Land Registration Systems & Discourses of Property
A Comparative Analysis of French Law

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The aim of this paper is to discuss the relation between land registration systems and discourses or conceptions of property from a comparative perspective. The hypothesis being defended is that choice of a land registration system is not neutral with respect to our way of depicting property. Indeed, land registration influences the way in which claimants can bring up evidence of land ownership before courts. This, in turn, reflects the way in which property is thought of in different legal systems, perhaps better than textbooks and abstract definitions.

Land registration always serves the purpose of insuring the effectiveness of land transfer and securing titles. This goal can, however, be reached through a variety of means. As a result, land registration can produce diverse effects, the most potent of which is the creation or transfer of the title to land itself. This effect of land registration usually applies to land ownership, but also to the creation of various encumbrances such as easements or mortgages [1]. Countries like Germany and England have adopted land registration systems that are constitutive of title, which means that title to land is created or transferred upon registration of the deed [2]. The most famous historical example of this mechanism is the Torrens system, in which the registered title to land is indefeasible, meaning that the certificate issued by the administration serves as conclusive evidence of a property title. When land registration is constitutive of title, and to the extent that registered titles are considered absolute, the one and only way to prove one's title to land is through the register [3]. This means that all other modes of evidence should be excluded. As a result, the Torrens system, in its original variants, was exclusive of the theory of adverse possession as a

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1. R. Tendler, « La publicité foncière française face à l'harmonisation européenne », *JCP G.*, 1991, doctr., 3544, nos 9 sq.
2. The specificity of the German system should be noted, although it will not be addressed in this paper since it is not directly related to land registration: a contract can create obligations but does not usually produce any real effect, such as creating or transferring *in rem* rights (Bürgerliches Gesetzbuch [BGB], § 433). As a result, possession of movables has to change hands, while immovables need to be registered to the new owner. While, in theory, the transfer of ownership is disconnected from the fate of the contract (*e. g.* when it is voidable or terminated), the abstraction principle does not apply when the contract has certain grave defects (*e. g.* it is null and void by law), which will prevent the transfer of ownership (Bürgerliches Gesetzbuch [BGB], § 134).
3. Criticising the absoluteness of title: H. Chaplin, "Record Title to Land", 6 *Harv. L. Rev.* 302 (1892).

means to prove one's title to land [4]. Most land registration systems no longer hold the title to be absolute, including in common law countries [5]. The German system has also always provided for the case of acquisition of land through adverse possession [6]. Overall, however, these systems still contrast sharply with the fact that there is virtually no conclusive evidence of land ownership when registration is merely declaratory. This is the case of French law, which works as a recordation system rather than as a registration system strictly speaking [7]. The title to land is technically transferred by contract [8] and, more specifically, by a meeting of the wills rather than by the deed or its registration [9].

Additionally, in all legal systems, land registration may have other effects than transferring titles to land. It is also means of information for third parties, who will be considered to act in good faith when they trust the land register [10]. In some legal systems, there is a presumption that the publicly held land register is correct, meaning that the registered owner is presumed to have a valid title to land, as is the person who acquires the land from them, unless the latter acted with knowledge of the inaccuracy of the register or unless the validity of the register itself is contested [11]. The presumption of title grants a direct advantage to the registered owner, meaning that the burden of proof lies with the other party. Other legal systems give land registration indirect effects on the rules of evidence. In French law, this is achieved by making unregistered deeds ineffective against specific persons, namely those who claim to hold rights from the same original owner, *i. e.* they cannot be set up and used as evidence against these third parties [12]. This particular rule ensures that whoever has registered their deed first will effectively be preferred over other title holders for the acquisition of ownership, or at least take rank before them when an

4. J. Crowley, "The Torrens System", 6 *Marq. L. Rev.* 114 (1922).
5. Outlining the difference between absolute and possessory systems in common law countries: J. Beale, "Registration of Title to Land", 6 *Harv. L. Rev.* 369 (1893).
6. Bürgerliches Gesetzbuch (BGB), § 900.
7. G. Cole and D. Wilson, *Land Tenure, Boundary Surveys and Cadastral Systems*, London: CRC Press, 2017, p. 158–164.
8. Civil code, art. 1198.
9. "In contracts the object of which is to transfer ownership of property or to transfer any other right, the transfer occurs upon formation of the contract", *i. e.* when the parties agree to the *negotium*, before they produce an *instrumentum* such as a deed (Civil code, art. 1196). Against the letter of the law, several authors contend that transfer of ownership does not (or rather should not) result from the contract itself, but from actual delivery and subsequent possession of the thing, as in the German system: Chr. Atias, *Le transfert conventionnel de la propriété immobilière*, PhD thesis, Poitiers, 1975; S. Zinty, *La constitution du droit réel par l'effet de la tradition*, PhD thesis, Lyon III, 2014; W. Dross, « Le transfert de propriété en droit français », *RdC* 2013.1694; V. Wester-Ouisse, « Le transfert de propriété *solo consensu* », *RTD civ.* 2013.299. These considerations are, however, prospective and beyond the scope of a study on land registration systems.
10. R. Tendler, *op. cit.*, n^{os} 15 sq.
11. Bürgerliches Gesetzbuch (BGB), § 891–892. *Adde* H. Wilsch, "The German 'Grundbuchordnung'". *Zeitschrift für Geodäsie, Geoinformation und Landmanagement*, 2012, n° 4, p. 224 sq., § 5.2 and 5.3.
12. Décret n° 55-22, 4th Jan. 1955 portant réforme de la publicité foncière, art. 30. The same rule applies in Belgian law (Civil Code, art. 3.30).

ancillary, such as a mortgage, is at stake [13]. In that case, land registration merely serves an informative purpose, and the exact same solution could equally be achieved without it, provided that the third party had effective knowledge of prior rights [14]. This system does not grant any presumption or title to the ownership of land, meaning that the title could still be contested by other third parties, *e. g.* if the vendor did not own the land [15].

