

Notarial Duties and Functions

Lecture Title: Practical Skills for a Notarial Office Assistant

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**Undergraduate Certificate in Notarial Law
Fundamentals for Office Assistants**

Registration of Acts and Titles:

A notarial act is deemed to be complete once it has been **published** and **signed** by the appearers, witnesses and the notary (**article 43 of Chapter 55**). Once a notarial act, with the exception of a will, is executed, it qualifies as a **public deed** and **becomes subject to public domain** and it shall **not be lawful to make any alteration thereto (article 44 of Chapter 55)**.

If the notary fails to register the act within 15 days, although the act is valid *inter pares*, it shall not be valid *erga omnes*. In such a case, the notary would be liable to a penalty.



Up until 1982, the only registry present in Malta was the Public Registry. In 1982, a second registry, namely the Land Registry, was established. While the Public Registry deals with the registration of **acts**, the Land Registry deals with the registration of titles to **land**.



Types of Registry

Public Registry (*Insinwa*)

- The registration follows a personal system (*nominatim*)
- Based on name and surname
- Registration of the Notarial Act (not the property)

Land Registry (*Cadastre*)

- The registration follows a real system (*res*)
- Based on map geo-location
- Registration of the title to the property



Land Registry:

- *main focus is the property*

Public Registry:

- *the focus is on the parties*



Public Registry

The Public Deed

Article 1232 (2), CC:

A public deed is an instrument drawn up or received, with the requisite formalities, by a notary or other public officer lawfully authorized to attribute public faith thereto.



Instances where the law requires Public Deed:

- Consensual personal separation (Article 59 CC)
- Usufruct (Article 330(1) CC),
- Use and Habitation (Article 390 CC)
- Partition of Immovables (Article 499(1) CC)
- Marriage Contracts (Article 1245 CC)
- Sale of Immovable Property (Article 1363(1) CC)
- Emphyteusis (Article 1497 CC)
- Lease for more than 16 years (if conditions resemble Emphyteusis) (Article 1498 CC)
- Donations (Article 1753(1) CC – as qualified by 1753(2))
- Conventional Hypothecs (Article 2025 CC)



... shall not be operative as against third parties before the deed is registered in the Public Registry, upon the demand of any of the interested parties, or of the notary before whom the deed was executed. The note for the registration of the deed shall be drawn up as provided in subarticle (2) of article 330.



Article 996 CC

Nevertheless, with regard to third parties any contract conveying the ownership of immovable property, or any right over such property, shall, in no case, commence to be operative until it has been registered in the Office of the Public Registry, as provided in article 330.



Article 239 of the **COCP** states that:

- Any judgement by which an act having the effect of transferring the ownership of immovable property or of any other right thereon is dissolved, rescinded or revoked
- Any judgement which directly pronounces the transfer of immovable property or of any other real right thereon

has to be registered in the public registry for it to be operative in relation to third parties.



- **Article 50, NPNA deals with 4 Categories of Acts:**
 - 1. Actual transfer of immovable property or the transfer of real rights over immovable property**
 - 2. Declaratory acts regarding immovable property**
 - 3. Public wills**
 - 4. Acts of settlement of property into trust**



The main consequence of enrolment in the Public Registry is that **third parties are considered to know that the transaction has taken place and the act would then be deemed to be valid erga omnes**



Note of Enrolment (Insinwa)

Article 50, NPNA:

(2) The said note must contain the **date** and **nature** of the act, the **designation** of the parties in accordance with article 28(1)(c), a precise designation of the things forming the **subject-matter** of the act in accordance with article 28(1)(f), and, in the case of an act in which the **value** can be determined, an indication of such value.

Therefore:

1. Date and Nature of the Act
2. Details of the Parties
3. Description of the subject matter
4. Indication of the value



Article 5, PRA:

(3) A note for the enrolment of an Act or for the registration of a cause of preference and any note of reference to the same shall be typewritten or printed in dark, clear, easily legible and indelible characters, on paper authorized by the Director; and there shall be deposited at the Public Registry, together with the note, a clear copy thereof.

(4) No note, whether for registration or enrolment, shall contain any figures or numbers which have not at least in the first instance, been written out in words, and no correction shall be made in any such note.

(5) The person who signs any note or copy referred to in this article shall, next to his signature, print, stamp or write in clearly legible letters, and in case of handwriting in block letters, his name and surname, and his professional capacity or, in the appropriate case, his capacity of creditor or debtor.



HYPOTHECS, PRIVILEGES AND NOTES OF REFERENCE

What is a hypothec?

Article 2011(1) CC

A hypothec is a right created over the property of a debtor or a third party for the benefit of a creditor as security for the fulfilment of an obligation.

