

SOME CONSIDERATIONS ON THE INSTITUTION OF A DISPOSAL OF AN EMPTIED MORTGAGE PLACE

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Abstract: After 18 months of *vacatio legis*, the act on land and permanent mortgage entries and also on other regulations¹ from 26th June 2009, came into force. This change resulted in introducing new regulations which considerably changed the previous model of mortgage succession. The answer to the demands reported by the representatives of the doctrine and the constant changes within the current market economy was the introduction of the permanent mortgage entries to the Polish legal system. The attempt to investigate the normative regulation as well as institutions responsible for restricting the advancement of the mortgage in other legal systems, was reflected in considerations presented in the hereby article. Moreover, the normative qualification of the disposal of an emptied mortgage place raises numerous questions. What therefore needs to be considered is the question whether the possibility of a disposal should be understood as a separate substantive right or rather as an entitlement being the element of ownership.

Keywords: mortgage, advancement, amendments, disposal of an emptied mortgage place, the advancement of the mortgage

1. Introduction

On 20th February 2011, after 18 months of *vacatio legis*, the act on land and permanent mortgage entries and also on other regulations² from 26th June 2009, came into force. This change resulted in introducing new regulations which considerably changed the previous model of mortgage succession.

The answer to the demands reported by the representatives of the doctrine and the constant changes within the current market economy was the introduction of the permanent mortgage entries to the Polish legal system. Disposing of the emptied mortgage entry is a completely new solution in Polish law. It came into force on 20th February 2011. As a justification of the project we are given the following statement: "The institution which is being created refers to the solution that can be found in other legal systems. In particular it concerns the Swiss system of permanent mortgage entries and the Austrian law of disposing of the mortgage. It is an original approach to this issue, which does not come down to any mentioned solutions. It simply unites the advantages of both solutions"³.

The fact that the institution of disposing of the emptied mortgage entry is completely new and that it has never been used practically in Polish law, affected the necessity to research, as well as to refer to polish and foreign materials.

The attempt to investigate the normative regulation as well as institutions responsible for restricting the advancement of the mortgage in other legal systems, was reflected in considerations presented in the hereby article.

The normative qualification of the disposal of an emptied mortgage place raises numerous questions. One could distinguish two variants of interpretation in this regard. What therefore needs to be considered is the question whether the possibility of a disposal should be understood as a separate substantive right or rather as an entitlement being the element of ownership. The settlement of this issue is of great importance not only from a theoretical point of view but also from a practical one and, therefore, requires a more thorough analysis.

It should be noted that the newly adopted legal solution is largely modelled on a similar concept provided for in the draft

property law of 1937 and 1939 and in the draft amendments to the Land and Mortgage Registers and Mortgage Act of 2000.

2. Limitation of the advancement of the mortgage in polish and foreign legal systems

Up to 20th February 2011 there was a general rule on the advancement of the mortgage (*ius successionalis*) in the Polish legal system. According to this rule, in case of charging the mortgage with more than one property and subsequently expiring the mortgage, which does not have the lowest priority, the mortgage and other laws encumbering the property move one level up in the hierarchy⁴.

For instance, in case of expiration of the mortgage located within the first place, this place is taken by the mortgage which previously had been found within the second place (and was written down in the land and mortgage register on the basis of a filed application) and when it expires, the place is taken by the property located within the third place⁵. To sum up, in case of expiration of the mortgage, the mortgages which follow it, gets a higher priority⁶. It should be stressed, that the reason of the expiration of the mortgage does not matter. As a result, the position of creditors, whose mortgages had lower priority in relation to the expired mortgage is improved. (it should be noted that the owner of the property does not have a right to establish a new mortgage in the place of the expired one)⁷. Therefore, he can establish a new mortgage only within the last place⁸. Yet, the expiration of mortgage has no influence on the laws with higher priorities. It should be noted that this described advancement does not take place if there are laws which are of equal priority with the expired mortgage, simply because they take the place of the expired mortgage. The rule of advancing mortgage was not expressed *expressis verbis* in the land and mortgage register, but it results from the regulations which normalize the priority of a limited property right⁹. J. Pisuliński writes that the 'advancement of mortgage' is a result of rule, which says that the law, written in the land and mortgage register on the basis of an application filed beforehand, has priority over the law written on the basis of application filed afterwards¹⁰.

The justification of the existing rule could be found in the legal system, namely in socialism. It seems that nowadays, at the time of market economy and economic relations departing from the rule of disposing of the emptied mortgage entry is a desirable step towards updating Polish law of land register¹¹.

