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# UTICAJ DRŽAVINE NA PRAVNU VALJANOST HIPOTEKE ZASNOVANE NA OBJEKTU U IZGRADNJI - sa primerima iz prakse

Prevod obezbedio autor

## Rezime

Proširenje predmeta hipoteke na objekte u izgradnji značajan je napredak u pogledu regulisanja ovog insitututa prava. Pravo svojine na objektu u izgradnji nije moguće upisati u registar nepokretnosti. Sticalac prava svojine nema zakonsku mogućnost da zaštiti svoje pravo. Sticanje svojine na objektu u izgradnji vezuje se za državinu. Na taj način se narušava publicitetno načelo upisa u registar, a time i načelo pouzdanja. Punovažnost hipoteke vezuje se za državinsku vlast na hipotekovanoj nepokretnosti u trenutku njenog zasnivanja. Takvim postupanjem sudova se dovodi u pitanje suština hipoteke.

**Ključne reči:** stvarno pravo, hipoteka; državina; nepokretnost; zabeležba; svojina; ništavost

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# THE IMPACT OF POSSESSION ON LEGALITY OF MORTGAGE REGISTERED ON A BUILDING UNDER CONSTRUCTION - with Case Law

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**Summary**

The expansion of the subject of a mortgage to buildings under construction is a considerable step forward in regulating mortgages. It is not possible to register ownership rights on buildings under construction. A person acquiring ownership does not have the possibility to protect his rights. Acquiring ownership rights to a building under construction is tied to possession. This is detrimental to the principle of publicity which in turn erodes the principle of reliance. Validity of the mortgage is tied to the possession over the mortgaged real estate at the time of its registration. Such position of the courts challenges the very essence of mortgage.

**Keywords:** property law, mortgage; possession; real estate; annotation; ownership; nullity

**JEL**: K11, P14

## Uvodne konstatacije

Ekonomske odnose u privredi i uopšte u društvu karakteriše visok stepen nesigurnosti u ispunjenju međusobnih obaveza učesnika pravnih poslova. Izvesnost naplate potraživanja, odnosno ispunjenja obaveze o dospelosti je sve manja, zbog čega se pristupa obezbeđenju potraživanja putem stvarnopravnih sredstava obezbeđenja u vidu zaloge. Kada je reč o bankarskom poslovanju, hipoteka je najčešći vid obezbeđenja. Po pravilu nastaje na inicijativu banke zbog neizvesnosti naplate potraživanja koje proističe iz obligacionopravnog odnosa kojim su ustanovljena prava i obaveze za poverioca i dužnika. Hipoteka je stvarno pravo na nepokretnoj tuđoj stvari, koje deluje prema svima. Sledstveno tome, potraživanje obezbeđeno hipotekom na nepokretnoj stvari se može uvek realizovati, ma čija ona bila. U savremenoj praksi, međutim, to nije uvek slučaj. Proširenje predmeta hipoteke na objekte u izgradnji, uz postojanje pravnih praznina u oblasti stvarnog prava, sve češće dovodi u pitanje naplatu potraživanja obezbeđenog hipotekom. Pravna valjanost hipoteke na objektu u izgradnji uslovljena je fakticitetom - državinom hipotekarnog dužnika na nepokretnoj stvari u trenutku zalaganja. Položaj hipotekarnog poverioca nije više nepovrediv.

Može se raspravljati o tome da li se ovakvim postupanjem narušava apsolutno dejstvo hipoteke, njena suština i osnovna svrha. Otvara se niz pravnih i praktičnih pitanja.

## Predmet i nastanak hipoteke

Hipoteka, kao založno pravo na nepokretnoj stvari nastaje upisom u katastar nepokretnosti i pruža obezbeđenje poveriočevog potraživanja bez deposedovanja hipotekarnog dužnika. Ovlašćuje poverioca da se, ukoliko potraživanje ne bude namireno dobrovoljno od strane dužnika o dospelosti, namiri prodajom hipotekovane nepokretnosti.

Hipotekarni dužnik je vlasnik hipotekovane nepokretnosti i, po pravilu, dužnik potraživanja. To, međutim, ne mora uvek biti slučaj. Moguća je situacija u kojoj je jedno lice dužnik potraživanja iz obligacionog odnosa, a drugo lice dužnik iz hipotekarnog odnosa, odnosno vlasnik založene nepokretnosti. Tada imamo dva dužnika: ličnog i realnog.

