Transfer of Real Property Rights in Germany (The providence of the German Grundbuch)

Vincent Nossek, Mag. iur.

I. Introduction

According to Victor von Liebe, assistant of the 1. Commission for the development of the German Civil Code (Bürgerliches Gesetzbuch), real property in Germany was awarded by the State, which made the registration of every real property transaction necessary. The special treatment real property received in the German laws was in his opinion a reminiscence of the idea that every right in land was derived from the State. This interaction with the State in conveying legal property rights was acknowledged as part of the German legal consciousness.

How did this idea of a derivation affect the historic laws in the German countries and how does it affect the contemporary German real property laws? In order to answer these questions, the key rules of real property conveyancing in the German legal system will be examined. Two main components will be examined in the process of this study: On the one hand that includes a closer look into the system of land registration as it was and is executed in Germany. A historic overview will show the predominant traces of Prussian Land Registration from 1693 on, focussing on the Prussian legislations of 1783/1794 and of 1872 being complemented by Bavarian and Saxonian laws of 1822 and 1843. The following comparison between the historic German land registration and the contemporary system may show remarkable similarities as well as important differences.

---

3 von Liebe, Sachenrechtliche Erörterungen zu dem Entwurfe eines bürgerlichen Gesetzbuches, p. 58.
The main focus of this study will be the principles of land registration which can be traced in every land registration law.

On the other hand, the agreement between the parties itself will be examined, because it complements the registration process. The focus in this section will be set on the acquisition of real property and its formalities. Of special interest is the role public notaries play in the registration process and the origin of their function therein. The historical view shall also enrich the study and facilitate the understanding of the German land registration.

II. Transfer of Real Property Rights

1. Legal basis for transfer of Real Property Rights

The contemporary German Civil Code defines in Art. 873 the general rule that the acquisition in the case of a transfer of ownership or in the case of an encumbrance requires the “agreement between the person entitled and the other person on the occurrence of the change of rights and the registration of the change of rights in the Land Register (LR) except insofar as otherwise provided by law.” In the case of a transfer of ownership, Art. 925 specifies that the aforesaid agreement has to take place before a competent agency, including i.a. a public notary (Art. 925 Para. 1 S. 1).

Following Art. 873 the two requirements are the agreement between the parties and the registration of the change in the LR. The agreement has to be conducted in front of a notary or any other competent agency. It is acknowledged that this dualistic interaction of the agreement and the registration is ingrained in the German legal order.

2. Registration in the Land Register

a) What is the Land Register (“Grundbuch”)?

Registration has to be executed in the LR, the so-called “Grundbuch”. The function of the Grundbuch is explained in the German Civil Code, for ex-
ample in the aforementioned Art. 873 or in Art. 891. A more formal display of the regulatory content can be found in the German Land Registration Act (“Grundbuchordnung”). Exemplary, Art. 3 German Land Registration Act states that every plot of land should receive a special place or folio in the Grundbuch.

The term Grundbuch is not a modern invention, but it finds its origins in from the middle ages, more specifically from the old Vienna land register in 1389.7

The idea of land registration is even older and can be traced back to the great antique powers of Greece and Rome.8 In some ancient Greek laws, mortgages were displayed as writings on the house walls or on boards on the property.9 The law of Greco-Roman Egypt already contained the possibility of a registration system as a collection of private deeds, the so-called βιβλιοθήκη ἐγκτήσεων.10

For the modern German lawyer in the 19th and 20th century the Grundbuch was not just a term but implied a legal concept. Its foremost task was the promotion of the land and mortgage market, as well as the protection of the land ownership.11 Other legal concepts, such as the so-called “Hypothekenbuch”, primarily had the function of promoting the

---

mortgage market.\textsuperscript{12} The \textit{Grundbuch} is a more complete concept and had a broader protective purpose.\textsuperscript{13}

b) Five principles of Land Registration

aa) Overview: What are the principles?