Such hypothec may also be **general** or **special**. While the former affects all the **present and future property of the debtor**, the latter only affects **one or more particular movables or immovables**



A special hypothec is **created by a notarial act** and **does not arise *ex lege***. **Article 2033(1)** of the **Civil Code** states that a hypothec, whether (i) **legal**, (ii) **judicial** or (iii) **conventional** is **ineffectual unless it is registered in the Public Registry**, and shall rank from the **date of registration**.

Article 2016 provides that if the creditor of a debt secured by a general hypothec believes that his rights are not adequately secured, he may register a special hypothec over the movable or immovable concerned as further security.

While special hypothecs over movables and immovables shall continue to attach whatsoever transfer takes place, a general hypothec ceases to exist if the property passes into the hands of a third party.



A privilege is created ex lege.

A hypothec can be created by operation of the law, through a judgement or by contract



Article 2029, CC: Special privileges over immovables and over those movables as specified in articles 2002(2) and 2012(1)(b) are ineffectual unless they are registered in the Public Registry within the time of two months.



Article 2033, CC: *(1) A hypothec, whether legal, judicial, or conventional, is not effectual unless it is registered in the Public Registry, and it does not rank except from the date of its registration.*

Article 2093, CC: *Hypothecs registered on the same day confer on the creditors an equal rank, without any distinction between registrations made at different hours of the same day.*



Article 2042, CC:

For the purposes of registration, there shall be presented to the Director of the Public Registry a note containing the following particulars:

(a) the details of the creditor

(b) the details of the debtor

(c) the cause of the debt or other claim, and the date and nature of the act creating such debt or claim;

(d) the amount of the capital due, or the amount stated in the cases referred to in article 2027; (in cases of conventional hypothecs parties agree amount up to which debtor will be granting security against liability for damages)

(g) an indication as to whether the registration is demanded for privilege or hypothec, and, in case of hypothec, whether it is general or special;

(h) in case of privilege or special hypothec, an indication of the immovable and movable charged with such privilege or hypothec.



Article 52, NPNA:

(1) Notwithstanding any covenant to the contrary, every notary must register in the Public Registry, within one month from the date of the relative act, unless registration shall have been made on the demand of other persons any assignment, subrogation, reduction or cancellation of a hypothec or privilege, provided that in the case of a privileged debt not yet registered the term specified in this sub-article shall run from date of registration of such debt.



Registration of Notarial Acts

- Deeds received by Notary residing in Malta relating to property in Malta – **registration in Malta**
- Deeds received by Notary residing in Malta relating to property in Gozo - **registration in Malta and Gozo**
- Deeds received by Notary residing in Gozo relating to property in Malta – **registration in Malta and Gozo**
- Deeds where a hypothec is constituted against a debtor residing in Gozo – **registration in Gozo**
- Deeds where a hypothec is constituted against a debtor residing in Malta or anywhere else except Gozo – **registration in Malta**





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Land Registry

The Land Registry Act, CAP 296

Act XXXV of 1981 was modeled on the 1925 Land Registration Act of England and Wales



The Ideal Characteristics of a Land Registry:

Ideally, a Land Registry should have three features. The **Mirror Principle** dictates that a transfer is not valid unless the purchaser registers the title in the Land Registry within the time specified. The Mirror Principle is termed so, as once the title has been registered, the person registering, is deemed to be the owner of the land registered.

Secondly, there is the **Principle of the Indefeasibility of Title**. This principle suggests that once the Land Registrar has issued a title, that title, in an ideal system, cannot be challenged. Although this is general belief under Maltese law, the Land Registration Act an exception does exists as the register may be rectified.

The third principle, the **Principle of Indemnity**, provides that if the Land Registrar makes a mistake, indemnity supported by an Insurance Government Fund should be offered.

Although a system embracing all three principles is probably not found in any place in the world, any Land Registry is usually inspired by such principles.



The land registerable in the Land Registry

Article 2 explains that the term land *“includes building and any other construction or works”*. Until 1995, the only properties which could be registered in the Land Registry were those based on compulsory registration or those specified by some special law such as the 1992 Ecclesiastical Entities (Properties) Act. In 1995, a new concept, namely that of Declaratory Registration Areas, was introduced.

This implies that at present we find:

- 1) **Compulsory Registration Areas**
- 2) **Declaratory Registration Areas**
- 3) **Areas which require registration due to some special law, such as the 1992 Ecclesiastical Entities (Properties) Act**



1) Compulsory Registration Areas

Article 2 states that a compulsory registration area comprises any area in the Maltese Islands declared to be such by the Minister under article 10 and any area deemed to be such by or under any other law.