Lični dužnik je dužnik iz obligacionog odnosa. On za isplatu duga poveriocu garantuje celokupnom svojom imovinom. U ovakvoj pravnoj situaciji nijedna stvar iz imovine dužnika nije izdvojena i opredeljena tako da se njenom vrednošću garantuje namirenje potraživanja. Konkretno, poverilac ima pravo da bira sredstva namirenja, da zahteva popis svih stvari u imovini dužnika, osim stvari koje su izuzete od izvršenja (član 82 Zakona o izvršenju i obezbeđenju; dalje: ZIO) i da, polazeći od svog interesa, izdvoji one stvari putem kojih će zahtevati namirenje svog potraživanja. Na prvi pogled, ovakav položaj poverioca izgleda povoljan, čak povoljniji od položaja založnog poverioca. U stvarnosti to nije tako, jer se

## Introductory Remarks

Business relationships in the economy and in the society in general have been characterized by a high degree of insecurity when it comes to honoring mutual obligations between the parties involved. Certainty regarding collection of claims, or timely fulfillment of obligations, has been decreasing. For this reason the parties to such transactions decide to secure their claims by establishing pledges on security objects. When speaking of banking business, mortgage has been the most common form of security. As a rule, it is established at an initiative of the bank because of uncertainty of collection of claims based on the contractual relationship that established the rights and obligations for the creditor and debtor. Mortgage is a property right on another person's thing that has *erga omnes* effect. Consequently, a claim secured by a mortgage on a real estate can always be collected, regardless of who owns that particular real estate. However, this has not been true in recent practice. The expansion of the subject of the mortgage on buildings under construction, taking into account present loopholes in the legislation regulating property law, has frequently jeopardized the collection of claims secured by mortgages. Validity of a mortgage on a building under construction is conditioned by the possession of the mortgagor on the real estate at the time of the mortgage origination. Thus, the position of the mortgagor is no longer inviolable.

It is open for discussion whether such practice violates *erga omnes* effect of the mortgage, its essence and fundamental purpose. Further, this opens a number of legal and practical issues.

## Subject and Origination of Mortgage

A mortgage, as a pledge on real estate is established by virtue of registration in the real estate registry and offers security for the creditor's claim without the need for the mortgagee to lose the possession of the real estate. A mortgage empowers the creditor, in the event of the debtor's failure to pay a debt voluntarily when due, to collect his claim by selling the mortgaged real estate.

The mortgagee is the owner of the mortgaged real estate and, as a rule, the debtor. This, however, does not always have to be the case. A situation is possible in which one person is a debtor from the contractual relationship while another person is a mortgagee, that is the owner of the mortgaged real estate. In the second scenario we have two debtors: personal and mortgage debtor.

Personal debtor is the debtor from the contractual relationship. He is liable for the repayment of his debt to the creditor with all of his assets. In this legal situation no single item from the assets of the debtor is separated and designated to be used in such a manner as to use the value of such item to guarantee the settlement of the debt. To be more precise, the creditor has an option to choose from which item of the debtor's property he wishes to collect his claim. The creditor has the right to request to have the inventory of the debtor's assets taken, except for the items that are precluded from forced collection (Article 82 of the Law on Enforcement and Security; hereinafter as: LES), and, from the position of his best interest in mind, to separate those items that he shall use to collect his claim. At the first glance, such position of the creditor seems rather favorable, even more favorable that the position of a pledge creditor. But in reality this is not the case because the debtor is very often insolvent, that is, in a state in which the value of his creditors' claims is greater than the value of his assets. In reality, this makes the position of the creditor uncertain with regards to collection and settlement of his claim. For this reason the creditor takes recourse to establishing a mortgage on real estate, and thus makes the collection of his claim more certain from the mortgaged real estate. To achieve this, the creditor focuses on the mortgagee, who is the owner of the mortgaged real estate.

Mortgagee is the owner of the mortgaged real estate and he is obliged to endure the collection of the creditor's claim from the value of the pledged thing, in the event of the mortgagor's claim not being settled when due. The mortgagor, at his own choosing, has the right to request settlement of his claim from the value of any other assets owned by the personal debtor. Such possibility, if followed through by the creditor, places the mortgagee

dužnik vrlo često nalazi u stanju insolventnosti, a to znači u stanju u kome vrednost dospelih potraživanja različitih poverilaca znatno prelazi vrednost njegove imovine. To praktično položaj poverioca čini neizvesnim u pogledu naplate i namirenja potraživanja. Zato poverilac pribegava uspostavljanju hipoteke na nepokretnoj stvari, a samim tim i izvesnijem namirenju svog potraživanja iz vrednosti hipotekovane nepokretnosti. U tom pravcu, poverilac se koncetriše na realnog dužnika, vlasnika hipotekovane nepokretnosti.

Realni dužnik je vlasnik hipotekovane nepokretnosti koji je dužan da trpi namirenje poveriočevog potraživanja iz vrednosti založene stvari, ukoliko potraživanje hipotekarnog poverioca ne bude namireno o dospelosti. To, međutim, ne predstavlja ograničenje za hipotekarnog poverioca. Hipotekarni poverilac, prema sopstvenom izboru, ima pravo da zahteva namirenje svog potraživanja iz vrednosti bilo koje druge stvari koja se nalazi u imovini ličnog dužnika. Takva mogućnost, kada dođe do njene realizacije, faktički predstavlja povoljnost za realnog dužnika, jer ako se poverilac namiri iz imovine ličnog dužnika, neće doći do realizacije hipoteke na nepokretnosti realnog dužnika. U praksi je, međutim, čest slučaj da lični dužnik nema dovoljno imovine.