Nowadays, no land registration system is purely constitutive of title to land. There are exceptions to this rule in all of the countries which predominantly apply it, and these countries usually also let registration produce informative effects in some cases. The French system is, however, of particular interest because it limits land registration to its weakest effect, namely an indirect—or negative—action on the efficiency of unregistered deeds. Land registration is not used to grant a title or even a presumption, but lack of registration bars the negligent buyer from using their title as evidence against the registered owner with respect to whom it is ineffective. This solution is, however, quite recent from a historical standpoint. From the 7th century century onwards, the Germanic institution of *gewere* (seisin) and the corresponding ritual of *vestitura* were widespread throughout all of Europe [16]. The contract had no effect on seisin (legal possession) of land, which was transferred through a public ceremony in which the parties displayed the disseisin of the previous owner, who simulated being chased away from the land, and the seisin of the new owner, who symbolically took possession of said land [17]. Seisin caused statutory limitations to run against third parties who had rights to the land, which would become extinguished a full year after the transfer of seisin. Over time, two other systems emerged in France. In the northern part of the country, called *pays de nantissement*, feudal law took over and the transfer of seisin progressively started to occur at the lord's court, using mere symbols or even producing a written contract [18]. This technique reminded of the Roman *in jure cessio*, as the transfer of ownership was registered in writing by the court. In the southern

13. A similar solution is provided for by German law in the case where a clause bars the current owner from disposing of land (or movables). If the clause is registered, then violated, the person for whose benefit it is intended may ignore the very existence of the sales contract which violates it. As a result, they may claim the thing in the hands of the buyer (Bürgerliches Gesetzbuch [BGB], § 135 and 892).
14. With respect to ownership and most other rights *in rem*, this means that the person who registers their deed first must act in good faith (Civil code, art. 1198, al. 2). A similar rule has long existed in the case of easements, which are notoriously effective, even when they are unregistered, as long as the buyer of the servient estate had prior knowledge of their existence (Cass., civ. 3e, 16th Sept. 2009, nº 08-16499 : Bull. III, nº 195 ; obs. Delebecque, *D.* 2010.2671 ; obs. Périnet-Marquet, *JCP G.*, 2010, doctr., 336 ; obs. Prigent, *AJDI* 2010.246 ; obs. Reboul-Maupin, *D.* 2010.2183 ; obs. Sizaire, *Constr.–Urb.*, 2009, comm., 141).
15. H. Lemaire, « Formalité foncière (publicité ou inscription) », *JCP N.*, 1991, 101395.
16. In German law: R. Huebner, *A History of Germanic Private Law*, Boston: Little, Brown & Co, 1918; in English law: Fr. Joüon des Longrais, *La conception anglaise de la saisine du XIIe au XIVe siècle*, PhD thesis, Paris, 1924.
17. E. Champeaux, *Essai sur la « vestitura » ou saisine et l'introduction des actions possessoires dans l'Ancien droit français*, PhD thesis, Paris, 1898; P. Ourliac and J. de Malafosse, *Histoire du droit privé*, 2nd ed., Paris : PUF, 1968–1971, nº 123 sq.
18. R. Besnier, « Le transfert de la propriété dans les pays de nantissement à la fin de l'Ancien Régime », *Revue du Nord*, 1958, vol. 40, nº 158, p. 195 sq. A rather similar system existed in some German cities,

part of France, a different evolution occurred whereby the parties to a contract would insert a clause saying that agreed on the fact that had performed the *vestitura* required by seisin, even though they had done no such thing. This technique, called *constitut possesoire* (constitution of possession) was used to ensure that the contract would transfer ownership of land *solo consensu*, by the sole agreement of the parties, without a further formality [19]. This contractual clause became so widespread that it was considered implicit in all contracts by the time of the Revolution. The new political order was favourable to this legal fiction, essentially, because it contradicted the old way of *gewere* which had become unduly associated with feudalism although it was, originally, customary law. From that time onward, France has never required any formality for the transfer of land or used a constitutive registration system, in contrast with numerous other jurisdictions.

The differences in land registration systems are particularly interesting in light of property theories. A quick glance shows that legal systems which hold registration to be constitutive of title to land also tend to treat property as a less absolute right, at least on the paper. The German Civil Code indeed explicitly limits the landowner's prerogatives by assigning a social function to property [20] whereas the English legal system has been deeply influenced, from a conceptual standpoint, by the feudal tradition of conveying the land in fee, instead of transferring a full title to ownership, resulting in the institution of estates and in the practice of time-limited interests in land [21]. By contrast, while the French Civil Code from 1804 contains the most iconic depiction of property as absolute dominion over a thing [22], its authors refused to implement any land registration system at first [23]. Later on, when laws were passed in that respect, the French chose a declaratory land registration system which *ipso facto* means that titles to land can always be contested in court [24].

This goes to show that there may be a link between land registration systems and underlying conceptions of property—not so much real as collectively imagined by people. This relationship is, however, quite paradoxical, since the more efficient the title, the less absolute ownership seems to be, at least in legal discourse. In a more circumscribed fashion, the aim of this paper is to show that the French choice of a declaratory land registration system is, in fact, highly logical in consideration of the overall conception of ownership. A first section will address the effects of land registration in declaratory systems, and show that it does not convey ownership of land (I). A second section will then discuss the fact

for instance in Munich which required, as far as 1347, that all property transfers of land be registered in court in order to become legally binding (H. Wilsch, *op. cit.*, § 1).

