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Mortgage Registers and Mortgage Council in the Kingdom of Poland

SUMMARY

The author analyzes the institution of Mortgage Registers appearing in the Kingdom of Poland. In this paper, there is the analysis of the legal act from 1818, which provided the obligation of keeping the Mortgage Registers for a larger property.

These are laws that cover subject to entry, the issue of the priority of rights and the effects of the registration in the Mortgage Council. Additionally, the paper concerns the issue of the construction of the Mortgage Registers. A description of magistracies mortgage system and the competent authorities, which include the Commission and the Departments of Land Court – are also provided.

The analysis has been extended by the case law of the Supreme Court of the interwar period.

Key words: Mortgage Registers, Mortgage Council, property.

I. Initial remarks

Registers of real estate are known since ancient times¹. Owing to the particular importance attributed to transactions of real estate throughout the history of the development of law, there were various types of real estate registers, as well as titles of their properties. It was caused by the need to provide safety of legal transactions in this respect. Such registers functioned under different names. At present, the legislator for the determination of the real estate register

¹ For more information about historical real estate registers development, see: T. Stawecki, *Rejestry nieruchomości, księgi hipoteczne i księgi wieczyste od czasów najdawniejszych do XXI wieku*, "Studia Iuridica" 2002, Vol. XL, p. 167 and n.

uses the name land and mortgage register (KW)². It is indicated that they constitute a guarantee and basis for safety in the real property market³. This name stresses the durability of this register because, as it results from its wording, files comprising this register are not subject to destruction after a certain time⁴.

However, in the legal circulation, there were other names of such inventories of real estate. The district law of the Prussian partition area and the territory of Austria used the term "land register" which indicated that they are conducted for real estate⁵. For determination of real estate there was also used the term books Mortgage Register. It paid it attention to the basic function of this register which in these times was to protect credit⁶. Such a name was used in the act of 26 April 1818 – Law on determination of ownership of real estate, privileges and mortgage in place of title XVIII. book 3 of the Civil Code⁷.

In the act and in the Act of 1 June 1825 – Law on privileges and mortgages⁸ many regulations were concerned with privileges on real estate and mortgage and its types. These issues remain, however, beyond the scope of this paper.

The main objective of this paper is to present the institution of mortgage registers in a historical perspective. The analysis of legal acts, described above, will allow the presentation of conclusions regarding the mortgage registers. The issue is current, according to significant mortgage register reform in Poland in recent years. Historical analysis is an important part of the preparation of amendments to existing provisions, and as a consequence, allows the evaluation of the reforms, which were introduced in recent years.

II. Law on mortgages from 1818

II.1. Introduction

Law on mortgages from 1818 constitutes an important contribution in regulation of liens relations in the Kingdom of Poland. The importance of registers

² According to Article 1, passage 1 of the Act of 6 July 1982 on land and mortgage registers and mortgage (unifrom text: Journal of Laws of 2001, No. 124, item 1361 with later amendments) land and mortgage registers are conducted in order to determine legal status of real estate; more details on the notion of Land and Mortgage Register see: P: Wancke, *Nieruchomości. Leksykon pojęć i definicji*, Warszawa 2007, p. 106–116.

³ P. Borkowski, J. Trzeźniewski-Kwiecień, *Wpisy do ksiąg wieczystych*, Warszawa 2008, p. 11.

⁴ J. Ignatowicz, *Prawo rzeczowe*, Warszawa 1977, p. 299.

⁵ Ibidem.

⁶ Ibidem.

⁷ Dz.P.K.P.of 1818, vol. 5, no. 21, p. 295 with later amendments: hereinafter referred to as Law on Mortgage of 1818.

⁸ Dz.P.K.P.of 1825, vol. 9, no. 40, p. 355.

of public real estate was considerable due to previous negligence in this respect, in particular there were no uniform registers of real estate of national nature lasting until the fall of the 1st Republic of Poland. The effectiveness of this Act expanded undoubtedly the confidence and safety of turnover. At the same time it enabled the development of mortgage protections as a result of uniform system of registration.

According to article 1 of the Mortgages Law from 1818 any activities between the living, the effect of which is to be the transfer of real estate, tightening, encumber, or release from this property should be, as a principle, concluded in offices suitable for the place of location of real estate. When the above requirement is not met it is impossible to enter a given right to mortgage registers. Upon entry, a specified title becomes a material right, while until that time it is only the personal law of the entity authorized.

Mortgage registers were regulated in Chapter 2 of the Act. The name mortgage registers indicated that the primary goal of keeping the books was credit needs⁹. In the opinion of J. Ignatowicz the organization of mortgage register on the basis of the Act of 1818 and 1825 was on a very high level¹⁰.