Nepodudarnost između ličnog i realnog dužnika može postojati već u trenutku konstituisanja hipoteke, a može nastati naknadno, ukoliko hipotekarni dužnik prenese pravo svojine na hipotekovanoj nepokretnosti na treće lice, ili ako treće lice, uz saglasnost poverioca preuzme dug. Dešava se da hipotekarni dužnik i vlasnik nepokretnosti koja se hipotekuje nisu isto lice ni u trenutku zalaganja. Kada je predmet hipoteke objekat u izgradnji, neophodno je stvoriti uslove da hipotekarni poverilac bude obavešten o tome.

Naše pozitivno pravo, nastanak punovažne hipoteke vezuje za postojanje punovažnog pravnog osnova (*iustus titulus*) i načina sticanja (*modus asquirendi*). Prema pravnom osnovu razlikujemo ugovornu, zakonsku i sudsku hipoteku. Predmet hipoteke može biti nepokretna stvar (*res immobiles*), deo nepokretne stvari, susvojinski udeo u nepokretnoj stvari, poseban deo zgrade na kome postoji pravo svojine, odnosno, drugo pravo koje u sebi sadrži pravo raspolaganja, pravo na zemljištu koje sadrži ovlašćenje slobodnog prava raspolaganja, a naročito pravo građenja, pravo preče gradnje ili raspolaganja u državnoj svojini.

Hipoteka nastaje upisom u registar nepokretnosti. Na ovaj način kod hipoteke se obezbeđuje obaveštavanje trećih zainteresovanih lica o postojanju hipoteke (načelo publiciteta). Hipoteka je vid bezdržavinske zaloge. To predstavlja pozitivnu stranu ovakvog sredstva obezbeđenja, jer se dužnik, odnosno hipotekarni dužnik (ukoliko se ne radi o istom licu) ne lišava državine na hipotekovanoj nepokretnosti, a samim tim ni koristi koje ta nepokretnosti daje. To znači da hipotekarni poverilac ne stupa u državinu založene stvari. Međutim, savremeno društvo i savremena sudska praksa nameću potrebu da hipotekarni poverilac na određeni način zadire u državinu hipotekarnog dužnika.

Predmet hipoteke može biti objekat u izgradnji, kao i poseban deo objekta u izgradnji bez obzira da li je već izgrađen, pod uslovom da je izdato pravnosnažno odobrenje za gradnju u skladu sa zakonom kojim se uređuje izgradnja objekata. Uvođenjem ove mogućnosti stvoreni su uslovi da investitor koji finansira izgradnju objekta, odnosno, kupac posebnog dela ili celog objekta u izgradnji, nakon dobijanja pravnosnažnog odobrenja za gradnju, može upisati hipoteku na objektu u izgradnji ili jednom njegovom delu, u korist poverioca. Nema spora o tome da su na ovaj način stvoreni uslovi za lakše finansiranje izgradnje, odnosno, kupovinu nepokretnosti u izgradnji. Praksa je pokazala da su neka rešenja Zakona o hipoteci nedorečena,

in a more favorable position, because if the creditor settles his claim from the assets of his personal debtor, the mortgage of the mortgagee shall not be activated. However, in reality, it is often the case that the personal debtor does not have sufficient assets.

Personal debtor may be different from the mortgagee as early as at the time of the mortgage origination, however, they may become different persons at a later stage, if the mortgagor transfers the ownership rights that he holds over the mortgaged real estate to a third party, or in the event when a third party, with the approval of the creditor takes over the debt. It does happen that the mortgagor and the owner of the real estate that is being mortgaged are not the same persons at the time of establishing the mortgage. When the subject of the mortgage is a building being constructed, it is necessary to create conditions that the mortgagor is informed of that fact.

Our legislation associates the creation of a valid mortgage with the existence of a valid legal basis (*iustus titulus)* and the method of acquiring (*modus asquirendi*). When examining mortgages according to the legal basis of their creation, we can differentiate between contractual, statutory, and judicial mortgages. The subject of a mortgage may be a real estate property (*res immobiles*), a part of a real estate property, a portion in a common real estate property, a separate part of a building, or some other right entailing the right of disposal, a right to the land authorizing the free legal disposition, including in particular the right of construction, right of priority construction or disposition of state-owned or socially-owned property.

The mortgage is originated by making an entry in the appropriate real estate registry. This informs the third parties interested in the existence of the real estate (the element of publicity). The mortgage is a form of a pledge without holding possession. This is a plus side of this type of security because a debtor, or mortgagee (it they are not the same person) is not deprived of the possession over the mortgaged real estate and therefore he, the mortgagee, may utilize the real estate. This means that the mortgagor does not obtain possession over the mortgage real estate. However, modern society and contemporary court practice have advanced a position that it is necessary for the mortgagor to encroach the possession of the mortgagee over the mortgage real estate.

A building under construction may be the subject of the mortgage, as well as a part of the building being constructed, regardless whether that particular part of the building has been built or not, provided that the final building permit has been issued in accordance with the law regulating construction of buildings. By introducing this possibility, the conditions have been created for investors financing the construction, or for the buyer purchasing a particular part of, or the entire building, to register the mortgage on the entire building being constructed, or on the part thereof, upon obtaining a binding building permit, in favor of the creditor. There is no dispute that these provisions of the law created conditions that facilitated the financing of the construction and purchasing of the real estate under construction. Practice has proven some provisions of the Mortgage Law to be unclear and not fully harmonized with other laws regulating real estate rights.

