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Kierunki rozwoju orzecznictwa Sądu Najwyższego w sprawach dotyczących nieruchomości w 2020 r. (cz. II)

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Przegląd

Abstrakt:

Opracowanie stanowi drugą część przeglądu orzecznictwa Sądu Najwyższego z 2020 r. Prezentuje zasadnicze tezy oraz motywy dotyczące problematyki obrotu nieruchomościami z orzeczeń wydanych w Izbie Cywilnej Sądu Najwyższego, a dotyczących przede wszystkim poszczególnych ograniczonych praw rzeczowych, posiadania, ksiąg wieczystych oraz reprywatyzacji (gruntów warszawskich na podstawie Dekretu z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m.st. Warszawy). W przeglądzie przedstawiono w szczególności najważniejsze tezy dotyczące problematyki skutków współdziedziczenia nieruchomości przez uprawnionego do służebności, nabycia służebności quasi-przesyłowej (służebności gruntowej odpowiadającej treścią służebności przesyłu), kwestie intertemporalne związane z regulacją hipoteki, a także zagadnienia związane z zasiedzeniem nieruchomości.

Słowa kluczowe: orzecznictwo, nieruchomości, własność, zasiedzenie, służebności, hipoteka, grunty warszawskie

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Directions of the development of judicature of the Supreme Court in cases regarding real estate in 2020 (part II)

Abstract

The article constitutes the second part of a review of judicature of the Supreme Court in 2020. It presents fundamental theses and motives regarding the issue of real estate trade in rulings issued by the Civil Law Division of the Supreme Court, mostly concerning individual limited property rights, ownership, land registers and reprivatisation (of Warsaw land on the basis of the Decree of 26 October 1945 on the ownership and use of land in the area of the City of Warsaw). The review particularly presents the most imperative theses on the effects of joint inheritance of property by the entitled to easements, the acquisition of a quasi-transmission easement, (easement appurtenant that corresponds with transmission easement in terms of content), inter-temporal matters associated with settling mortgages, but also notions of real estate prescription.

Keywords: jurisprudence, real property, ownership, prescription, easements, mortgage, Warsaw land

Introduction

This analysis covers the second part of the issue of property rights on real properties in the case law of the Supreme Court in 2020 (the first part was published in no. 2 of '©Nieruchomości' of 2021). It presents jurisprudential theses of the Supreme Court concerning property rights – easement and mortgage as well as the institution of land and mortgage registers. The last part discusses the judgement regarding Article 7 of the Decree of 26 October 1945 on the ownership and use of land in the area of the City of Warsaw (the so-called Bierut decree).

V. Limited property rights

1) Easements

Pursuant to Article 247 of the Polish Civil Code, a limited property right ceases to exist if it is transferred to the owner of the encumbered asset or if the entity entitled to this right acquires the ownership title to the encumbered asset. This provision establishes the so-called consolidation principle[2]. Decision II CSK 583/18 of the Supreme Court of 10 July 2020 refers to the assessment of a situation in which the beneficiary of personal easement encumbering real property becomes only one of co-heirs of the share in the inheritance, which includes real property encumbered with such an easement. The Court indicated that in this case we cannot speak of an effect in the form of confusion (actually – consolidation, 'merger of rights'). In the Supreme Court's assessment, the last effect occurs when all rights and obligations are transferred to the same person (or persons), while in the analysed situation of joint inheritance, the heir does not become the exclusive owner of real property, which means that the scope of rights to use the real property on account of inheritance may be different (the same or broader) from the scope of rights resulting from easement. At the same time in the reasons for the judgement it was reminded that personal easement, including easement of dwelling, is of a maintenance nature as it serves consumption purposes in a broader sense. In practice, it usually serves needs of elderly and ill people. On the other hand, the right resulting from share in inheritance does not secure only interests of the entity authorised on account of such easement. As a consequence, it was assumed that personal easement does not cease to exist when the entity authorised on account of the easement becomes the co-owner of the encumbered real property in fractional part. Therefore, the norm of Article 247 of the Civil Code is not applied. The Supreme Court referred to the content of Resolution III CZP 3/83[3] of 10 March 1983, in which the definition of confusion (consolidation) mentioned at the beginning was formulated. According to it, personal easement will cease to exist on the basis of Article 247 of the Civil Code in the case of the allocation in the inheritance share of the encumbered real property to a person having an easement. As a side note in connection with the above-mentioned judgement, it should be recalled that we can speak of a 'maintenance nature' of property right, including personal easement, due to the normative formation of its content, according to which it is to serve meeting only own needs of the entitled entity, and as a consequence – similarly as in

[2] For more recent publications see e.g. T. Henclewski, *Institution of Confusion in the Polish Civil Law (Instytucja kontuzji w polskim prawie cywilnym),* 'Commercial Law Review' (Przegląd Prawa Handlowego) 2011, no. 4, p. 51 et seq.

