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THE PUBLIC AUTHORITY OF THE ACTS OF NOTARIES AND REGISTRARS IN MEXICAN LAW

LUIS CARRAL Y DE TERESA

*"A person cannot be
forced to have faith"*
—Saint Augustine

INTRODUCTION

When Saint Augustine spoke of faith, he used the word in its religious sense. Indeed it is in this sense that the word is normally understood by the public. Faith is self-imposed and self-ordered belief. With reason it creates two ways of arriving at truth. Behind this general or religious faith is authority of a subjective kind; behind the public faith to be discussed herein is another kind of authority. This is the objective authority of society that requires the acceptance as true and valid of acts done within its scope as the price for living within and benefiting from that society.

The most important part of this general public faith or authority is its legal aspect. In the legal sense faith may be defined as the acceptance of the truth of a statement or the validity of a document because it is supported by the authority of a rule of law. The authority depends not on the persuasiveness of the statement or document, but rather on compliance with the special requirements as set up by law.

The present number and complexity of legal relationships could not exist without protection, and such protection can be afforded only by means of lending an authority to documents which evidences those relationships. In effect, legal transactions are supported by the full public authority and faith given to such documents. It was thus that the system came into being whereby an official, the notary, was vested with the power to give documents the same authenticity they would have had if the state had participated in their execution.

PUBLIC AUTHORITY OF NOTARIAL ACTS

The notary is the depository of notarial public authority and faith. Thus a concept, faith, that began as simple belief has been converted into an official truth which all must believe. As the embodiment of this official truth the notary is indispensable in modern society which requires his validation of the numberless private actions creating, modifying or terminating legal relationships. His office, even more than that of the judge, helps society live within the law. His supervision keeps these many transactions up to a standard high enough to merit public support and protection.

In order to accomplish this, the notary must be a public functionary with powers granted by the state. He is not, however, a part of any branch of the government; this remains true notwithstanding the fact that the records of which he is custodian must be kept in accordance with strict administrative standards. His role is an independent one, unconnected with others of the public bureaucracy. His main function is to apply the law, but, in spite of his position, the state assumes no liability for his action. Every governmental officer is a public officer but not *vice versa*. The administrative officer protects the interests of the state, not the interests of private citizens; the notary, although he protects the state which granted his authority, also defends the private interests entrusted to him by his clients. In this respect the state does not pay the notary. As a professional he is free to organize his office and administer it as he desires. He bears complete responsibility and risk for the manner in which his notariat is run. He competes on the sole basis of merit for clients who are free to select any notary of their choice.

Compared with the judge, it may be said that the notary acts where there is a "meeting of the minds" while the judge acts only when parties disagree. The notary acts preventively, the judge compensatorily. The notary intervenes where there are individual or interrelated interests to be secured, while the judge intervenes in situations where interests clash. The notary helps the parties properly express and evidence their will while the judge deals with the final consequences of previous acts. The judge can substitute his will for that of the parties; the notary cannot.

How, then, did such far-reaching powers come to be vested in notaries? How could the state be certain that those exercising this unique power would be the proper persons? From the first two articles of the new Law of the Notariat in force in Mexico City, this definition may be taken:

A notary is a member of the legal profession vested by the state with public authority and faith. As a matter of public policy the executive power imposes on him the duty to provide the proper form, authenticity and solemnity for the facts, transactions and documents of all interested parties and to give them the absolute assurance that what has been done for them has been in accordance with the law.¹

In view of this position, the notary is subject to public control. The most significant features of such control are: in the Federal District only a limited number of notaries will be permitted to practice, at the present time 134²; he must reside at the place of his official seat³; to be admitted as aspirant to the notariat, the applicant must be a Mexican by birth, at

1. LAW OF THE NOTARIAT (Ley del Notariado), art. 2.

2. *Id.*, art. 90.