In order for the mortgage to be established, on the basis of the Mortgage Law (hereinafter: the MO), it is necessary for the mortgagee to be the owner of the real estate being mortgaged. Ownership rights over a thing are proven by an extract from the real estate registry. Ownership over a building, or part thereof, under construction is not possible to be registered in the real estate registry, nor to prove the ownership by the extract from the real estate registry, up to the point when the construction is finished, the building utilization permit obtained, and individual parts of the building registered in the real estate registry. For the sake of clarification, it should be stated that within the meaning of the Mortgage Law, buildings under construction include constructed buildings that are not registered in the real estate registry. Until the building is registered in the real estate registry we cannot determine with certainty who the owner of that building is. The ownership is not evident to the outside world. Therefore, when we deal with buildings under construction, the principle of publicity can only be achieved by registration of the ownership rights in the real estate registry. In this situation, only possession over the building

kao i da nisu do kraja usaglašena sa ostalim pozitivnopravnim propisima u oblasti stvarnog prava.

Da bi hipoteka nastala, na osnovu jednog od Zakonom o hipoteci (dalje: ZOH) predviđenih osnova, neophodno je da je hipotekarni dužnik vlasnik nepokretnosti koja se hipotekuje. Svojina na stvari dokazuje se izvodom iz registra nepokretnosti. Svojinu na objektu, odnosno delu objekta u izgradnji nije moguće ni upisati u registar nepokretnosti, niti dokazivati izvodom iz registra nepokretnosti, sve do okončanja izgradnje i ishodovanja upotrebne dozvole za objekat, etažiranja i upisa posebnih delova u registar nepokretnosti. Radi razjašnjenja, potrebno je reći da se, u smislu Zakona o hipoteci, pod objektom u izgradnji, smatra i završen objekat, sve dok isti ne bude upisan u registru nepokretnosti. Sve do njegovog upisa u registar nepokretnosti ne može se sa sigurnošću utvrditi ko je vlasnik stvari. Pravo svojine nije spolja manifestovano. Kada je reč o objektu u izgradnji, publicitet se dakle, ne može ostvariti upisom prava svojine u registar nepokretnosti. U tom slučaju, vidljiva je samo državina, kao faktička vlast na stvari. Državina stvara privid prava svojine. To ne znači da je uslov zasnivanja hipoteke da vlasnik ima državinu hipotekovane nepokretnosti. Bitno je da li je on i dalje vlasnik kada na taj način raspolaže. Suštinski problem su raspolaganja posebnim delom objekta u izgradnji učinjena pre zasnivanja hipoteke. Jedini put da se ustanovi da li je to učinjeno je uvid u državinu. Proizlazi, da državina postaje odlučna činjenica za pravno valjano raspolaganje objektom u izgradnji. Nesavesno ponašanje investitora stvorilo je probleme u praksi, naročito za hipotekarne poverioce.

## Svojina i državina

Državina se razlikuje od svojine. „Kao faktička vlast na stvari, posjed se pojmovno suprotstavlja pravnoj vlasti koja izvire iz subjektivnog prava". (Krneta, 1978., str. 1010.) Državina je faktička vlast na stvari, a svojina je pravna vlast. Da li je jedno lice vlasnik stvari ne može se videti na prvi pogled, ali da je držalac stvari to se odmah vidi, jer je za državinu potrebna faktička, a ne pravna vlast na jednoj stvari.

Publicitet stvarnih prava, zbog njihovog apsolutnog dejstva je neophodan da bi treća lica bila upoznata sa njihovim postojanjem i da bi se ta prava mogla suprotstaviti prema svima. Funkcija publiciteta daje informaciju da je zasnovana državina na stvari. To je naročito vidljivo kada je reč o neposrednoj državini. Neposredna državina je pogodno sredstvo upozorenja za treća lica da na određenoj stvari postoji neko stvarno pravo. Svojim spolja vidljivim postojanjem državina čini vidljivim postojanje onih prava povodom stvari koja se ostvaruju kroz državinu. U uređenim pravnim sistemima, opravdano se očekuje da svaka državina ima osnov u nekom subjektivnom pravu. Zato, spolja manifestovana državina objavljuje svakome da povodom određene stvari najverovatnije postoji ne samo državina, nego i pravo na državinu. Svaki učesnik pravnog prometa može prema tome uskladiti svoje ponašanje. Nedostatak je u tome, što je spolja vidljiva samo neposredna državina. Bez obzira na to, činjenica da neko lice ima neposrednu državinu na stvari će poslužiti kao polazna tačka za saznanje celokupne strukture državine, a odatle najverovatnije i prava na državinu. Putem neposrednog držaoca biće moguće saznati da li on predmet državine drži samostalno ili priznaje nečiju „višu vlast" (Gavela, 1998.).

