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Regulation of English-Welsh land law in the context of Torrens system principles²

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Abstract:

The article presents the main principles of English-Welsh land law with respect to protection of real estate transactions on the basis of land registration. The main purpose is to study the similarities and differences between these regulations and the three major Torrens system principles as formulated by T. Rouff – the mirror principle, the curtain principle and the insurance principle.

Keywords: land law, property law, land register, Torrens system, mirror principle, curtain principle, insurance principle

¹ Dr nauk prawnych, prawnik specjalizujący się w prawie rzeczowym, spora część jego badań koncentruje się wokół problematyki obrotu nieruchomościami i ksiąg wieczystych. Jeden z założycieli Wydziału Prawa i Administracji Uniwersytetu Zielonogórskiego, autor nowatorskiej koncepcji kształcenia prawników, która stanowi podstawę programu studiów prawniczych w Zielonej Górze. W latach 2014-2019 prodziekan Wydziału Prawa i Administracji Uniwersytetu Zielonogórskiego. Obecnie zatrudniony w Instytucie Nauk Prawnych Uniwersytetu Zielonogórskiego (Katedra Prawa Cywilnego, Postępowania Cywilnego oraz Komparatystyki Prawa Prywatnego). ORCID: 0000-0003-1019-5190.

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1. Introduction

The purpose of this article is to cast a closer look at the basic principles of the Torrent system in a legal theory approach and to use it as the background for analysing the basic regulations of English and Welsh land law. This will allow the Polish reader to understand the fundamentals of real estate transactions based on English and Welsh land registration in a slightly wider context. The article is meant to contribute to understanding certain general real estate transactions concepts found in English-language legal literature. The space constraints imposed by the article mean that a number of questions, particularly the legal status of real estate not entered in the land register, must be omitted. Nor will the issues of equity and trusts be discussed here.

1.1 Development of real estate transactions based on the land register in England and Wales.

The United Kingdom has three separate regulations related to real estate transactions: English and Welsh, Scottish, and Northern Irish.³

The need for reforming the system of real estate transactions was first noticed empire-wide in the 19th century. Solutions based on English law that were adopted in different parts of the empire hindered real property transactions and opened the door to abuses. At that time, the real estate transactions system was very complicated. The lack of public registers made it very difficult to ascertain the legal status of real estate. While some attempts to reform English and Welsh Law were undertaken, for a long time they produced no significant improvements. It took 27 years of work of the parliament and its committees until a proposal was reached in 1857 on which the Her Majesty Land Registry Act of 1862 was based. Unfortunately, because these regulations were optional (entries in the register being made on a voluntary basis) and the project was underfinanced, no major breakthrough was achieved. 19th century reforms that followed in 1875 and 1897 did not bring essential changes either.⁴ Paradoxically, at the same time parallel efforts were successful in a distant part of the British Empire, namely Australia.

In 1858, the South Australian parliament passed The Real Property Act 1858,

³ S. Rowton Simpson, *Land Law and Registration*, Cambridge, London, New York, Melbourne 1976, s. 24.

⁴ E. Dowson, V.L.O. Shepard, *Land Registration*, London 1956, s. 36–46.

often called the *Torrens Title Act* after its architect. Sir Robert Richard Torrens (1814–1884) laid the grounds for new solutions, relying on German methods used in the Free City of Hamburg. Torrens was assisted by Dr Ulrich Hübbe, a Hamburg lawyer who came to settle in Australia. The two men managed to set up a system of real estate transactions based on compulsory registration, in which legal status is decided by entry in the register.⁵ Similar solutions underlie the real estate transfer regulations in many countries world-wide.⁶

After the debacle of 19th century reforms in England and Wales, 1908 saw the appointment of the Royal Commission on the Land Transfer Act whose task was to examine the causes for the failure and to propose future reforms. In 1911, the Commission submitted a report that proposed to make property law simpler and introduce other reforms. Due to the First World War, work on the reform was not taken up until 1919. The end result was seven acts passed in 1925 that greatly simplified English and Welsh property law. Even though legal practitioners were highly opposed to compulsory registration, by degrees a system of real estate transactions based on the land register was consolidated.⁷