The legal concept of the \textit{Grundbuch} can be structured by means of five leading principles of land registration:\textsuperscript{14}

1. “Registration”
2. “Publicity”
3. “Legality”
4. “Speciality”
5. “Real Folio”

Every principle offers different legal understandings and multiple options how it might be executed. To prove that even the most contradictory possibilities were viable, the footnotes will give brief historic examples.

bb) First Principle: Registration or entry in the LR

The first principle may be described as registration or entry on the LR. It may seem redundant at first glance that a LR needs a principle of registration, but the importance of the compulsory entry should not be underestimated. Indeed there is the possibility of a compulsory entry on the LR, but a voluntary one also seems possible. A compulsory entry would guarantee the visibility of every change in the legal position concerning a plot of land. Therefore, the integrity of the LR would be elevated and third parties would have the security when transacting.\textsuperscript{15}

\begin{flushright}
\textsuperscript{12} Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Volume III, Berlin/Leipzig 1888, p. 18s.; \textit{Martin Wolff}, Sachenrecht, Marburg 1932, § 26 III.
\end{flushright}

\begin{flushright}
\textsuperscript{13} Staudinger/Gursky, Version 2012, § 873 No. 2.
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{15} In favour of the obligatory entry amongst others: \textit{Otto Bähr}, Die preußischen Gesetzentwürfe über die Rechte an Grundvermögen, Jena 1870, p. 67.
\end{flushright}
On the other hand, a mere voluntary registration in the LR would allow the parties the full freedom to choose whether they wish to show a transaction and a legal position regarding a plot of land. In the understanding of a LR designed for the parties’ needs and requests, a compulsory registration would rather not meet those expectations, whereas the voluntary entry emphasizes the parties’ autonomy and could be less expensive because there would be no LR fees.\textsuperscript{16} They could very well choose not to register their transaction and the change of ownership would remain clandestine and unknown to the public.

Another pivotal decision in the first principle is whether the registration should have a constitutive or a declaratory effect. A constitutive effect means that a change in the rights in real property does not take place until they are registered. Solely the parties’ agreement does not transfer a right in real property. The necessity of a registration due to its constitutive effect does guarantee the correctness of the LR because there is no possible legal position outside the LR (in the case of a compulsory-constitutive registration, that is).\textsuperscript{17} In the case of a voluntary-constitutive registration system, the proprietor would in the first place be able to decide, if he or she chooses to register the plot of land in the register. But to henceforth the proprietor would be bound to enter every upcoming change in the rights to the land in the LR.\textsuperscript{18}

The alternative to constitutive registration is declaratory registration, which implies that the transaction is valid with the parties’ agreement and the registration in the LR serves exclusively for third parties.\textsuperscript{19} This arrangement would have the benefit of respecting the parties’ agreement, because the agreement only transfers the rights. The role of the State running the LR would be limited to an information keeper who does not have any influence on the transaction of rights in real property. That said there is of course the combination of an obligatory-declaratory LR, where the parties cannot elect whether they choose to register their transaction, but nevertheless the legal effects between them take place outside of the LR.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{16} In favour of the voluntary entry amongst others: Charles Fortescue-Brickdale, Registration of Title to Land, London 1886, pp. 89s.
\item \textsuperscript{17} F. ex. Art. 873 German Civil Code 2018.
\item \textsuperscript{18} F. ex. in Art. 32, 34 Land Registry Act 1862 (England).
\item \textsuperscript{19} F. ex. in Art. 1583 Code Civil 1804 (France).
\end{itemize}
\end{footnotesize}
cc) Second Principle: Publicity or open LR and good faith protection

The principle of publicity includes two different elements. On the one hand, it regards the accessibility of the LR as open to everyone, open to people with legal interest or closed register. On the other hand, publicity also regulates the good faith protection which is effected by the LR.

Regarding accessibility, it might seem imperative to constitute an open LR, because why would a State otherwise bother to go through all the work of mapping the plots of land and forcing people to register their rights, if the result may not be inspected by the public. But this publicly open LR also has the detriment of displaying the legal positions of everyone in front of the public. The opposite would be to have a somehow closed LR which may only be inspected with the consent of the proprietor or by a court order. This system on the other hand emphasizes the privacy interests of the proprietors to the detriment of the third parties who can only hope to be able to inspect the LR.