"Državinu treba razlikovati od prava na državinu (*ius possidendi*). O pravu na državinu govorimo onda kada određeno subjektivno pravo, pravo svojine ili neko drugo stvarno pravo, sadrži u sebi i pravno ovlašćenje na državinu stvari" (Popov, 2004., str. 164.). Subjektivna prava na stvari ovlašćuju titulara da stvar drži, da se njome koristi i da njome raspolaže (pravo svojine). Dakle, titularima navedenih subjektivnih prava pripada pravo na državinu radi mogućnosti faktičke realizacije sadržaja subjektivnih prava koja imaju.

Kada bi svaka državina bila zasnovana na pravnom osnovu, pravna vlast držaoca podudarala bi se sa njegovom faktičkom vlašću. Vršenjem državine, izvršavala bi se ovlašćenja subjektivnog prava koje držalac ima na stvari. To, međutim, često nije slučaj.

Pravna i faktička vlast iako razlučene ipak se najčešće podudaraju i istovremeno ispoljavaju. Samostalnost državine ima za posledicu da ona može da postoji nezavisno od prava na stvari, odnosno, nezavisno od toga da li se u

is visible, as it is a factual exercise of power over a thing. The possession creates an illusion of ownership. This means that a precondition for the registration of the mortgage is that the owner has possession over the mortgaged real estate. Further, it is crucial whether he is still the owner at the time of disposing of the property. The crucial problem is disposing of a part of the building undergoing construction before the registration of the mortgage. The only way to determine this is by examining the possession. Consequently, the possession becomes the decisive fact for legal disposition of the building under construction. Negligent actions of the building investor have created considerable problems, in particular for the mortgagor.

## Ownership and Possession

Possession is different from ownership. "As factual exercise of power over a thing, possession contradicts legal ownership that stems from the subjective right." (Krneta, 1978, p. 1010). Possession is a factual exercise of power over a thing while ownership is a legal exercise of power over a thing. It cannot be determined at the first glance whether a certain person is the owner of a thing, but it is visible to the eye whether that person has possession over that thing, because possession requires the factual and not the legal exercise of power over the thing.

The publicity of property rights, due to their *erga omnes* character, is necessary for third parties to be informed about their existence and for such rights to be enforceable towards all persons. The element of publicity provides information that possession has been established over a thing. This is, in particular, evident in the case of actual possession. The actual possession is a very suitable means of warning third parties that property rights exist on a thing. By its features visible to the outside world, possession makes visible the existence of rights that are exercised through the possession over a thing. In well harmonized legal systems, it is justifiable to expect that possession is based on some subjective right. Therefore, possession that is evident to the outside world communicates to everyone that, along with the possession over a thing, the right to possession also exists. Each party to legal transactions may therefore harmonize their actions accordingly. A fact that only the actual possession is visible to the outside world is a shortcoming. Regardless of the previously stated, the fact that a person has possession over a thing may be used as a starting point for determining the entire structure of the possession, and possible for determining the right to possession. By examining the person being in actual legal possession it is possible to find out whether he holds the object of possession independently or he recognizes someone else's 'higher authority' (Gavela, 1998).

"Possession should be differentiated from the right to possession (*ius possidendi*). We speak of the right to possession when certain subjective right, like the right of ownership or some other property right, includes the right to legally hold in possession a certain thing" (Popov, 2004, p. 164.). Subjective rights to a thing give power to the holder of such right to have possession over the thing, to use it and to dispose of it (the right of ownership). Therefore, holders of the above listed subjective rights are entitled to the possession so that they may have the possibility to exercise their subjective rights.

If every possession would have legal basis, legality of the right to exercise power over a thing would overlap with the factual power over that thing. This, however, is often not the case.

Although legal and factual authorities are separate they are most often overlapping and are simultaneously exercised. The consequence of independence of possession is that the possession may exist separately from the property rights to that thing, that is, regardless of the fact whether in a particular case legal and factual authorities are overlapping or are in conflict.

Possession is of particular importance for movable things, while in the case of real estate, the function of publicity, for the most part, is exercised by registration of rights in the real estate registry. However, when we deal with a building under construction, publicity may not be achieved by registration of rights in the real estate registry. In that situation, in order to determine the existence of rights over the real estate, we must start by examining the possession over the real estate that is to be mortgaged. Visible existence of actual possession warns third parties that

konkretnom slučaju pravna i faktička vlast na nekoj stvari podudaraju ili suprotstavljaju.

