

PRINCIPLES ABOUT A FUTURE U.S. NATIONAL LAND RECORDING SYSTEM: IS IT REALLY NECESSARY TO CONTINUE EXISTING M.E.R.S.?

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ABSTRACT

This article deals with the weaknesses of the current American Land Recording System and the lack of a nationwide federal regulation involving all the subjects on Recording Land Acts, taken from the point of view of Professor Matheu's experience, as teacher of Real Estate Law in the University of La Laguna at Spain. He proposes a new Federal Act that includes a full regulation on recording deeds, land titles, encumbrances, all kind of burdens, liens and mortgages notes, to give certainty to any buyer/seller or borrower/lender. The article explores the Spanish and Italian experience on digitally recording land acts. It also explores the idea of taking the I.C.T. new tools and Graphical Geobase data to give full certaintiness to the registration system. Matheu also makes an in-depth analysis of several duties concerning recording land titles, such as the chain of title doctrine, and proposes several main principles to the future Federal Land Recording Act, to be able to enforce the land titles covered by the protection of a public registry office. He also makes a draft of a new American Public Registry System, rather than the actual local and State's county clerks offices. Matheu faces the problems of the actual Mortgage Electronic Recording System, a private system created by the bank industry that has not given any transparency to legal transactions on real estate property.

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I. AN INTRODUCTION TO THE MORTGAGE RECORDING PROBLEMS IN U.S.A.

The following article criticizes the lack of an American Land Recording System, not only for mortgages, but also for all real estate transactions, from the point of view of a comparative study of the Spanish Land Registration System. In this position, the truth is that following the aftermaths of the subprime mortgage crisis in early 2007, the bank industry failed to foreclose many of their loans. Not only due to the lack of money of borrowers and grantees, but also due to the fact that the Recording Systems failed to provide the correct information related to the real owner of the land and the real record of the mortgage note describing the property. What usually happened was that when a bank, an owner or a holder of a mortgage tried to foreclose, the mortgage had already been transferred to another bank. If the initial one had gone to the secondary mortgage market, or even the land, the lot or the property actually didn't belong to the real debtor, because the chain of title had been broken in the local office of the Registration System.

This article pretends to take the weaknesses and strengths of all U.S.A. land recording systems all over the different states and local offices, to make possible a new federal system. A system more accurate and more transparent to the bank industry as lenders, to the customers as borrowers, and also for all operators involving real estate transactions, buyers, sellers, holders of any burdens or conveyances, and financial operations dealers. This article doesn't propose to draft a new regulation for a nationwide land recording system, as some scholars and academic have done in past years.² What we want is to draft the main aspects and outlines to be considered towards the issue of a Federal Land Regulation Act by Congress. I want to give academics and politicians a new vision taken from other legal systems, like Spain and others in the European Union that come from the Roman law tradition, rather than common law which is used by the American and the English.

II. THE WEAKNESSES OF AMERICAN MORTGAGE REGISTRATION SYSTEMS

The main issue related to the recording land title system is how to get a system that gives the real estate operators the accurate data taking from its

² Dale A. Whitman, *A Proposal for a National Mortgage Registry: MERS done right*, 78 MO. L. REV. 1 (2013).

publicly main target.³ That also gives the real and on line information about all subjects, such as the land description, boundaries, prior owners, and mayor burdens or liens to a specific parcel or lot, regardless of fact of the variety of assignments that happened all over the past time. The fundamental thing is that, if we don't want to break the real chain of the title, we must have all the information related to a parcel described in the recording system, that allows customers (borrowers and lenders) to know in real time what happened with the property to be purchased, mortgaged or taking any conveyances. This lack of information muddles transactions, because people living in one part of the country that want to acquire a property located in another state far from where they are, need to know all the information. Regardless of the fact that they have never seen that parcel or they don't even know all the information about prior conveyances.

A federal national recording land registry would give such information in real time. We shouldn't need to visit the County Clerk's Office to search the necessary information or to make an assignment on it, if we could use the modern information technology systems. When the antiquated local title recording system failed to meet the needs of national lenders, a private and limited access system to record the residential mortgage assignments was created. The Mortgage Electronic Recording System Inc. (MERS), created by the bank industry in 1993,⁴ provides an electronic processing and tracking of mortgage ownership and transfers. Nonetheless, MERS's main target in the beginning was profitable, but then failed because recording laws differ from State to State, and indexing practices can differ over time in the same county or municipality. Even we can say that land recording is not required for purchasers to take possession of property or for deeds to be effective⁵, purchasers must search diligently for prior recordation in their chain of title, to ensure they are receiving a good title. That's why the failure of such a private parallel system had played an important role in most of the foreclosures cases in the United States. The need of a Plan of

³ The system of publicly recording land title documents originated in the Plymouth and Massachusetts Bay Colonies, in the U.S. (1640). See JESSE DUKEMINIER, ET AL., PROPERTY 559 (2006).

⁴ MERS was created by the Mortgage Bankers Association, Fannie Mae, Freddie Mac, The Government National Mortgage Association, The Federal Housing Administration and the Department of Veterans Affairs. See Tanya D. Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, III COLUM. L. REV. 19, 26 (2011).

⁵ Rather, recording deeds protects subsequent purchasers who take title without notice of prior conveyances that are either recorded in a manner that doesn't impart adequate notice, or aren't recorded at all, Emily Bayer-Pacht, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrine*, 32 CARDOZO L. REV. 337, 346-357 (2010).

Modernization of the American Land Title Recording System⁶ is a real need and an urgent measure, for the lenders/mortgagees and the borrowers/mortgagors.

Conveyances in real estate are normally recorded with a county recorder or a register of deeds. For locating a mortgage and identifying the lender, you must look at the chain of title of the real property in question and find the name. Such work is not easy if all of the data related to conveyances or the parcel description hasn't been recorded correctly, nor contains all the agreed and trading information. To achieve such a goal, modern technology provides a full and complete variety of tools based on information systems, like data-search programs and indexing functions, rather than focusing on the digital submission or recorded documents.⁷ The old ancient systems based on written books and notes must be substituted for another one based on recorded data, PDF files and information accessible to anybody using a personal computer, and connecting to a server with all the land information processed. In the 21th century this aim should be easily achieved with modern technologies, because machines don't think and therefore must be people to qualify the deeds, titles and all the land information prior to be technically processed or scanned, to match with legal requirements. This target must be made by future public officials in local or State registries of land titles. The goal is to make the systems safe and accurate between the recorded titles, the database containing the land information (the owners and holders too) and real life.

III. THE STRENGTHS AND POSSIBILITIES OF A NEW RECORDING SYSTEM FOR U.S.A.

All land title offices allow on-site searches, but they work with no coordination, because every State has their own rules related to the recording system. If we take a combination of transparency and clear priority in title recording processes, it will create lots of security in land interest and strengthen the confidence of investors who seek to purchase real estate and banks or financial corporations hoping to lend money secured by the real estate properties. We have more than 3,000 local recording systems all over the U.S. In the beginning, deeds, mortgages and leases were hand-transcribed into books. Now we have the possibility of making such transcriptions into e-books and computerized data books that let lose the old lack of inaccuracy.

We need to take advantage of such technological and information system tools, because the static indexing system couldn't account for changing legal descriptions of property parcels. The ancient systems used traditional boundary descriptions to identify parcels of land. New systems assign a parcel

⁶ Marsh, *supra* note 4, at 19.

⁷ Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 741-742 (2009). See also Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. MARSHALL L. REV. 227 (1999).

identification number, but it is a number related to a tax or zoning map, it does not offer the real information about a parcel of land. MERS recording system is acting solely as a nominee for lender and lender's successors. The information is held only by MERS and its Servicer Identification System.⁸ Such a technically developed system could be drawn upon to: (1) create the real, perfect and best Federal Recording System;⁹ (2) to spread all the information to real estate title land, wherever you are located in the U.S. and whenever you want to make a purchase; or (3) to make a conveyance or a mortgage to any parcel or property. This could be possible because the actual status of MERS holds no beneficial interest in the property, and that position is irreconcilable with the mortgage laws.