II.2. Rights subject to entry

The right of regulation of real estate property is gained by entering the purchase title into mortgage registers. It seems from this provision that the right to dispose the real estate ownership in an authorized manner begins no sooner than at the time of entering the purchase title into mortgage registers.

The principle of public faith of land and mortgage registers is regulated in Article 30 of the Mortgage Act of 1818, which indicates that the buyer is considered, in activities on real estate concluded with third parties, as a significant owner, after acknowledgment of the mortgage authority that the title of a buyer is not subject to charges. The principle is excluded in the case when concluding the activity with the owner entered in mortgage register knew that he/she is not the real owner. Then he cannot acquire any right at the expense of proper real estate owner. The same applies to a situation when the right of owner entered into the register is doubtful and the doubt was disclosed by entering into mortgage registers.

Connection or disconnection of affiliation should be provided in the mortgage register of the main property from which affiliation was detached or to which it was attached. Disconnection of affiliation cannot involve damage of creditors whose sum or right is secured in the entirety.

⁹ B. Barłowski, E. Janeczko, *Księgi wieczyste – rejestr nieruchomości*, Warszawa 1988, p. 6.

¹⁰ J. Ignatowicz, *Prawo...*, p. 297.

The value of goods, which results from documents may be entered into a mortgage list. The land and mortgage civil court is responsible for reliability of entry, rather than for reliability of the value of goods.

Also an obligation to disclose in the registers any tightening of real estate ownership, particular perpetual weights and ground servitudes were introduced¹¹. By **tightening** property in respect of real estate any limitations of the owner in disposal of the object of ownership are meant. Here, reference is made to perpetual lease, repurchase and pre-emption right, life estate and pledges. **Perpetual Fees** are fees, levies or fixed responsibilities consisting in particular of titles which are entered into the mortgage register as debts¹². Also any mortgage encumbrance of properties should be disclosed in mortgage registers, as well as their possible sale.

In the case of expiration encumbrances on the real estate, they should be deleted from mortgage registers.

II.3. Priority of entries

Priority of property law depends on the priority of entry. In the case of making entries on the same day, the numerical order, under which they were made is determinative. If to entry, at the same time several documents were sent, the one, which has the earlier date should be entered first. Only the identity of dates justifies acceptance of simultaneousness of entries.

In the event when in front of the land and mortgage civil court different people used a valid real estate ownership title, priority is granted to the one who obtained the title from the owner recognized in mortgage registers. However, in the case when their title of ownership comes from this owner, priority is given to the buyer whose title was first entered into mortgage registers. However, if the title of any buyer has not been entered into books, then priority will be granted to the one with the earlier date.

II.4. Construction of mortgage register

A mortgage register consists of three parts: perpetual contracts registers, collection of documents submitted into the land and mortgage register and from the list of mortgage. The perpetual contracts register is designed for

¹¹ But still they do not lose the power of servitude established before the effective date of the Act, except for servitude of pastures and rims that obligatorily are subject to be entered, even if they already exist.

¹² An example of perpetual load is the obligation to pay on the annual basis for eternal times a certain given amount of money, the so-called: pension, see: ruling of the Supreme Court of 5.2.1937 (I C 1210/36), OSN(C) 1938, no. 2, p. 68.

recording mortgage transactions contained in locally competent offices, as well as for recording application and statements between the parties demanding entry as a result of a transaction made abroad or in locally competent offices, as well as demanding an entry on the basis of a court ruling. For each property a separate register should be established, unless this applies to property consisting of various estates belonging to one owner, purchased and encumbered under a general name. In the case of property division, for each real estate a separate register should be created.

The second part of the mortgage register is a set of documents. For each separate register a separate set is created. To the third part, namely the list of mortgage, only this part of the contract or document is introduced which refers to the ground and mortgage rights. Parties when concluding the contract should indicate which content should be entered to the mortgage list. The ruling of the Supreme Court of 7 January 1937 should be borne in mind¹³, according to which "content designed by both parties and already brought into the list of mortgage cannot be in any mortgage mode supplemented upon request of one of the parties with the principle, that a contract being the basis for designed record, entitled this party to disclose in the mortgage list condition, not included in the designed content". Accuracy of this thesis is justified by a circumstance that, since the parties have jointly prepared the content of the contract which is supposed to constitute the basis for entry into the list of mortgage, it is groundless to supplement such entry on the basis of a unilateral statement of one of the contractors.

According to article 24 of Law on Mortgage of 1818, a mortgage register is the original. Documents submitted to mortgage register cause effects such as originals. On the contrary, records from registers have nature of a copy that cannot be subject to sales, transfer or charge. Acquisition of a document, whose goal is to obtain a property right should be disclosed by entering it into the mortgage register.

