property to B, who does not register the right but conveys it to C, C will not be able to register until B’s right is registered. In the United States, C could record the deed without requiring B to record his right. That way of working looks easier and at first the recording offers no difficulty. So, we might think that it is better. Nevertheless, it triggers subsequent problems, maybe with more serious consequences, in the following sense: if A sells the property to B, and then A sells the property to X, both grantees (B and X) could register the deed and think that they are the real holder. Only one of them can be the owner, but both think they are. With no obstacle from registering the deed, neither suspects the situation. Problems arrive later and outside of the public records, when B and X try to use the property as owners; their rights will clash and the conflict will have to be resolved in court.

Depending on the State, the solution to these situations will be different. The American Registry of Deeds can work in three different ways according to three different types of recording Acts: race statute, notice statute and race-notice statute. Let us see how each one works through the example of the same property which is sold twice by the same seller.

a.- Race statute: The first who records a deed becomes the holder of the right even if he bought the property in the second place and even if he knew that the seller had already sold the property. It exists in a very few states, and looks clearly unfair.

b.- Notice statute: The subsequent purchaser will only prevail over the prior grantee if he did not have notice of the prior unrecorded conveyance. The important issue here is knowledge of the subsequent purchaser, which is difficult to prove in a lawsuit. About half of the states have a notice statute.

c.- Race-notice statute: This system combines elements of the other two systems. A subsequent purchaser will be protected against the prior buyer only if the subsequent purchaser has no notice of the prior conveyance and records his deed first. About half of the states have a race-notice statute. This system seems to be the most suitable.

Everyone who wants to acquire a title has to search and examine the public records in order to obtain the information about the title if he does not want to take risks with the transaction. But, that is a hard job because contradictory titles can be simultaneously recorded and only one of them can be recognized as the truthful title according to the type of recording Act adopted in the State. Sometimes one of the conveyances is not recorded, which makes the search difficult in the chain of title. In any case, legal knowledge is required for the examination of the title: interpretation of the deeds and its value in accordance with its registration and the recording Act in a certain state are issues that can be determined only with specialized training. Even with a lawyer’s assistance, there is a risk of mistake. The consequence is mistrust of the public records, which can be considered ineffective in providing clear information of the legal situation of a property.

4.- COMPARING THE SPANISH LAND REGISTRY (TITLE REGISTRATION) AND THE AMERICAN REGISTRY OF DEEDS.

Actually, situations in which the same property is sold twice by the same seller to different purchasers can occur in both systems –title registration and Registry of Deeds-; neither of them can avoid these situations. The question is: which one resolves it in a more efficient way?

In the title registration system, the registrar’s control of the rights can be considered as a filter of the rights submitted to the Land Registry. As a result, mistakes become less usual than in a system in which every deed can be recorded. The fact of recording cannot be considered as a reliable sign of the existence of the right. Mistakes can occur, of course, but they are limited to some substantive defects in the title that cannot be known by the registrar; at least the formal validity of the chain of title is guaranteed.

In the Registry of Deeds, every deed is recorded without checking if another already registered deed is contrary to it. Thus, not only is there a risk of substantive defects that cannot be verified in the public records, but contradictory titles can also be registered at the same time; showing, for example, that a different person is the owner of the same property. Consequently, there is no formal coherency in real estate transactions through registered deeds, which makes the discovery of the real holder of the right more difficult. Information from the public records is far from being considered logical and an in-depth examination of the deeds is required.
Legal information of a piece of property, which is not gathered on the same sheet, but is organized through grantor-grantee indexes, triggers a lack of clarity of the rights existing on the property and their holders. In short, risk in real estate transactions is high.

As a result of this recording system, the burden of securing property rights falls exclusively on individuals, who are charged not only with the duty of recording the deed—similar to the title registration system—but also with the search and examination of the title—a hard job, as we have seen above. The purchaser can record the deed without a search and examination, but he will then be assuming a huge risk, not recommended at all: if the seller is not the owner, he will be paying for a title which does not exist, i.e., he will be paying for nothing, and nobody knows if he will be able to recover the expense. Thus, a lawyer’s advice is highly recommended for which the client will pay.