3. *Id.*, art. 93.

least 25 but no more than 70 years old; he must enjoy all civil rights, and be and have been of good reputation and not a member of the clergy; he must be a lawyer with his license registered and have practiced in a notarial office for eight months without interruption; he must not suffer from any chronic disease or disorder which might impair his mental faculties nor have any physical defect inconsistent with his notarial activities; finally, he must pass the examinations as required by law.⁴

In order to obtain a notarial license (*patente*), it is necessary to submit proof of being registered as a notarial aspirant and proof that the aspirant has none of the impediments listed in Article 128. It is also necessary that there be a vacancy in a notarial seat. Finally, the candidate must receive the highest grade on a competitive examination which consists of a practical case and an essay type problem judged by a specially appointed committee. This committee decides which of the candidates has won the competition.⁵

All these strict requirements would be superfluous if the notary were a mere authenticator and recorder. However, his function is not only that of accepting the parties' instructions and reducing the instructions to proper instruments; he is also their legal advisor, helper and adjuster. This broader class of notarial duties is exercised in various ways. The following are the most significant: (a) In his *directive* function the notary acts as counselor, expert and adjuster. By his authority, the notary advises clients and acts, in many cases, as a mediator trying to adjust opposing interests. (b) Out of the fulfillment of his directive capacity emerges the notary's *formulative* function. In this stage, the notary is not creating acts, but rather molding them into correct, and in many situations, legally necessary forms. In so doing, the notary has to consider the nature of the underlying transaction and its legality. This scrutiny may cause the notary to withhold his professional services if he finds that the act or the aim of the act is in violation of the law. (c) Finally, in his *authenticating* function he endows transactions evidenced by his acts with a presumptive validity for all juridical transactions. This authority, it will be recalled, stems from the public power delegated to him. It is in this aspect of his work that the notary reflects the classical idea of the public instrument. Of all the notary's activities this is the thing he does most often.

According to Article 327 of the Code of Civil Procedure for the Federal District, public documents are, first of all, formal instruments or certified copies (*testimonios*) thereof issued in accordance with the law. Article 32 of the Law of Notariat states that a "formal instrument" is the original instrument which the notary enters in his record (*protocolo*) in order to validate it as a juridical act. Article 14 provides that such no-

4. *Id.*, art. 97.

5. *Id.*, art. 116.

tarial record consists of books and volumes into which the notary inscribes such formal instruments together with the notarial acts which accompany them. These books come in standard sets of ten and must be used by the notary—in rigid order—by both the date and number of the formal instrument entered therein. All of this technical control, plus the notarial capacity and ethics, guarantees the authenticity of the dates as well as the content of such instruments.

Public instruments constitute full proof. According to Article 411 of the Code of Civil Procedure, their effect will not be impaired by the fact that the claim arising out of them is open to exceptions. Public instruments, acts and attestations are also full proof that the parties freely entered into the act contained in the protocol. The instrument proves that they made the statements and did those things which the notary verifies with his public faith or authority and that he properly observed all legal formalities mentioned. The instrument can only be impeached for falsity in a special proceeding and loses its validity only when such action has been terminated.⁶ Notaries are personally responsible for delicts and faults in the performance of their duties. They have to answer in criminal or civil courts or even in administrative proceedings, as the case may be, and the state may punish them by warning, fine, suspension or removal from office.

PUBLIC AUTHORITY OF REGISTERS

Before entering into a discussion of the authority and faith due public registers, an explanation of the importance of the notariat with respect to real property transactions is in order. It is to be kept in mind that in Mexico the notary is responsible for the validity of the title to property involved in his acts^{6a}. The Law of the Notariat imposes upon him the duty to refer back at least to the title of the predecessor and to cite it according to the Public Register. The notary is thus closely linked with the activities of the registrar. This is especially true in that both officials are invested by the state with a similar public authority and faith.

The title of the Civil Code concerning registers deals mainly with what may be termed legal intercourse in things, i. e., with different modes of acquiring interests in land. It regulates the transfer of title from one party to another and, consequently, the acquisition, transfer and abandonment of interests listed in Article 3022 of the Civil Code. Consequently, this branch of law does not concern itself with the content of such interests; this latter area is controlled by general principles of the Civil Code.

Legally important acts are made public, under the Mexican system, by recording them in a set of books which list pieces of land as well

6. *Id.*, art. 75.