19. A. Rabagny, « Le transfert et la preuve de la propriété », *PA*, 21st Nov. 2002, n° 233, p. 4 sq.
20. Bürgerliches Gesetzbuch (BGB), § 903 sq.
21. Estates for a term of years absolute and equitable life interests form the traditional core of English land law, although they would not be considered as proprietary interests in continental systems (Fr. Lawson, *The Rational Strength of English Law*, London: Stevens & Sons, 1951, p. 86–91).
22. Civil code, art. 544.
23. S. Piedelièvre, « La publicité foncière hors le Code civil », *PA*, 29th June 2005, n° 128, p. 4 sq.
24. Two statutes were passed in 1855 and 1935 before the land registration system was reformed by an administrative act of 1955 (Décret n° 55-22, 4th Jan. 1955 portant réforme de la publicité foncière). A recent proposal to reform the land registration system explicitly seeks to preserve its declaratory nature (L. Aynès, *Pour une modernisation de la publicité foncière*, 12th Nov. 2018, p. 49).

that conclusive evidence of ownership *in fine* rests solely on possession (II). The third section of this article will then draw from these elements to show that there is indeed a correlation between the choice of a land registration system and the underlying discourse of property (III).

I. Effects of Land Registration in declaratory Systems

In order to depict declaratory systems, one should first draw out the main characteristics of constitutive land registration systems. In that respect, English law will provide the best insight into the French system. Land ownership is transferred by registration which acts as conclusive evidence of title [25]. However, this system is limited, owing to the fact that it only applies to registered lands. As a result, lands that were never registered are still subject to the rules of evidence at common law or in equity, depending on how they are being held. Evidence of ownership can, in that case, be brought by deed or by other means, such as a possessory claim which will revert the burden of proof onto the other party. The land registration system is also limited, to a lesser extent, with respect to registered lands. It has been argued that the doctrine of title relativity, which is inherited from the common law, still has some applications under the Land Registration Act [26]. The common law mechanism of adverse possession can defeat the title to land, although the possessor will need to register the land in their own name before their claim becomes indefeasible [27]. This doctrine allows for the legal ownership of land to match the facts, when they contradict the registered title.

More important, in light of a comparison with French law, is the fact that the land registration system is only concerned with legal estates. Upon failure to register the land, no legal interest can be vested in the person who acquired it, but they are granted an equitable interest in the land [28]. According to Frederick Henry Lawson, a legal interest in land is "a right or interest of a type which, if formally created, will prevail against everyone else whether they know about it or not" [29]. By contrast, an equitable interest in land does not, in principle, bind a subsequent buyer especially if they are in good faith, because it is subject to overreaching [30]. This mechanism somewhat resembles *inopposabilité* in continental systems, which makes it impossible to set off a contract against certain third parties. Failure to register the land results in an equitable interest, which grants the holder a claim against the legal owner, but not necessarily against potential third party buyers who claim to hold the land from the same vendor.

25. Land Registration Act 2002, § 58(1).
26. A. Goymour and R. Hickey, "The Continuing Relevance of Relativity of Title under the Land Registration Act 2002", *in New Perspectives on Land Registration*, Oxford, England: Hart, 2018, p. 65–93.
27. Land Registration Act 2002, Sch. 6.
28. M. Dixon, *Modern Land Law*, 11th ed., London: Routledge, 2018, p. 41–42.
29. Fr. Lawson and B. Rudden, *The Law of Property*, 3rd ed., Oxford University Press, 2002, p. 13.
30. In this case, the interest in land is replaced by the price paid by the buyer (M. Dixon, *op. cit.*, p. 36–37).

If we turn to the French land registration system, which is declaratory in nature, we shall find that it serves a similar purpose through different means. In this system, the transfer of ownership occurs prior to the registration of land. One of the reasons for this is that France does not technically use *land* registration as much as *deeds* recordation [31]. The declaratory formality only concerns the deed, which is publicised on the registers, but it does not in and of itself confer any title to land. Indeed, only the formal validity of the deed is verified by the notary who registers it, but not the validity of the title to land [32].

Under French law, besides a general informative role, the sole purpose of land registration is to solve conflicts of titles. The law explicitly states that failure to register a deed results in the *inopposbilité* thereof [33]. This means that the sale, for instance, is still valid between the parties, but interested third parties can pretend that it never occurred [34]. It happens, for instance, when the original land owner decides to sell their land to a first buyer, but double-crosses them by selling the land again to another person. Both buyers claim to hold the land from the same vendor and the law has to decide which of them gets to keep the land. In this case, the land was never conveyed by contract to the second buyer, because it had already been transferred to the first buyer [35]. Nevertheless, according to article 1198 of the Civil code, whoever registers their deed first is preferred over the other person [36], unless the latter acted in bad faith or in collusion with the vendor [37]. If the

31. The register is composed of deeds and judicial decisions pertaining to land, which are indexed both under the owner's name and under the location of the land (Décret n° 55-22, 4th Jan. 1955 portant réforme de la publicité foncière, art 1er). *Adde* Ph. Simler and Ph. Delebecque, *Les sûretés & La publicité foncière*, 7th ed., Paris : Dalloz, 2016, nos 871 sq.
32. Décret n° 55-22, 4th Jan. 1955 portant réforme de la publicité foncière, art. 34. If a mistake in the register allows two persons to register contradictory titles to land, the first to register their deed is preferred (*e. g.* Cass., civ. 3e, 13th Feb. 1991, n° 89-12046 : Bull. III, n° 59 ; obs. Aynès, *Defrénois* 1991.1318 ; obs. Bandrac, *RTD civ.* 1992.155 ; obs. Delebecque and Simler, *RDI* 1992.104).
33. Décret n° 55-22, 4th Jan. 1955 portant réforme de la publicité foncière, art. 30. Other sanctions are possible for certain categories of deeds, with similar results *in fine* (Ph. Simler and Ph. Delebecque, *op. cit.*, nos 911 sq.).
34. *Inopposabilité* describes the inefficiency of a contract or other juristic act with respect to certain persons. The act is valid, but may not be used as evidence in a court claim against certain third parties who may feign to ignore its very existence, for instance upon failure to perform a formality such as registration (*Vocabulaire juridique*, 8th ed., Paris : PUF, 2007, *vis* Inopposable, Inopposabilité). Technically, the person with respect to whom the deed is *inopposable* can claim that it never existed and never substantially conveyed ownership of land (even though it did). As a consequence of this, the deed logically cannot be evaluated as evidence, because it is deemed not to exist for the purposes of the case at stake (J. Duclos, *L'opposabilité*, PhD thesis, Paris : LGDJ, 1983, n° 6).
35. Because transfer of ownership occurs upon the meeting of the wills, the second buyer could not acquire any right at all, since the land was already transferred to the first buyer.
36. "Unless they were properly registered, deeds and judicial decisions subject to registration cannot be set up against third parties who claim to have acquired concurrent rights over the same immovable and from the same author, if these were subject to registration and accordingly registered" (Cass., civ. 3e, 4th May 2000, n° 98-20136 : Bull. III, n° 98).
37. Case law traditionally dismissed the effects of registration upon evidence of a fraudulent collusion between the vendor and the registered buyer, but this requirement was brought down to mere bad