In 2002, land registration in England and Wales underwent another thorough reform. The new Land Registration Act (LRA 2002) introduced a number of changes related to real estate transactions and land registration, for example by enforcing compulsory registration of certain kinds of transactions, enhancing the position of the buyer acting with faith in the register, simplifying issues of priority and, most controversially, changing the rules of adverse possession. The main purpose of the act, however, was to lay the grounds for the future introduction of electronic real estate transactions.⁸ The 2002 reform was a step towards bringing the English and Welsh model in conformity with the Torrens system, nevertheless a dispute is still ongoing in English-language legal literature to what extent this was achieved.⁹

This article analyses the principles of the Torrens system using an approach proposed by Theodore Ruoff. The author studied the Torrens system in Australia and New Zealand in the 1950s¹⁰ and formulated its three fundamental principles - the

⁵ M. Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law*, The Hague, London, New York 2003, s. 26–60.

⁶ G. Larsson, *Land registration and cadastral systems. Tools for land information and management*, Harlow, New York 1991, s. 44–52.

⁷ S. Rowton Simpson, *Land Law...* s. 44–67.

⁸ *Land Registration for the Twenty-first Century: A Conveyancing Revolution*, [online:] <http://www.lawcom.gov.uk/app/uploads/2015/04/Lc271.pdf> [dostęp: 27.09.2021].

⁹ E. Cooke, *The New Law of Land Registration*, London 2003, s. 9–12.

¹⁰ Na marginesie warto wspomnieć, że w późniejszych latach (1963–1975) pełnił funkcję Chief Land Registrar, przewodząc HM Land Registry.

mirror principle, curtain principle and insurance principle.¹¹ Ruoff made a clear distinction between the Torrens and the English systems, yet the principles he named are cited in English property law textbooks¹² as the basic rules of real estate transactions based on land registration.¹³

English-language legal literature notes that security of real estate transactions involves a balance between static and dynamic security. Static security consists in securing already held rights, sometimes at the expense of the rights of the buyer, while dynamic security means securing justified rights of the buyer at the expense of existing rights.¹⁴

2. The mirror principle

According to the mirror principle, the registration should fully reflect the legal status of real estate. According to Ruoff, a title disclosed in the land register should be absolute and indefeasible. The author notes a number of exceptions from that principle, such as death, fraud, mistake and obvious encumbrances.¹⁵ The mirror principle in English and Welsh law is very accurately summed up by Elisabeth Cooke, who notes that the mirror is strangely active – whatever it shows becomes the truth. This is confirmed by section 58 of the LRA 2002¹⁶ – a provision used to argue that if someone not entitled is mistakenly entered into the register, they acquire the title and keep it as long as the entry persists – this is called “indefeasibility”. It is irrelevant that the entry was made by mistake, or even fraudulently.¹⁷ It is stressed that title to unregistered real estate generally relies on possession and good root of title. In case of real estate entered into the register, the basis for the title is the entry.¹⁸ It should be emphasised, however, that indefeasibility depends on possession by the entitled person. The entry of an entitled person who is in the possession of real estate can

¹¹ T. Ruoff, *An Englishman Looks at the Torrens System*, Sydney 1957.

¹² Land Law – w ramach programów studiów naucza się w zasadzie tylko prawa rzeczowego w odniesieniu do nieruchomości, problematyka rzeczy ruchomych jest prawie nieobecna.

¹³ M. Dixon, *Modern Land Law*, Routledge 2018, s. 34–37; E. Cooke, *Land Law*, Oxford 2020, s. 49–51 i 69–72; R. Kelly, E. Hatfield, *Land Law. A problem based approach*, London, New York, s. 89–91.

¹⁴ P. O’Conor, *Registration of Title in England and Australia: A Theoretical and Comparative Analysis*, [w:] E. Cooke (red.), *Modern Studies in Property Law – Volume II: Property*, London 2003, s. 85–89; M. Harding, R. Hickey, *Bijural Ambiguity and Values in Land Registration Systems*, [w:] S. Bright (red.), *Modern Studies in Property Law – Volume 6*, London 2011, s. 286–290.

¹⁵ T. Ruoff, *op.cit.*, s. 8–10.

¹⁶ Ustawa (Act) w prawie angielskim dzieli się na sekcje (*section*) skrót „s.” będzie używany w dalszej części artykułu.