Naročit značaj državina ima kod pokretnih stvari, dok se kod nepokretnih stvari funkcija publiciteta, uglavnom, ostvaruje upisom prava u registar nepokretnosti. Međutim, kada je reč o objektu u izgradnji, publicitet se ne može postići upisom prava u registar nepokretnosti. Tada se, u cilju utvrđivanja postojanja prava na nepokretnosti, mora poći od državine na stvari koja treba da bude predmet hipoteke. Vidljiva egzistencija neposredne državine upozorava da na stvari postoji ne samo faktička vlast, nego i pravo na državinu. Za neposrednog držaoca stvari važi pretpostavka da je samostalni držalac stvari, a za samostalnog držaoca pokretne stvari važi pretpostavka da je vlasnik stvari (Gavela, 1998.). Kao dilema se nameće, da li i faktička vlast na nepokretnoj stvari takođe formira pretpostavku o pravu na stvari. U svakom slučaju, od neposrednog držaoca će se moći saznati da li je njegova državina samostalna ili nesamostalna. Dokle god se ne zna da je situacija drugačija može se u pravnom prometu ponašati u skladu sa ove dve pretpostavke. Ukoliko se ispostavi da neposredni držalac priznaje „višu vlast" drugog lica (posrednog držaoca) tj. da nema samostalnu državinu, to drugo lice će se smatrati samostalnim držaocem i vlasnikom, osim ukoliko i ono ima posrednu državinu, poštujući posrednu državinu drugog lica koje ima državinu višeg stepena (Gavela, 1998.).

**Državina kao pretpostavka o pravu svojine na stvari**

Neka stvarna prava na nepokretnostima, kao što je hipoteka, ne mogu postojati ako nisu upisana u registru nepokretnosti. Drugačija je situacija kada je reč o svojini i službenostima. Pravo svojine i službenosti imaju za sadržinu upotrebu i korišćenje stvari i povezane su sa državinom. Na taj način državina omogućava publicitet ovih prava, mada je upis u registar nepokretnosti znatno savršeniji oblik publiciteta. U nuždi, ova prava mogu funkcionisati i posredstvom publiciteta državine. Hipoteka ne može.

Državina kao manifestacija čovekove vlasti nad stvarima stvara spoljnu sliku o postojanju prava čija se sadržina faktički vrši. Spoljna manifestacija državine utiče na pravne odnose i formira određeno poverenje učesnika pravnog prometa. Radi obezbeđenja nužnog stepena pravne sigurnosti, pravni poredak vezuje za državinu određene oborive pravne pretpostavke.

Prema članu 70 Zakona o osnovama svojinskopravnih odnosa, (dalje: ZOSPO), „državinu stvari ima svako lice koje neposredno vrši faktičku vlast na stvari (neposredna državina). Državinu stvari ima i lice koje faktičku vlast na stvari vrši preko drugog lica, kome je po osnovu plodouživanja, ugovora o korišćenju stana, zakupa, čuvanja, posluge ili drugog pravnog posla dalo stvar u neposrednu državinu (posredna državina) ",

Struktura državine može biti takva da pored neposrednog držaoca istu stvar drži još neko drugi. To će biti slučaj kada neposredni držalac ima potpunu vlast na stvari, ali je njegova volja sadržajno ograničena, jer stvar drži kao tuđu (Gavela, 1990.). Faktička vlast posrednog držaoca ne mora biti spolja vidljiva. Ona postoji kroz odnos posrednog i neposrednog držaoca. Posredni držalac vrši faktičku vlast na stvari posredstvom drugog lica koje je neposredni držalac. Njegov faktički odnos prema stvari je posredan, za njega faktičku vlast vrši neposredni držalac (Gavela, 1983.) Dakle, za postojanje posredne državine nužno je ispunjenje dve pretpostavke: posredna državina i posredujući odnos (Gavela, 1998.) U ulozi posrednog

there exists not only factual power, but the right to possession as well. The presumption for the person holding actual possession of a thing is that he is an independent holder of that thing, while we presume that independent holder of movable thing is the owner of that thing (Gavela, 1998). Here we have a dilemma. Does the factual power over a thing create a presumption about the rights to that thing. In any case, we are in the position to find out from the person holding actual possession over a thing whether his possession is independent or not. As long as we are not aware that the situation is different from the above described one, we may act in accordance with these two presumptions. If we become aware that the person having actual possession recognizes 'higher authority' of another person (indirect possessor), or put differently, that he does not have independent possession, that other person shall be regarded as an independent possessor and owner, unless there is a third person having indirect possession, in which case the indirect possession of that third person shall be respected as the possession of a higher rank (Gavela, 1998).

**Possession as Presumption of the Ownership Rights**

Some property rights on real estate, such as the mortgage, may not exist if not registered in the real estate registry. The situation is quite different in case of ownership or servitudes. Ownership and servitudes are focused on the use of a thing and are closely connected to possession. The possession makes these rights, ownership and servitudes, public although the registration in the real estate registry is far better for achieving publicity. In case of necessity, these rights may function through the publicity of the possession. The mortgage may not.

Possession as manifestation of human power over things creates an image about the existence of rights that are exercised over those things. External manifestation of possession has an impact on legal relations and creates certain trust reliance with parties to legal transactions. In order to secure a necessary degree of legal security, the legal system associates possession with certain rebuttable presumptions.

According to Article 70 of the Law on the Elements of Property Law Relations (hereinafter: LEPLR) "any person that directly exercises factual power over property shall be deemed the possessor of such property (direct possession). Any person that exercises factual power over property through another person, in the direct possession of which it has placed the property on the basis of usufruct, tenancy contract, lease, safekeeping, loan to use or some other legal transaction, shall also be deemed the possessor of property (indirect possession)".