person who was chronologically the second buyer registers their deed first, this solution will amount to depriving the first buyer and rightful owner of their claim to the land, since their deed is inefficient with respect to the second buyer. In turn, the second buyer will get to keep the land by virtue of a judicial decision, even though they technically have no title to it under the contract [38]. In that case, it may look as if registration of the second buyer's deed created an actual property title, much like in a constitutive registration systems [39]. However, this is not entirely accurate, because the absence of registration by one of the buyers makes the deed inefficient against the registered buyer through the mechanism of *inopposabilité* [40]. Registration does not, in and of itself, confer any title to land: it merely alters the way in which the trial will be handled in that specific setting.

This is confirmed by the fact that the effects of deeds registration are strictly limited to certain third parties, namely those who claim to hold their title to land from the same person, usually when they both claim to have bought it from the same vendor [41]. With respect to these specific persons, the rules of evidence will be modified by land registration since the judge will only be allowed to take the registered title into account. Contrary to what happens in other legal systems, land registration has no effect with respect to anyone else, such as complete strangers (*penius extranei*) [42]. Moreover, case law provides that while registration affects the sheer efficiency of deeds in certain cases, it does not in and of

faith or knowledge of the previous sale (Cass., civ. 3e, 22nd Mar. 1968, nº 66-12943 : Bull. III, nº 129 ; n. Mazeaud, *D.* 1968.412 ; obs. Bredin, *RTD civ.* 1968.564 ; n. Planckeel, *Defrénois*, 1968.II.15587). This position has flickered in recent case law which sometimes refused any sanction in the case of mere bad faith (Ph. Simler and Ph. Delebecque, *op. cit.*, nº 893), but this requirement is now clearly stated by article 1198 of the Civil code, arousing mixed reactions (Ph. Simler, « Pour le maintien de la condition de bonne foi », *JCP G.*, 2019, doctr., 1348). It should also be noted that, in principle, both buyers cannot register their title, because the registrars verify the chain of purported titles, meaning that registration will be refused if the deed does not emanate from the currently registered owner (M. Chaguet, « L'effet relatif dans les actes soumis à la publicité foncière », *Defrénois*, 28th May 2020, nº 22, p. 23 sq.).

38. I. Takizawa, « Notion d'inopposabilité dans la publicité foncière », *RRJ* 1993.933.

39. The theory is that deeds registration operates as a form of seisin, or transfer of possession, similar to handing the keys to the buyer (Fr. Danos, « Publicité foncière et transfert de propriété », *Dr. et patrim.*, 2012, nº 219, p. 22 sq.). This solution is proposed because authors rely on the supposed *opposabilité*, or efficiency, of a right supposedly resulting from registration of the deed (W. Dross, *Droit civil : Les choses*, Paris : LGDJ, 2012, nº 32-5). Some authors are also favourable to dropping the good faith requirement altogether, as they consider that the property transfer is corollary to registration (M.-A. Cochard, « La publicité foncière, mode d'acquisition de la propriété ? », *Dr. et ville*, 2016, nº 81, p. 105 sq.).

40. *Opposabilité* is the normal state of all contracts (Civil code, art. 1200), whereas failure to register a deed causes *inopposabilité*, or inefficiency, of the deed as a sanction for slackness and misinformation of others. As a result, absence of registration deprives the owner of the potency of their title, when registration does not grant anything aside from the sanction brought upon unregistered titles.

41. Décret nº 55-22, 4th Jan. 1955 portant réforme de la publicité foncière, art. 30. For more detail on the third parties who are affected by registration, *adde* Ph. Simler and Ph. Delebecque, *op. cit.*, nos 885 sq.

42. Property titles should be respected by all third parties which qualify as *penitus extranei*, *i. e.* persons who do not claim to hold their rights from the same vendor (Cass., req., 22nd June 1864, Lepère

itself constitute evidence of a property right which could still determined by other means if a conflict arose involving a stranger [43]. Chiefly, this means that in the vast majority of cases—*i. e.* in conflicts with strangers—an unregistered deed can still be used as written evidence, with a significant weight, since it is usually notarised.

II. Possession as Conclusive Evidence of Land Ownership

In the French system, land registration is only useful in cases such as when an immovable is sold by the same person to two different buyers [44]. It does not serve as evidence of ownership, but as a means of making the unregistered deed inefficient against certain third parties. This means that the attribution of property by the court to the registered owner against a subsequent buyer is effective only relatively to the case and parties, and it does not bind other third parties who may still contest the title [45]. With respect to complete strangers, land registration serves virtually no purpose of its own, since the notarised deed—or even a mere written contract—may be used as evidence in court without registration. In the case of a conflict between two complete strangers over the ownership of land, the judge will grant the land to whomever has a better title to possess it, by preponderance of the evidence.