MERS's only right is the right to record the mortgage, but doesn't qualify as a mortgagee pursuant to our foreclosure statute¹⁰. The wellness of drawing a new Federal Land Recording System not only for mortgages, but also for any kind of burdens, conveyances or liens related to real estate property, would give us the security and accuracy that would make the U.S. transfer of property legal system one of the best in the world. There have been some attempts on drafting a statute to create such federal system¹¹, but authors fail to create the mainframe before creating the federal regulation on how to record a mortgage or the note related to it. What I propose in this article is to outline the main principles, in order to create a Federal Registration System, taken from the experience of Spain legal principles that have several centuries of background and thousands of cases resolved in court of land assignments and mortgages questions. This is what I will explain in the next pages.

IV. THE MAIN PRINCIPLES TO INSPIRE THE FUTURE U.S. RECORDING SYSTEM

In the following pages, rather than making or proposing a statute¹², I will try to outline the main principles that a pure recording land system should have,

⁸ MERS Servicer ID, *The Mortgage Industry's Utility*, MERS SERVICERID, <http://www.mers-servicerid.org/sis/>.

⁹ Australia's registration system is among the best, often referred to as the "Torrens System", a tribute to its earliest, most effective designer and advocate, Robert Richard Torrens, appointed Registrar-General of the State of South-Australia in 1852. See DOUGLASS J. WHELAN, *THE TORRENS SYSTEM IN AUSTRALIA* 12 (1982). See also John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61 (1992).

¹⁰ See Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1380-86 (2010).

¹¹ See Whitman, *supra* note 2.

¹² To face mortgage recording problems, see *id.*

taken from the Spanish law experience¹³. I will call them *registration principles*. The chain of title doctrine will be analyzed at the end of the present article. It basically states that a deed related to a property cannot be recorded unless it is previously recorded on the parcel or land, or the previous assignments and liens related to such a piece of land¹⁴. These mortgage recording principles are law and real regulation on recording systems. That means that, regardless of the fact that there is not a federal regulation over them, those principles must be enforced by judges and public authorities, and must be taken for local, regional or state regulations wherever the property is located.

A. The Registration/Recording Principle

This principle comes from German Law,¹⁵ and it means that recording a deed is a necessary requirement to an existing change of status of any property. Either way, you could say that only a note or deed would be necessary to create a debt, a mortgage, a lien or any burden without recording them. But if you want to enforce them, what gives the legal security and accuracy is the recording status at a Public Land Recording System. Therefore, the changes of real estate status can happen in real life, regardless of the fact that such changes are being recorded. These changes exist for law, judges, particulars, etc. But the existence of the change of property status only has the protection of law to be enforced, if the deeds are recorded in a public registry.

B. The Agreed Principle

The following principle states the need of an agreed act to be recorded in such a future recording system. What it means is that no act should be recorded by any public clerk if such an act does not come from an agreement from parts of a note or from a judicial statement. But you can question that when someone enforces a foreclosure they are not really making an agreed act. You may also say that such judicial statement came from an initial agreed act and the foreclosure is only the subsequent aftermath, or an initial agreement that becomes a note or deed breach. Therefore, the root of an enforced recording act must be an agreement, so that any act recorded in a public system must have a background from an agreement.

¹³ The main work related to such a matter in Spanish Law belongs to JOSÉ LUIS LACRUZ BERDEJO ET AL., *ELEMENTOS DE DERECHO CIVIL III, DERECHO INMOBILIARIO REGISTRAL* (1984) with several following editions.

¹⁴ On chain in title doctrine it is important to see *Coco v. Ranalleta*, 733 N.Y.S. 2d 849 (Sup. Ct. 2001) and *Federal Natl. Mtge. Assn v. Levine-Rodriguez*, 579 N.Y.S. 2d 975 (1991). See also *Bayer-Pacht*, *supra* note 5.

¹⁵ This is known in German as *Eintragungsprinzip*.

C. The Publicity Principle

According to this principle, we can have two different points of view: (1) that publicity gives us accuracy and security on private transactions on real estate, and only what it is recorded in a public system, could have a presumption of *bona fide* and accuracy; and (2) that the recording system must be available to the public, that is to anyone who searches for land information. So that people, banks or investors, who want to know the real owner of a property and/or the real characteristics of a lot or a parcel, must have full access to the recording system wherever the real estate is located. This principle would give full transparency on any transaction, would make them less expensive and may help avoid future foreclosures, because investors have the full information before the deed is signed by the parts of such transaction. When you are buying a vehicle, you must go to the Department of Motor Vehicles (D.M.V.) and a quick search of their computerized data would enable you to know who owns the car and whether it is subject to a loan¹⁶. The same fact should happen if you are searching for data of any property in a public registry.

D. The Standing or Legitimation Principle

The holder of a recorded note or mortgage¹⁷ should be considered the real owner, rather than one that has not recorded his note. It is enough for him to show the recorded note, to prove that he is the real owner and such a title gives him all the enforcement power to go to trial court. One that only holds a non-recorded note should record his note before he goes to court. Even more, there will be a possession presumption for the recorded one that he is in possession of any real estate or property. This destroys the presumption for the non-recorded one, so this last one is not in possession of the property. Either way, if you cancel the records of any parcel in the registry, it will be a legal presumption that the rights have disappeared for such recorded one. Also, for preserving the records in the public registry systems, the Courts will take a lot of care not to cancel any record that is not due to a trial or a judicial case involved to it. Therefore, not only the County Clerk Officials will take care of the records, but also, the judges will not allow any cancellation of a recording data, unless it is due from a foreclosure

¹⁶ For this comparative example, see GEORGE LEFCOE, REAL ESTATE TRANSACTIONS, FINANCE AND DEVELOPMENT 244 (6th ed. 2009).

¹⁷ About becoming a non-holder who has the rights of a holder, see American Law Institute and the National Conference of Commissioners on Uniform State Law, *Report of the Permanent Editorial Board for the Uniform Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (November 14, 2011), http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf. See also *In re Veal v. American Home Mortgage Servicing Inc.*, 450 B.R. 897, 911-12 (9th Cir. 2011), which it recognizes the rights of a holder status, but states that it did not exist in the absence of possession of note.

case or based on a statement or a judicial act. That's why only the standing holder of a recorded note (a bank or any owner holding a right) will have the legal right to go to courts to enforce his rights from a recorded act.

E. The Public Faith or Confidence Principle

This one is the outcome of the publicity principle and the key of all the Recording System. It means that if a person gets or buys a property from the second person who appears at the recording system with *bona fide*, he will be held in his possession when acquired with a valid deed, even if later the title of the seller is repealed or cancelled by any judge. This is due to the fact that the owner acquired in good faith thinking that the seller had the real property protected by public faith on the Registration Recording Land System. In cases of a double sale or purchase by one seller and two buyers at the same time, the public system will always protect the first one to record his deed in the Recording Land System or Public Registry, even if he is the second one to buy in time. Therefore, the first person who bought will only have the right to recover the money he paid against the seller, but he will not have the right to record his deed. The second buyer or holder recorded his title first and is protected by the public faith principle, due to the confidence in the public registry recorded deed.

This principle ensures the transactions concerning the variety of title insurance companies that make thousands of title insurance notes before the closing dates. So they can make sure that their titles are ensured, valid, that there are no doubts of their authenticity and that there is a real and valid deed and title that is marketable¹⁸.