[3] OSNC1983, no. 8, item 115.

the case of personal easements – it is in principle a non-transferable right, e.g. exercising it by other person then the entitled entity is inadmissible.

In the jurisprudence from 2020 the Supreme Court again referred to the issue of the acquisition of the so-called quasi-transmission easement (decision of the Supreme Court of 28 August 2020, I CSK 20/20). It recalled in particular the existing achievements in this scope, noting that the establishment of this type of special easement had been provided for earlier in Article 33 of the Decree on Property Law of 11 October 1946[4]. Also on the grounds of the Civil Code from the time before the amendment of 2008 introducing the transmission easement, it was indicated that the acquisition of this type of easement as a land easement is admissible, i.e. on the grounds of provisions – this last form of regulatory easement. It was to allow the use of transmission devices located on real property by an entrepreneur using them in its business activities[5]. The admissibility of prescription of such an easement was also confirmed (decision of the Supreme Court of 27 August 2020, IV CSK 165/20). This concerned – according to the established jurisprudence – the so-called easement corresponding in its content to the transmission easement, although the last easement was not regulated by law until the above-mentioned amendment to the Civil Code of 2008 (Articles 305^1–305^4). Then the period of the occurrence on the real property of the actual state corresponding to the content of the transmission easement before entry into force of Articles 305^1–305^4 of the Civil Code is added to the time of possession required for the prescription of this new easement[6]. As a consequence, the possession in the scope of land easement is considered as the possession that corresponds to the control in the scope of the transmission easement, which allows the acquisition of the last easement by prescription on the basis of appropriately applied Article 292 of the Civil Code.

The issue whether it is necessary to establish the transmission easement is resolved on the basis of circumstances of a specific case, on which the assessment of the admissibility of its establishment on the basis of Article 305^2(2) of the Civil Code is to depend. However, it is unclear and should be assessed by a trial court whether the necessity to establish the easement requires in each situation absolute lack of possibility to access transmission devices without establishing the easement and to use them in a different way. The establishment of encumbrance requires – as it was indicated while referring to earlier jurisprudence – proportionate balancing of all interests at stake[7]. At the same time, the Supreme Court rightly noticed that a public road lane cannot be made available to a transmission company for use by the establishment of a limited property right – the transmission easement[8], as such a lane constitutes property of a special kind, whose purpose is to satisfy the general interest.

The establishment of the transmission easement is performed for remuneration determined by a court. Its purpose is to compensate for the use by a transmission company of a third party's property in the scope

4 Journal of Laws no. 57, item 319, as amended.

5 See in particular judgement of the Supreme Court of 31 December 1962, II CR 1006/62, OSPiKA 1964, item 91, resolutions of the Supreme Court of 3 June 1965, III CO 34/65, OSNC 1966, no. 7-8, item 109, of 17 January 2003, III CZP 79/02, OSNC 2003, no. 11, item 142 and of 7 October 2008, III CZP 89/08, Bulletin of the Supreme Court (Biuletyn SN) 2008, no. 10, p. 8.

6 See e.g. resolutions of the Supreme Court of 27 June 2013, III CZP 31/13, OSNC 2014, no. 2, item 11, and of 6 June 2014, III CZP 107/13, OSNC 2015, no. 3, item 29.

7 Resolution of the Supreme Court of 14 May 2014, III CZP 14/14, OSNC 2015, no. 1, item 8.

8 See also decision of the Supreme Court of 27 April 2017, II CSK412/16, unpublished.

necessary to operate devices and perform other activities (decision of the Supreme Court of 23 June 2020, IV CSK 729/19). The easement established in this way on the basis of a decision is of a compulsory nature and occurs regardless of the will of the owner of the real property, which is to be encumbered. A special case occurs when – similarly as in the circumstances of the case examined by the Supreme Court – the necessary scope of interference of a transmission company on the real property subject to encumbrance with land easement coincides with the most probable way of the use of land for residential purposes. It is worth noticing that in the absence of normative regulation it is not clear whether the establishment of easement – both transmission and land easement – may take place for one-off remuneration (as a sale of future right[9]), or for remuneration in the form of periodic payments (quasi-rent) with the effectiveness of these obligations in the case of derivative acquisition of easement. The latter may raise doubts due to exclusively conventional character of the obligation effective only *inter partes*.