When land registration is out of the picture, for instance between complete strangers, it is held as a principle, that the peaceful possessor of land is always the defendant in a property case. The burden of proof is shifted onto the claimant who will have to prove that they have a better title to the land than the actual possessor [46]. However, the contract or even a deed that conveys the land over to the claimant is not always sufficient, even if it was registered, because land registration does not convey ownership of land [47]. While a proper title may help convince the judge, the claimant will be required prove not only that their title is valid (*i. e.* not null and void), but that they acquired the land from its real owner,

c. Leprovost : *D.* 1864.1.412 ; *S.* 1864.1.349 ; *GAJC*, 13e éd., no 84). The title can be used as evidence against such persons, even if it was not registered.

43. "With respect to real property, judges appreciate the evidence brought before them; they are not affected by deeds registration which fulfils a distinctive and different finality", namely the efficiency of the deed with respect to certain third parties (Cass., civ. 3e, 23rd Apr. 1981, no 79-14044 : Bull. III, no 80). As a result "the one who claims to be the owner of land may rely on the presumption attached on deeds which transferred or recognised their ownership of land, [but] proof of ownership is not tied to the efficiency of deeds against interested third parties" (Cass., civ. 3e, 2nd July 1997, no 95-20190 : Bull. III, no 161).
44. The same rule applies to all other interests in land, such as easements or mortgages.
45. P. Mendelssohn, *De la preuve de la propriété immobilière*, PhD thesis, Paris, 1922.
46. Cass., civ. 3e, 19th Mar. 1969, no 67-14239 : Bull. III, no 250.
47. "With respect to immovables, judges are sovereign in their appreciation of the evidence submitted to them, which is independent from land registration" (Cass., civ. 3e, 23rd Apr. 1981, no 79-14044, aforementioned). The contract or covenant transferring ownership "may only be invoked as a presumption" of fact, and does not constitute conclusive evidence of ownership (Cass., civ. 3e, 2nd July 1997, no 95-20190, aforementioned), albeit being considered as one of the best presumptions.

which is a *probatio diabolica* (diabolical proof) [48]. The claimant would indeed have to retrace the chain of titles to land to prove that the original owner acquired the land legally and that it was conveyed in legally binding ways ever since, in an uninterrupted chain. This being impossible, because all land was eventually conquered by someone a long time ago, the main conclusive evidence of ownership admitted by French law is *usucapio*, which generally requires thirty years of uninterrupted possession, possibly by several owners if the chain of titles can be proven [49]. The fact that the title to land was even registered is irrelevant in that respect, as long as the chain of possession can be proven by sufficient factual elements—given that registration does not amount to evidence of possession in the least.

It should be stressed however that *usucapio* differs greatly from adverse possession to the extent that it is not used merely to contest another person's registered title to land [50]. The French *usucapio* is used, mostly even if implicitly, to prove one's own title to land and only occasionally to acquire someone else's land through prolonged possession [51]. Evidence of a thirty year long chain of titles does not, in and of itself, prove that the titles are legally valid, but it proves that this person did possess the land for that period of time without any known interruptions. Contrary to the English adverse possession, which allows the possessor to apply for registration after ten years, *usucapio* operates retroactively to the day the possession started, thus consolidating the title to land from that time onwards [52]. It confers a title held from the law itself (*de lege*), which bars the other party from bringing up any evidence in favour of their own claim, unless they contest the very fact that land was possessed uninterruptedly for thirty years [53]. This means that conclusive evidence of land ownership under French law is always, technically, some form of possession, even when written instruments such as contracts are used as evidence.

When neither party can prove thirty year lawful and peaceful possession of land, the judge must still decide whom should be granted ownership thereof [54]. Usually, a covenant or even a mere contract emanating from the previous owner will constitute sufficient evidence that possession of the land was conveyed to the buyer as property, *i. e.* not in a precarious way, such as under a lease. However, in the most extreme cases, judges have granted claims

48. A. Rabagny, *op. cit.*

49. V. Streiff and C. Pommier, « Droit de propriété et pratique notariale », *Dr. et patrim.*, 2016, n° 259, p. 34 sq. *Usucapio* normally occurs after thirty years, but the delay is be reduced to ten years if the possessor is in good faith and has a "just title", meaning a contractual title that has no apparent flaw (Civil Code, art. 2272).

50. See above, on the German and English legal systems which allow the adverse possessor to claim the land registered in another person's name after having, themselves, registered that claim.

51. Under French law, possession is as much the manifestation of ownership by the true owner of the land as a contradiction of ownership (W. Dross, *op. cit.*, n° 234).

52. This means that any land covenant formed prior to the passing of the thirty year delay is valid (Cass., civ. 3e, 10th July 1996, n° 94-21168 : Bull. III, n° 180 ; n. Reboul-Maupin, *D.* 1998.509).

53. Cass., civ. 1re, 7th Oct. 1964 : Bull. I, n° 430. Contrary to the wording of article 2254 of the Civil code, which suggests that *usucapio* is a result of the fact of possession, courts consider more accurately that the resulting title emanates from the law itself, upon the condition that the possessor invokes it before a judge (Cass., civ., 7th July 1856, Aubert c. Talon : *D.* 1856.1.285).

54. Civil code, art. 4.

to the ownership of land on the basis of mere legal presumptions[55], witness testimonies, bills or tax receipts when the other party to the case had even less convincing evidence[56]. These elements are taken into account specifically because they amount to some level of evidence that the party was effectively in possession of the land, although it is indeed more common to display actual possession of land through material acts of usage and a behaviour compatible with peaceful possession thereof. Once again, evidence of ownership is brought solely through possession of land.

In legal systems where land registration performs a declaratory function, ownership of land is proved using possession rather than though the title itself, which is used only insofar as it presumably conveys possession, since property would be a diabolical proof[57]. The only advantage of displaying a long chain of titles is that the thirty year possession criterion required for *usucapio* will probably be met already, so the title holder no longer has to worry about existing adverse claims. Land registration plays no role when it comes to bringing evidence of ownership, except in the case outlined above of a conflict between two people claiming to hold their title from the same original owner. This mechanism is mostly foreign to jurisdictions which use a constitutive land registration system, at least to the extent that the registered title will serve as primary evidence of ownership, even when said title can be contested by adverse possession.