F. The Priority Principle

This principle comes from a Roman law that says: *prior tempore, potior iure*. It means the first in time is the first in right and the key is to know which title is the first in time. For this priority principle, the answer is that the first in law¹⁹ is the one that first records his deed in the public system. So that law will protect whoever had access to the registry, even if his deed is later on time than the other that signed before, but who has not recorded his title in the Registry. That's why, regardless of the fact that a buyer or mortgagee has a note that recognizes his purchase or his debt, the first to enforce will be the one who firstly recorded his,

¹⁸ Condell Private Letter, *If Title Insurance Didn't Exist Today We'd Have to Invent It*, (May 15, 2000), <http://condell.com/pdf/titleinsurance.pdf>.

¹⁹ To an explanation about that the first in law is declared first in right, see Ralph W. Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405 (1924). In the specific case of mortgage, see *Union Central Life Ins. Co. v. Cates et al.*, 137 S.E. 324 (N.C. 1927), as quoted in *Household Realty Corp. v. Lambeth*, 656 S.E.2d 336, 339–40 (N.C. Ct. App. 2008).

but that doesn't mean that the second one could not get his deed to access to the public registry. Not at all, the second owner or mortgagee could also record his title, for not to break the chain of title, but he has the sole right to enforce his after the first who recorded has done it. That's the meaning of priority principle.

So if there are many burden titles recorded (for example, mortgagee number one, bank note holder number two, investor who bought the initial burden with number three, etc.) the priority will be for the first who recorded his deed regardless of the date of the title. He will have a prior right and the following holders will have to wait for the firstly recorded to enforce theirs. This is valid unless there is a judicial statement that cancels the initial recording title due to a false or forgery document, or in the case of a claimant fully protected, in order to preserve their priority before any later adverse claims²⁰.

G. The Starting Praying Principle

Changes in the public recording systems might happen if somebody asks for them with a valid right, or holding a valid title (even a judge). What I mean is that, even if the public employee or the official clerk from the public recording office have notice about a deed, a conveyance or assignment, not only by hearing about it, but also if he has seen the title or the deed, only can have access such a title to the public registry, if somebody (a private, a bank or a judge) makes all the arrangements to record such deed in the recording system, but not if we have notice from a conveyance²¹ or an investors will. There must be a real will from somebody with a legal interest (usually a party of the agreement or the assignment) or a due warrant to record a deed from a judicial court, regardless of the level (i.e. state, local or Supreme Court). For that reason it will be very important that the future officials and employees from the Registration Public Office will be selected and appointed with special requirements of law knowledge, because of the full responsibility to record only the titles that should be legally recorded, without a reasonable doubt of the validity of the deed submitted to record.

H. The Legality Principle

The Land Registry is not a mere library or digital library held by a Public Official to record deeds, notes or agreements. Due to the fact that the public registry gives such an accuracy and certainly related to land, all the recorded deeds must be according to laws in Real Estate, giving the true related to land,

²⁰ Illustrating the risks of not promptly recording a deed, see Robert J. Bruss, *Uncle Invalidated Quitclaim Deed*, LOS ANGELES TIMES (Feb. 13, 2005).

²¹ See Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. MARSHALL L. REV. 227, 230 (1999).

and his owners or burden holders. To gain such a target, the county clerk office employees must have special knowledge in laws involving real estate, transactions and land financing. Also, due to that special education, they must demand recorders, even if he is a judge with his statements, all the legal requirements. The public officials must, not only record a deed, but also see the previous deeds recorded on the same parcel or property, so they don't break the chain of title, even with the privilege of *res judicata* for the recorded files on each property, as equal as if it were a non-appealable judicial statement.

I. The Speciality Principle

This last principle means that a mortgage must be a guarantee of a particular debt, a kind of an assurance for it, with a determined sum or amount of debt by a particular borrower to a bank lender of such amount, with a principal amount, an interest rate, a term of years to pay it and the currency used. All the data must be specified and can't bring any doubt of forgery or mistake. The principle of specialty or determination of the recorded subject, must be transferred to all items to be registered, that are: the subjects in the relationship (owner, mortgagee, mortgagor, owner of a burden, holder of the note, etc.), the property characteristics (parcel, size of it, lands around it, boundaries, etc.), the real estate rights created over it, etc. It also refers to a kind of determination of every data that is being recorded. If public registry gives us accuracy and full faith of any data previously recorded, to gain such a goal, all the data must be specified and determined without gaps or doubts.

V. A SIMPLE RECORDING SYSTEM OR A TAX RECORDING SYSTEM: IS IT POSSIBLE SUCH A COMBINATION?

The banks invented MERS because the land title system failed to meet the needs of a modern real estate industry. However, imagine how easy it would be to search in a public recording system, spread all over the nation, with the same characteristics of searching and ease of access. There should be uniformity and consistency in the rules governing the form and substance of documents eligible for being recorded, and this system should be public, not a private one like MERS²². We should change from the paper-based system to a computer system with documents to be seen on the internet and in PDF format, downloadable documents, with the accuracy and faithfulness of the old paper-based systems. You must also imagine integrating property tax records, subdivision plats and recorded documents with a dynamic map with the Geographical Information

²² See Carson Mullen, *MERS: Tracking Loans Electronically*, MORTGAGE BANKING (2000) available at <http://www.thefreelibrary.com/MERS%3A+Tracking+Loans+Electronically.-a063975145>. See also Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, THE NEW YORK TIMES, March 5, 2011.

System (G.I.P.) technology,²³ and such a system bringing up all the data in the records pertaining to a particular parcel of land.²⁴ A type of Land Registry Graphical Database, consisting of layers of spatial information that have been created using digital technologies (orthophoto, drawing tools, computerization, links to juridical information, etc.), would make searching for lawyers a much easier feat to handle.

Even in Spain some land recorders in every county office or registry have developed ICT applications for the processing of the graphical database with the following outcome. They will enable coordination between registered properties and graphical database, and that will let recorders to include the data related to town planning, the environmental aspects and the administrative affairs. Why don't to the same in a future Federal Recording Land System in the U.S. with the same ICT applications to all county offices of registry? MERS don't do it actually and only gives bank industry limited mortgage information. That's not enough at all because we need to make a step towards, like Spanish recorders have done²⁵.

One solution should be to centralize the land title system at the state level, much like the registration system used by article 9 filings under the Uniform Commercial Code. Nevertheless, I think that a better step would be to create a federal system of recording titles. In the state of New York, for example, there is a Tax Map where every land, parcel, condominium or any property have a *tax number*, which is the same number that is registered at County Clerk's office. Therefore, we have the two elements for achieve the most complete description of a parcel. One of them, the public recording system at County Clerk office, where there are the total backgrounds of the property. The second one should be that we have a tax map that controls every property, for the income and revenue tax purposes for public governments.

The combination of these two elements gives us the full control of real estate conveyances and financial transactions based upon them. All mortgage deeds must pay a kind of mortgage tax, thus the tax map has the information to any property assigning a number to every parcel. Thereby, every time such a number suffers a conveyance or an encumbrance, the data system will record what is going on with such a parcel. That should be a well profit for the State

²³ In Spain, for such a purpose, have a new system called "Geobase Project", which consists in using ICT tools to geographically translate or render the properties that have already been registered in the land registry by literally description.

²⁴ In Spain and Italy, most of the research work on database upon GDI, has been made by Elena Sánchez Jordán & Cesare Maioli, *The Role of the Land Registry within the INSPIRE Directive* (2009) <http://www.gsdi.org/gsdiconf/gsdil1/papers/pdf/104.pdf>; Elena Sánchez Jordán & Cesare Maioli, *Towards a Reliable Parcel Identification System: The Spanish Land Registry Graphical Bases System*, INSPIRE (2010) http://inspire.jrc.ec.europa.eu/events/conferences/inspire_2010/conf_skd_conference.cfm.

²⁵ Elena Sánchez Jordán & A. Falcinelli, *The new European Infrastructure for Spatial Data: The implementation of the INSPIRE Directive in the UK* (2009), http://www.academia.edu/21496570/The_role_of_the_Land_Registry_within_the_INSPIRE_Directive.