In Spain, there is also an examination of the deeds, but qualitative differences with the American model could make us conclude the superiority of the Spanish one. As described above, registrars record the rights only once they have verified that there is no obstacle in the Land Registry books or in the deed. Before the registration of the right, once an application has been made, there is a notice of the application and the subsequent possibility of registering the right in the Land Registry called “asiento de presentacion”, which is made automatically once the application is submitted. Everybody is provided with a constructive notice that a right can be registered and the applicant is guaranteed that the registration of his right, in case it takes place, will be according to the legal situation of the property existing at the moment of the application. A posterior right contrary to his interest will never be preferred over his right.

The tax for registering a right is paid not only for the fact of registration, but also for the examination made by the registrar, so it can be considered at the same time to be a tax and a fee. When the right is registered it means that, according to the registrar’s verification, there is no formal obstacle to registering the right. In a certain way, we can say that when the right is registered, the registrar has concluded that it is technically correct. If he is wrong, he will be liable for any damages with the registration caused to the real holder of the right (for example, when as a consequence of the registration, the real holder loses the right, according to the Land Registry rules). But these kinds of mistakes—which rarely occur—are different from substantive defects (e.g., false title, vices of consent, etc.) that cannot be noticed by the registrar and consequently, he cannot be liable for registering a title with such defects.

There is not such a duty of examination in the Registry of Deeds before recording a deed. Thus, no liability can be attributed to the clerk who records a deed with that kind of formal defect. The examination is not prior to registration, but posterior, and it takes place anytime that a person is interested in knowing the legal situation of a piece of property. This means that every time somebody is interested in the legal situation of a piece of property, the examination must be made. In practice, however, professionals retain the results of every search and examination, so that the next time they have to examine a title related to the same property, their work is limited to the time spent from
the last search. In a certain way, both lawyers and abstractors are playing the same role as the Spanish registrars with an important difference: results of the examination are published in Spain in the Land Registry books, while American professionals keep their information private. When someone asks about the legal situation of a piece of property in the Land Registry, he pays only for the information (6 euros) and not for the examination; consequently, it is cheaper.

Abstracts of titles exist in both, the Spanish and the American system. In the Spanish one, they are accomplished by registrars and published in the Land Registry books, while in the American system they are made by abstractors and lawyers who give information only to the person who has employed them. Do both Spanish and American professionals have the same liability for mistakes made during the search and examination of titles?

Registrars are always liable when a defect in the title could be known through the examination of the Land Registry books, if they did not realize it and registered the right. They are liable against any person damaged by their mistake. There is a general insurance covering all registrars’ liability. However, mistakes rarely occur.

In the American system, abstractors can be lawyers; if they are not, an attorney’s supervision is required because “[t]he examination of titles requires expert legal knowledge and skill.” In Ex parte Watson, the court held that “we find that examining titles and preparing title abstracts constitute practicing law. Therefore, we require that licensed attorneys either conduct or supervise such activities. This requirement was established in Buyers and continues today for the purpose of protecting the public”. Abstractors are liable when negligently fail to find and disclose recorded deeds. In the case that the abstractor is not a lawyer and was performing his duties under a lawyer’s supervision, only the abstractor is liable for negligent performance of his duties.

Given that abstracts of titles are kept in privity, whereas they are published in the Spanish Land Registry books, abstractors are considered to be liable only against the person who employed them and not anyone who relied on the title abstract. According to this rule, when an abstract of title was required by the owner who intended to sell his property, the abstractor could not be considered liable against the purchaser who relied on the abstract shown by the seller. Fortunately, courts have changed their mind and currently abstractors are now commonly considered liable not only against the person to whom the abstract of the title is issued, but also against any other person whose reliance on the abstract of title can be reasonably foreseen by the abstractor (i.e. a purchaser of the property when the abstract of title was contracted by the seller).

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Abstractors can buy insurance covering their liability for mistakes in performing their duties. However, it is not a general and obligatory insurance, as with the Spanish one, with the risk that damages cannot be compensated in case of an abstractor’s insolvency\textsuperscript{10}.

Liability in both cases, Spanish and American, exists only when the defect of the title could be known according to the public records or Land Registry books, and not for off-record defects, which could not be known. Thus, they are liable for negligence in a title search, and not for defects that they could not discover. Theoretically, that would be the difference with title insurance companies\textsuperscript{11}, but we will see later that the latest ones try to limit liability to recorded defects of the title, which is really disappointing bearing in mind the possibilities of protection that could be provided through insurance.