2) Mortgage

The Supreme Court addressed the inter-temporal issue related to the regulation of mortgage in judgement IV CSK 537/18 of 20 February 2020. In accordance with Article 79(1) of the Polish Act of 6 July 1982 on land and mortgage registers and mortgage[10], in the case of transfer of a mortgage claim to the purchaser, also the mortgage is transferred, unless provided otherwise in the Act. The transfer of mortgage is an effect of the transfer of a claim secured by the pledge right and cannot be treated as the establishment of mortgage. The Court emphasised that, in relation to the mortgage established (entered into the land and mortgage register) before 20 February 2011, the provisions of the Act on land and mortgage registers and mortgage in the wording effective until 20 February 2011 constitute the normative basis (see Article 10(2) of the Polish Act of 26 June 2009 amending the Act on the land registers and mortgage and other acts[11]). Therefore, in the scope of pledge rights on real properties established earlier the principle of further validity of the previous act applies. Under prior regulations, pursuant to the principle of the level of detail, mortgage could secure only one specified cash claim. Hence, securing many claims was excluded. It became possible upon the entry into force of the amendment in the case of newly established mortgages (the so-called multi-mortgages[12]). An ordinary mortgage entered before 20 February 2011 makes use also after that day – despite the repeal – of the presumption of the existence of a right resulting from the entry of mortgage (see Article 3(1) of the Act), which also covers, when it comes to liability based on real property, a claim secured by mortgage. Moreover, the Supreme Court stated that the entry of an ordinary mortgage constitutes for a mortgage creditor sufficient grounds for pursuing claims and proving their existence. Challenging the presumption should be performed by the debtor.

The content of a legal action concerning the establishment of this pledge right prejudges the scope of the encumbrance with mortgage which is to secure specified claim (decision of the Supreme Court of 17 July 2020, Ill CSK362/17). In the light of Article 76 of the Act on land and mortgage registers and mortgage,

9 See e.g. R. Longchamps de Berier, Obligations (*Zobowiązania),* Lviv 1938, p. 445

10 Journal of Laws of 2019, item 2204, as amended (hereinafter referred to as the Act on land and mortgage registers and mortgage).

11 Journal of Laws no. 131, item 1075.

12 Information about the concept can be found in: K. Zaradkiewicz, *New Regulation of the Mortgage Law (Nowa regulacja prawa hipotecznego),* 'Commercial Law Review' (Przegląd Prawa Handlowego) 2011, no. 1 (supplement), passim.

in the case of the establishment of a separate ownership of at least one premises in real property encumbered with mortgage, resulting in transfer of this premises to another person, the real property is divided and, at the same time, joint mortgage is established. In the Supreme Court's assessment, joint mortgage is not established as a change in the content of the existing mortgage, constituting a kind of conversion dictated by the creditor's interest. It is to consist in a 'legal adaptation of the established security to the situation which occurs as a result of the division of the encumbered real property'[13]. In further part of the judgement, the Supreme Court assessed in detail some issues related to effects of sale in bankruptcy proceedings as an enforcement sale resulting e.g. in the expiry of rights disclosed by the entry in the land and mortgage register (Article 313 and Article 98 of the Polish Bankruptcy Law of 28 February 2003). It reminded in particular different opinions presented in jurisprudence on consequences of the execution of agreements concerning sale of separate ownership of premises by a trustee in bankruptcy in the implementation of the preliminary agreement when the price was paid by the purchaser in full before the declaration of bankruptcy, and as a consequence not performed under a tender or auction procedure. In jurisprudence there is in particular an opinion that the provisions of the Bankruptcy Law do not affect the necessity to apply special regulations of Article 44(1) and Article 44(1)[1] of the Polish Act of 15 December 2000 on housing cooperatives, which make the legal effect of the real property division in the form of excluding the establishment of joint mortgage conditional upon the fact whether the mortgage on cooperative real property (the so-called original real property) existed on the day of entry into force of this Act. The provisions of the Bankruptcy Law also do not exclude the general principle indicated in Article 76(1) of the Act on land and mortgage registers and mortgage as to the effects of the division of land property encumbered with mortgage[14]. Indicating earlier opinions, it was recalled that sale in bankruptcy proceedings within the meaning of Article 313(1) of the Bankruptcy and Reorganisation Law should be aimed at obtaining financial resources for the satisfaction of the bankrupt's creditors and must be performed in the form provided for in the Bankruptcy and Reorganisation Law. Sale aimed at the performance of an obligation resulting from the preliminary agreement made before the declaration of bankruptcy, not being a mutual agreement, does not constitute it, and the performance of an obligation burdening the bankrupt before the declaration of bankruptcy is not aimed at maximising the mutual performance obtained by the estate. This opinion is sometimes questioned in jurisprudence[15], as it is indicated that for the qualification of the legal action of sale of an asset of the bankruptcy estate within the meaning of Article 313(1) and (2) of the Bankruptcy and Reorganisation Law with appropriate effects it is sufficient to sell an asset of the bankruptcy estate in bankruptcy proceedings, as these provisions apply to each sale. The last position was shared in the discussed judgement.

In turn, in decision IV CSK 287/18 of 12 March 2020 the Supreme Court examined the issue whether the administrator of mortgages encumbering real property for the purpose of securing claims to which bondholders are entitled against the bond issuer on account of the issue of bonds may give a valid consent to the so-called unencumbered establishment of a separate ownership of premises. It was emphasised

13 Decision of the Supreme Court of 14 January 2011, II CSK 364/10.

14 Decision of the Supreme Court of 14 January 2011 II CSK 359/10, II CSK 364/10, II CSK 363/10, of 24 June 2019, III CSK 259/17.