Treasury Departments and also for the Federal. It should be almost impossible to avoid paying taxes to any real estate selling or mortgaging act or any real estate transaction. Servicers,²⁶ at land registries, would have easier to handle with all the money from loans, fees and taxes.

VI. THE NECESSARY ELEMENTS FOR A PUBLIC RECORDING SYSTEM

A perfect recording system should have clearly defined what kind of data must be recorded. This should mainly be: the land, parcel or property; the holder of a note or the owner of it; and all the acts related to the relationship between them.

A. The Land, Parcel or Real Estate Property

1. *The Description*

The first and most important data to be recorded is the land or property. We must define what kind of data, related to it, are the most important and necessary to have a full description.²⁷ These data are mainly the following:

- The nature of the property: (1) if it is private or public property, or belonging to any non-governmental organization; (2) if it is a building, condominium, a loft, a farm, etc.; and (3) if it is an urban land located inside a city or a ground land dedicated to such purposes as agriculture goals, forest exploitation, etc.
- The situation: describing where it is located. For example, the town, street, the number of house or the floor, etc.
- Surface size in square meters or yards, feet, or any admitted measure.
- The boundaries to north, south, east and west describing who the adjacent neighbors are.
- Finally, the parcel will be given a number that should be the same in the tax map, and also a reference to be found in any other searching data.

2. *Access to Registry*

Once we have the full description of the property and there is no doubt concerning it, even with a recorded document with a dynamic map, photos or

²⁶ See Whitman, *supra* note 2, at 57.

²⁷ The description delineates a specific piece of land and cannot be applied to any other, MARY RANDOLPH, *THE DEEDS BOOK: HOW TO TRANSFER TITLE TO CALIFORNIA REAL ESTATE* 6; 15-16 (1987).

pictures of it,²⁸ we are able to make the record of such a parcel of land, and all the following acts concerning it. The future Federal Land Recording Act should describe the kind and number of documents necessary to make a full description of a parcel of land. Without them the record should be uncompleted and not able to give us the accuracy that we need from any successfully public registry.

3. Changes or Assignments

Such a property is like a living object, it should change its status. Land changes, roads are vacated, rivers move, condominiums are established and building are demolished, so the future federal recording system should be able to monitor and record such changes of the status of the land. The registry must change all the assignments on land, recording the new legal situations: new buildings, new boundaries, and any changes of measure of parcels, any construction built over a lot, an extension of measure or a decrease of building. You must also record any parcel joining, or the opposite, when you segregate a whole parcel in different parts.

4. The Acts That Have Access To Registry

All acts related to a property should have full access to the Recording System. The first act to be recorded is the initial description of the land and who was/is the first owner.²⁹ This is so because land cannot exist without an owner, even if it belongs to government, a church, corporation or even a non-governmental organization. Therefore, any deeds covenants should go to a registration system, no matter which one it is, even if it is a simple agreement not changing any recording status. Recording system must offer full information of all data in life of any property. Its tax number and value should be recorded with a kind of automatic update system, to make its value as close to market as it is possible. That would let lenders to know which the maximum amount they can offer a borrower is.

B. The Holder of a Note or a Mortgage

As the land description, the second main element to be recorded is the owner of the property. Also every holder of a note or a mortgage note,³⁰ or any

²⁸ Or a *Graphical Database* as the new Spanish and Italian systems based on INSPIRE Directive from U.S. drafted on 2007. Directive 2007/2/EC, of the European Parliament and of the Council (March 14, 2007) (Official Journal of the European Union L/108/1-14, published on April 25, 2007).

²⁹ The chain of title must begin based certainly on an initial real estate act.

³⁰ See *RMS Residential Properties, LLC v. Miller*, 32 A.3d 307, 314 (Conn. 2011) (“[A] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage”).

lien, burden or encumbrance, such as servitudes,³¹ must be recorded. People can also be designated in the registry system, according to different rules: by a single nomination or by reference to, for example, a corporation. This always has to be with all the relevant data regarding who is the final headline holder, to avoid getting anonymous parcels that are figurehead hiding the real owner or holder. In the case of a disabled person, his legal guardian must be mentioned, and if he or she doesn't have one, the name of the Governmental Social Service official, who holds and handles his/her case, must be appear. Transparency must be one of the most important values of a full credit public recording system, and what gives us full faith and confidence on such a registration system.

C. The Recording And Registration Process

First of all, we must be clear about both terms: "recording a deed" *versus* "registering a title,"³² because the distinction is important to know what we have to do. Recording must be referred to the technical automatic process, that historically was a manual process and still is in many counties, but today it is made with computerized or electronic sources and ICT tools, to gain or take notice of any property act or deed covenant. Recording is just one of several steps in the registration process and will probably be the last step. Though not necessarily, registration refers to the whole process concerning taking public notice of a real estate act. It begins with a kind of informal qualification of the deed or note, to know if such an act must be recorded or not. This is followed by a formal analysis of a paper, to see if it includes all the legal formalities to be taken in a good notice by the public registry. That is one of the reasons why the servicers and employees at public registration offices must have a special qualification concerning real estate law. They must be skilled at analyzing legal requirements of acts and deeds to be able to discriminate which act or title is recordable, and which one is to be returned to his initial holder to be amended.

Nevertheless, recording a deed or note must be the final activity after we have deputed a legal act. It is a simple operation, by a technological skill in a public record, to take notice of an act or deed related to a real estate transaction. This simple technical operation must have all the requirements to give us all the information on a particular parcel of land. The record must contain almost the full content of the deed, or at least the main aspects, so there will be no place for interpretations that could confused the holder and/or the owner of what really

³¹ For cases upon servitudes doctrine, see *Witter v. Taggart*, 78 N.Y.S.2d 338 (1991) and *Ammirati v. Wire Forms Inc.*, 82 N.E. 2d 789 (1948). See also Kenneth L. Gartner, *Witter v. Tuggart and Ammirati v. Wire Forms. Inc.: The Potential Ramifications of New York's Newly Restrictive Definition of "Chain of Title" and Newly Expansive Definition of "Easement by Necessity"*, 5 HOFSTRA PROP. L.J. 101 (1992).

³² See Tim Hanstad, *Designing Land Registration Systems for Developing Countries*, 13 AM. U. INT'L L. REV. 647, 649 (1998). See also BARLOW BURKE, *REAL ESTATE TRANSACTIONS: EXAMPLES & EXPLANATIONS* 221 (4th ed. 2006).

happened in the life of such a property. Interpretation of a legal deed would be the opposite of accuracy and confidence in a public recording system. The legal principle runs on “the less interpretation is the better legal accuracy.”

1. Constitutive or Declarative Recording For the Mortgage Note?

Advice in mortgage notes is necessary to record one and to be effective? This question is based on constitutional or declarative doctrine on recording acts. This subject would help us to demystify MERS as a private recording system.³³ If we considered it is not necessary to record a mortgage note, then it should be a declarative act. That does not mean a mortgage is not effective or that one cannot enforce it, because the mortgage really exists, but it lacks the investment of a public record, making it more difficult to enforce it in court. Instead, it only means that one must go to trial to give knowledge to the party that one is going to sue for a breach of the debt amount or the due obligation. The other party should recognize his signature in a mortgage document, in order to avoid problems and for one will be able to enforce directly his mortgage note. If the other party does not give assurance of his signature, then one will have to go to court as a plaintiff to gain a judicial statement giving the right to sue for a breach of contract. Then one will be able to enforce the mortgage agreement or foreclosure, if the other party fails to pay.

On the other hand, if you consider the recording act and/or the mortgage note as a constitutive act, they lack the power to be enforced. That means the note does not exist lawfully until it is recorded in a public registry. This theory would bring problems because it would be possible that the same bank lender could sign different mortgage notes, for example, on the same day, but at different times and places with different borrowers. Also it could happen when the second or the third person to sign the mortgage note, goes to record his note before the one who signed before in time. In this case the law could give the power to enforce the mortgage to who really was the last in time, against the law principle: “the first in time is the first in law.”