A compromise would be the third possibility: to have a LR which might be inspected by a party who proves a legal interest in the content of the LR. In respect to the open LR that would diminish the amount of people being able to inspect the LR, but on the other hand it would entitle those with a legal interest to inspect the LR. The barrier of a legal interest would bring specific requirements which, if present, would give the security of an entitlement, other than the hope to receive the proprietors consent or convince the court.

The good faith protection affects the LR’s mode of action. In case the entries on the LR are subject to good faith, a third party may purchase from a non-purchaser. Keeping in mind that this may extend as far as the property of a massive estate which may be transferred by the registered person without true proprietorship, a regulation of good faith is of great importance for the LR.

Accessibility of the LR and good faith of the entries appear to be somehow two sides of the same coin, because in case the LR is open to public, good faith in the entries is easily constituted. Although that might be the case, the legislator can still be of the opinion that no party may transfer

20 F. ex. in Art. 3 Code Hypothécaire 1795 (France).
21 F. ex. in Art. 15, 137 Land Registry Act 1862 (England).
22 F. ex. in Art. 12 German Grundbuchordnung 2018.
23 F. ex. in Art. 892 German Civil Code 2018.
24 Joseph Grasset, Les projets de réforme hypothécaire, Montpellier 1907, p. 412s.
more rights than he possesses. The different dogmatic interpretations of good faith acquisitions were implemented in the LR by the various legislators.

dd) Third principle: Legality or proof of authenticity and entitlement

The so-called legality principle refers to different levels of proof. The transactions being subject to registration shall be valid so that they do not impede the integrity of the LR. In order to uphold this idea, there has to be an institution to control the transactions. It may vary if this institution is the registrar or a clerk, a court or a public notary. The extent may vary as well, from a sole proof that the signatures are authentic to the validity of the contract due to a possible lack of legal capacity or the non-existence of a transferrable title. The proof of authenticity may be executed by an official who knows the parties or verifies their identity, or it may be done by witnesses as well. The entitlement may be controlled by consulting the LR itself or concerning questionable legal capacity again by an official or a witness. The pinnacle of the principle of legality would be the control of the validity of the contract which is the base for the transaction of real property rights. One could think of a judge who has to control whether the sales contract, being the basis for the conveyance, is valid according to the law. In case it is not valid he shall not permit the entry on the LR because the registration of a transaction due to a non-valid contract could affect the stability of the registration in the future.

ee) Fourth principle: Speciality

Speciality of the LR means in case of a mortgage the denomination of a specific sum and of a specific plot of land being engraved by the mortgage. This speciality was the goal of many, but nevertheless there was a

25 F. ex. in Art. 2124 Code civil 1804 (France).
26 F. ex. in front of the LR, any local court or any public notary Art. 925 German Civil Code 1953.
27 F. ex. for witnesses in Art. 7 of the law, 2 & 3 Anne c. 4 (West Yorkshire, 1703), in: Danby Pickering, The Statutes at Large from the Second to the Eighth Year of Queen Anne, Cambridge 1764, pp. 15–22.
28 F. ex. in Part II, Art. 13 of the German General Mortgage Law 1783.
29 F. ex. in Art. 1115 German Civil Code 2018.
constant opposition for some reason.\textsuperscript{30} Advantageous for the debtor and third parties, the principle of speciality was disadvantageous for the creditor’s protection. The reasons lie in the interest and the efforts one has to take for a special registration. The creditor is well advantaged, when he can extend his interest to many different plots of land for the same debt. For example, he lends a specific amount of money, and not just one plot of land of the debtor is engraved, but all of the debtor’s plots of land. In the case of a foreclosure of one plot of land, the creditor’s risk of not being fully repaid would be minimized, because he could seek satisfaction in another of the debtor’s lands.

Whereas for third parties this system would be problematic, because when on every plot of land lies every mortgage, he cannot evaluate the risk in the case of a creditor’s satisfaction. Every risk to a third party decreases the potential purchase price of the proprietor.

However, this lack of speciality could be for the sake of different vulnerable parties, such as wives or children.\textsuperscript{31} Their financial interest was sometimes secured with so-called legal mortgages which were not subject to obligatory-constitutive registration and neither to speciality. Their mortgage should charge all of the debtor’s plots of land for maximum safety.

ff) Fifth principle: Real Folio or organisation of the LR

The last principle of land registration organises the LR. There are three common possibilities of organisation: the real folio, the personal folio or the chronological municipal register.