15 Decision of the Supreme Court of 10 March 2017, III CSK 91/16, OSNC-ZD 2017, no. 4, item 65; of 6 April 2017, III CSK 117/16, III CSK 123/16, III CSK 133/16, of 18 May 2017, III CSK 197/16.

that such a solution would result in considering it as tantamount to a waiver of this limited property right. The problem concerned the application of Article 7(1a) and (1b) of the Polish Act of 1995 on bonds. Pursuant to these regulations, before the commencement of the issue of bonds the issuer is obliged to sign an agreement in written form to be valid with the mortgage administrator that performs rights and obligations of a mortgage creditor in its own name, but on account of bondholders. Also a bank performing the function of an agent bank may be the mortgage administrator. Article 31(2)–(5) of the Act applies accordingly to the mortgage administrator appointed in this way, while Article 68^2 of the Act on land and mortgage registers and mortgage does not apply to it. In turn, a report on the cancellation of redeemed bonds, prepared by a notary, constitutes a title for removing the mortgage established for the purpose of securing bondholders' claims.

In earlier jurisprudence the Supreme Court stated that the mortgage creditor's declaration on waiver of mortgage, which the consent to unencumbered separation of premises should be equated, leads to the exclusion of the application of Article 76(1) and (4) of the Act on land and mortgage registers and mortgage.[16] Such a declaration is treated as an alternative for determining the manner of division of mortgage directly in the agreement on its establishment (Article 76(4)(2) of the Act on land and mortgage registers and mortgage). It may consist in a waiver by the mortgage creditor of the mortgage, which would encumber the separated real property[17]. In this context, the requirement concerning the content of a developer agreement, indicated in Article 22(1)(17) of the Polish Act of 16 September 2011 on protection of rights of buyers of residential units and single-family houses[18], was recalled. Pursuant to this provision, an agreement should include in particular information about the consent of a bank or another creditor secured by mortgage to an unencumbered separation of residential premises and transfer of its ownership after the payment of the full price by the purchaser, if such an encumbrance exists. In the Supreme Court's assessment, unless otherwise specified directly in the conditions of the issue the mortgage administrator cannot waive mortgages securing bondholders' claims, and as a consequence they also cannot give their consent to an unencumbered separation of premises from real property encumbered with mortgage. In order to recognise the admissibility of a different determination it is not sufficient to introduce only a note into the agreement with the mortgage administrator. Otherwise the declaration of the mortgage administrator is absolutely invalid (Article 58(1) of the Civil Code), as it is contrary to the 'norm not expressed directly in the Act of 1995 on bonds, indicating the scope of the mortgage creditor's rights and obligations performed by the administrator on account of bondholders'.

VI. Possession

The issue of possession in jurisprudence of the Supreme Court concerned in particular the prescription of real properties. Pursuant to Article 172 of the Civil Code, the holder of real property not being its owner acquires the ownership if they have possessed the real property continuously for twenty years as an

16 Decision of the Supreme Court of 26 November 2019, IV CSK416/18.

17 Decision of the Supreme Court of 21 February 2013, IV CSK 385/12, OSNC 2013, no. 10, item 119; decision of the Supreme Court of 10 April 2013, IV CSK 551/12, unpublished, and of 16 May 2013, IV CSK 653/12, unpublished.