That’s why I prefer the declarative doctrine, even giving us a kind of insecurity and a lack of collateral, because we must respect the times of signing any document, regardless of the fact that a doctrine makes us face more arrangements and force us to go to court at least twice, to enforce a mortgage note.

Even the declarative theory is in the way of assignment real estate, the property is transferred regardless that the conveyance is recorded in a public registry, only taken possession of the land you become the owner, if any deed is signed with all the legal requirements. You don’t need to record your deed to take

³³ See Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory*, 53 WM. & MARY L. REV. 111, 143-55 (2011). See also PETERSON, *supra* note 10.

legal possession of a land that has been bought with all the legal requirements. You are the owner to real property regardless of the fact that the deed is recorded or not, since you cannot prove your ownership against the person who records a better title, regardless of the fact that he is or not a *bona fide* purchaser³⁴.

2. *The Defense of Recording Acts*

For defending the recorded acts, the future recording system should create a civil action that should be called the “recording act civil action”³⁵. This action is to be used not only by the real owner of any property, but also by any holder of a note or a mortgage note, to give effectiveness of his recorded act. Even, if he only has the sole possession of a parcel. The target should be the defense of any recorded act. Thus the action is to be sued in court to get a judicial statement, telling that the recorded act has a legal presumption of accuracy and truthfulness. This action is to be sued against anybody who holds a note that could controvert the one recorded in the registry, but also against anyone who appears in a registration note but is not the real owner, or even against somebody who has a greater right to be recorded rather than him, for example, due to a simple error, mistake or even forgery.

3. *Presumption of Accuracy*

The presumption of accuracy means that any recorded act belongs to whom appears as the owner in the public registry, in the same way that it is described in the public records. Also means that he has the effective possession of such a piece of land. These records are saved by court decisions or decrees, and can be changed only by a judicial statement or by an agreement made by the person who appears as the holder in the public registry. This legal presumption of accuracy can be destroyed or rebutted only by opposing evidence.³⁶ Therefore if one shows any proved evidence that the recorded is a mistaken act, or based on forgery, that presumption will definitively fall.

4. *The Possession Presumption*

This presumption lets us know that someone who has a recorded note, has the real, *bona fide*, public and peaceful possession of the land, without any

³⁴ *Bona fide purchaser* is also commonly referred by academics as “BFP” in most works.

³⁵ Similar to the *eminent domain action*, a government forfeiture proceeding, a quiet title action or an action to enforce a zoning, housing code, or building code infraction. The federal government may maintain a “criminal forfeiture” action pursuant to 18 U.S.C. § 982 and 21 U.S.C. § 881 against property used in the commission in certain crimes. The title to real estate so forfeited “relates back” to the date of the first commission of illegal activity. See 21 U.S.C. § 881(h). See also *United States v. Schecter*, 251 F.3d 490, 497 (4th Cir. 2001).

³⁶ This is called in latin the “*iuris tantum* presumption.”

interruption in time made by the previous owners and while the recorded act was published at the public registry. Therefore, the public recording title system not only gives us a possession presumption, but also a public possession that shows everyone who is the real owner of the land and the legal description of such a parcel or lot. This presumption also admits any opposing evidence, so if you are the real possessor of a piece of land, that possession destroys the legal presumption of possession in his note or deed recorded at a public registry. In this case, you would have to go to court to sue based on your evidence of such a possession presumption, and you will have to pay some money for trail and lawyers. You will most certainly win the case.

5. *The Action to Enforce or Defend a Recorded Act*

A new recording act civil action should be drafted. This action should be useful, not only for the holder or owner, but also for the banks, investors and for anybody who wants to enforce a recorded act against anybody who deals with a forged or simple mortgage note, that are in contradiction with previously recorded data. A complete regulation of such action should be addressed with the proposed statute for a new National or Federal Mortgage Registry Act, and it should contain the terms for using it for the following objectives:

- a) To make a defense of a recorded act when somebody is threatening against it, for example with an illegal possession of land against the real owner according to registry;
- b) To attack a recorded act when somebody holds a signed note or a deed that indicates he is the real owner or holder of a legal mortgage note, if the recorded data seems to be another person;
- c) To claim the legal possession of land when somebody holds it without a recorded act that shows notice of his right;
- d) To know who has the standing to sue it, or who has to be the defendant as holder of any passive legitimation*;
- e) To find what kind of evidence must be taken in trial to prove the legal possession or ownership of a recorded land, or what kind of legal evidence should be enough to destroy the legal presumption of accuracy of a recorded act;
- f) Finally, a Future Federal Registry Act should include the procedure to sue, the terms of claiming and the closing dates³⁷ to gain security and collateral for insurance title companies.³⁸

³⁷ See K.F. BOACKLE, REAL ESTATE CLOSING DESKBOOK: A LAWYER'S REFERENCE GUIDE & STATE-BY-STATE SUMMARY (2d ed. 2003).

6. *Effectiveness of a Recording Act*

The main effect of a recorded act has to be the protection of the holder or owner mentioned in the recorded books. This protection must be understood as a legal protection against any third party that disputes this recorded act, or who disagrees with the notice that the records seem to notice anybody, for example, if any boundary size or measures are not specified as in real life, or if it's not a coincidence between both of them, even if the owners of boundary lands aren't the ones specified in the registry. Therefore, registry must give us full accuracy about what's happening in real life. Only a *bona fide* holder with a valid deed, but not recorded, could destroy a legal presumption, if his conveyance is based on a valid agreement that does not breach the chain of title.

The *bona fide* principle establishes a requirement for the effectiveness of a valid recorded act. But what means *bona fide*? Basically, we must describe *bona fide* as the personal belief that your title is a valid one, without any mistaken data. It is the belief that the person, who took the note, gave it to you and made the transfer of ownership by a conveyance or an assignment, was in fact the real and legal owner, without any thoughts of breach of chain of title. Thus, *bona fide* must be the absolute lack of any doubt about the legality of an agreement and the ownership of the holder of a note or deed. *Bona fide* can be lost if you find evidence of such a lack of belief about the real data and owner. You can sue to prove the absence of *bona fide*³⁹ by any evidence which destroys the legal presumption of it.

7. *Preventive Annotations*

To gain security or collateral in real estate agreements, it should be possible to make a temporary preventive recording act, to ensure the future conveyance or mortgage note. To gain legal security in such a future Federal Land Title System as a nationwide registry, you must record an insurance record made by a Title Insurance Company, so that makes sure to all parties during the complicated process of a buying/selling or lending/borrowing agreements, that should even last a long time. This temporary preventive annotation in land registry should be cancelled on records, when the final agreement is arranged or closed, or even if the closing date finishes with an agreement or not. If you have a trial over property ownership, conveyances or about a mortgage question, it should be a profit to record the suit, claim or foreclosure by the plaintiff. Ensure

³⁸ See Tammy L. Ortman, *Title Insurance- A Comprehensive Look into the World of Title Insurance Today*, 34554 NBI-CLE 27 (2006).

³⁹ *Bona fide* means "genuine or good faith" in latin and a *bona fide* purchaser in notice states, is one that prevails against the holders of prior unrecorded interest. See LECFOE, *supra* note 16 at 261, taking the sense of the U.C.C. art. 8 (revised).

the final judicial statements, decrees, aftermaths and deeds, do not have access to the recording system, unless the trial has finished with a non-appeal statement.