The right to inspect mortgage register is granted to the owner of the property, for which the register was established, as well as an entity having a protected right on this real estate and persons authorized by the aforementioned. Others have the right to inspect only by the agency of the Court Clerk or the President of the Land Court (in the case of refusal of the Clerk) when they demonstrate legal interest (in the original: they will prove the need to enlighten from the book). Inspection of files is made in the presence of the clerk or regent who bears responsibility for the whole and immunity of the acts included in the books.

¹³ File ref. no. act I C 893/36, OSN(C) 1938, no. 1, p. 22.

II.5. Effects of entry

The entry obtains the attribute of public faith no sooner than at the time of recognition of the authority that such an act is not subject to charges, which include: a contradiction to third party rights known from mortgage registers¹⁴, exceeding by the content to be entered to the mortgage list the nature of a document or contract, as well as when the activity cannot result in any intended effect by inadvertence to legal provisions violating validity or the essence of mortgages. However, the approved act cannot benefit one acting in ill faith¹⁵. It is indicated in the Act that approval of entry does not give the act greater power in relations between the parties, and only has the effect of a warranty of public faith of land and mortgage registers towards third parties.

The effect of legal activity, which is subject to the entry may depend on the approval of the land and mortgage civil court, if the parties so decide. If the court demands additional explanations from parties, coming into force of a given activity or if it considered that a given activity cannot stand, and the above condition was not reserved, the party whose duty it is to try to maintain the act in force, has a year to provide explanations, bring activities into force, or obtain the decision of the Court of Appeal. The annual deadline runs from the date when the suspending decision is delivered to the person reporting the suspended application¹⁶. After the ineffective expiration of this term, the suspended activity was considered as null and void.

II.6. Deletion of an entry

In section 6 of Law on Mortgage from 1818 regulations were included governing the principles of cross out entries. According to article 119 of the material right act, the creditor is remitted by satisfying liabilities secured by mortgage. However, in the event when debtor does not take activities aiming at crossing out of liabilities from mortgage registers, and third person in good faith undertook activities with the creditor, the debtor cannot hide behind

¹⁴ Rights of third parties known from mortgage registers mean that information on rights of a third party land and mortgage civil court takes not only from register, in which the activity was made, but also from other mortgage registers within the same mortgage office, unless instructions with regard to messages in these registers can be found in real estate register to which activity relates, see: ruling of the Supreme Court of 9.5.1935 r. (I C 1937/34), OSN(C) 1935, nr 12, s. 504.

¹⁵ According to the ruling of the Supreme Court dated 11.4.1935 "the awareness making the activity with the mortgage owner that against the last third parties brought a trial about a given real estate, does not prove his bad faith and does not deprive them of the right to refer to mortgage openness", see: ruling of the Supreme Court of 11.4.1935 (I C 2303/34), OSN(C) 1935, no. 10, p. 417.

¹⁶ See: ruling of the Supreme Court of 28.10.1936 (I C 1947/35), OSN(C) 1937, no. 8, p. 288.

satisfying debt against this person, unless a warning on satisfying the debt was applied in the registers.

The creditor may allow deleting the entry of secured debt, even if it was not protected. If the liability was incorrectly removed, the creditor is entitled to request repair of any damage incurred, from people who caused the deletion.

Mortgage rights do not need re-entering until they are not cancelled from mortgage registers. Before removal of entry also is not the date of expiration. The debtor can, however, raise the charge of expiration with regard to overdue commissions and part of debt, which cannot be satisfied from the real estate, from the time when the estate was transferred to the third party.

At the same time, the ruling of the Supreme Court of 28 September 1934 should be recalled¹⁷, in accordance with which “pursuant to the regulations of the mortgage register act of 1818 entries from the list of mortgage may be deleted only on the basis of permits of the interested person, or on the basis of court ruling, while an extract from the debt collector repertory is not a document, which can state in the mortgage proceedings expiry of right, protected with mortgage”.

II.7. Warnings (protests)

The law on mortgages from 1818 distinguishes three kinds of warnings:

- a) when a valid file or final and a binding sentence is issued, the effect of which is deprivation of will, civil death or suspension in use of the civil rights, advisors, abandoning of goods for creditors (*cessio bonorum*);
- b) when act is submitted that proves bringing an action for which the mortgage activities should be suspended such as: a death certificate;
- c) when a suit is submitted by the party which in court wants to demonstrate the right to goods or mortgage receivables.

These premises apply to circumstances existing between the parties whose occurrence may affect the content of entry, such as lack of ability to legal activity or death of one party, or suing as to rights constituting the subject of entry.