Legal systems, in which you can find the priority rule of laws written in order of either filed applications or entries made in the land and mortgage register, accept solutions, which aim at preventing the advancement of mortgage or other mortgage laws. A special attention should be given to the following solutions:

- a) The owner's mortgage (German system),
- b) Permanent mortgage entry system (Swiss system),

⁴ See T. Czech, *Wykonywanie uprawnienia do rozporządzania opróżnionym miejscem hipotecznym*, MoP 2010, no. 20, p. 1103, B. Swaczyna, *Rozporządzanie opróżnionym miejscem hipotecznym i hipoteką właściciela (uwagi na tle projektu Komisji Kodyfikacyjnej Prawa Cywilnego)*, KPP 2003, no. 1, p. 212, S. Rudnicki, *Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu w sprawach wieczystosięgowych*. Komentarz, Warszawa 2010, p. 31.

⁵ See S. Golab, *Rozporządzanie hipoteką przez właściciela*, p. 5-6.

⁶ J. Pisuliński [in:] *System Prawa Prywatnego. v. 4. Prawo rzeczowe*, (ed.) E. Gnierek, Warszawa 2005, p. 656.

⁷ *Ibidem*, p. 656.

⁸ See J. Ignatowicz [in:] *Prawo rzeczowe*, J. Ignatowicz, K. Stefaniuk, Warszawa 2009, p. 290.

⁹ See article 249 in the Civil Code and art. 12 in The Land and Mortgage Registers and Mortgage Act.

¹⁰ See J. Pisuliński, *Verfügung über frei gewordene Hypothekenstellen* [in:] *Jus est ars boni et aequi. Festschrift für Stanisława Kalus*, (ed.) M. Habdas, A. Wudarski, Frankfurt am Main 2010, p. 409.

¹¹ See B. Swaczyna, *Hipoteka umowna*, Warszawa 2007, p. 433.

c) Mixed system (Austrian system)¹².

In the Polish legal system we find that the expiration of limited property law which is applied when the law along with the freehold charged with the limited property law, are put together¹³. However, in the German legal system we can find the institution of the owner's mortgage instead (§ 1163, section 2 of German Civil Code from 1896). This regulation says that obtaining the charged mortgage and the claim secured by the mortgage does not result in the expiration of the mortgage (§ 1143, section 1 and § 1177, section 2 of German Civil Code from 1896). The owner of the charged mortgage can transfer the claim along with the mortgage to another person. But when the secured claim expires, the owner is by right (§ 1163, section 1, sentence 2 of German Civil Code from 1896) provided with the mortgage which is changed into the owner's land debt (§ 1177 of German Civil Code from 1896)¹⁴. The owner of the estate can also secure another claim by using this mortgage¹⁵. But this is not the only case when the mortgage is changed into the owner's land debt. In case of abandoning the right to the mortgage by the creditor, the mortgage does not expire but it is transferred to the owner who can use it for securing another mortgage (§ 1168 of German Civil Code from 1896). Abandoning of the right to the mortgage results in the complete expiration of the property law by virtue of paragraph 871, sentence 1. By virtue of paragraph 1183, section 1, it requires the consent of the owner.

As J. Pisuliński writes, the regulation concerning the owner's mortgage has already lost its significance¹⁶. Its reasons can be found in the claim to mortgage removal (§ 1179a, 1179b of German Civil Code from 1896.). According to Przyborowski, it is quite a common practice when the owner of the mortgage is obliged to perform the mortgage removal by people entitled on the grounds of the lower priority pledge laws¹⁷. There are two subjects entitled to the legal claim - the mortgage creditor and the subjects entitled on the ground of a land debt (to be specific - persons entitled on the ground of mortgage with equal or higher priority). Every owner, to whom the mortgage was transferred (even if at the moment of satisfying the claim he already was not the owner) has the right to the claim. The result of this claim is found in a brief entry made in the land and mortgage register. The executing of the claim results in cancelling such law and advancing other pledge laws. However, when the mortgage was transferred to the owner whose creditor is unknown, the proper proceeding are then undertaken (§ 1170 of German Civil Code from 1896).

One of the characteristic features of the Swiss system is the permanent mortgage entry rule (Prinzip der festen Pfandstelle)¹⁸. This issue was regulated in the article 813-815 in the Swiss Civil Code¹⁹. The pledge laws can come into existence by virtue of an act or a legal act, which represent the owner's will²⁰. In case of statutory pledge laws, an act determines their priority and influences on the way they come into existence. Relations between laws created by way of legal transactions (in the context of priority of the pledge laws competing on the mortgage) come under particular rules resulting from the regulation mentioned

¹² See: J. Pisuliński, *Verfügung...*, s. 412 – 415, B. Swaczyna, *Rozporządzenie...*, p.214 – 215, J. Ignatowicz, J. Wasilkowski [in] *System prawa cywilnego*, vol. II, *Prawo własności i inne prawa rzeczowe*, Warszawa 1977, p. 799 i 800

¹³ See: art. 247 in the civil Code and S. Rudnicki, *Komentarz do kodeksu cywilnego. Księga Druga. Własność i inne prawa rzeczowe*, Warszawa 2006, p. 435 – 438.