18 Consolidated text: Journal of Laws of 2019, item 1805, as amended.

autonomous holder, unless they acquired the possession in bad faith; after the expiry of thirty years the holder of the real property acquires its ownership even if they acquired the possession in bad faith. As it is known, one of premises for acquiring a property right on real property by prescription is possession, which in the case of acquiring the property right should be of an autonomous (ownership) nature. Pursuant to Article 336 of the Civil Code, an autonomous holder of an asset is the entity actually controlling it as an owner. In accordance with Article 339 of the Civil Code, it is presumed that the entity actually controlling an asset is an autonomous holder. In principle an autonomous possession is considered as equivalent to the possession which corresponds in the content to control in the scope of the property right (and therefore according to the Roman theory the so-called possession of assets as opposed to the possession of rights which corresponds in the content to control in the scope of other substantive right than ownership[19]). There is no doubt that the legal presumption under Article 339 of the Civil Code may be rebuttable. In the Supreme Court's assessment, on the grounds of the first of these provisions the determination of the character of control, i.e. whether it constitutes an autonomous possession (necessary for prescription), may require referring to the basis of the possession of assets and a number of other circumstances (decision of the Supreme Court of 24 September 2020, IV CSK 33/19). It was legitimately stated that the act of physical control (land cultivation) does not constitute grounds for a clear determination whether we deal with acts of control of an ownership nature or of a different nature (e.g. under lease, i.e. as a dependent possession). It is also essential to take into account the possibility that a dependent possession can change into an autonomous possession (considering the inapplicability in the Polish property law of differently understood Roman principle *nemo ipsi causam possessionis mutare potest*). Therefore, the admissibility of conversion of a dependent possession into an autonomous possession and vice versa was considered to be obvious. However, the change in this case in relation to prescription cannot be limited only to the internal will of the holder (the *animus* element), but – from the point of view of prescription – the will to control the asset as the owner must be manifested in a manner visible to the surroundings (in the scope of acts of control noticeable to the surroundings, i.e. *corpore,* decision of the Supreme Court of 18 August 2020, IV CSK 48/20, and decisions of the Supreme Court cited there of 7 October 1997, I CKN 224/97, unpublished, of 1 June 2017, I CSK 587/16, unpublished and of 10 May 2019, I CSK 220/18, unpublished). In principle the necessity of existence of the so-called clear manifestation of change in the holder's relation to real property should be recognised. Then this 'manifestation' should consist in disclosing by the holder of the asset that they will not possess real property *alieno nomine*, but exclusively on their own behalf, i.e. *suo nomine*[20]*.* Pursuant to Article 348 of the Civil Code, the transfer of possession may take place primarily through handing over the asset *(traditio corporalis).* While analysing the transfer of possession, the Supreme Court indicated that for the purpose of maintaining the continuous possession the possession may be transferred not only by tradition, but also in each of the ways indicated in Articles 348–351 of the Civil Code. (decision of the Supreme Court of 17 July 2020, IV CSK 53/20). What is important, in the court's opinion the performance of an actual (not legal) operation is sufficient for the

19 More extensively on this topic: K. Zaradkiewicz, *Roman Theory of Possession vs Civil Code (Romańska teoria posiadania a Kodeks cywilny),* 'Studia Iuridica' 2016, volume LXIV, p. 93 et seq.

20 See decision of the Supreme Court of 12 May 1959, I CR 167/59, OSNCK 1961, no. 1, item 8; decision of the Supreme Court of 29 September 2004, II CK 550/03, unpublished; decision of the Supreme Court of 11 October 2013, I CSK 5/13, unpublished; decision of the Supreme Court of 16 October 2015, I CSK 885/14, unpublished.

transfer of possession, which is to result from the fact that possession is an actual state. This opinion refers to controversy in literature concerning the character of the event constituting grounds for transferring the possession as actual control in the scope of substantive right.

VII. Land and mortgage registers

Pursuant to Article 3(1) and (2) of the Act on land and mortgage registers and mortgage, it is presumed that the disclosed right from the land and mortgage register is entered in accordance with the actual legal state. It is also presumed that the deleted right does not exist. They are rebuttable legal presumptions, which are binding on the adjudicating court (see Article 234 of the Code of Civil Procedure. According to the Supreme Court, questioning the presumption requires the indication that the actual legal state is different from the state disclosed in the land and mortgage register because the right entered into the register does not exist or despite deletion from the register it still exists (judgement of the Supreme Court of 10 January 2020, I CSK 451/18[21], as well as judgement of the Constitutional Tribunal cited there of 21 July 2004, SK 57/03[22]). The presumption may be rebutted in proceedings concerning the agreement of the content of the land and mortgage register with the actual legal state (Article 10 of the Act on land and mortgage registers and mortgage). However, it may also take place under another procedure, in particularly in each other court proceedings in which the compliance of the entry of right disclosed in the land and mortgage register with the actual legal state is important for the result of the proceedings[23]. Nevertheless, in the case of constitutive (right-forming) entries it is sometimes indicated in jurisprudence of the Supreme Court that the rebuttal is admissible only in proceedings under Article 10 of the Act on land and mortgage registers and mortgage.[24] Discrepancies in jurisprudence are indicated in relation to rebutting the presumption concerning the entry of mortgage (see position in favour of exclusivity indicated in the analysed decision – judgement of the Supreme Court of 4 March 2011, I CSK 340/10, see also judgement of 4 October 2019, I CSK 419/18, unpublished, judgements of the Supreme Court of 29 November 2019, I CSK 473/18, unpublished, and of 8 May 2011, II UK 247/11, OSNP 2013, no. 7-8, item 9, while in favour of admissibility in all proceedings – in judgements of 6 June 2007, III CSK 407/06, and of 25 November 2015, IV CSK 79/15 unpublished, and in decision of 13 December 2018, V CSK 559/17 unpublished). In the above-mentioned judgement of 2020 the Supreme Court approved a liberal position, indicating the admissibility of rebutting the presumption in relation to mortgage not only by way of a legal action under Article 10(1) of the Act on land and mortgage registers and mortgage, but also as a result of pleas of the defendant owner of real property encumbered with mortgage in the case initiated against them by a secured creditor. In the court's assessment, Article 3 of the Act on land and mortgage registers and

[21] See also resolutions adopted by seven judges of the Supreme Court of 15 March 2006, III CZP 106/05, OSNC 2006, no. 10, item 160, and of 18 May 2010, III CZP 134/09, OSNC 2010, no. 10, item 131.