The real folio puts the plot of land into focus. Every plot of land receives one folio of its own where all the important information such as proprietorship or mortgages is displayed.\textsuperscript{32} The searching third party would be able to receive exhaustive information concerning this plot of land which he desires to purchase or charge. The somewhat opposite organization of the LR is the personal folio being arranged regarding the

\textsuperscript{30} Conflicting with the speciality amongst others: Eustache-Antoine Hua, De la nécessité et des moyens de perfectionner la législation hypothécaire, Paris 1812, p. 22.


\textsuperscript{32} F. ex. in Art. 3 German Grundbuchordnung 2018.
proprietor of the land. Every proprietor receives a personal folio display- ing his different plots of land with their respective mortgages. The third party would have to know the proprietor in case he requires information on a specific plot of land.

A third possible principle is the chronological municipal register. It files the entered information in a chronological order and not regarding the mentioned parties or the plot of land. This is to be done on a municipal level where every municipality for example has its own register. For reasons of simplification of searches there are auxiliary lists showing the names of the parties and when the deed was filed.

c) A brief history of Land Registration in Germany

aa) Introduction

Those five principles of land registration were not merely theoretical ideas in the literature but practically executed systems of land registration throughout the centuries and in different territories. For the following studies, the focus lies on the German history of land registration.

It shall not remain unmentioned that there were legal efforts in the direction of a LR in some German countries prior to the great Prussian law reform at the end of the 18th century. Most descriptions of German land registration tend to focus on the Prussian development. The main reason is the great importance of Prussian law for the final German unification process, which lies in the nearly unrivalled influence Prussian law exerted on the other territories and even on foreign legislation.

The Prussian development of the LR started in 1693 and reached after some improvements in 1722 a first peak in 1783 and 1794. Those two codifications of 1783 and 1794 achieved an exemplary function not only concerning their LR but also because they divided the LR law into formal

---

33 F. ex. in Art. 2148 Para. 2 No. 2 Code civil 1894 (France).
34 F. ex. in Art. 8 of the law, 2 & 3 Anne c. 4 (West Yorkshire, 1703), in: Danby Pickering, The Statutes at Large from the Second to the Eighth Year of Queen Anne, Cambridge 1764, pp. 15–22.
35 Mascher, Das deutsche Grundbuch und Hypothekenwesen, 1869, p. 128.

https://doi.org/10.5771/9783845289410-113
Generate durch IP '54.70.40.11', am 06.01.2019, 03:50:36. Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
and material law, with the 1783 codification being the formal and the 1794 codification being the material law.

bb) The Prussian system of 1783/1794

The General Mortgage Law (*Allgemeine Hypothekenordnung*, AHO) of 1783 was the first codification of the LR in a German territory and regulated, with its over 400 articles, most of the foreseeable question in LR. Due to the absence of a general civil law legislation, which came in 1794 (*Allgemeines Landrecht für die Preußischen Staaten*, ALR), there were some parts in the AHO referring to the acquisition of real property and real property right although those material questions were rearranged in the material law of the ALR. It is only in the complex interaction of the 1783 and 1794 legislation wherein lies the consistent system which was held as an example of good ruling in land registration laws. The great impact this Prussian system had on the debate in the 19th century and on the implementation of the LR was mainly justified by the consistent enactment of the registration principles.

The registration of proprietorship and mortgages was obligatory and in the case of mortgages also constitutive, whereas only declaratory for the proprietorship. That meant the conveyance remained untouched by the registration process. The parties were obliged to register the conveyance afterwards. There was a good faith protection for third parties, when they were ignorant of the non-proprietorship of their contract partner and if there was no annotation stating his non-proprietorship.