¹⁴ The importance of the owner's land debt for limiting the regulation on advancing mortgages is the same as for the owner's mortgage. See in comments included in footnotes by B.Swaczyna, *Rozporządzenie...*, p. 214.

¹⁵ See: J. Pisuliński, *Verfügung...*, p.412.

¹⁶ *Ibidem*.

¹⁷ See: L. Przyborowski, *Ograniczone prawa rzeczowe w prawie niemieckim*, Studia Prawa Prywatnego 2008, nr 4, p. 56.

¹⁸ See: B. Swaczyna, *Ograniczone prawa rzeczowe w prawie szwajcarskim*, Studia Prawa Prywatnego 2008, nr 4, . 80 and 81, J. Pisuliński, *Verfügung...*, p. 413.

¹⁹ See: reflections on the sense of this regulation in: P. Simonius, T. Sutter, *Schweizerisches Immobiliarsachenrecht*, Bd II. *Die Beschränkten dinglichen Rechte*, Basel und Frankfurt am Main 1990, p. 176-177.

²⁰ See: interesting comments on this aspect: P. Tuor, B. Schnyder, J. Schmidt, *Das Schweizerische Zivilgesetzbuch*, Zürich 1995, p. 993-994. The commentators write: „Beim gesetzlichen Grundpfandrecht bestimmt das Gesetz, den Rang, und zwar in anderer Weise beim mittelbaren als beim unmittelbaren gesetzlichen Pfandrecht. Beim vertraglichen Grundpfandrecht entscheidet der Wille der Beteiligten“ and E. Weber, *Das system der festen Pfandstelle*, Bern 1929, p. 9-15

above. In case of expiration of the pledge laws, laws with lower priority do not advance and a new place is created. It should be noted that the pledge law, even at the moment of coming into existence, can be given priority over one which results from the *prior tempore potior iure* rule.

In the Swiss legal system there is a possibility of creating a mortgage only to a specified part of the mortgage. The mortgage is created by the owner through a record written down in the land and mortgage register, which means that it can be immediately created within the second or a further place. The only condition is that the sum falling on the future pledge laws of a higher priority must be stated at the point of making an entry in the land and mortgage register. Such mortgage is given a certain priority, which is a deviation from the rule concerning property law. (the rule saying that priority of the limited property law is determined by the data written in the land and mortgage register. It is admissible to establish mortgage law on the empty mortgage entry with a higher priority. As a result of the expiration of mortgage, a new entry/place is created (so called 'offene Stelle'), which can be disposed of by the owner of the mortgage²¹. The owner of the mortgage can also reserve the right to the empty mortgage place for a determined amount of money while establishing the mortgage within the further place.

It should be noted that the permanent mortgage entry system does not have an absolute character²². However, an exception can be found in the article 815 of Swiss Civil Code. During pursuing the enforcement of the claim, the amount of money is divided in such a way as if there is no empty place. So we do not take into account the empty mortgage entries. Another example can result from the agreement between the owner and a person, who is entitled to the mortgage law of a lower priority which charges a given mortgage, rather than another law of such kind. Parties can state that in case the law of higher priority expires, a new empty entry will not be created, and a law of a lower priority will take its place. According to the regulation found in the article 814, paragraph 3, in Swiss Civil Code, such agreement can be effective towards the successive owners only when it's stated in the land and mortgage register²³. B. Swaczyna writes that in practice such agreements are rarely found, which means that permanent mortgage entries are a rarity²⁴.

Solutions accepted in Austrian law can be described as mixed system²⁵. This statement requires a brief explanation. In the mortgage expires, the Austrian law gives exception to the rule of advancing mortgages. This enables the owner of the mortgage to dispose of free entry. There are also situations, in which the owner's mortgage is established.

When the secured claim is passed along with mortgage to the owner and the debtor of the claim secured by a mortgage is a third party, then the owner's mortgage is created. (It is so called *Eigentümerhypothek*)²⁶. The owner of the estate who is at the same time a mortgage creditor can dispose the claim along with mortgage to the property of another person. However, according to act 2, paragraph 470, the mortgage on property is important for the owner because in case of pursuing the enforcement of claims from a property charged with this mortgage he

²¹ See: P. Tuor, B. Schnyder, J. Schmidt, *op.cit.*, p. 996

²² See: B. Swaczyna, *Ograniczone...*, p. 81, see also: P. Tuor, B. Schnyder, J. Schmidt, *op.cit.*, p. 996-998, the authors write: „Die Parteien können durch Vereinbarung festsetzen, dass bei Erledigung einer Pfandstelle ein Nachrücken erfolgt. Ein solcher Vertrag bedarf der öffentlichen Beurkundung (71¹ GBV) und begründet zunächst einmal ein obligatorisches Nachrückungsrecht“ and „Die zweite Ausnahme gilt für die Pfandverwertung. (...) Die leere Stelle wird bei der Verwertung einfach ausser Acht gelassen“, interesting remarks: B. Trauffer, in: H. Homell, N.P. Vogt, T. Geiser, *Basier Kommentar. Zivilgesetzbuch II*, Basel 2007, p. 1639-1642.