Finally, it can be interesting to compare the length and the costs of registration in each system because a high level of security in the registration system could perhaps be followed by high costs and a long time to obtain the registration of the right. In the end, that could mean that the system is not very efficient. It may be preferable to reduce controls to obtain a faster and cheaper system. Or not.

According to \textit{Doing Business 2008}, the World Bank’s report\textsuperscript{12}, the Spanish system is more expensive than the American system (7.1% and 0.5% of the value of the property, respectively) and slower (18 days to register a right in the Spanish system and 12 days in the United States). These data, however, should be examined more carefully.

A.- Costs.

As far as the cost is concerned, in Spain two different things must be distinguished: first An “asiento de presentación” is required to be paid at the time of submitting the application, which costs 6 euros. The cost of registration changes according to the value of the property following these rules:

If the value of the right is not more than 6,010.12 euros, the tax is 24.040484 euros
If the amount the value exceeds between 6,010.13 and 30,050.61 euros, the tax is 0.175% 
If the amount the value exceeds between 30,050.62 and 60,101.21 euros, the tax is 0.125% 
If the amount the value exceeds between 60,101.21 and 150,253.03 euros, the tax is 0.075% 
If the amount the value exceeds between 150,253.03 and 601,012.10 euros, the tax is 0.030% 
And if the amount the value exceeds 601,012.10 euros, the tax is 0.020%
In any case, the tax can never exceed the amount of 2,181,673.939 euros.

\textsuperscript{10} Reid v. Dayton Title Co., 31 Ohio Misc, 275, 278 N.E.2d 384 (1972) 
\textsuperscript{12} Pages 150 and 159.
Bearing in mind the current prices of housing in Spain -the average is around 200,000 euros- the tax for registering the ownership is around 200 euros\(^{13}\).

In Massachusetts, for instance, the usual tax for recording a deed related to the ownership of a piece of property is $125, and in the unusual case of a value exceeding $450,000, the tax is higher.

Comparing the data above, we can conclude that the Spanish system is more expensive. But we do not want merely to compare the amounts; it is perhaps more accurate to establish a relationship between the costs and the protection of property rights. The protection provided with the record of the deed is similar to the one obtained with the “asiento de presentacion”, although the first one costs $125 and the second one 6 euros. The tax paid for the registration of the right is higher than the $125 for the Registry of Deeds, but it implies a search and examination of the right made by lawyers in the American system, whose cost is established freely by each lawyer and is generally higher than the Spanish tax. Registrars’ fees are established by the government and are the same for everyone, while lawyers fix their own fees freely and vary in each case\(^{14}\). The search and examination have to be made every time someone is interested in the legal situation of the property, even if it has not changed. In contrast to the lawyer’s fees, when a person is interested in the legal situation of a Spanish piece of property, he has to pay only 6 euros to the Land Registry to obtain the information.

There is another issue related to the cost: in the title registration system, the examination of the title is paid by its holder, and that information is published in the Land Registry books for general knowledge. Any person interested in that information will pay only for the information and not for the examination of the title. In the Registry of Deeds, when the holder of the title submits an application in the Registry of Deeds, he does not pay for the examination, but only for publishing a deed: anyone who is interested in the legal situation of a property pays not only for the information, but also for a search and examination before obtaining that information.

\(^{13}\) Nevertheless, according to the World Bank’s report referred to above, the Spanish system’s cost is 7% of the value of the property, which does not seem to be the amount of 200 euros. The reason for this difference is that World Bank is not reflecting only the cost for registering, but also two other expenses: a) the tax paid to the public Notary, because only documents approved by him can be submitted for registration; and b) the tax paid to the Government every time a piece of property is sold, which is a cost that does not exist in the United States. We could discuss the convenience of these two taxes and especially the questionable necessity of public documents in the Land Registry; but since we are comparing the registration systems, let us focus only on this aspect.

\(^{14}\) The question is whether a registrar’s fees really correspond with the cost of examining and registering or are they higher than is justified according to the real cost. But that is another issue which would imply a broader research which exceeds the purpose of this work.
Besides, the title registration is more advantageous in another sense. Fees for registering a title include not only the fact of registration, but also the examination of the title. It is enough to check that the grantor is registered as the holder, and not for all of the chain of title. Since to be registered, the grantor’s title must undergo a similar examination, every registration is based on precedent examinations and registrations, reducing the efforts of registrars. In contrast, in the Registry of Deeds every time the examination takes place, the lawyer has to examine the chain of title and he cannot limit his work to checking that the grantor is registered as the holder. This process implies a greater effort in the examination of the title which means a higher cost, which in a certain way explains his higher fees compared to the Land Registry tax.