The structure of possession may be such that together with a direct possessor the property may be held by another individual. An example for this is when direct possessor has full power over a thing, however, the content of his will is limited because he holds this thing that belongs to another person (Gavela, 1990.). The factual power over a property or a thing may be such that it may not be visible to the outside world. The factual power exists through the relationship between indirect and direct possessor. The indirect possessor exercises his power over a thing through another person that acts as direct possessor. The factual relationship of the indirect possessor is indirect, and factual power is exercised via direct possessor (Gavela, 1983). Therefore, for the existence of indirect possession it is necessary to fulfill two requirements: indirect possession and relationship between direct and indirect possessor (Gavela, 1998). A number of persons may take the role of indirect possessor. This is the case when there is direct and indirect possession over the same thing and when the direct possessor surrenders the thing to a third party, than the direct possessor becomes indirect possessor (for example, when lessee acts as indirect possessor and sub-lessee acts as direct holder of possession).

**Consequences of Incompatibility between Possession and Right to Possession**

Legislation and legal teachings set certain conditions that must be fulfilled in order for possession to exist. Those conditions are: external manifestation; relative durability; availability of a thing to the possessor and possibility of exclusion of (all) other persons from exercising factual power.

The situations where we have an

držaoca može se naći veći broj lica. To je slučaj kada postoji neposredna i posredna državina na istoj stvari i kada neposredni držalac preda stvar u državinu trećem licu, onda i on ima u pogledu te stvari položaj posrednog držaoca (npr. zakupac se javlja u ulozi posrednog držaoca, a podzakupac u ulozi neposrednog).

**Posledice neusklađenosti državine sa pravom na državinu**

Pozitivno pravo i doktrina postavljaju određene uslove koji moraju biti ispunjeni da bi se smatralo da postoji državina. To su: spoljna manifestacija, relativna trajnost u vremenu, dostupnost stvari držaocu i mogućnost isključenja (svih) ostalih od uticaja na postojeću faktičku vlast, odnosno stanje.

Nisu isključene situacije neusklađenosti državine sa pravom na državinu. U tim situacijama kada državina nema osnov u subjektivnom pravu, ona stvara samo privid subjektivnog prava. Odatle proizlazi opasnost za sve učesnike pravnog prometa koji se ponašaju u skladu sa postojećom državinom, pogrešno smatrajući da je ona zasnovana na subjektivnom pravu, a ona daje samo njegov privid. Neusklađenost državine sa pravom na državinu moguća je i u drugom smeru. To je situacija kada je jedno lice upisano u registar nepokretnosti kao vlasnik stvari, a drugo ima zakonitu državinu na istoj stvari. Dakle, ima državinu zasnovanu na punovažnom pravnom poslu.

Savremeni trendovi naročito čine interesantnim uslove za pravno valjano opterećenje hipotekom nepokretnosti - objekta u izgradnji, a u svetlu odredaba Zakona o osnovama svojinskopravnih odnosa, Zakona o državnom premeru i katastru i Zakona o hipoteci.

## Pravni okvir posmatrane problematike

ZOSPO, u članu 33 propisuje: "Na osnovu pravnog posla pravo svojine na nepokretnosti stiče se upisom u javnu knjigu ili na drugi odgovarajući način određen zakonom".

Odredbom člana 63 Zakona o državnom premeru i katastru propisano, (dalje: ZDPK) je: "Podaci o nepokretnostima upisani u katastar nepokretnosti su istiniti i pouzdani i niko ne može snositi štetne posledice zbog tog pouzdanja".

Odredbom st. 1 člana 81 ZDPK propisano je da je zabeležba upis kojim se u katastar nepokretnosti upisuju činjenice koje su od značaja za zasnivanje, izmenu, prestanak ili prenos stvarnih prava na nepokretnostima, koje se odnose na ličnost imaoca prava, na samu nepokretnost ili na pravne odnose povodom nepokretnosti. Vrste zabeležbi propisane članom 82 ZDPK su: zabeležba ličnih stanja imaoca prava, zabeležba spora, odnosno drugog postupka koji se vodi pred sudom ili vršiocem javnih ovlašćenja, a koji za ishod može imati promenu upisa prava na nepokretnosti, zabeležba da prvostepena odluka nije konačna, zabeležba da prvostepena odluka nije pravnosnažna, zabeležba upravnog spora protiv drugostepene odluke u katastru nepokretnosti, zabeležba odluke o zabrani otuđenja i opterećenja nepokretnosti, zabeležba odluke o zabrani upisa, zabeležba postojanja ugovora o doživotnom izdržavanju, zabeležba postojanja bračnog ugovora, zabeležba prvenstvenog reda, zabeležba pokretanja postupka eksproprijacije, ostale zabeležbe propisane zakonom, rešenje o izdavanju građevinske dozvole upisuje se kao zabeležba prava gradnje na parceli na kojoj je izdata građevinska dozvola i sadrži podatke o investitoru, tehničkoj dokumentaciji, građevinskoj dozvoli i drugim činjenicama od značaja za upis zabeležbe.