²³ See: P. Simonius, T. Sutter, *op.cit.*, p. 177-178, this problem is also discussed by R. Pfäffli [in:] *Theorie und Praxis zum Grundpfandrecht*, recht 1994, Heft 6, p. 271-272.

²⁴ See: B. Swaczyna, *Ograniczone...*, p. 81.

²⁵ See: J. Pisuliński, *Verfügung...*, p. 414.

²⁶ See: J. Pisuliński, *Verfügung...*, p.414, K. Hofmann, in: P. Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, Wien 2000, Bd. 1, p. 732, the author writes: „Echte Eigentümerhypothek, auch „forderungsbekleidet“ genannt, entsteht bei der Vereinigung von Eigentum (Pfandschuld) u Hypothek (Forderung), zB durch Zession der Forderung oder Erbgang sowie Zahlung durch den Pfandschuldner (1358) unter der Voraussetzung, dass weiterhin ein Dritter persönlich schuldet. In diesem Fällen hat der Eigentümer ausnahmsweise die Stellung eines Hypothekargläubigers“.

participates in the division of the amount of money gained from the enforcement of claims.

In Austrian system, apart from the owner's mortgage, there is also an institution responsible for disposing of the emptied. According to Cierpial the aim of accepted regulation is only owner's business interest. In her opinion, with which we should agree, is that mortgages which were established within further entries and which secure lending rates mentioned above, should not be unconditionally transferred to better positions which aim at securing cheaper loans²⁷.

In Austrian law, the mortgage may exist formally up to the moment of its removal from the land and mortgage register. When the secured claim expires it is obtained by the owner of the real estate and when its secured claim expires (in a situation when the owner of the mortgage was at the same time a personal debtor) or when the creditor abandons his right to the mortgage, the owner of the real estate is given the law of establishing a new mortgage within the free position, to the value of the mortgage and with the priority of mortgage. Then, so called *die Verfügungsrrecht über einen Pfandrand* which is a possibility to dispose of mortgage entry comes into being to the benefit of the owner. We have this possibility up to the moment of removing the expired mortgage from the register²⁸. It should be noted that keeping unremoved mortgage in register may result in creating the danger of purchasing a satisfied claim in god faith by a third party²⁹. In such situation, according to the principle of public credibility of land and mortgage register, unremoved mortgage is revived, also in case when the claim secured by mortgage expires. Article 469 says that if a property is charged with other limited property right which have a priority lower than the mortgage, then the owner of the real estate can dispose of the mortgage only when such right was reserved in the agreement along with persons entitled on the ground of these rights and then registered in the land and mortgage register (*Rangvorbehalt*)³⁰. In case of dismissing the estate, the right to dispose is given to the purchaser. However, when the declaration of insolvency of the owner is issued, the right is given to the bankruptcy trustee. In reference to the blanket mortgage the right to dispose have all owners of the estate charged with the mortgage³¹. The owner of the mortgage can secure with the mortgage a new claim, which value cannot be higher than the value of the expired claim. Paragraph 479, section 1 says that *dasforderungsbekleidete Eigentümerhypothek* is not taken into account during dividing the sum of money gained from pursuing the enforcement of claims. Paragraph 58, section 1 says that during the removal of mortgage from the land and mortgage register the owner reserves for himself the possibility to establish a new mortgage up to the value and with a priority of removed mortgage. He gets the right to dispose within 3 years since the moment of removing the mortgage³². The owner of the mortgage can also apply for a conditional entry of the new mortgage, only if the existing mortgage will be removed from the land and mortgage register within the next 12 months (§ 59)³³.

3. The right to dispose of the emptied mortgage entry within the Polish legal system

According to article 101 of the Act on Land and Mortgage Registers and on Mortgage, when the mortgage expires, the owner has, within the expired mortgage, the right to dispose of the emptied mortgage entry. In contrast to previously regulations, according to which the expiration of a mortgage with a higher priority resulted in the automatic movement forward of mortgages with a lower priority, new regulations create the possibility of inhibiting this process. A similar aim was given to the creation of the owner's mortgage, which was

included in the government's plan. However, during the parliamentary session, the regulations concerning the owner's mortgage were rejected.