These preventive annotations act as a warrant or a seizure measure that give accuracy to the registry system, without jeopardizing the property. It should take the way of an edge annotation in the parcel sheet, if we are talking about a registry based on paper. But if we are achieving a digital system with ICT tools, it should be submitted by a kind of a footnote or a digital note where the record is scanned in the database. In this case, we should avoid suspicious circumstances or contradicting facts.⁴⁰

8. Cancellations

Cancellation of a recorded act or note should be easy or difficult, depending of what kind of act we want to remove from the registry. It will not be a single operation deleting a data, and we must keep the whole background of a land and his owners or holders. If we are talking about deleting an encumbrance, burden, a lien or a mortgage, the process would be quite difficult because we are going to delete a data that could affect somebody interested in such a burden and have consequences over his rights. If we are talking about deleting a single sell, trading act or assignment, it should be easy to erase an agreement, but always keeping the original data in the registry. You just delete it from the final sheet of the recording book and therefore do not breach the chain of title. Cancel the whole history of a building could happen only if the building is destroyed or knocked down, and the whole property disappears to anybody. You must face the fact that the lot or parcel will exist in real life and it will have an owner. So, deleting all the data is absolutely impossible to happen. You can delete or cancel any data of a demolished building or a condominium, but the land will always exist, maybe with a different owner, but it will always have a real existence.

Cancellations should happen by a judicial statement or an agreement among the parties involved. If it happens against the owner's will, he must be notified so he can make a defense of his recorded act. Cancellations must be taken due to the time, either if a term has gone or if any agreements or trading acts have lasted their agreed term. Cancellation of a recording act can be used if the initial right has gone beyond its expiration or closing date.

9. Errors and Mistaken Rectifications

When a recorded file in the public registry has a data error or mistaken information, we should begin a procedure to make a legal correction or

⁴⁰ See *Pepe Coin Laundries v. Catovest Int'l Inc.*, 820 So. 2d 947 (Fla. Dist. Ct. App. 2002). For suspicious facts theory, see 14 RICHARD POWELL, POWELL ON REAL PROPERTY §§ 82.01-82.04 (Michael Allan Wolf ed., 2015).

amendment, to fix the reality into the registry. This could happen by a mistaken data on measure, names, due to the description of land or if the bounds have changed for another trading act. This process should take notice by a corrective deed⁴¹ in recording registry, because we are not changing the reality of life of land and we are not making any arrangement or agreement over real estate. The only thing that we are doing is adjusting the recorded data to the reality. That's why this process should be accessible to anybody with evidence based on documents, deals, contracts or judicial statements. This procedure should be easy to handle, because we are not disputing the recorded rights of owners or holders, but making a material operation to fix a better recording data according to the reality. We are not taking nullity of the recorded deeds or rights, neither changing any legal status. We are only matching the registry data with real life.

Therefore, corrective acts⁴² should happen by a judicial statement or a decree taken from a trial suit, which could also be made by the parties involved in the mistaken data with a corrective deed. But if it happens against the owner's will he must be taken in notice to make a defense of his recorded rights due to his legal note or deed. This is an aftermath of the presumption of accuracy we talked about before, and its effects takes off from the real date the initial act was recorded by the first time in the registry system⁴³.

10. Inscription Procedure

A recording procedure must be drafted because individuals, financial institutions, investors and bank lenders need to know the legal process. Since a person asks for a particular record, until the official recorder gives him a notice of a proved recorded act, many questions can be asked by particulars and banks. All these questions must have an answer and a legal regulation to solve them, because most of them involve a legal question that needs a legal answer.

The inscription process is a kind of *tertium genus*, a third type or procedure. It is not a jurisdictional process nor administrative, but an extrajudicial process. It is a process that involves recording acts and that must be enforced by the public officials working at the public office of recording land titles. But what can you do if the public registry denies you a recording act? You must go to court to get a judicial statement to search for that recording act warrant or decree.

⁴¹ See Stacy O. Kalmanson and Jerry Morris, *Five Tips Every Real Estate Practitioner Should Know About Defective Deeds*, 82 FLA. B.J. 37 (2008).

⁴² Most states have Curative Acts which function, essentially, as statutes of limitations. These laws bar challenges to documents, because of technical irregularities after they have been on record for the prescribed statutory period. See POWELL, *supra* note 40. See also e.g. CAL. CIV. CODE § 1207 (West 2016). A Bankruptcy Court interpreted the Pennsylvania Curative Act as curing only minor defects, not major defects such as the notary never having met the party giving the acknowledgment. In re Rice, 133 B.R. 722 (E.D. Pa. 1991).

⁴³ Some acts cleanse all defects in instruments recorded before a certain date. These laws needs to be reenacted periodically, e.g. 21 PA. CONS. STAT. § 281.1 (2016).

The first thing to do when a deed is presented to the public registry is the qualification process done by a public official at the registry with a especial qualification in real estate law. Anyone could present a title, but not all should get a recorded act or title from the registry. The holder or owner of a valid land title should be the only allowed doing it, with a valid legitimate right. When you submit a title to the registry, you must receive a proved ticket, receipt or note. With that you can get a proved document of your title, until the qualification process has finished. Immediately after you submit your deed, the public official must make a presentation record at the recording books, e-books or database, so that any document submitted after that date, can be taken notice from the registry. The last document submitted to the registry won't have any priority towards the first one presented, until the final recording process is done, over or if the recording act is denied with a valid justification.

One can desist at any time a withdrawal from the document presented before, that can only be made before the final recording is done. After the deed or note is recorded, you cannot desist, because the title has been legally recorded and that legal fact cannot ever disappear from the registry and from the law. Although you can delete documents, you cannot make the law or the acquired rights from real estate disappear, unless an assignment is done by an agreement or by judicial statement. According to the legality principle, you must make the legal qualification of the title you submit to the registry. To do so, the public official must look the previous titles recorded to not breach the chain of title. You must also watch inside the title, deed or note, to see if the legality is enforced. I mean that the qualification process is not only a procedure to check if the chain of title is not broken, but it's a legal process to enforce the law in real estate. For achieving such a target, not only you must use de pre-recorded data and the recorded backgrounds, but you must bear in mind the real estate regulations, cases and all documents you are taking notice before the Registry. You must take all the time needed, because the recording act must give us accuracy of legal requirements. You can make a preventive record to ensure your rights, if the recording process is complicated and taking a lot of time.

After you make all the qualification process, the public official must record the act or deny it. The denial must be done with proof or evidence that the title is not according to the real estate law or to previous titles that can break the chain of title. If the fault in the title submitted is minor you can correct it in a short period of time. After that happens, without taking a corrective deed, the rejection will become non-appealable. Then, you can only go to trial to get a judicial statement to gain a recording warrant or decree. These are the main outlines on the recording process to be drafted in the future Federal Recording Land Act. Much of the experience from previous judicial cases should be taken to make such regulation.

VII. THE PUBLIC GOVERNMENTAL ORGANIZATIONS

A. The Future U.S. National Registraton System And Its Officials And Employees

Actually, most of the public registries over the country are taken in county clerks offices. The future U.S. Land Recording Title System should be a National Federal Agency spread all over the States, without local control (states and town offices). This Federal Agency would substitute every local office, and the officers should be appointed with special requirements and according to their knowledge of real estate law. Actually, there are over 3.600 recording systems where holders of an interest in real estate can register that interest.⁴⁴ However, it is a fact that all these local offices would be extremely difficult to dismantle. Nowadays, the American Recording System is in the hands of thousands of elected officials, and many of them hold offices established in their State's Constitutions. Eliminating them would be impossible, but we cannot give up the idea of creating a Federal Agency for recording land titles due to such a problem. This is one of the main problems we considered to gaining our target. We should make a change in the structure of local and state offices, mixing today's officials with the future ones well versed in real estate law, to attain our purpose, that is accuracy in all land titles over the nation.

The federal government should create an alternative recording system that includes the features we mentioned above. This federal recording system should be able to digitalize new records and maintain the indexes, although some smaller county clerk offices continue using physical books for indexing, until they finally disappear in a couple of years⁴⁵. These manuscript book systems should be changed for a new one based on ICT tools. The new information technologies' and tools allow us to obtain the information we need to know in less time and with more accuracy, and also find the location of the documents and its content. Change will not be easy to handle, but it's possible and desirable. The real need for the new times to come in the field of information technologies is to gain the main target in a public system, confidence and accuracy.