The LR was not open to everyone but only to those having proved a legal interest in the information. Concerning the proof of authenticity and entitlement, there were very strict resultatons in the Prussian system of 1783/1794. Other than the examination of authenticity, the judge keeping the register had to examine the entitlement of the losing party and the validity of the registered information as well. This extensive understanding of the principle of legality was based on the hope of the correctness of the

---

38 Part I Chapter 10 Art. 6 ALR.
39 *Mascher*, Das deutsche Grundbuch und Hypotheckenwesen, 1869, p. 133.
41 Part I Chapter 10 Art. 6 ALR.
42 Part I Chapter 10 Art. 10ss. ALR.
43 Part I Art. 72 AHO.
44 Part II Art. 13, 19 AHO.
LR. Its execution by a judge the LR should not cause doubts as to its accuracy and reliability of its information. After a revision between 1783 and 1794, the legislator enacted a specific LR, going against those voices who demanded the right to unspecific, general mortgages.45

The LR was organized by the real folio.46 That was unaffected by the lack of a cadastral register and included the right of the proprietor to describe his lands.

This enactment of registration principles in Prussia was the great example the German land registration legislation needed to take off in the 19th century – truly a “Meisterwerk”47 serving as an inspiration for other territories and remaining mainly continued until the “new” Prussian land registration in 1872.

c) The Bavarian system of 1822

The Bavarian legislation of 1822 was on the one hand greatly influenced by the Prussian system of 1783/1794, but maintained on the other hand an individual scope.48 This distinctive mixture of Prussian and new influences justified the great importance the Bavarian legislation had for the German land registration legislation.49 The main legislator, Nikolaus Thaddäus von Gönner, stated in his quasi-official commentary that the enormous expenses of an encompassing LR would be inappropriate and unnecessary for the purposes of a safe mortgage market.50

The most important characteristic of the Bavarian law was that its LR only covered the properties with mortgages. The scope was from the beginning limited to displaying mortgaged plots of land and never the perfection of LR in registering the hole of Bavarian properties.51

This being stated, the registration principles did not differ greatly from the Prussian principles, but seemed somewhat more refined. The registra-

45 Mascher, Das deutsche Grundbuch und Hypothekenwesen, 1869, p. 131.
46 Part I Art. 8 AHO.
47 Mascher, Das deutsche Grundbuch und Hypothekenwesen, 1823, p. 134.
48 Wolfgang Heinrich Puchta, Worte der Erfahrung, Erlangen 1819, p. 113.
50 Nikolaus Thaddäus von Gönner, Commentar über das Hypothekengesetz für das Königreich Bayern, 1823, pp. 259ss.
51 Gönner, Commentar über das Hypothekengesetz für das Königreich Bayern, 1823, pp. 259ss.
tion of ownership was obligatory and declaratory, as it was in Prussia, and for mortgages it was obligatory and constitutive.\textsuperscript{52}

The law of 1822 stated that a third party could acquire a mortgage from the registered owner, even if he was not the real owner, when he relied on the accuracy of the LR.\textsuperscript{53} A good faith protection was arranged. The LR was open to third parties only by permission or if they stood in a legal connection to either the proprietor or the creditor.\textsuperscript{54}

Concerning the speciality and the real folio, the Bavarian Mortgage law followed the Prussian example.\textsuperscript{55}

The great novelty of the Bavarian legislation and the crucial divergence from the Prussian system was the lack of a strict legality as it was executed in Prussia. The Bavarian Mortgage law of 1822 only requested that the Registrar verify that the vendor or debtor had a registered position in the LR.\textsuperscript{56} The lack of a tedious procedure and the consistent publicity and speciality made the Bavarian Mortgage law of 1822 a celebrated legislation.\textsuperscript{57}

dd) The Saxonian system of 1843

Influenced by and yet different than the Bavarian Mortgage law of 1822, the Saxonian legislation of 1843 expanded the perspective of land registration in Germany. For the first time a land registration law included the crucial term \textit{Grundbuch} in its name. The Saxonian law concerning the “Grund- und Hypothekenbücher” was enacted the 6\textsuperscript{th} November 1843 and

\begin{itemize}
\item \textsuperscript{52} Art. 1, 21 Bavarian Mortgage law 1822.
\item \textsuperscript{53} Art. 26 Bavarian Mortgage law 1822.
\item \textsuperscript{54} Art. 24s. Bavarian Mortgage law 1822.
\item \textsuperscript{55} Art. 11, 120 Bavarian Mortgage law 1822.
\item \textsuperscript{56} Art. 96ss. Bavarian Mortgage law 1822.
\end{itemize}
served, mainly because of its registration principles, as an example for the LR in the 19th century.\(^{58}\)