Limiting the rule of advancing mortgages through disposing of an emptied mortgage entry may occur in a situation where after the mortgage expires, the owner either can establish a new mortgage within this place or transfer another one. He may also retain the right to such acts by registering them in the land and mortgage register. The term 'mortgage entry' means a position in order of the priority of established regulations. Grzechnik compares disposing of the mortgage entry to a free place in a garage³⁴. Another car (or a vehicle of its size) can park in this free place (assuming it fits). However, to overspill the parking place is forbidden as it would damage other cars situated nearby.

The owner can also establish a new mortgage or transfer an existing one, but they must add that the only condition is not to exceed the sum of expired mortgage. It should be stressed that both mortgages will have the same priority. As we can see, we have got here an exception to the found in the article 12, section 1 of the Land and Mortgage Registers and Mortgage Act, which says that the priority of laws established in the land and mortgage register is determined by the moment at which the consequences of the entry start to be taken into account.

According to the article 101, section 2 of the Land and Mortgage Registers and Mortgage Act, if a mortgage expires only partially, then the owner can dispose of the emptied mortgage entry in this part.

However, it should be stressed that in a situation when the owner does not perform the acts mentioned above along with removing the expired mortgage, all remaining ones will move one level up according to the previous rule. Here we can notice that for instance, in the Swiss law (in which we find the 'absolute' permanent mortgage entries system), removing a mortgage results in creating a free mortgage entry which can be used later. So the positions of remaining mortgages do not change by right.

The right to dispose of the emptied mortgage entry, which was registered in the land and mortgage entry at the same time as the expired mortgage was removed, is not time-limited, but it expires in case of selling the estate during the process of pursuing the enforcement of claims or during insolvency proceedings. We can find a similar situation in Swiss law. Here, in case of removing the mortgage, the owner can establish a mortgage within the emptied place only within 3 years starting from the moment of removing the mortgage.

What is really significant from the mortgage owner's point of view is article 101 of the Land and Mortgage Registers and Mortgage Act which aims at preventing exclusion of the right to dispose of the emptied mortgage entry. The owner of the estate cannot commit themselves to not disposing of the emptied mortgage entry, unlike in Swiss law, where such obligation is admissible. Also the regulation included in the project of the property law from 1939 allowed the existence of an obligation not to dispose of the emptied mortgage entry, which in practice could make this right illusory. In this context we should pay special attention to the regulation included in the article 101 of the Land and Mortgage Registers and Mortgage Act. This regulation permits the claim to transfer the mortgage to the emptied entry disclosed in the land and mortgage register. As a result, the owner can be obliged to transfer a given mortgage to the specified mortgage entry many times after it's already emptied. In such a situation the owner's prerogative becomes limited as he can no longer willingly dispose of such entry. Moreover, in order to fulfil the previous obligation, he must transfer a mortgage to this entry.

In contrast to the Swiss system of permanent mortgage entries, if an estate was not previously charged with a mortgage, then the immediate establishing of mortgage within the further place is

²⁷ See: R. Cierpial, *Ograniczone prawa rzeczowe w prawie austriackim*, Studia prawa prywatnego 2008, nr 4, p. 12.

²⁸ See: K. Hofmann, in: P. Rummel, *op.cit.*, p. 726-727.

²⁹ See: R. Cierpial, *Ograniczone...*, p. 12.

³⁰ See: J. Pisuliński, *Verfügung...*, p. 414.

³¹ *Ibidem*.

³² See: K. Hofmann, in: P. Rummel, *op.cit.*, 730-731.

³³ *Ibidem*, p. 731-732.

³⁴ See: L. Grzechnik, *Hipoteka w obrocie gospodarczym. Komentarz do nowelizacji ustawy o księgach wieczystych i hipotece*, Warszawa 2011, p. 29.

not admissible. Moreover, in contrast to the Swiss law, removing the expired mortgage without a simultaneous registration of the right to dispose of the emptied mortgage entry results in the advancement of a mortgage with lower priority. Similarity can be noticed in the fact that in both legal systems, the owner establishes a new mortgage within the place of an expired one, but he does not dispose of the mortgage³⁵.

It should be noted that in Austrian law, even if the secured claim expires, the mortgage starts to formally exist when it is removed from the land and mortgage register. Therefore the owner can transfer it to another person in order to secure the new claim. In Polish law, however, within the place of the expired mortgage, the owner establishes a new mortgage or transfer a new one to this place.

It's also worth mentioning that in Austrian law the owner of the estate cannot dispose of the mortgage or transfer it in order to secure another claim if the estate is charged with a law of lower priority, which came into being by right. However, it does not constitute an obstacle in disposing of the emptied mortgage entry in accordance with the Polish regulations by the owner.