[22] OTK ZU no. 7/A/2004, item 69.

[23] See in addition to the above-indicated judgement of the Constitutional Tribunal also resolutions adopted by seven judges of the Supreme Court of 15 March 2006, III CZP 106/05, and of 18 May 2010, III CZP 134/09, judgement of the Supreme Court of 17 June 1960, 3 CR 328/60, OSPiKA 1961, no. 6, item 162, judgements of the Supreme Court of 5 April 2006, IV CSK 177/05, unpublished, of 13 February 2009, II CSK 464/08, OSP 2010, no. 2, item 17, of 20 March 2009, II CSK 581/08, unpublished, of 21 June 2011, I CSK 555/10, OSNC-ZD 2012, no. B, item 43, of 25 November 2015, IV CSK 79/15, unpublished, decision of the Supreme Court of 4 February 2011, III CSK 146/10, OSNC-ZD 2011, no. D, item 89.

[24] See e.g. decision of the Supreme Court of 20 March 2019, V CSK 1/18, unpublished, in relation to perpetual usufruct: resolution of the Supreme Court of 13 January 2011, III CZP 123/10, OSNC 2011, no. 9, item 96, and judgements of the Supreme Court of 16 February 2011, I CSK 305/10, OSNC-ZD 2012, no. A, item 7, of 4 March 2011, I CSK 340/10, unpublished, of 26 June 2014, III CSK 192/13, unpublished, of 22 February 2018, I CSK 391/17, unpublished, and of 12 April 2019, I CSK 172/18, unpublished), in relation to the ownership of premises – judgement of the Supreme Court of 9 November 2011, II CSK 104/11, unpublished.

mortgage does not indicate the necessity of rebutting under special procedure, unlike in the case of some other legal presumptions (e.g. Article 539 and Article 679(1) of the Civil Code, Article 63(3) of the Family and Guardianship Code). As a consequence, the procedure under Article 10(1) of the Act on land and mortgage registers and mortgage cannot be considered as the exclusive procedure for rebutting the presumption related to the entry. However in this case, contrary to other proceedings in which rebutting constitutes a preliminary matter, the effects of rebutting are specific, as the legal assessment that the entry does not correspond to the actual legal state is covered by the binding force of the court judgement (Article 365 in connection with Article 366 of the Code of Civil Procedure). The judgement in such proceedings is the basis for removing (deleting) the entry in the land and mortgage register, with effects *erga omnes*[25].

As it results from Article 67 of the Act on land and mortgage registers and mortgage, mortgage is established as a result of an entry in the land and mortgage register, which means that the entry is of a constitutive nature. However, it is not the only premise for the effective establishment of this limited property right. In particular the entry may include a right that does not exist. Mortgage is established on the basis of another event, whose lack or defectiveness (e.g. invalidity of a legal action on establishing a right of pledge[26]) is not remedied by the entry. What is important, it was recalled that the entry constitutes an element of a complex event with which the Act connects the establishment of mortgage[27]. In order to rebut the presumption from Article 3(1) of the Act on land and mortgage registers and mortgage it is not necessary to 'rebut (remove) the entry' of mortgage, but to demonstrate that despite the disclosure by the entry the right has never been established or it has expired despite the establishment. The removal due to the expiry of mortgage as a result of the expiry of the claim secured by it is of a declarative nature due to the accessory character of mortgage (Article 94 of the Act on land and mortgage registers and mortgage). Then lack of its removal results in the state of non-compliance between the actual state and the disclosed state in the content of the land and mortgage register. As an analogous situation the Supreme Court considers the situation in which mortgage disclosed in the land and mortgage register has never been established due to lack of effective substantive and legal grounds.

In judgement IV CSK 276/18 of 12 March 2020, main principles concerning land and mortgage registers were reminded. They constitute public, open court register of the legal state of real properties covering property rights or other rights subject to disclosure in the register, while the court maintaining the land and mortgage register performs the entry at the request and within its scope, unless specific regulation provides for undertaking this activity ex officio. The character of the land and mortgage register procedure is formal. It is not the role of this court to rule on legal relationships, but on the content of the land and mortgage register, while the entry covers data shown on an appropriate basis (decision of the Supreme Court of 12 March 2020, IV CSK 585/18). The land and mortgage register court does not have competences to conduct evidentiary proceedings. Nevertheless, it does not mean that it cannot carry out ex officio the assessment of absolute invalidity of the legal action constituting the basis of the entry. On the contrary, this circumstance cannot be omitted by the court maintaining the register (decision of the

25 See resolution of the Supreme Court of 15 March 2006, III CZP 106/05.

26 Judgement of the Supreme Court of 4 October 2019, I CSK 419/18, unpublished.

27 See *mutatis mutandis* the justification of resolution of the Supreme Court of 11 April 2019, III CZP 100/18, OSNC 2019, no. 12, item 119.