¹⁷ E. Cooke, *The New Law...*, s. 53–55.

¹⁸ D. Cowan, L.F. O’Mahony, N. Cobb, *Great Debates in Land Law*, London, New York 2016, s. 101–103.

usually be removed only when they can be blamed for the current status of entries.¹⁹ Making indefeasibility dependent on possession is a peculiar feature of English and Welsh regulations, absent in countries traditionally reckoned among those using the Torrens system.²⁰

The purpose of the mirror principle is to ensure that the buyer can obtain comprehensive information about the legal status of the real estate, but LRA 2002 never intended to fully put this principle into effect, leaving unchanged certain rights that, even when not disclosed in the register, are effective against both the buyer and the person entered.²¹

The mirror principle decides the importance of register entries in the real estate transactions system. In Poland, an entry is as a rule declaratory, disclosing changes in legal status that have occurred outside the register. Making an entry, although sometimes obligatory, is not even necessary to change the legal status. By way of exception, in many situations the entry is constitutive and serves as a prerequisite for changing the legal status, but is never the only basis for the legal title as in the English and Welsh system.

Comparing the analysed solutions with Polish regulations, one might readily see an analogy to the public credibility of land and mortgage registers as an institution aimed at ensuring the security of transactions. The dissimilarities, however, are quite essential. The first major difference is that in the Polish legal system public credibility was established as a means of acquiring a right from someone who does not hold the title.²² In the Polish system, it cannot be said that an entry underlies the legal title to real estate is – this solution is typical for “positive” land registration systems, of which the English and Welsh system is one of the most pertinent examples.²³

Another major difference is the scope of application – public credibility protects all rights disclosed in the land and mortgage register, while the English and Welsh

¹⁹ E. Cooke, *The New Law...* s. 122–130.

²⁰ P. O'Connor, *Registration of Invalid Dispositions: Who Gets the Property?*, [w:] E. Cooke (red.), *Modern Studies in Property Law – Volume III*, London 2005, s. 53–63.

²¹ A. Nair, *Morality and the Mirror: The Normative Limits of the 'Principles of Land Registration'*, [w:] S. Bright (red.), *Modern Studies in Property Law – Volume 6*, London 2011, s. 263–284; E. Lees, *Guaranteed Title: No Title, Guaranteed*, [w:] A. Goymour, S. Watterson, M. Dixon, A. Goymour, S. Watterson, M. Dixon (red.), *New Perspectives on Land Registration: Contemporary Problems and Solutions*, Oxford: Hart Publishing, 2018, s. 97–116.

²² Szerzej na temat charakteru i ukształtowania instytucji patrz B. Jelonek-Jarco, rozdział II *Pojęcie, zakres oraz prze-stanki działania rękopisami wiary publicznej ksiąg wieczystych*, [w:] *Rękopisami wiary publicznej ksiąg wieczystych*, [online] Warszawa 2011 <https://sip.lex.pl/#/monograph/369242396/13?keyword=R%C4%99kopia%20wiary%20publicznej%20ksi%C4%85g%20wieczystych&toHit=1&cm=SREST> [dostęp: 15.10.2021], jak również fundamentalne w tym zakresie rozważania – A. Kunicki, *Domniemanie w prawie rzeczowym*, Warszawa 1969, s. 127–132.

²³ Szerzej na temat tego rozróżnienia patrz P. Mysiak, *Postępowanie wieczystoksięgowe*, Warszawa 2012, s. 28–30, oraz odnośnie do charakteru prawnego wpisu w polskim systemie prawnym, również w ujęciu prawnoporów- nawczym – s. 264–268.

regulation applies only to a certain group of rights, corresponding functionally to Polish right of ownership (with certain distinctions). Polish law also defines a group of rights against which public credibility does not apply (such as life annuity).