Registration was obligatory and constitutive, both for mortgages and for proprietorship in the Saxonian law of 1843.\(^{59}\) The constitutive entry for proprietorship was a novelty which rapidly found successors in the German land registration legislation.\(^{60}\)

The LR was open to those with a justified interest and the good faith in the entry was protected by the possibility to achieve proprietorship from the entered proprietor notwithstanding a real proprietor.\(^{61}\) Speciality and legality followed the example of the Bavarian Mortgage law of 1822.\(^{62}\) It also enacted a real folio.\(^{63}\)

ee) The “new” Prussian system of 1872

A prequel to Prussian law reform in land registration legislation was the law of 1853. It should have corrected the paralysing slowness of the legality principle in the Prussian codifications of 1783/1794, which seemed behind the times in an industrialised country.\(^{64}\) Unfortunately for the law reform, the law of 1853 was nothing more than an amendment and remained mostly unappreciated in the development of land registration legislation.\(^{65}\)

59 Art. 2–4, 37, 50 Saxonian Grundbuch and Mortgage law 1843.
61 Art. 21s. Saxonian Grundbuch and Mortgage law 1843.
63 Art. 168ss. Saxonian Grundbuch and Mortgage law 1843.
64 Mascher, Das deutsche Grundbuch und Hypotheekenwesen, 1869, p. 141.
65 Mascher, Das deutsche Grundbuch und Hypotheekenwesen, 1869, p. 141.
An unbroken commitment to reform carried out diverse reform projects in Prussian land registration between the unsuccessful amendment of 1853 and the “new” system in 1872.\(^{66}\)

Finally, taking on effect the 5\(^{th}\) May 1872, a new Prussian land registration was enacted and the reform movements in Prussia found its successful completion.\(^{67}\)

It followed the Prussian tradition of separating the more formal aspects from the aspects of material law and consolidated this dichotomy for the further law reform.\(^{68}\) The successor of the AHO 1783 was the Grundbuchordnung 1872 and the successor of the material law regarding real property in the ALR 1794 was the Law on Property Acquisition and rights on property 1872.\(^{69}\)

The registration principles were enacted in perfection as most of the critiques attested.\(^{70}\) Proprietorship and mortgages were registered in an obligatory and constitutive manner, such as seen in the Saxonian law.\(^{71}\) The Speciality and the real folio were enacted as well.\(^{72}\) Following the Prussian tradition of Publicity, the LR was only open for those with a legal interest.\(^{73}\) A good faith protection was mentioned in the Law on Property acquisition and rights on property 1872 but somehow hidden in a paragraph because of fierce debates in the legislation process.\(^{74}\) The third party in good faith should be able rely on the accuracy and integrity of the LR.\(^{75}\)


\(^{67}\) *Hedemann*, Sachenrecht, 1924, p. 262.


\(^{70}\) *Hedemann*, Sachenrecht, 1924, p. 262.

\(^{71}\) Art. 1, 18 Prussian Law on Property acquisition and rights on property 1872; *Förster*, Preußisches Grundbuchrecht, 1872, p. 82.

\(^{72}\) Art. 23 Prussian Law on Property acquisition and rights on property 1872; Art. 10–12 Grundbuchordnung 1872.

\(^{73}\) Art. 19 Prussian Grundbuchordnung 1872.


\(^{75}\) Art. 9 Para. 2 Prussian Law on Property acquisition and rights on property 1872.
Another point of contention was the principle of legality. In its final form, the principle consisted of a proof whether the vendor or creditor was registered and whether he had authorised a modification in the LR. The validity of the sales contract was explicitly not part of the evidence. However the conveyance contract, the so-called “Auflassung” was to be examined. This conveyance contract was to be made in front of the registrar, so that a proof of the conveyance would not impose great delay because the registrar would have proved the authenticity.

d) Land Registration in the German Civil Code and the German Land Registration Act 1900

Finally, after many years of law commissions and open debates, in 1896 and 1897 the German Civil Code (BGB) and The German Grundbuchordnung were completed. The unified German legislation was enacted on the 1st January 1900 and followed the Prussian dichotomy with the formal law in the Grundbuchordnung and the material law of real property in the BGB. Also in various other aspects the Prussian legislation served as an example for the unified German legislation.