We can notice not only differences but also similarities between both, Polish and Austrian legal systems. The similarity can be seen in a situation when the mortgage expires and the right of the owner to dispose of the emptied mortgage was registered in the land and mortgage register. Then, the owner can establish a new mortgage within the place of the expired one, but in Austrian law the owner can do it only within 3 years since the moment of removing the previous mortgage.

4. The disposal of an emptied mortgage place as an entitlement

A differentiation between a substantive right and an entitlement does not pose an easy task. The doctrine presents different positions, and what for some constitutes a substantive right is viewed by other representatives as a mere entitlement or a type of entitlement.

Undoubtedly, a substantive right is perceived as a central category which constitutes the basis of individual civil institutions³⁶, hence the doctrine has long been involved in defining the nature of this category. There have been many theories aiming to explain the essence of a substantive right³⁷, starting from those which proclaim that a substantive right is something inherent to a man, something that combines the elements of will and interest, or something that derives from a right in the objective sense and ending with the theories denying the existence of substantive rights³⁸. Natural law ideologies recognize the priority of substantive rights over the written laws, in turn, the positivist mainstream assumes that the substantive right is derived from the system of norms enacted by the competent authorities.

By making some generalisations it can be stated that a substantive right is treated as a bundle of rights³⁹. Entitlements are perceived as a peculiar material for the legislator to create substantive rights. Yet, there arise certain differences. Z. Radwański, in contrast to A. Wolter, does not refer the classification of substantive rights to entitlements. S. Grzybowski, in turn, believed that the content of the legal relationship consists of entitlements and obligations, while Z. Radwański views the elements of a civil law relation as a substantive right and a duty.

³⁵ Unlike in Austrian law, where the owner administers the owner's mortgage by transferring it to the creditor.

³⁶ See: A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 2001, p. 125.

³⁷ More M. Pyziak – Szafnicka [in:] *System Prawa Prywatnego, Prawo cywilne – część ogólna*, v. 1, (ed.) M. Safjan, Warszawa 2007, p. 704, Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2009, p. 675 – 687.

³⁸ See K. Opalek, *Prawo podmiotowe*, Warszawa 1957, p. 414.

³⁹ See M. Pyziak – Szafnicka, *op.cit.*, s. 704, Z. Radwański, *Prawo cywilne..., op.cit.*, p. 85.

For the purpose of the subject at issue it seems reasonable to narrow the study to the right of ownership as being the broadest and the most basic substantive property right. The ownership right is defined in the article 140 of the Civil Code. When analysing the cited definition, we can distinguish a positive and a negative side of ownership. The positive side will consist of a triad of the owner's entitlements - *ius possidendi*, *ius utendi et fruendi*, *ius abutendi*. In turn, the negative side will entail the duty of other entities involving non-interference in the sphere of the owner's rights (*non facere*). The core of the ownership right consists of the entitlement to use the thing and the entitlement to dispose of the thing⁴⁰. The entitlement to use the thing includes the entitlement to possess the thing (*ius possidendi*), to use it (*ius utendi*), to derive benefits and other profits from the thing (*ius fruendi*) as well as to have the thing at one's actual disposal (*ius abutendi*)⁴¹. The entitlement to dispose of the thing entails, in turn, the power to divest oneself of the ownership of the thing and the right to encumber the thing. The power to encumber the thing in the strict sense stands only for the entitlement to charge the thing, while in the broad sense, it also involves the power to take the activities resulting in incurring obligations, such as rental or lease⁴².

In the context of the abovementioned views we need to make an attempt to answer the question whether the disposal of an emptied mortgage place is a substantive right or an entitlement.

The provisions of the statute do not resolve the above issue directly. The title of the subsection 5 of the Act includes the term '*the disposal of an emptied mortgage place*'. A similar terminology can be found in the draft law of 1939, which constituted the model for the existing legislation. In turn, section VII of the draft law of 1937 as well as the subsection 5 of the draft act of 2000 is entitled '*The power to dispose of an emptied mortgage place and the owner's mortgage*'. The provisions of the draft law of 1939 replaced the term '*the power to dispose of an emptied mortgage place*' by the description of the competence or the determination⁴³ of '*the entitlement*'⁴⁴. This issue is similarly settled in the current text of the Act⁴⁵. It must be therefore concluded that the literal wording of the relevant sections and their terminology weighs in favour of adopting the second perspective⁴⁶.

In this context, the disposal of an emptied mortgage place should be regarded as an entitlement which, together with other powers, constitutes the ownership right. At the same time, it must be assumed that it forms a part of more widely understood powers of the owner to dispose of the property, which is the core of the ownership right (*ius disponendi*)⁴⁷.

Confining our considerations merely to the analysis with the use of a linguistic interpretation seems to be insufficient. It is therefore reasonable to investigate the consequences of adopting one of the two possible positions.