It can be observed at this stage that the choice of a land registration system influences the ways in which land ownership can be claimed before a court[58]. The very question of evidence needs not be raised under a purely constitutive registration system, when

55. "With respect to immovables, when neither party has a title and the conditions for *usucapio* [adverse possession] are not characterised, if the defendant cannot prove that they have a lawful and peaceful possession of the land, judges may decide the question of land ownership according to mere presumptions of fact" (Cass., civ., 26th Dec. 1921, Charlin c. Sorin : *S.* 1923.1.297, obs. P. Esmein ; *GAJC*, 13e éd., n° 86).

56. Courts may then "look into the facts and circumstances of the case for clues as to the ownership of land [...] such as a better possession, information from the cadastre, payment of land taxes, witness testimony, land topography or an map drawn by an expert" (Cass., civ., 16th Apr. 1860, Brun c. Gaston : *D.* 1860.1.251).

57. *Adde*, for a similar perspective from Quebec, G. Gidrol-Mistral and Th. Trân, « Publicité des droits et prescription acquisitive », *RGD*, 2016, vol. 46, p. 303 sq.

58. Among other modes of acquisition of ownership *de lege* (by law), one should mention the rare yet useful concept of *propriété apparente* (apparent ownership), which is used by courts when a person acquires the land without possibly knowing that the vendor is not the real owner, *e. g.* because the vendor acquired ownership of land by inheritance without knowing that the deceased had other children. If the true heir, whom nobody knew about, resurfaces after the sale, courts will uphold the buyer's right on the grounds that *error communis facit jus* (a common and inevitable mistake creates a right). Historically, the Supreme Court has ruled these cases by granting a substantial right to the *bona fide* (Cass., req., 3rd Aug. 1815, Deprépetil c. Ribard : *S.* 1815.1.286). This situation cannot be tried under current land registration laws, because the buyer and the true heir, whose identity was unknown to all, do not hold their rights from the same original owner. Indeed, the true heir holds their rights from the deceased whereas the *bona fide* buyer holds a title from the then apparent owner or heir. Land registration laws are unable to handle this particular conflict, which case law solves in favour of the *bona fide* buyer, irrespective both of registration and classic evidence rules.

it is absolutely essential in a declaratory system such as the French one. As a result, one may wonder why some jurisdictions opt for a type of land registration system that makes it quite difficult to prove one's title to land when the question could be avoided altogether in most cases. The reason for this comes from the underlying discourse of ownership, which determines the choice of a land registration system and the corresponding rules of evidence.

III. Underlying Discourse of Property

A land registration system that performs a purely declaratory function has rather limited legal consequences and, in the general case, evidence of land ownership will still have to be brought by other means, specifically through some form of possession. It may be asked, then, why would anyone choose such a convoluted system. The answer to this question may rest in our different conceptions or discourses of property.

When discussing conceptions of property, we do not mean to say that land law is substantially different in countries such as France, Germany or England, all of which abide by the European Court of Human Rights jurisdiction and share a common history, especially with the aforementioned system of seisin which was used both for the transfer of land and registration thereof. Conceptions of property refer more precisely to the *discouse* of lawyers and laymen about property, which may be very different from the reality of positive law. However, discourse is not without effects on the choices made by politicians when it comes to picking a land registration system.

The law and economics literature has shown that there is no clear-cut reason to believe that one land registration system is preferable over the other. When given the choice because the two systems coexist in the same place, people tend to use a constitutive land registration system, such as the Torrens model, when their title seems insecure due to numerous prior transfers. On the other hand, they tend to prefer a declaratory recordation system when the title is secure enough on its own [59]. Indeed, full land registration systems, which are constitutive of land rights are more expensive but provide more security than mere declaratory systems. These findings lead authors to the conclusion that "choice of an efficient titling system is an empirical issue that cannot be solved on purely theoretical grounds" [60]. Since there is no legal or economic reason to prefer one system over the other, is it our view that property discourse—and therefore the ways in which property is perceived—may have an influence on the choice of land registration systems.

The British tradition was deeply influenced by the feudal system of land tenures, which was not abandoned until 1925 in England and 2004 in Scotland. Property theories in common law countries not dot very much stress the question of property as an absolute

59. Th. Miceli, H. Munneke, C. Sirmans and G. Turnbull, "Title Systems and Land Values", 45 *JL & Econ.* 565 (2002).

60. B. Arrunada and N. Garoupa, "The Choice of a Titling System in Land", 48 *JL & Econ.* 709 (2005), p. 725.

right [61]. As a matter of fact, the Crown still owns very significant amounts of land which is then transferred in the form of estates to private landowners. The acquisition of land by the state in the general interest is referred to as an *eminent domain* prerogative, which is a direct reference to the feudal practice of land concessions and the contractual clause which let landlords reclaim the land for certain purposes [62]. With that mindset, it is quite logical that land ownership should, or at least could, be guaranteed by the State itself through a land registration system that is constitutive of title. The cultural heritage of the feudal system is consistent with a registration system which operates on the basis that the State is in charge of all land conveyances.

The French system is substantially similar to the English one, at least to the extent that takings are permitted. However, the Supreme Court has ruled that there is no such thing as eminent domain in a case about inheritance taxes on land. It was clearly stated then, that land is not conceded by the State through feudal tenures, not even perpetual, and that taxes are a personal obligation towards the State [63]. The question of takings in handled in the same way: this procedure is technically called *expropriation* because the State does not take back something that already belongs to it through eminent domain; it acquires land from a private owner through a forced contract. The procedure is defined as an exorbitant power of the State which infringes on private property [64]. Legal discourse therefore considers that private property is not held from the State (or from anyone else) [65], implying that the State should also have no control over the attribution and transfer of land rights. These choices date back to the French Revolution which sought to abolish feudalism in acts as well as in words. While the substance of expropriation procedures is similar in both legal systems, the legal discourse that surrounds them is completely different and may be a contributory factor in the choice of a land registration system.