Supreme Court of 20 July 2020, I CSK 229/19). Of course, pursuant to the established jurisprudence, while examining a case in the land and mortgage register proceedings the court may take into account facts known to it officially[28]. In decision II CSK 719/18 of 10 July 2020, it was indicated that it results from the literal interpretation of Article 626^8(2) of the Code of Civil Procedure that documents not attached to the application for the entry or to the files of the land and mortgage register to which the application relates, but included in the files of another land and mortgage register and mentioned by the applicant in the application as the basis of the entry, cannot be the basis of the entry in the land and mortgage register. This applies even if for this last reason they are known to the land and mortgage register court ex officio.

In Article 626^8(2) of the Code of Civil Procedure regulating the scope of the jurisdiction of the land and mortgage register court, the manner of the determination by the land and mortgage register court of an obstacle to the entry is not directly regulated. This provision specifies only means of evidence, which can be used by participants of the entry procedure. Therefore, circumstances known to the court ex officio, referred to in this provisions, are in particular facts resulting from documents included in the files of the land and mortgage register, from documents of other land and mortgage registers and the content of other land and mortgage registers as well as facts resulting from letters or appeals submitted by participants of the land and mortgage register proceedings objecting to the entry[29] (decision of the Supreme Court of 18 August 2020, IV CSK 637/19).

In the system of land and mortgage registers, formal and material transparency of these registers (Article 2) and presumptions of compliance of the entered disclosed right with the actual legal state (Article 3) are aimed at ensuring security of legal transactions. In turn, the principle of public credibility constitutes an exception to the principle *nemo plus iuris in alium transfere potest, quam ipse habet,* as it allows the acquirement of a property right from an unauthorised person that was entered into the land and mortgage register as the owner (it is worth adding – also another authorised person according to the content of the register in line with the entry). With reference to the content of Articles 16 and 17 of the Act, it was indicated that the character of the claim for the transfer of the ownership right to real property from the preliminary agreement made in the form of a notarial deed causes that they may be disclosed in section III of the land and mortgage register with the effect of extended effectiveness in relation to rights acquired later, i.e. provided for in Article 17 of the Act on land and mortgage registers and mortgage. In the Supreme Court's assessment, in this case the entry is in fact of a protective nature *(actio in rem scripta,* judgement of the Supreme Court of 12 March 2020, IV CSK 276/18).

In the above-mentioned judgement the Supreme Court also stated that the 'warning' concept has a legal character as provided directly for the disclosure of the claim for removing non-compliance between the legal status of the real property disclosed in land and mortgage register and the actual legal status (Article 10(2) of the Act on land and mortgage registers and mortgage), entering the information about the change of the owner obtained by the land and mortgage register court (Article 36(3) of the Act on land and mortgage registers and mortgage), as well as non-compliance of these states noticed by it (Article 626^2(4),

[28] See e.g. decisions of the Supreme Court: of 4 April 2003, III CKN 1302/00, OSNC 2004, no. 6, item 102, of 15 December 2005, V CK 54/05, OSNC 2006, no. 7-8, item 138, of 18 June 2009, II CSK 4/09, of 23 June 2010, II CSK 661/09, OSNC 2011, no. 1, item 12.

[29] See decision of the Supreme Court of 14 June 2017, IV CSK 657/16, unpublished and of 4 April 2017, I CSK 514/16, unpublished.

Article 626[13](1) of the Code of Civil Procedure). Such an entry is, by nature, temporary, while the principle of public credibility of land and mortgage registers excludes only the warning concerning non-compliance between the legal status disclosed in land and mortgage register and the actual legal status of the real property. A warning understood in this way cannot be equated with the 'appropriate warning' disclosed in the land and mortgage register as a security of non-monetary claims (Article 755(1)(5) of the Code of Civil Procedure).

In resolution III CZP 80/09 adopted by seven judges of the Supreme Court on 16 December 2009[30], having the force of a legal principle, the Supreme Court ruled that while examining the application for entry into the land and mortgage register the court is bound by the actual state existing at the time of the application submission and the order of its receipt. It is worth mentioning that in the Supreme Court's assessment, only the application for entry into the land and mortgage register based on documents existing at the time of its submission, not on documents developed after the submission of the application for entry, may be taken into account in the land and mortgage register proceedings (decision of the Supreme Court of 20 July 2020, I CSK 229/19).

The principle expressed in the above-mentioned resolution of 2009 was recalled in this judgement as well as in decision V CSK 435/19 of the Supreme Court of 23 January 2020. The position of the Supreme Court expressed in resolution III CZP 86/15 of seven judges of 25 February 2016[31] is not contrary to the above-mentioned resolution, as the possibility to take into account facts known to the court ex officio does not mean that they are facts occurred after the submission of the application for entry.