6a. *Id.*, art. 34, par. (3).

as interests in the land. Two main types of registers exist: one, the personal folio or record where the names of persons holding interests in land are listed⁷ and, two, the real folio or record, where pieces of land are listed together with interests in them⁸. In Mexico, the system of real folios prevails. Inscriptions there are effective only against third persons.

Registers of real property are common to all modern nations. The variances which exist stem from basic legal principles within the particular systems. The most fundamental principle of all is that stability and protection of ownership of land and other interests in land is dependent upon some kind of recording of such interests in registers. These are the fundamental principles as adopted in Mexico:

(a) *Principle of inscription.* The term inscription means any entry made in the register as well as the act of making it. Valid interests may be created without inscription but through inscription with its power of legitimation and public authority the interests acquire a greater strength and protection.

In Mexico, aside from exceptions to be discussed later, the inscription has no creative effect. Registration only gives notice of the underlying act which may or may not have established, by its own force, the interest so inscribed. Therefore, the Mexican system of registration is termed declaratory and, as such, without effect as between parties. On the contrary, it protects third parties since non-registered acts cannot affect interests of third parties except in their favor.⁹

(b) *Principle of speciality.* This principle, sometimes also called that of determination, imposes upon parties the duty to identify precisely the piece of land, the nature of the interest to be created in it, and the person entitled to exercise it. All this may be done only if pieces of land are registered as independent entities.

(c) *Principle of consent.* An inscription in the register may only be made with consent of the one having an interest in the particular land which would be affected. Therefore, inscription may be said to be the product of agreement between parties. And since no one can dispose of an interest who does not hold it, only the real holder of the interest may validly consent to an inscription.

(d) *Principle of sequence.* This is a principle of continuity. Accordingly, the entries in a register must form a chain properly connecting the predecessor and his successor in the interest so that every transfer or extinction of the interest involved is effectuated by consent of the predecessor,

7. A registry similar to the Grantor-Grantee Index in our common law jurisdictions.

8. This registry is the equivalent of the Tract Index known in our common law jurisdictions.

9. CIVIL CODE, art. 3003.

except, of course, in the case of the original holder. From this principle follows, on the one hand, the possibility of inscribing interests derived from the one holding such interest, and, on the other, the impossibility of inscribing interests not so derived. This claim or order of title principle is the one that keeps the world of registry in line with the real world.

The new Article 3019 of the Civil Code has formulated this principle as follows: "in order to inscribe . . . an interest, there must exist a previously inscribed interest in favor of the one who grants the inscription or who may be affected by the same . . ." In order to be effective, the chain must have no missing links.

(e) *Principle of application.* The registrar may inscribe an act and, by so doing, change the interests appearing on the face of the register only if there is an application for such inscription and never ex officio. Private parties involved must apply for the inscription according to Article 3010 and 3018 of the Civil Code.

(f) *Principle of priority.* This principle is intended to cope with situations where simultaneous and contradictory interests in land are submitted for inscription. The conflict is solved simply by relying upon the old maxim "*prior tempore potior iure.*" This means that the earlier applicant will prevail. This rule is expressed in Article 3013 of the Civil Code: "Between real rights in the same piece of land or in interest therein preference shall be given the one that had priority of inscription in the register regardless of the sequence of the dates when such interests were created."

It is obvious that a conflict can only arise if two deeds involve the same piece of land and the same interest. The most frequent example is the double sale. According to Article 2266 of the Civil Code, the sale first registered will prevail. The deed concerning the other sale, although executed before the one already inscribed, will be denied inscription in view of Article 3009 of the Civil Code which provides that identical interests in land cannot be inscribed "in favor of two or more different persons except they hold such interests in common." In the case of mortgages there is an incompatibility, not a complete head-on collision as in a case where two deeds grant the same interest to two different persons. In the case of a mortgage, the inscription of one does not preclude the inscription of another since they are not mutually exclusive. Being inscribed according to the moment of their filing, their rank (priority) is well established.

Examining further the case of a double sale, it is well established that the one who purchases after the first, and omits inscription of the deed, acquires nothing since the property ceased to be the seller's as a consequence of the first inscribed sale. Of course, if the second purchaser would have his interest inscribed prior to the first, he would "prevail over the latter."¹⁰

10. *Id.*, art. 2266.