61. The only noted exception is William Blackstone, who described property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (W. Blackstone, *Commentaries on the Laws of England*, Oxford University Press, 2016, II, p. 2). Much like Pothier in France, he was inspired by philosophers and romanists (L. Dunoyer, *Blackstone et Pothier*, PhD thesis, Paris, 1927). He borrowed excepts from their thought, which should be put in perspective with his entire conception of property (R. Burns, "Blackstone's Theory of the 'Absolute' Rights of Property", 54 *U. Cin. L. Rev.* 67 [1985]; C. Rose, "Canons of Property Talk, or, Blackstone's Anxiety", 108 *Yale LJ* 601 [1998]). Most of the literature nowadays focuses on the *bundle of rights* theory, which dilutes the contents of ownership to virtually nothing at all (A. Honoré, "Ownership", *in Making Law Bind: Essays Legal and Philosophical*, Oxford, England: Clarendon Press, 1987, p. 161–192). *Adde*, for a critical take on that theory, H. Smith, "Property as the Law of Things", 125 *Harv. L. Rev.* 1691 (2012).
62. J.-L. Mestre, « Les origines seigneuriales de l'expropriation », *Recueil des mémoires et travaux de la Société d'histoire du droit et des institutions des pays anciens de droit écrit*, 1980, n° 11, p. 71 sq.
63. Cass., civ., 24th June 1857, Clausse : *D.* 1857.1.233 ; *S.* 1857.1.401.
64. The Declaration of the Rights of Man and the Citizen states that private property is inviolable, and describes expropriation as a deprivation of this right (art. 17). The Civil Code mentions that: "No one may be compelled to transfer [*i. e.* yield] their ownership, unless for public purposes, and for a fair and previous indemnity" (art. 545).
65. This hypocrisy was denounced in one article: X. Bioy, « La propriété éminente de l'État », *RFDA* 2006.963.

Similarly, the German Civil Code has long recognised the social function of property, for instance by providing for the case of nuisance or mere risk of certain dangers caused by neighbours [66]. The German fundamental law, which serves as a Constitution, even states that property entails obligations [67]. The German discourse on ownership therefore acknowledges certain duties of owners, which are inherited from the feudal system that imposed duties along with the concession of land. On the other hand, while substantial law is similar in France, legal discourse barely recognises such limitations on ownership, which is deemed absolute as per article 544 of the Civil Code [68]. Nuisance emanating from neighbouring lands have been an entirely praetorian part of the law [69] and should remain so until a reform in torts law, which also means that neighbourhood nuisances are not considered a property issue, unlike in Germany. The question of abuse of right has also been recognised by courts, but is seldom used despite attracting a fair amount of interest in the past [70]. Similarly, while case law has imposed certain duties on owners, like strengthening a cliff that had become unstable [71], such obligations are absent from the C. civ.. The French scholars who came up with the idea that property serves a social function and should be limited accordingly are widely read throughout the world, especially in South America [72], but are on their way to oblivion in French legal doctrine [73]. It therefore appears that, while substantial law may be similar in France and Germany, the property discourse is quite radically different and may account for the choice of a land registration system that does not involve State intervention in the French case.

The hypothesis of the influence of feudal concessions on the choice of a constitutive land registration system seems to be equally confirmed by the study of other common law countries which have not, in their history, experienced feudalism. In the United States, for instance, land recordation systems are widely used, which perform a declaratory and informative function and leave the evidence of ownership to the owner on an as-needed

66. Bürgerliches Gesetzbuch (BGB), § 906–908.

67. Grundgesetz (GG) art. 14.

68. A reference textbook does not indicate that there may be limitations to the right of property, claiming that limitations apply only to the thing itself (Fr. Zenati-Castaing and Th. Revet, *Les biens*, 3rd ed., Paris : PUF, 2008, p. 259–449). Another reference treatise devotes over 65 pages to property being absolute and exclusive and only 20 pages to limitations, all of which are brought from outside the Civil code (J.-L. Bergel, M. Bruschi and S. Cimamonti, *Les biens*, 2nd ed., Paris : LGDJ, 2010, p. 55–146).

69. Cass., civ. 2e, 19th Nov. 1986, n° 84-16379 : Bull. II, n° 172.

70. Cass., req., 3rd Aug. 1915, Coquerel c. Clément-Bayard : *D.* 1917.1.79 ; *GAJC*, 13e éd., n° 69. *Adde* L. Josserand, *De l'abus des droits*, Paris : Arthur Rousseau, 1905.

71. Cass., civ. 3e, 5th Nov. 2015, n° 14-20845, n. Dross, *Gaz. Pal.*, 23rd Feb. 2016, n° 8, p. 73 sq. ; n. Lardaud-Clerc, *PA*, 17th Mar. 2016, n° 55, p. 10 sq. ; obs. Tadros, *RdC* 2016.334 ; obs. Dross, *RTD civ.* 2016.150 ; obs. Le Rudulier, *AJDI* 2016.218 ; obs. Parance, *RLDC*, 2016, n° 135, p. 59 sq. ; obs. Périnet-Marquet, *JCP G.*, 2016, doctr., 446 ; obs. Reboul-Maupin, *D.* 2016.1779 ; obs. Seube, *Dr. et patrim.*, 2016, n° 259, p. 70 sq.

72. L. Duguit, *Les transformations générales du droit privé depuis le Code Napoléon*, Paris : Félix Alcan, 1912, p. 147–178.