This future Federal Recording System should be located as a spread agency in the actual local offices, but with an official headquarter led by federal authorities, to give all of them common instructions to record the titles and deeds, and to gain homogeneity. A leading official should be a manager or director of every local or county office. The whole system should be connected with ICT, receiving general outlines to record any act from the main headquarter, led by lawyers with a notorious and high level of knowledge in real estate local and state regulations. A kind of a pyramidal system that gives general

⁴⁴ LECFOE, *supra* note 16, at 248.

⁴⁵ Tanya D. Marsh, *The limits of constructive notice: a call to reform Indiana's recording statutes*, 46 RES. GESTAE 20 (2002).

instructions from the top to the ground level, and to give unanimous criteria to recording deeds or land titles. Every local office of registry should be connected to a database network all over the country. Should be an internet registry that tell us, in real time, all the information about a property or about an owner, lender, borrower or anyone who is taken notice in a deed or land title. A kind of electronic book, like a virtual library with PDF documents scanned, that should be accessible to anybody with a legal interest. Only public official should be able to record or deny the inscription in such database.

This measure ensures the chain of title so that, only one data belonging to a certain property can be introduced at the same time, even from different places around the country, like with airlines reservation systems. Only one person can have access to a land file. The next person to introduce a data on the same parcel, dated at least a second after the first, thus the chain of title is not breached at all and respects the principle that the first in time is the first in right. Of course, it should be a paid system, so that these fees should finance the salaries, the buildings and all the arrangements for such a Federal Agency. Maybe such fees make the real estate transactions more expensive at the beginning, but accuracy and security in property assignments is worth it. Later the whole federal system will become economically sustainable by itself.

B. The Future of the Actual Mortgage Electronic Recording System

A uniform state law would allow a parcel of real estate or property to permanently migrate out of the local recording system into the new federal system. Then, why it's still necessary for MERS to continue existing⁴⁶? MERS is a separate corporation that is acting solely as a nominee for lenders, lender's successors and assigns. When a mortgage is sold, the conveyance information is registered in MERS, but no assignment is recorded. I really need to know who I am paying my mortgage to, which company actually owns my mortgage if it has been sold in the secondary market⁴⁷, what is the name of the trust of investors that bought it, even if such a company is not to be considered a lender, and also the name of the servicer I have to pay my debt to. Even if I receive a foreclosure notice, I could not consult the county clerk office to verify who is threatening foreclosure and owns the debt of my property. Such information is only held by MERS that created a service information system, giving to the homeowner the identity of the servicer and the investor that owns the loan. This step promotes

⁴⁶ See Patrick Pulatie, *Is the Current Recording Process Sufficient for Today's Complex Financial Instrument? Can MERS Resolve the Issues?*, ML-EXPLODE.COM (Nov. 2002) <http://ml-explode.com/2011/11/mers-and-recording-past-present-and-future-pt-1/> (outlining other deficiencies in the public recording system).

⁴⁷ See Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to do About It*, 37 PEPP. L. REV. 737, 747-48 (2010).

transparency⁴⁸, but is not enough. We must even say that MERS is irreconcilable with mortgage law due to such a lack of transparency.⁴⁹

The future Federal Land Title Recording System should let us avoid all the questions and problems that MERS cannot solve, mainly the transparency. If we were to have a public land title registry that does all the work that MERS does for the banking industry, why should MERS continue being an alternative land title recording system? Only for banking industry purposes and for keeping the lack of transparency that does not let us know who has bought our mortgage in the secondary mortgage market⁵⁰. Such a dual system is not necessary, if one of them gives us all the information we need to know. What better solution than a public system with the governmental law blessings? Even, this public system would let us index land title records in different methods: (1) a track index that gives us a legal description of the relevant land, and (2) a grantor/grantee or lender/borrower system index using the names of the parties to a conveyance. MERS does not give us all the information we should have available to make a real estate transaction. It only gives us the information that MERS has recorded because of its interests, and that is not all the information necessary for a financial agreement, involving real estate. MERS is only a mortgage recording system, but not a full real estate recording system. MERS gives us the data related to a given mortgage, but there are more encumbrances besides it, e.g. servitudes, etc. There are more facts involving real estate than a simple mortgage or loan. Property is eternal and a lot of changes could happen along its long life. That is the reason why a full information system should be preferred by investors than a simple mortgage database system.

Even more, in the future it could happen that the private system involving MERS⁵¹ will end up being at odds with this Federal Public System, and courts would have to decide which one gives the full faith or the real legal situation of a single parcel or lot. That would increase court disputes, which is not good for the judicial system. The dichotomy “public versus private recording system” is served. I surely prefer a public recording land title system, with the accuracy and wealth of information it could give us.

⁴⁸ For transparency on MERS, you can see Whitman, *supra* note 2, at 58.

⁴⁹ Marsh, *supra* note 4, at 23.

⁵⁰ For further information on secondary mortgage market you can see David Reiss, *Reforming the Residential Mortgage-Backed Securities Market*, HAMLIN L. REV. (2012), Brooklyn Law School, Legal Studies Paper 275 (2012).

⁵¹ Even it could have to face federal agencies as the Federal Reserve Board, *see* 12 C.F.R. § 208 (2012); the Office of Comptroller of the Currency, *see* 12 C.F.R. § 1.1; the Department of Housing and Urban Development, *see* 24 C.F.R. §§ 200.1, 300.3; the Federal Housing Finance Agency that supervises Fannie Mae, Freddie Mac and The Federal Home Loan Banks, *see* 12 C.F.R. § 1282.1; and the new Consumer Financial Protection Bureau created by the Dodd-Frank Act, Public Law 111-203, *see* 12 C.F.R. § 1282.1. Anyone of these Agencies would have disputes with MERS, when the Federal Agency was created, or any of them would assume the goal of it.

VIII. OTHER QUESTIONS RELATED TO A RECORDED MORTGAGE**A. The Chain Of Title Doctrine**

One of the main principles in real estate recording law is the chain of title doctrine.⁵² The chain of title consists of an analysis of all legally relevant documents, transferring interests in a particular parcel of land, from the earliest to the most recent. Basically, it means that the successive deeds concerning a piece of land must be recorded, so that we can have the chronological background of every parcel or lot. Also, you cannot record any deed regardless of the last recorded deed, with the last recorded owner or holder of the note, and description of the property. Therefore, you will have recorded all the background history of any property with a chronological order, so you can get any information from the registry according to the last events that happened in a real estate property. This principle will let buyers and lenders handle the last information on any parcel, so they will not be dispossessed from their notes by anyone who claims a better right, as they are the real legal last holder or owner. Therefore, anyone can sell a property, unless you have recorded your property of your ownership as the last owner or holder. Thus, anyone who wants to buy a property, will be ensured that people holding the last note and going to sell or make a mortgage trade, is the real last recorded owner or holder of a mortgage note. It could happen that the real owner or note holder, who is in legal possession of any property, is not the last recorded one. The future Federal Recording Act should have different sources to protect this legal owner, so he can record his legal possession to get the chain of title back in legal real life, according to recorded data.

These different sources to not breach the chain of title should prevent cases, such as the “wild deed doctrine.”⁵³ According to this doctrine, a purchaser is allowed to gain the protection of the recording by acting against a prior purchaser who has recorded his own deed, but whose chain of title includes an unrecorded deed. In this case, the holder of a wild deed will prevail in a title dispute. Also the “mother-hubbard problem,”⁵⁴ a clause also known as a general assignment, conveys all the grantor’s property in a given area, without identifying which parcels it conveys or where the parcels are located. This clause does not identify the property’s location, so there is no way for a county records’ office to

⁵² The legal relevance of a document depends on whether it could be located in a conventional search of the public records, see LECFOE, *supra* note 16 at 243.