(g) *Principle of legality.* The idea behind this principle is to make reality match the status as evidenced by the register. This may be achieved best if invalid or defective deeds are not permitted to be inscribed in the register. Therefore, they are scrutinized before inscription in order to determine whether or not they have defects which would prevent or temporarily delay their inscription. The investigative intervention of the registrar is termed *regstral qualification (calificacion regstral)*.

(h) *Principle of legitimacy.* It has already been mentioned that the register may show a state of affairs which does not correspond with that which exists in fact since, to a certain extent, interests in land may be acquired, modified or extinguished outside of the world of the register. It may even be said that two different worlds develop; one in real life, the other in the register.

Where these two worlds match, there are no problems. Difficulties arise when they differ. Which is to prevail? Statistics show that divergencies are the exception and conformity the rule. In view of this, two principles appear to be justified: that of a presumption in favor of the register (principle of legitimacy), and the other of *regstral full authority and faith* designed to protect anyone who relies upon the register although the status shown by it may not be the true one. The principle of legitimacy is now expressed by Article 3010 of the Civil Code which provides that an inscription interest is presumed to exist and that it belongs to the one shown by the inscription.

It is clear that this principle cannot exist in a system of registers where inscription is one of the requirements for the very creation of interests in land. It can only operate in a system where such interests arise on the outside and must acquire through inscription the presumption of regularity and validity in favor of the one who appears from the register to be the holder of the interest. This presumption is not absolute but may be overcome by evidence of falsity. Until such falsity has been declared, however, the register still controls.

(i) *Principle of regstral public authority.* This principle also arises out of the fact that the register may differ from the true facts. To overcome this dangerous dualism, the principle of full public authority is adopted to make the register, although incorrect, prevail in certain situations over the extra-regstral reality. In Mexico, generally, interests in land come into being outside of the register; their inscription in the latter only puts everyone on notice, except for falsified deeds which are not validated by their inscription.¹¹

This is the rule. However, in exceptional cases, particularly where the traffic in such interests must be protected, inscriptions are given a substantial effect. According to this rule, the inscribed holder of an interest in land can dispose of it even though he is not really the owner. Article 3007 of the

11. CIVIL CODE, art. 3006.

Civil Code provides that "[n]otwithstanding provisions in the previous article, deeds and contracts granted or entered into by persons who, according to the register, appear to be entitled to dispose of them, will not be held invalid in regard to third persons acting in good faith, once [such deeds or contracts] are inscribed, regardless of a subsequent annulment or extinction of the interest of the grantor because of a pre-existing non-inscribed interest or on grounds not shown by the register"¹²

In the light of this statutory provision the following requirements for protection because of inscription may be listed: (a) that the interest of the grantor is inscribed; (b) that the grant arises out of such inscribed interest through a valid contract or other method of transferring it; (c) that the grantee inscribes his interest since protection will not be given without inscription; (d) the defect in the power of the grantor must stem from the existence of a "previous interest not inscribed or grounds not evidenced by the register"; (e) that there is good faith on the part of the grantee, i.e., that he had no notice of the non-inscribed interest; (f) that the grant was for valuable consideration.

To be entitled to the protection given in Article 3007 of the Civil Code, it is necessary that the two contracts be so closely interrelated that the grantee in the first is the grantor in the second. The situations of Article 3006 and Article 3007 can be distinguished. In the former there is a void sale of property belonging to the grantor. Inscription has no effect on this transaction. If the nullity is declared between the parties, the property inscription returns to the grantor. In the latter there is a valid sale of property which does not belong to the grantor but which is inscribed in his name in the register. If this Article 3007 sale follows the Article 3006 sale before nullity is declared, the acquiring third party prevails the moment he in turn inscribes. This is the true meaning of public authority and faith of the register.¹³

12. This provision is not applicable to gratuitous contracts.

13. It should be pointed out that contracts violating express legal prohibitions of public policy are not only not protected by art. 3007, but are not even inscribable. See art. 302, section IV of REVISED DRAFT OF THE CIVIL CODE.