Entering the sentence or act to mortgage registers confirming the circumstances indicated in item a) prevents consequent activities, which can aim towards reversion of any effects of this sentence or act. With regard to item b), entering the death certificate to the registers causes the effect of suspension in undertaking activities, lasting until completion of inheritance proceedings. The basis for warnings indicated in item c) is possible, if a party that requested applies to the Court such an application and receives a decision on the permit to contribution of warnings any applications to registers mortgage. Then, it shall

¹⁷ I C 2532/33, OSN(C) 1935, no. 3, p. 100.

be obliged to submit to the Land Office such a certificate as a result of which in the mortgage register proper mention of law content will be made. In the event when, in the concerned case a positive sentence will take place for the submitting party, priority of given right will count from the date of the stated warning. In the case of losing the case, warning will be deleted, and the loser will be required to compensate for the damage so arisen. It should be noted that warning as defined by item c) does not create mortgage rights, and only protects the result of laws of property, namely also mortgage responsibility in the event of obtaining a final and binding sentence taking into account the lawsuit protected by submission of warning¹⁸.

To mortgage registers, a sentence may be submitted giving a personal amount, before it became effective, in order to obtain space in mortgage provided that the sentence is not changed and will become legally binding. Before entering the warning to the mortgage register, it should be acknowledged by the land and mortgage civil court.

II.8. Organization of Mortgage Governments

Regulations regarding the structure and the organization of mortgage governments were included in chapter 3 of Section I of the law on mortgage of 1818. According to the regulations contained therein, Commissions were supposed to be established¹⁹. The purpose of their actions was the determination of real estates and mortgage rights. An obligation was introduced, according to which all immobile goods owned by private entities whose ownership could be transferred, or which could be charged, should be recorded in new mortgage registers, under threat of a fine. The aforementioned Commission consisted of one Judge of Appeals, one Judge of Land Court, one member selected by the Provincial Council, who could be the member of Council, or come from outside of this organization. A clerk and regents in respective numbers were expected to be co-opted to the Commission. Receiving acts had to belong to Commissioners, Clerk and Regents. To approve acts was supposed to be the function of proper land and a mortgage civil court composed of three Commissioners. The clerk could have an advisory vote.

After completion of the Commission's operation competence to approve acts was transferred to the competent Department of Land Court composed of the President and a Judge or two Judges of this Court, along with the assigned Clerk of land office having a firm vote.

¹⁸ See: justification of ruling of the Supreme Court of 16.1.1936 (I C 1154/35), OSN(C) 1936, no. 10, p. 386.

¹⁹ Commissions were supposed to be established separately for provinces: Mazowieckie, Kaliskie, Płockie and Augustowskie, Podlaskie, Lubelskie, Sandomierskie, as well as Krakowskie.

The commission and Departments of Land Court examined and approved files to mortgage registers, even if there was no dispute to give them the mark of public faith. The court was competent to settle important disputes.

The decision of the Commission and Department of Land Court could be appealed to the Court of Appeal.

The office was supposed to consist of a Clerk and Regents. Their term of office was life-long. They were selected by Provincial Councils from among applicants who presented certificate issued by the Governmental Commission of Justice that they have ability to take obligations of a Clerk or Regent according to existing rules.

III. Summary

Registers of real estate currently play a significant role in legal circulation and are a guarantee of safety on the real estate market. The above analysis indicates that this issue was the object of interests of lawyers already in earlier times. The undertaken attempt to present legal status regulating the public register of real estate known as mortgage register operating in the Kingdom of Poland, leads to a conclusion that today's understanding of these problems is deeply rooted in the history of law. The highly assessed 19th-century regulation was a set of rich experiences for Polish lawyers of the inter-war period. This thesis is confirmed by the fact that the mortgage act of 1818 was valid until 1 January 1947 and was the object of interest of the Supreme Court in interwar period – as an evidence by numerous decisions.

The above regulation should be assessed as positive due to a high degree of legislative technique, in particular that it constituted an attempt of complex regulation of public real estate register which on such scale was not prepared in the pre-partition period. In the opinion of the author it constituted a foundation for development of land and mortgage registers in today's understanding, and it realized all hopes.

The analysis indicates the need of assessment the mortgage register reform in context of the existing solutions in 19th century in the Kingdom of Poland, because these provisions are in fact rated positively in accordance with the legislation level. There cannot be any doubt that the current regulation to some extent takes into account the solutions known in the legislation of the Polish Kingdom, for example, basic rules of priority of entries. Of course, the provisions cannot be the basis of assessment in all fields, like solutions related to the computerization of the mortgage registers, but without a doubt, described legal provisions can serve as the general basis for the evaluation of current measures.

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