The registration principles, as displayed by the Prussian laws of 1872 and with respect to other German territories, were enacted in the German legislation of 1896/7. Registration in the LR meant the obligatory-constitutive entry of proprietorship, mortgages and any other rights in real

77 Art. 46 Prussian Grundbuchordnung 1872.
78 Art. 46 Para. 2 Prussian Grundbuchordnung 1872.
79 Art. 2 Prussian Law on Property acquisition and rights on property 1872.
property.\textsuperscript{84} Publicity stood for good faith protection. Any third party was protected concerning the accuracy and integrity of the LR.\textsuperscript{85} The LR was open to those with a justified interest.\textsuperscript{86}

The principle of legality followed the Prussian system of 1872 and consisted therefore of a mere proof whether the modification was authorised by the vendor or creditor.\textsuperscript{87} In the case of a conveyance the agreement had to be proved.\textsuperscript{88} That again was fairly simple because the conveyance had to be executed in front of the registrar.\textsuperscript{89}

The speciality was given because the mortgages had to denominate the exact sum of money and the plot of land that should be charged.\textsuperscript{90} The real folio was generally executed.\textsuperscript{91}

e) Contemporary German Land Registration

The stability of the rules of Land Registration in Germany since 1900 are due to the great amount of experience which was taken into consideration when making the rules of the BGB and the GBO.\textsuperscript{92} Therefore the legislation on real property and the Grundbuch remained mainly unchanged since their enactment in 1900. Registration is still in Art. 873, German Civil Code, the good faith protection still in Art. 892, 893, German Civil Code and the speciality still in Art. 1115, German Civil Code.

Legality is still in Art. 19, 20, German Grundbuchordnung and only the formal publicity moved from Art. 11 to Art. 12, German Grundbuchordnung.

Doctrinal changes or political and economical reforms did not revise real property law. The discussion of the 19th century remained formative in real property law and the registration principles proved themselves to great extent.

\textsuperscript{84} Art. 873 German Civil Code 1900.
\textsuperscript{85} Art. 892, 893 German Civil Code 1900.
\textsuperscript{86} Art. 11 German Grundbuchordnung 1900.
\textsuperscript{87} Art. 19 German Grundbuchordnung 1900.
\textsuperscript{88} Art. 20 German Grundbuchordnung 1900.
\textsuperscript{89} Art. 925 German Civil Code 1900.
\textsuperscript{90} Art. 1115 German Civil Code 1900.
\textsuperscript{91} Art. 3 German Grundbuchordnung 1900.
\textsuperscript{92} Staudinger/Gursky, Version 2012, Introduction to § 873 BGB No. 10;
3. Agreement between the parties

a) The “Auflassung”

The second part of Art. 873’s dualistic system is the agreement between the parties. In the case of legal rights such as encumbrances, there are no special formal requirements in the BGB. Due to the legal abstraction between the obligatory contract, such as the sales contract, and the acquisition, the agreement under Art. 873 has to be valid in itself after the general rules of validity.

For the transfer of ownership of real property, Art. 925 BGB imposes the necessity of a notarially certified agreement. In the German Civil Code the agreement on the transfer of the proprietorship between the parties is called “Auflassung”. It is necessary that the parties agree in front of a public notary about their will to convey a plot of land which has to be defined by them.

The idea and etymology of the Auflassung came from medieval times, whereas the legal content of the figure was mainly developed in the 19th century by German lawyers.

b) Historical perspective of the “Auflassung”

In the BGB of 1900 the Auflassung as agreement between buyer and seller was executed in front of the LR office, being part of the regional courts. The idea behind that was that a transaction would be less prone to errors when it was done in front of the registrar who subsequently register the transaction. Nevertheless, there remained the possibility for the territo-

---

93 Staudinger/Gursky, Version 2012, § 873 No. 50.
95 Art. 925 Para. 1 Sentence 1 German Civil Code 2018.
99 Art. 925 in the version of 1900, Reichsgesetzblatt 1896, Nr. 21, pp. 342ss.
100 Hesse, Über die Auflassung, ihre Form und die für sie zuständigen Stellen, Deutsches Recht 1940, pp. 1032–1037; p. 1032s. naming also further sources.
ries to allow the agreement in front of a public notary of their territory. This was thereinafter executed in Bavaria after Art. 81 of the Bavarian adaption law of the German Civil Code. In the case of the Auflassung as well as in the case of the registration principles, the Prussian development lead the way. Prussia in 1918 allowed the Auflassung to be done in front of any Prussian public notary and in 1928 it allowed it to be done in front of any German public notary.