In short, the issue of cost must consider that the examination of the title takes place in a different time of registration in the Spanish system than in the Registry of Deeds.

B.- Time.

The Spanish system is considered to be slower than the American Registry of Deeds. As it was explained above, the average time for registration in Spain is 18 days while in the United States it is 12 days. Consequently, although providing a higher level of security in land transactions, the Land Registry could be considered less efficient than the Registry of Deeds. And perhaps a faster system would be preferable in spite of its lack of control of recorded deeds if there is a way to prevent the consequences of this lack of control. Nevertheless, more important than this consideration is an issue that could make us change our mind.

As described before, in the Spanish Land Registry, the right is registered (not the deed, but the title) once the registrar has examined the Land Registry books and the deed and has concluded that there is no obstacle to registration. Obviously, it takes time to reach that conclusion. During this time, it could be possible, for example, that a mortgage or another right contrary to the applicant’s interest is registered, having priority over his right. To prevent any damages caused by that reason, a notice of the application is reflected in the Land Registry books with the date and time of the application once it is made until the registrar decides to register the right or to refuse the registration. That notice’s, called “asiento de presentacion”, main goal is a guarantee to the applicant of the legality of the property at the time he applied, in case his right is registered. It does not matter what happens after that moment because his right will have priority over any posterior event. Let us look at an example:

A, registered holder of a house, sells it to B, who applies for registration at 10 am on May 5th, when there were no encumbrances registered in the Land Registry. The same day, at 1 pm, the registration of an ownership right is applied by C, who has also acquired the house from A, still registered as the
owner although he is no longer because he sold the house to B. Without the “asiento de presentacion”, if C’s application is decided first, it would be resolved affirmatively because the grantor, A, is still registered as the owner of the house, and the registration would take place against B’s interest. B’s application, posterior to C’s registration would be denied because his grantor is now not registered as the owner. In the case that B and C were not buyers, but creditors who have guaranteed their loan with a mortgage, C’s interest would have priority over B’s right because his application was resolved first, although it was applied for later.

The “asiento de presentacion” avoids these unfair consequences. As B’s application was made first, his priority is guaranteed against any other application made after him, even though the registrar could resolve others first. When any other person applies for the registration of a title before B, he can have constructive notice of his application and, consequently, that B’s acquisition of a right is going to be registered.

We can conclude, then, that the “asiento de presentacion” plays a similar roll to the record of the deed because it always takes place without control and provides constructive notice of a transaction. The title registration which follows the “asiento de presentacion” once the examination of the title is made by the registrar has a different value, closer to the search and examination made by abstractos in the Registry of Deeds, and thus, is stronger than the mere record of a deed. If the registration is refused because there is an obstacle in the chain of title, it is possible to go to court and keep the “asiento de presentacion” during this time. In a judicial procedure, parties with contradictory interests have to prove the validity of their titles. If the court holds that the applicant’s title should have been registered, the registrar will have to accept the judicial decision and the registration will be made with priority provided by the “asiento de presentacion”. That refusal made by the registrar, however, must not be understood as a lack of protection because a title has been excluded from the Land Registry, but as a way to provide security in transactions. According to the registered titles, there are reasons to doubt or even deny the validity of the applicant’s title. These doubts can be resolved only by a court in a procedure where the parties with contradictory titles have to prove the validity of their titles.

According to these ideas, if the equivalent of the record of a deed is the “asiento de presentacion” and not the title registration, the comparison should be made between those two. Title registration provides greater protection which exists only when it is justified through the examination of the title made by the registrar. Comparing the record of the deed with the registration of a title is comparing nonequivalent or heterogeneous terms, which leads to wrong outcomes.
Bearing in mind all the issues above, the Registry of Deeds appears to be faster and cheaper than the Spanish Land Registry. A more in-depth analysis of both systems which takes into account protection provided by each one leads us to conclude that for the same level of protection, the Spanish Land Registry is cheaper and faster, and its general level of protection is greater than the American public records, is more expensive and slower. To reach the same security in land transactions, the United States system needs the intervention of abstractors, and then it becomes slower and more expensive than the Spanish title registration system.

Furthermore, given the cost and time of registration, there is an important issue related to registration systems whose main goal is providing security and certainty to the legal situation of a property. We must remember that the reason for the establishment of a registration system is to end the uncertainty in real estate transactions.