⁵³ See Emily Parker-Pacht, *supra* note 5. See also Board of Education of Minneapolis v. Hughes, 136 N.W. 1095 (Minn. 1912), Morse v. Curtis, 2 N.E. 929, 931 (Mass. 1885) and Anthony J. Fejfar, *The Wild Deed and Real Property Law* (2007) available in <http://www.scribd.com/doc/210501/The-Wild-Deed-and-Real-property-Law>.

⁵⁴ Luthi v. Evans, 576 P.2d 1064 (Kan. 1978).

index the deed properly. The recorded land federal system would let the purchaser know what property the deed conveyed, without examining every deed to and from its grantor. The purchaser would need to go through numerous books (which are in chronological order, so one volume does not contain all the records pertaining to a particular grantor). That problem would be solved with a Federal Recording System with scanned digitalized documents in a database, making the purchase search easier and faster, using new ICT technologies.

Finally, another theory concerning the breach of chain of title should be “The Spring Lakes v. O.F.M. Co. Rule.”⁵⁵ This states that a subsequent purchaser is not on constructive notice of restrictions not contained within the subsequent purchaser’s own chain of title, but instead contained within the deed to an adjacent lot conveyed by a common grantor. Such restrictions did not impart constructive notice even through the subsequent purchaser’s deed referenced restrictions.

B. Denying a Recording Act

Denying a registration should be a restrictive act that should happen in a few cases, if the deed was correctly done and the chain of title has been respected. Before denying a recording act, the deed should be able to be corrected or amended if possible. For that process, the registry office must give everyone the opportunity to make all the amendments to a deed, giving a reasonable period of time to make a corrective deed⁵⁶. In many cases it should just be a simple correction, but in many other cases the process for changing a deed requires more time and more arrangements, because you have to take notice to all parties again, draft a new agreement text, and maybe send the corrective deed to a public notary again. This means more money to pay, more time to get collateral, and a plenty of subjects to get? That is sometimes not easy as we desire. The denying act attempts to gain the accuracy in recording acts and the security in real estate transactions. Public officials do not deny a recording act easily, because it must be the result of a qualified procedure after examining the whole deed or note, and taking notice of all the legal requirements.

The same agreement will have to get to the registry twice and it is not worth doing the same job twice. Thus, denying a recording act is a complicated solution and must be taken unless there is a big error or fault in the proposed recording act. If you cannot agree with the registry denying act, you should be able to sue at local or state courts to get a judicial statement, to gain the recording

⁵⁵ Spring Lakes Ltd. v. O.F.M. Co., 467 N.E.2d 537, 540 (Ohio 1984) (“[I]n order for a purchaser of real property to be charged with constructive notice of an encumbrance contained in a prior recorded instrument, the prior instrument must be recorded in the purchaser’s chain of title.”).

⁵⁶ See LACFOE, *supra* note 16, at 358. See also Kalmanson and Morris, *supra* note 41.

warrant or decree. This procedure should be legally fixed or regulated in the future Federal Land Title Recording Act or in a Denying Procedure Act.

C. The Release of Encumbrances and Resume of Chain of Title's Breach

One important question to be regulated is the release of any burden, liens or encumbrances recorded in the public registry. This action should not be easy to handle, neither impossible to achieve. Any encumbrance or burdens recorded have a target, mainly to get a kind of lien over a real estate property. Anyone who obtains information from a registry can know all the encumbrances upon a parcel of land, and the legal holder or owner could begin a judicial action to protect his rights. This is true, unless the final term is gone. If the period for a legal encumbrance has reached its end, it should be easier to delete such a data from the recording books. For example, a kind of servitude over a land for the crossing of people or animals should have a final term, and once this term is over, it should be easier to remove such an encumbrance from the recording books. Then, the registry should be able to certify that the property is "free of burden." Otherwise, in a mortgage, once all the debt has been repaid to the bank by the borrower, an additional act (a deed of cancelation of the loan) should be needed to facilitate the cancellation of a burden from the registry. There an additional requirement: a formal deed or note with the agreement of the grantor/grantee, that the entire amount of principal and interest is paid, and therefore, the mortgage note could be canceled from the public registry. This recording act should let such a recorded real estate appear to the public as "free of any burden."

Therefore, depending of the kind of encumbrance, it should be easier or more difficult to release the recorded burden from registry. But what must appear to be easier to handle, is the resume of chain of title's breach. It is a goal of any public registry to respect the chain of title doctrine, so purchasers are on constructive notice of recordation pertaining to the property they wish to purchase and regardless of whether a recordation is recorded late or out of order. In addition, purchasers of lots in a subdivision are on constructive notice of restrictions contained in the deeds to adjacent lots, as well as other lots in the same subdivision. That's why a subsequent purchaser must be a *bona fide* purchaser who records after a prior purchaser, because if he (*i.e.* subsequent purchaser) records before this last one purchaser (*i.e.* the prior one), we should be in front of a race-notice, rather than a notice.⁵⁷

⁵⁷ The distinction is clear: In a *race* all conveyances of real property are void, except between the parties to the conveyance, but from the time of recordation, regardless of when the conveyance was executed, sealed or delivered. In a *notice*, no conveyance of real property shall be valid against subsequent purchasers without notice, unless the conveyance is recorded. In a *race-notice*, every conveyance of real property which is not recorded is void as against any subsequent purchaser, in

IX. CONCLUSION

After having discussed all the above subjects, we must conclude that a new regulation for American Land title recording system is urgently needed. Such a regulation must be enforced by Congress, rather than States or local authorities, if we really want to achieve a nationwide act that brings us homogeneously to the land recording system all over the U.S. We must quit the idea of each State regulating its particular recording system of real estate. That is not a fine solution for real estate problems. We are in the 21st century and new ICT technologies can provide us all the skills to leave the ancient books system based on manuscript data. New database systems and internet programs should let us share all the information related to every parcel of land or lot, wherever you and the land are located. The information should be available all the time and to all peoples, should need to make a real estate transaction, finance operation or trade anytime, anywhere with anyone.

New communication technologies should let us to get such information, and that new system should provide all the accuracy and safety in the land, trade deeds and agreements, to all parties involved. Collateral is the correct word and the target to achieve in real estate transactions. It should even be good evidence in courts, based on public registry data. It would make full faith of the recorded land information according to real life, and the facts involving the data should be in a full coincidence or match. All real estate operators will be grateful and thankful for such a new recording system. It would allow them faster transactions by obtaining all the information of the proposed trade or agreement, nevertheless that we are making a common selling, a loan note with a formal mortgage, or a simple conveyance or burden with a lien.

This new U.S. Land Recording System, created as a Federal Agency, would make all the trades and agreements less expensive, regardless of the payment of fees to make the future Federal Agency economically sustainable. What is going to be a problem is the training of thousands of current local and state public officials in county clerk or municipalities' offices, to provide them the land law knowledge needed to handle all such land information. This should be a progressive process to educate them in land regulations and in technical database tools to be able to scan and make PDF files of submitted recording proposed deeds or mortgages notes. Such a goal should be achieved during several years, even renewing the older officials after their retirement, and electing new officials to be well prepared in such ICT skills, land title acts and regulations.

The challenge can be possible to achieve, but not impossible. We only need to carry on with it. We have only drafted the general outlines to achieve it. Now the governmental authorities and politicians have to make their steps to

good faith, of the same real property, whose conveyance is first recorded. See LECFOE, *supra* note 16, at 262 for more examples.

create an efficient alternative to the private system MERS. It is up to them to craft a future federal recording land title system to gain the security and accuracy in all real estate transactions all over the nation. Do not miss this opportunity. Countries with modern land recording systems have gained this goal and their legal systems could be found as the best in the world, like Spain, Italy and most European Union countries have done. The U.S. deserves one, and should take the experience of European land registering systems and their mistakes and successes, to enact its own land recording law, as the newest one, should be the most perfect in the world.