Article 10(1) provides that:

“The Minister shall, from time to time, by order in the Gazette, declare areas in Malta to be registration areas, and shall define such areas by reference to a map included in the order and in such other manner that he may deem appropriate



2) Declaratory Registration Areas

Article 2 defines a declaratory area as any area in Malta declared to be such by the Minister in virtue of articles 15 and 16

The Minister may make such order either:

- With reference to a particular area defined by means of a map (This implies that the Minister may, for instance, order that the University of Malta [which is part of the Msida zone] is to be registered).
- With reference to a person or a group of persons (Such as band clubs or NGOs for instance).
- With reference to the nature of the right in or over the land (The Minister may, for instance, order that in the event that the utile dominium of any property is acquired, the direct owners are to register their right within a year).



Essentially, the difference between compulsory registration areas and declaratory registration areas is that while in the former the owner of the property is under **no obligation whatsoever** to register the property **unless certain events take place** (specified in **articles 12 and 14**), in the latter **the Minister** establishes a **time period**, which shall in no case be less than that of **3 months, within which the relevant person is to register the property concerned, the failure of which will lead to the penalty established in the order.**



3) Special Laws

Certain special laws may also stipulate the registration of land. The most important law in this context is the **1992 Ecclesiastical Entities (Properties) Act**. Article 5 of the latter act provides that where property has been transferred by the Roman Catholic Church to the State, the Joint Office is obliged, in the name of the Government of Malta, to register the property transferred.

Moreover, article 5 provides that the Joint Office also has the obligation, in the name of the Ecclesiastical Entity, to register immovable property which was retained by the Ecclesiastical Entity in the Land Registry.



Article 21(1) LRA:

On the application for first registration of land, charge or other registerable right, whatever the title under which such land, charge or right has passed to the person applying for registration, the Registrar shall issue to that effect a certificate for the title to that land, charge or other registerable right, according to the title under which the land, charge or right has passed to that person.



Article 25 (LRA): the following persons only may be registered as proprietors of land –

1. the owner, a trustee, the dominus, the emphyteuta, the bare owner, the usufructuary;
2. the person in whom the absolute possession of the property of an absentee and the absolute exercise of the rights depending upon his death have been granted by a judgment or order of the court; and
3. the competent authority holding land in use and possession or on public tenure, or any assignee of such rights, and the person entitled to the acquisition rent or the recognition rent:

Provided that the holder of a legal usufruct may not be registered as proprietor, but may have his interest protected on the register.



Article 21(3) (LRA)

... where land is registered, it shall be deemed to have been so registered with effect from the date on which the application for registration has been **entered in the daybook**

Article 23 (2) (LRA)

... the Registrar shall, unless an application for the interruption of prescription or other caution having the same effect has been lodged, convert the title into a **guaranteed title** on the lapse of ten **years from first registration**



The provisions of the Land Registration Act relating to compulsory registration areas only come into play when there is a transfer of land or of rights pertaining thereto, namely

- In the case of **transfers inter vivos**
- In the case of **transfers mortis causa**
- In the case of **voluntary registration**



In the case of **transfers inter vivos**:

Article 12(1) (LRA) states that in any registration area –

-every **contract** conveying the **ownership of immovable property**, or any real right over such property; and

- every **judgment** [relating to transfer of immovable property]; and

- every conveyance of immovable property by **judicial sale**, and every **redemption of groundrent** effected in accordance with article 1501 of the Civil Code,

[...] shall, in no case, commence to be operative, with regard to third parties, until and unless the title to the land conveyed or affected, whether beneficially or adversely, by any contract, judgement, judicial sale, redemption or hypothec as aforesaid, is registered in the day-book in the manner prescribed



In the case of transmission *causa mortis*:

Article 12(1) (LRA):

On the opening of the succession of any person, the title to land comprised in the transmission and situated in any registration area shall [...] be registered in the name of the persons in whose favour such land may have passed and any disposal or partition of such land or any dealing therewith shall not be entered into before the title thereto has been registered [...]



In the case of **voluntary registration areas**:

Article 17(1) LRA:

Subject to such conditions and procedures as may be prescribed and without prejudice to the provisions of article 12(2) and of article 14(2), the registrar may, in his discretion, and either on his own initiative or on an application in that behalf, register the title to any land, whether such land is or is not in a registration area; and in any such case he shall make such entries as may be appropriate.



The plans presented at the Land Registry should be appropriately marked by an architect, illustrating the exact site, the nature and the extent of the applicant's rights by using the following colours:

- **Red** – To indicate that the applicant is the owner
- **Yellow** – To indicate any common parts
- **Green** – To indicate the parts subject to servitudes and other third party rights
- **Brown** – To indicate any servitudes which are specified
- **Blue** – To indicate any other rights not mentioned above



Where should registration take place?

Where should registration take place?

General hypothecs

always registered in the Public Registry

Special hypothecs and Special privileges

depends on whether the land has been registered or not



General hypothecs - always Public Registry

Special hypothecs and special privileges

- if in registration area = Land Registry
- if not in registration area = Public Registry



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