When a Spanish registrar decides to register a title after the examination, he assumes liability for any damages caused by mistakes. His decision to register a title or not is subject to judicial control which can make the registrar rectify his decision. And if as a consequence of his wrong decision an interest in the property is damaged or lost, the registrar will have to indemnify the holder. For instance, if an ownership right was registered although the grantor was not registered as the holder of the right, and as a consequence, the real holder loses his right, the registrar will be liable because he has the duty to examine for any obstacle in the deed or the Land Registry books and to register the right. If he discovers an obstacle, he must deny the registration application. The fact that the grantor is not registered as a holder is an obstacle which breaks the chain of title and if the registrar registers the right, he will be liable for any damages. If the grantor is registered as a holder, but his signature is false, the registrar will not be liable because he cannot know this circumstance through the examination of the deed and the Land Registry books.

In the Registry of Deeds, every deed is recorded with no control and no liability in the case that the grantee is not the real holder. Consequently, nobody can trust in the fact that the grantor is registered as a holder because anyone can be. When someone is interested in understanding the legal situation of a piece of property and its owner, a search and examination of the title —similar to the Spanish registrar’s control— will be made by a lawyer. But the difference is that lawyers insist in the idea that they are just giving their opinions about the legal situation of the property; they try to avoid any kind of liability in case they are wrong for reasons that could have been discovered through the search and examination —for example, a breach in the chain of title- or for any other reason that they could not have discovered—for example, a false signature on the deed.

Due to all these problems in the Registry of Deeds, title insurance was commonly established to cover risks if the title reveals any kind of defect in the future which was not discovered by the lawyer. Let us see now how this protection is provided and if it is broader than the one which exist in the title registration system.
5.- Title insurance’s coverage and title registration’s protection.

The purchaser of a property and the lender of a mortgage loan are interested in protection against any defects in the title. In the United States, they know that the search and examination process in the public records is difficult, and abstractors and lawyers, although experienced in this task, can make a mistake. In order to protect their interests, purchasers and mortgage lenders can buy title insurance to cover the risk of any defect in the title that they did not know about at the time of the acquisition. Only defects that already existed when the policy was issued can be covered, and any defects arising after the issue of the policy are always excluded.

As far as prior defects are concerned, this insurance does not mean total protection for the insured, but only within the terms established in the policy. Through title insurance, the insurer guarantees the validity of the title in the way and to the extent defined by the policy. In case of later discoveries that there was a defect contrary to the guaranteed validity, the insured will be indemnified. But if the defect was not covered by the policy, the insured will not be indemnified.

Abstractors’ liability is different from that of the insurers’. The first one exists when a title defect was negligently omitted in the abstract of title because a recorded deed was not found during the abstractor’s search. Title insurance means a guarantee of certain conditions of the title, which does not necessary mean that there is no defect in the title. If title defects are discovered later, and as a result, a title has a worse condition than the guaranteed one, the title insurance company will be liable. However, insurers try to avoid liability. Prior to the issuance of a policy, the insurance company searches and examines the public records, and basically the insurance guarantees the title based on the results of the examination. Theoretically, title insurance can be extended beyond recorded risks, guaranteeing the integrity of title against other dangers, including forged deeds and lack of authority by the signing parties, for example. But, insurers rarely want to assume these risks, limiting coverage to defects of the title created before the issuance of the policy, and to those which could have been discovered through the search and examination but, for any reason, were not. Basically, in practice, title insurance is just a way to endorse the search and examination, but nothing else, because coverage will be coincident with the result of the search and examination.

A good example of this attitude of avoiding liability is the clause commonly included in a policy through which “the rights of tenants or persons in possession” are excluded from coverage. The purpose of the insurer is to protect himself from adverse possession and from any unrecorded right of a third person who consequently is in

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possession of the property. Courts usually limit the interpretation of these clauses in order to provide a broader protection to insureds)\(^{16}\).

Thus, title insurance is criticized\(^{17}\) because insurance companies are interested only in obtaining profits and not in providing broad protection against defects in a title. What seems to happen is that insurance policies are written in such a way that covered risks often do not arise. Title insurance companies obtain premiums from insured holders but hardly ever indemnify for damages because title defects, which are found to exist during the search and examination, are automatically excluded from coverage. Policies are very complex and extensive, and it is not unusual that various risks are excluded from coverage and the insured ignores it. So, when after the issuance of a policy, a defect arises and the insured claims protection, the insurer responds that the defect is not included in the coverage. The result is that the insured paid to be protected from defects in the title and he later realizes that the real terms of the insurance do not protect him.