73. As noted by W. Dross, *op. cit.*, n° 37.

basis[74]. In some States, this choice was made as early as the seventeenth century, prior to the invention of the Torrens system, and rests on a much more primitive technique. Much like in France, the record only indicates the chain of titles to land, but it does not guarantee the validity thereof or the absence of conflicting interests in land acquired through other means. Similarly, while most land in Canada still belongs to the Crown as part of its cultural heritage, the province of Quebec has been largely influenced by the French legal culture and eventually gave up trying to implement a true land registration system. Much like in the French case, deeds are recorded so they can be set up against third parties, *i. e.* persons who claim to hold their title from the same original owner[75]. A single step was taken towards making the recordation efficient with respect to complete strangers, as it entails a rebuttable presumption of ownership[76], which means that whomever has a recorded title will be put in the same position as an actual possessor of land. This, however, does not grant the registered owner a title but a mere probationary advantage, which is a totally different thing.

While the French legal system has a feudal past, the Revolution sought to destroy it utterly, in very radical ways. It resulted in laws which are not substantially different from those of neighbouring countries, but in a legal *discourse* which sets more emphasis on property being absolute. It was proclaimed to be a natural and sacred right of man[77]. Ownership is deemed to be part of natural law and cannot be conferred by public authority. At the same time, Napoleon I sought to create an empire of small owners, who would be easier to control than large landowners, so he decided to facilitate the transfer of land by generalising the contractual clause which permitted to transfer all ownership *solo consensu*, by a meeting of the wills rather than through a registration formality[78]. This policy complemented the newly found belief in the ability of a contract to produce effects with respect to rights *in rem* and especially to transfer ownership of land, which it could not do under customary and feudal law[79]. From that time onwards, property has been depicted as an indefinite right which is exerted in an absolute manner, precisely, because it is held from no one and comes without bonds[80]. It is only logical, in that context, that evidence of ownership should be brought by the person who claims property as their own, and not through a register which is held by the State. This is why the authors of the Civil code

74. G. Cole and D. Wilson, *loc. cit.*
75. Civil Code of Quebec, art. 2941, § 1: "Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect".
76. Civil Code of Quebec, art. 2944: "Registration of a right in the register of personal and movable real rights or the land register carries, in respect of all persons, simple presumption of the existence of that right".
77. Article 2 of the Declaration of the Rights of Man and the Citizen includes property among the "natural and imprescriptible rights of man", while article 17 defines property as an "inviolable and sacred right".
78. J.-Fr. Niort, « Droit, économie et libéralisme dans l'esprit du Code Napoléon », *Arch. phil. dr.*, 1992, vol. 37, p. 101 sq.
79. Specifically discussing the origins of the French land registration system: J. Duclos, *op. cit.*, n° 291.
80. Civil code, art. 544: "Property is the right to enjoy and dispose of things in the most absolute manner, provided that they are not used in a way prohibited by statutes or regulations". The second part of the phrase, about statutes and regulations, is consistently neglected in legal doctrine.

implemented no registration system whatsoever and, when one was finally chosen fifty years later, a declaratory recordation system was chosen which works in a negative way by making certain unregistered deeds inefficient against the registered owner.

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As a conclusion, we may return to the original paradox according to which the more efficient the title, the less absolute ownership seems to be in legal discourse. Indeed, a title held from the State is extremely potent, but the property right it conveys is—at least in the collective imagination of lawyers—less powerful than a property right which is held from no one and therefore knows no intrinsic limitations aside from those pertaining to the thing itself.

Abstract: This paper discusses the relations between land registration systems and underlying discourses of property from a comparative perspective. It is based on the example of French law which, characteristically, uses a declaratory land recordation system, *i. e.* registration is informative in nature, it affects the rules of evidence but it does not convey property nor does it affect complete strangers in any way. It is found that such a system implies that people will need to prove their ownership of land, and therefore presupposes rules of evidence which are based on possession or title to possess, since land registration is not used for that purpose. The historical reason for this choice was inherited from the French Revolution. It rests on the idea that property is held from no one, least of all from the State. Most countries in the world have opted for a land registration system which is constitutive of title, meaning that the State guarantees the registered owner's title to land. This system was originally inherited from the remnants of the feudal system in which land was held through a tenure, *i. e.* from someone else. This conception of ownership also traditionally implies a greater tolerance—in legal discourse— for legislative or State interference in the ownership of land which is merely granted by public authority. It may therefore be said that the more efficient the title, the less absolute ownership seems to be, at least in the collective imagination of lawyers as to what property entails.

Résumé : Les systèmes de publicité foncière et le discours de la propriété : Une analyse comparative du droit français — Cet article porte sur les relations entre les systèmes de publicité foncière et les discours sous-jacents de la propriété, dans une perspective comparatiste. Le droit français est plus particulièrement pris en exemple, car il fait partie des rares systèmes à conférer à la publicité foncière un effet strictement déclaratif. Celle-ci a pour fonction d'informer les tiers, modifie les éléments de preuve recevables entre ayants cause d'un même auteur (opposabilité des actes), mais ne produit aucun effet à l'égard des *penitus extranei*. Un tel système de publicité foncière implique nécessairementla possibilité pour les propriétaires de prouver leur droit par tous moyens et, spécifiquement, par la possession ou le titre sur laquelle elle se fonde. La raison historique de ce choix est la conception, héritée de l'abolition de la féodalité par la Révolution, selon

laquelle la propriété est un droit que l'on ne tient de personne, et notamment pas de l'État. Par contraste, la plupart des systèmes juridiques dans le monde utilisent un système de publicité foncière constitutive de droit réel, dans lequel l'état garantit, à travers le registre, le titre de propriété. Ce système est né des remaniements du système féodal dans lequel la terre était uniquement conférée en tenure, de sorte qu'elle était toujours tenue de quelqu'un d'autre. Cette conception de la propriété implique aussi une plus grande tolérance envers l'intervention du législateur ou de l'autorité publique dans la propriété foncière, qui est tenue de l'État. Il est donc possible de conclure que, dans le discours juridique, la propriété est d'autant plus absolue que le titre ne l'est pas, au moins dans l'imagination collective des juristes et dans les représentations qu'ils se font de la propriété.