What needs to be analysed firstly is the situation where the owner is vested with the substantive right to dispose of an emptied mortgage place. The consequence of such an assumption is the fact that this place can be foreclosed under the security of monetary claims that the creditor has against the property owner under article 747 paragraph 1 of the Polish Civil Procedure Code. In turn, the combination of this type of security with encumbering the debtor's property with a compulsory mortgage, in accordance with article 747 paragraph 1 of the

⁴⁰ See J. Ignatowicz [in:] J. Ignatowicz, K. Stefaniuk, *Prawo rzeczone*, Warszawa 2006, p. 66.

⁴¹ *Ibidem*.

⁴² *Ibidem*, p. 67.

⁴³ See articles: 225, 226, 234 of the draft property law of 1939.

⁴⁴ See articles: 228, 230, 231, 232, 236, 241 of the draft property law of 1939.

⁴⁵ See articles: 101, 101¹, 101², 101⁶ of the Land and Mortgage Registers and Mortgage Act.

⁴⁶ Compare B. Swaczyna, *Hipoteka po nowelizacji* (ed.) J. Pisuliński, Warszawa 2011, p. 445, B. Swaczyna, *Rozporządzanie..., op.cit.*, p. 217-219, T. Czech, *Wykonywanie..., op.cit.*, p. 1104.

⁴⁷ T. Czech, *Wykonywanie..., op.cit.*, p. 1104.

Polish Civil Procedure Code, would allow for entering a compulsory mortgage.

Conversely, if one assumes that the disposal of an emptied mortgage place is an entitlement included in the ownership right vested with the owner, the security of a pecuniary claim becomes inadmissible. What weighs in favour of this concept is the regulation included in article 101⁴⁶ of the Land and Mortgage Registers and Mortgage Act, which provides that “The right to dispose of an emptied mortgage place is not subject to a foreclosure. Establishing a compulsory mortgage on an emptied mortgage place is inadmissible”. The cited article 101⁶ of the Land and Mortgage Registers and Mortgage Act is a consequence of treating the disposal of an emptied mortgage place as non self-contained substantive right. It therefore confirms that the disposal of an emptied mortgage place is an entitlement being the component of the ownership right.

This approach has been also manifested in the wording of the regulation contained in article 101⁵ of the Land and Mortgage Registers and Mortgage Act. In addition to an easily discernible term ‘entitlement’, used in the text, it also merits noting the meaning of this regulation in the context of the adopted standpoint. Undeniably the very entitlement itself, as a part of a substantive right, cannot be traded independently of the right itself.

The abovementioned provision states that the entitlement to dispose of an emptied mortgage place is vested with each and every property owner. It should be therefore concluded that since the disposition of eligible mortgage place is vested with each and every property owner, it cannot be traded regardless of property right. This, in turn, is supported by the fact that it is an entitlement rather than a subjective right.

In the context of the relevant problems, one cannot leave aside the importance of a functional interpretation. The rules of the said interpretation prefer such an understanding of the phrases contained in the regulations which allows achieving the goals that underlie the rationale for the implementation of a relevant institution to the legal system⁴⁸. The purpose of implementing the institution of the disposal of an emptied mortgage place into the legal system is to protect the legitimate interests of the property owner with a simultaneous respect for the rights of the persons vested with the rights of a lower priority. The establishment of a compulsory mortgage on an emptied mortgage place is undoubtedly in contradiction with such a goal.

According to K. Zaradkiewicz, “This entitlement is not an inherent property right (i.e. the right to one’s own thing), or an obligation, providing only – based on the draft law substantiation – to some extent ‘independent’ element of the ownership right, excluded from the frames of the broadest property rights (as indicated in the justification, it is *a manifestation of the flexibility of ownership right*)”⁴⁹.

We should also mention the position presented by S. Golęb in the context of the draft property act of 1937. The author does not agree with the term ‘the right to dispose of an emptied mortgage place’, used in the draft law. He clearly states that “there was no separate substantive right, there was no practical need to construct such a right. One of the links in the chain should not be called a chain, but only a part of it”⁵⁰. This position interacts with the so-called Occam’s razor, namely the principle of an economy of thought, assuming the desire for simplicity in explaining phenomena⁵¹. Assuming the standpoint that the disposal of an emptied mortgage place constitutes a substantive right would result in creating more beings than required (*Non*

sunt multiplicanda entia sine necessitate)⁵². It is beyond doubt right to claim that the reason for the disposal of an emptied mortgage place is based on the ownership right. If the owner can establish a mortgage, he can also transfer a new mortgage or previously established mortgage to the emptied mortgage place on his property.

The reasons of the draft law include the statement that “the entitlement to dispose of an emptied mortgage place should be seen as a manifestation of the flexibility of ownership rights. Since the existing encumbrance expired, the property owner should be able to dispose of his property right, for example by establishing a new mortgage in the place of an expired one”⁵³.