Sometimes, however, a recorded defect in the title is not discovered in the search and examination of the title, but after the issuance of a policy. If insurance coverage was drawn according to the result of the search and examination, the defect omitted in the abstract of title should be a covered risk. Title insurance companies try to avoid any liability against the insured by searching for an interpretation of the policy that excludes the risk from coverage. In some cases, it is clear that the defect is included in the coverage. Bearing in mind that prior to the issuance of the policy, a search and examination of the title is made, and the report resulting from it is the basis for the extent of the policy, one question arises on this point: Is the title insurance company liable according to the insurance policy or for negligence during the search and examination preceding the issuance of the policy?\(^{18}\) In the first case, it would be a contractual liability, and damages will be compensated according to the terms of the policy. And in the second one it would be a case of tort law, where compensation includes all the detriment caused. The insured is commonly interested in the latter one while insurance companies try to avoid this situation. There is no general rule to resolve this dilemma; rather, it is a case by case decision. If the title insurance company can be assumed to have the role of an abstractor and its report was an abstract of the title, on which the insured relied to acquire the right, then it is an issue of tort law. But, if the report had only an internal value for the title insurance company in order to establish the basis of the coverage, no negligence can be presumed and only liability from the insurance contract can be recognized\(^{19}\).

One more time, the Spanish title registration system seems to provide broader protection. Defects in the title that can be noticed through an examination of the Land Registry books always trigger liability for the registrar. Title insurance companies are


\(^{18}\) HOMBURGER, T.C., “Insurance law overlay on title insurance”, Practising Law Institute, Real Estate Law and Practice Course Handbook Series, PLI Order No. NO-005B, November 2000, p. 1002.

only liable if they assumed the role of an abstractor or if, not assuming that role, the defect was not excluded from coverage.

The possibility of insuring title defects is not a bad idea, although its practical implementation shows clear deficiencies. Maybe better results could be achieved under different circumstances. Title insurance can provide, at least theoretically, broader protection than the title registration system. Land Registry efficiently protects as far as the formal validity of a title is concerned, but substantial defects cannot be avoided with the title registration system because there is no way for the registrar to notice them. In title registration, a title can be void, for example, in the case of forged deeds, lack of authority by one or both signing parties, or a void construction license. The registrar cannot be expected to discover these defects through the examination of the deed and the Land Registry books, nor is he liable for them. Problems with boundaries can also happen. Recently, there is a gap in the protection provided through the title registration system, which also exists in title insurance, due to commonly established exclusions from coverage.

Nevertheless, in all these cases and in other situations of substantive defects of title, a title guarantee could be, perhaps, a solution, providing the most perfect protection to the title, acting as a complement to the title registration’s protection. The question is whether that kind of guarantee is feasible from an economic point of view and whether, contrary to this idea, it is preferable to assume the risk. Substantial defects are not common; so, the risk would not be very great and the coverage may be thus profitable without the need for more costly premiums. However, this guarantee should be drawn in such a way that it does not allow fraud by the parties. Only defects prior to the registration which do not depend on the parties’ will should be covered. In order to avoid criticisms existing in the American title insurance, it would be desirable for the coverage not to be provided by a private company interested in a profitable business but by a public office whose goal is security in land transaction. For that case, there should be a public interest in this insurance. This seems to exist in European countries—although with different intensity—but it is difficult to gain acceptance in United States.

6.- CONCLUSIONS.

In sum, both systems provide protection from formal defects which can be noticed through an examination of the public records or the Land Registry books. The Spanish system seems to be more effective because of the control over registering titles, which on the one hand avoids the registration of contradictory titles and, on the other hand, is always translated into liability of the registrar in the case of mistakes. Nevertheless, there is no control in the American public records, and that means that liability for recorded defects arises only in the case that an abstractor or a title insurance company assumes the duty of providing an abstract of the title. Security in property rights rests in private hands; there is no public interest in it. Everyone interested in a piece of property makes the decision to protect himself or assume some risks. As a result, the Registry of Deeds itself is considered cheaper and faster than the Spanish title registration
system. However, obtaining a similar level of security in transactions necessitates incurring other costs and spending more time.