3. The curtain principle

According to the curtain principle, the registry should be the only source of information about the legal status of real estate. Certain groups of rights, basically rights under trusts and equity, are essentially excluded from the register. Such rights basically should not bind the buyer and are outside their scope of interest.²⁴

In English and Welsh property law, some rights are regulated by means of a trust. For example, the land register may list a maximum of four owners. If there are more, the relations between them are regulated by provisions on trusts. The disclosed owners manage the trust on behalf of the others. On certain conditions, they are also entitled to sell the real estate. In case of an effective sale, the other entitled owners lose their rights and become entitled to obtain the price of sale (overreaching)²⁵. A similar situation occurs in case of rights based on equity (e.g. specific kinds of proprietary estoppel). A concern for the buyer arises when the formal conditions necessary for overreaching cannot be met.²⁵ Another concern occurs when the person entitled under such rights is in the possession of real estate. In such case, that right may bind the purchaser. The curtain principle reflects the intention to simplify real estate transactions, providing dynamic security (to use legal terminology used in English-language literature)²⁶.

As equity or trusts are unknown to the Polish legal system, equivalent regulations can hardly be expected to exist in property law. Similar outcomes can, however, occur due to the negative effect of public credibility of the land and mortgage register. The Polish system provides for a much broader list of rights which can be disclosed in the land and mortgage register.

4. The insurance principle

The insurance principle provides that the state is liable for risks faced by citizens caused due to the operation of the land register system, in particular the risk of losing ownership.²⁷ This principle is put into effect through a scheme of indemnities for

²⁴ T. Ruoff, *op.cit.*, s.11–12.

²⁵ M. Dixon, *op.cit.*, s. 36–37.

²⁶ E. Cooke, *The New Law...*, s. 92–97.

²⁷ T. Ruoff, *op.cit.*, s. 8–13; E. Cooke, *The New Law...*, s. 9–10; M. Raff, *op.cit.*, s. 12–13; J. Zevenbergen, *Systems*

persons who suffered a loss as a result of the operation of the land registration system. The loss may have various causes, even fraud or forgery, except for a few expressly stated exceptions (such as loss caused by fraud of the injured party). The indemnity will be paid even if the state and its institutions cannot be held culpable for the resulting loss. This is a kind of strict liability. Two solutions are practised – either a special fund for payments is set up, or the indemnity is paid directly by the state. In some countries, indemnity may be paid directly by the state without the need to sue the persons responsible (*insurance of first resort*). The state then has judicial recourse against persons responsible for the loss. In others, indemnity is paid only when it cannot be obtained otherwise (*insurance of last resort*).²⁸

In England and Wales, a special fund to pay the indemnity has been set up. The basis for payment is a claim to align the contents of the registry with actual legal status. Indemnity is awarded to anyone who sustained a loss because an entry was or could not be changed. In addition, another basis for indemnity are mistakes in documents issued or made available by HM Land Registry, as well as destruction or loss of a document. Once the indemnity is paid, the fund is entitled to a recourse claim.²⁹

No similar regulations exist in Polish law. The state may be sued for indemnification for irregularities related to maintaining the land and mortgage register, but on general terms. Nevertheless, these opportunities are very much restricted.

5. Summary

As shown by the above analysis, the basic rules of real estate transactions in England and Wales differ considerably from Polish solutions. This kind of regulation undoubtedly ensures much greater security, but also means much higher involvement of the state, both on organisational and financial levels.

Basically, despite certain differences, the Torrens system principles are also applied in English and Welsh property law, nevertheless English-language legal literature makes a clear distinction between these systems³⁰, which is not so obvious

of Land Registration. Aspects and Effects, Delft 2002, s. 42–43.

²⁸ M. Dixon, *op.cit.*, s. 34–37; K. Reid, G. Gretton, *Land registration*, Edinburgh 2017, s. 239–244; G. Hinde, D. Mcmorland, N. Campbell, D. Grinlinton, *Land law in New Zealand*, Wellington 1997; B. Edgeworth, C. Rossiter, M. Stone, P O'Connor, *Australian Property Law*, Australia 2008, s. 555–578; J. Deenley, *Registration of Deeds and Title in Ireland*, Dublin 2014, s. 339–340; A. Moir, E. Moir, *Moir on land registration. A Guide to Land Registration Law and Practice in Northern Ireland*, Belfast 2011, s. 102–105.

²⁹ C. Harpum, J. Bignell, *Registered Land. Law and Practice under the Land Registration Act 2002*, Bristol 2004, s. 303–312; M. Dixon, *op.cit.*, s. 34–37 i 92–94.

³⁰ P. O'Conor, *Registration of Title...*, s. 81–100 i cytowana tam literatura.

from our point of view.

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