Under the German legislation of 1934, the legal unification was also carried out on the field of the Auflassung with the law on the unification of judicature on 16th February 1934 and the Order of 11th May 1934. Art. 1 § 1 of the Order of 11th May 1934 stated that every public notary should be competent to accept the Auflassung. To minimize the risk of a lack of a sale contract, the sale should be certified before or at the time of the Auflassung.

The German Civil Code remained unchanged until the law for restoration of legal unity in 5th March 1953. From that moment on, the German Civil Code stated that the Auflassung could be executed in front of the LR, any local court and any public notary. Although the Auflassung in front of the public notary was always the most common way of conveyancing, the legislator waited until the 28th August 1969 to specify that the Auflassung could be done in front of the public notary. The other possibilities, LR or local courts, were not forbidden by the new lay, but they were no longer mentioned in Art. 925 German Civil Code.
c) Contemporary discussion

On the 9th March 2017 the European Court of Justice clarified an important issue concerning the acceptance of non-notarial certificates.\textsuperscript{110} The Court stated prominently that

\begin{quote}
“2. Article 56 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which authentication of signatures appended to the instruments necessary for the creation or transfer of rights to property is reserved to notaries, and as consequently excluding the possibility of recognition in that Member State of such authentication carried out, in accordance with his or her national law, by a lawyer established in another Member State.”\textsuperscript{111}
\end{quote}

In Germany that could only be appreciated, because the importance of the role of the public notaries was traditionally accepted. It was seen as a crucial part of the registration system and an important factor in ensuring the legal certainty in conveyancing.\textsuperscript{112} The public notary resembles a “Gatekeeper”\textsuperscript{113} securing the Grundbuch.

It should not remain unmentioned that this ruling of the European Court of Justice can be put into the context of the German discussion whether foreign public notaries should be able to certify the Auflassung.\textsuperscript{114} That was rejected because of the complexity of the German real property law.\textsuperscript{115}

\section*{III. Conclusion}

It seems at first glance that the Grundbuch is the epitome of land registration systems. The impression is enhanced if one consults contemporary German legal work: Only the Grundbuch system can guarantee the total security of third parties being imperative for Real Property transactions.\textsuperscript{116}

\textsuperscript{110} European Court of Justice, C-342/15 (“Piringer”).
\textsuperscript{111} European Court of Justice, C-342/15 (“Piringer”), No. 72.
\textsuperscript{113} \textit{Waldhoff}, Notarvorbehalt im Grundstückverkehr europarechtskonform, EuZW 2017, p. 385.
\textsuperscript{114} \textit{Riedel}, Erklärung der Auflassung vor einem ausländischen Notar?, DNotZ, 1955, pp. 521ss.
\textsuperscript{116} Staudinger/Gursky, Version 2012, § 873 No. 2.
In the international comparison, the *Grundbuch* remained unmatched and was a great example for other legal systems.\textsuperscript{117}

That is of course a quite superficial outcome and should not be generalized. There definitely are other systems for the regulation of real property. What may be said is that the following of some key principles in registration are of great importance for a continuous legal system. The article showed briefly the long journey those registering principles undertook from the 17\textsuperscript{th} century to their current state in 2018. It is remarkable that in comparison to the activity of the legislator in the 19\textsuperscript{th} century concerning the LR, the legislator of the 20\textsuperscript{th} century remained nearly motionless. The state of the LR and the law of real property therein seemed to have reached a climax with the German Civil Code and the German *Grundbuchordnung* of 1900. Without judging other real property orders, one can candidly state the German *Grundbuch* is a finely working system and has been successful for the past century.