The proceedings concerning the removal of non-compliance between the legal status of the real property disclosed in land and mortgage register and the actual legal status (Article 10 of the Act on land and mortgage registers and mortgage) should be conducted with the participation of all interested parties. The use of all means of evidence within these proceedings is possible. It includes e.g. the category of other appropriate documents within the meaning of Article 31(2) of the Act on land and mortgage registers and mortgage. Such appropriate documents, as the Supreme Court indicated, may include in particular statements of entities establishing a separate ownership of premises and disposing of them on the evasion of legal effects of declarations of will or their correction (decision of the Supreme Court of 12 March 2020, IV CSK 585/18). The Court also emphasised that the separation of premises would result in a complex legal relationship. Treating by the legislator as separate real properties not only land, but also premises of a building constituting the so-called separate common real property in specific shares in the case when land was handed over for perpetual usufruct in specific shares, caused the necessity to reflect this state in provisions regulating the content of land and mortgage registers, providing for the necessity to disclose in the land and mortgage register entries of different detailed data indicated in the Act.

Moreover, in the above-mentioned judgement the Supreme Court indicated that the calculation of shares directly under Article 3(3) of the Polish Act on the ownership of premises as a rule takes place on the basis of the declaration of knowledge, not the declaration of will. As a consequence, it considered as

30 OSNC 2010, no. 6, item 84.

31 OSNC 2016, no. 7-8, item 81.

admissible the presentation of documents justifying the performance of entry of declarations of the owner of separated premises submitted in written form with signatures certified by a notary together with documents demonstrating the change in entries in the land and premises register in the scope of the area of buildings and premises as well as shares in rights of ownership and perpetual usufruct related to them, confirming the correctness of calculations and the legitimacy of changes concerning their disclosure, prepared in the form specified by law for entries in the land and mortgage register, i.e. extracts from the evidential database, including registers of buildings and premises, files of buildings and premises with appropriate notes, maintained on the basis of the Polish Act of 17 May 1989 – Geodetic and Cartographic Law[32] and the Regulation of the Minister of Regional Development and Construction of 29 March 2001 on the land and building register[33].

The housing community does not have the right of action in the land and mortgage register proceedings (to submit applications for entry into the land and mortgage register), as it was not directly indicated in the catalogue of entities entitled under Article 626^2(5) of the Code of Civil Procedure, which has special character and excludes reference to general provisions of non-contentious proceedings (decision of the Supreme Court of 12 March 2020, IV CSK 585/18)[34].

VIII. Warsaw land

Specific issues examined by the Supreme Court concerned some problems related to the application of the provisions of the Decree of 26 October 1945 on the ownership and use of land in the area of the City of Warsaw[35]. In resolution III CZP 71/19 adopted on 30 June 2020 it was indicated that a trial court, while examining the premises for compensation liability in the situation when damage occurred due to the issue of an administrative decision on the refusal to establish perpetual usufruct on the basis of Article 7(1) of the Decree, may determine whether the correct examination of the application for establishing perpetual usufruct would also lead to the refusal to establish this right. It happens when the invalidity of the decision was determined due to lack of clarification whether the use of land by the existing owner can be compatible with the land designation included in the spatial development plan applicable on the day of the issue of this decision.

IX. Summary

In 2020 the Supreme Court did not issue ground-breaking judgements in the scope of property rights on real properties. Most of them confirmed existing positions concerning such key issues as e.g. the admissibility of the prescription of easement with the content corresponding to the transmission easement, or adding the possession in this scope to the possession of the transmission easement. The meaningful fact is that, despite quite a uniform jurisprudence line in this scope, the issue of the prescription of transmission easement still returns in the jurisprudence of the Supreme Court. What is important, the

32 Journal of Laws of 2017, item 2101, as amended.

33 Journal of Laws no. 38, item 454.

34 See also decision of the Supreme Court of 24 November 2010, II CSK 268/10; differently in decision of Supreme Court of 26 September 2013, II CSK 43/13.

35 Journal of Laws no. 50, item 279, as amended.

opinion that it is possible to suspend the period of prescription for political reasons as the force majeure (referred also to the issue of prescription), however in the case of demonstrating actual circumstances justifying such an application in a specific case, seems to prevail. Special attention should be given to certain theses that, formulated sometimes *obiter dicta*, may open new fields of analysis (see decision of the Supreme Court of 17 July 2020, IV CSK 53/20). It concerns e.g. the issue of legal character of the ownership transfer[36] insufficiently discussed in the existing Polish literature, which was assessed not uniformly also in few previous decisions of the Supreme Court.

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[36] In this regard, see extensive analysis of M. Krajewskiego, *Legal Character of the Ownership Transfer (Charakter prawny przeniesienia posiadania),* 'Studies on Private Law' (Studia Prawa Prywatnego) 2013, no. 3-4, p. 79 et seq.

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