It should be therefore concluded that the power to dispose of an emptied mortgage place results from ownership right (140 of the Civil Code). The power to use the thing, to collect the proceeds and other benefits, and to dispose of the thing is included in the ownership rights, called direct entitlement or authority⁵⁴. A. Wolter claims that their essence is the ability to use the specific thing or to take other actions concerning the latter. The entitlement to dispose of an emptied mortgage place can be viewed as a form of disposing of a thing by its owner (*ius disponendi*) and it relates to the owner’s entitlement to encumber the real property with the mortgage⁵⁵.

5. Conclusion

The analysis of regulations concerning disposal of emptied mortgage entries which was described in this article, show that it’s a highly original institution that cannot be amounted to any presented constructions, which can be found in foreign legal systems.

It can be noted that a Polish legislator strives for showcasing benefits and eliminating shortcomings in foreign legal systems. However, the main aim of introducing the institution is to secure the owner’s legitimate interest and to respect entitlements of other people, who have rights of lower priority, and this can be done only through inhibiting the automatic advancement of mortgages with a lower priority.

The analysis of normative regulations in other legal systems as well as economic relations in Poland leads to a conclusion that in the era of market economy, the departure from the rule of advancing mortgages is a significant step towards updating Polish mortgage law. The regulation of the institution is considered to be consistent and clear but on the other hand, it’s not difficult to see that on the basis of the amended acts there are still plenty of doubts, which will certainly be resolved by the doctrine and jurisdiction.

The analysis of the provisions on the disposal of an emptied mortgage place and the comparison of the nature of the right and the entitlement clearly indicate that the disposal of an emptied mortgage place constitutes an entitlement, a variation of disposing the thing by its owner and it relates to the owner’s entitlement to encumber the real property with a mortgage. What can be also observed is the desire of the Polish legislator to expose the advantages and to eliminate the disadvantages perceived not only in foreign legal systems, but also in draft laws of 1937, 1939 and 2000, which is reflected in the implementation of the analysed institution into the Polish legal system. The introduced solutions derive mainly from the solutions adopted in the draft property law of 1939, what needs to be positively assessed. The cited draft law included some amendments in relation to the draft law of 1937, both in editorial as well as substantive terms. What was taken into account were

⁴⁸ More Z. Radwański, M. Zieliński [in:] *System...*, p. 465 – 457.

⁴⁹ See K. Zaradkiewicz, *Nowa regulacja prawa hipotecznego*, PPH 2011, no. 1, p. 29 and 30.

⁵⁰ Compare S. Golęb, *Opróżnione miejsce...* KPP 1938, no. 1, p. 52 – 53, M. Lisiewski, *Hipoteka...*, p. 36, B. Swaczyna, *Rozporządzanie...*, p. 217 i 218.

⁵¹ See J. Zieliński, *Ekonomia myślenia – brzytwa Ockham'a*, <http://it-consulting.pl/autoinstalator/wordpress/index.php/2011/04/23/ekonomia-myslenia-brzytwa-ockham'a>, [access: 26.04.2013].

⁵² T. Czech, *Wykonywanie...*, p. 1104.

⁵³ Uzasadnienie projektu ustawy o zmianie ustawy o księgarstwie wieczystym i hipotece (The reasons of the draft law), druk sejmowy nr 1562 z 29.12.2009 r., p. 1, www.sejm.gov.pl, p. 11.

⁵⁴ M. Pyziak – Szafnicka [in:] *System Prawa Prywatnego...*, p. 704, Z. Radwański, *Prawo...*, p. 76.

⁵⁵ M. Deneka, *Księgi wieczyste. Zasady materialnoprawne*, Warszawa 2010, p. 259.

significant achievements being the result of a number of ongoing controversy presented in legal journals.

It can be stated that the update of the Act on Land and Mortgage Register and on Mortgage which was suggested by a legislator definitely deserves acclaim. After many years the act was finally legislated. It has significantly changed Polish law of land register. Moreover, it's an organized regulation and is beneficial for both parties. According to the legislators, the new solution is 'a sensible compromise between the interests of the owner of the charged mortgage and the need of creating a flexible and easily established security'. It should be stressed that in most cases these changes are necessary and moreover, they have been postulated for a very long time. The Regulations from the Act on Land and Mortgage Register which were previously in force, did not provide sufficient security for the claim. The main reason for this situation was the lack of adaptation to the current system, free market and to the economic circulation. The motives for drafting the act show that the amendments do not eliminate the possibility of further modification to the mortgage law. To sum up, the amendments to the mortgage law from 2009 constitute an important step towards making mortgage a flexible and effective instrument of securing claims.

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