Članom 3 stav 1 tačka 6 ZOH je propisano da predmet hipoteke može da bude objekat u izgradnji, kao i poseban deo objekta u izgradnji (stan, poslovne prostorije, garaže i dr.) bez obzira da li je već izgrađen, pod uslovom da je izdato pravnosnažno odobrenje za gradnju u skladu sa zakonom kojim se uređuje izgradnja objekta.

Članom 10 stav 2 ZOH je propisano da ugovor o hipoteci može da zaključi vlasnik, ili drugo lice koje ima pravo raspolaganja, kao investitor i kupac objekta u izgradnji ili posebnog dela objekta u izgradnji.

U takvoj situaciji, kada svojinu nije moguće upisati u registar nepokretnost, nužno se nameće pitanje na koji način hipotekarni poverilac može proveriti da li je hipotekarni dužnik vlasnik nepokretnosti koja se zalaže, naročito kada je

incompatibility between possession and the right to possession are not excluded. In those situations, when possession is not based on subjective right, the possession only creates illusion of the subjective right. This generates danger for all participants in legal transactions that honor the existing possession, erroneously believing that the possession is based on the subjective right, while in reality it is only an illusion of the existence of the subjective right. The incompatibility of possession with the right to possession is possible the other way around. It is the situation when one person is registered as the owner in the real estate registry and the other person has lawful possession of the same property. Therefore, the possession of the second person is based on a valid legal act.

Modern trends in particular make interesting the requirements for the legally valid pledge by mortgage of the real estate - buildings under construction, in the light of provisions of the Law on the Elements of Property Law Relations, the Law on State Land Surveying and Cadastre, and the Mortgage Law.

## Relevant Legal Framework

The LEPLR, in Article 33 states that: "The right of ownership in relation to immovable property may be acquired on the basis of a legal transaction subject to its entry in public books or in some other appropriate way determined by the law."

Provision of Article 63 of the Law on State Land Surveying and Cadastre (hereinafter: LSLSC) states that: "Data on a real estate registered in the real estate registry are true and reliable and no one may suffer harmful consequences for relying on such data".

The provision of Paragraph 1 of Article 81 of LSLSC states that an annotation is an entry in the registry whereby facts pertaining to the acquisition, change, termination or transfer of property rights regarding the person of registered rights holder, the real estate itself or to the legal affairs regarding the real estate. According to Article 82 of LSLSC the annotations may refer to annotation of personal status of property rights holder; annotation of the existence of proceedings before the Court or other executive body, that may result in a change of registered right on the real estate; annotation that the first instance decision is not final; annotation that the first instance decision is not final and binding; annotation of administrative proceedings against a second-instance decision; annotation of decision on freezing the real estate and prohibition of registration of liens; annotation of decision on prohibition of registration; annotation of lifelong care contract; annotation of marital agreement; annotation of priority for future registration; annotation of initiation of an expropriation procedure; annotation of other decisions prescribed by law. Annotation of building permit is registered as annotation of the building rights on a parcel for which the building permit has been issued and contains data on the investor, technical documentation, building permit and other facts that are relevant for this type of registration.

Sub-paragraph 6 of Paragraph 1 of Article 3 of the Mortgage Law regulates that a building under construction, as well as a separate part of a building under construction (an apartment, business premises, garage, etc.), irrespective of whether completed or not, provided that a valid building permit has been issued in conformity with the law governing the building construction.

Paragraph 2 of Article 10 of the Mortgage Law states that a mortgage deed may be entered into by the owner or some other person having the right of disposal, as well as the investor and buyer of a building under construction or a separate part of a building under construction.

In such a situation when it is not possible to register ownership in the real estate registry, the question is how can the mortgagor check whether the mortgagee is the owner of the mortgaged real estate, especially in the case of building under construction. This issue is very common in practice and thus it is very interesting, in particular from the standpoint of the case law.

Article 12 of the Law on Obligations (hereinafter: LOO) states that in establishing obligation relations and realizing rights and duties out of these relations, the parties shall adhere to the principle of good faith and honesty.

Paragraph 2 of Article 18 of LOO states

reč o objektu u izgradnji. Problematika je veoma zastupljena u praksi i interesantna, naročito sa stanovišta aktuelne sudske prakse.

Članom 12 Zakona o obligacionim odnosima (dalje: ZOO) je propisano da su u zasnivanju obligacionih odnosa i ostvarivanja prava i obaveza iz tih odnosa stranke dužne da se pridržavaju načela savesnosti i poštenja.

Članom 18 stav 2 ZOO je propisano da je strana u obligacionom odnosu dužna da u izvršavanju obaveze iz svoje profesionalne delatnosti postupa s povećanom pažnjom, prema pravilima struke i običajima (pažnja dobrog stručnjaka).

Članom 103 ZOO je propisano da je ugovor koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima ništav, osim, ako cilj povređenog pravila upućuje na neku drugu sankciju, ili ako zakon u određenim slučajevima propisuje šta drugo. Ako je zaključenje određenog ugovora zabranjeno samo jednoj strani, ugovor će ostati na snazi ako u zakonu nije ništa drugo određeno za konkretan slučaj, a strana koja je povredila zakonsku zabranu snosiće odgovarajuće posledice.

Polazeći od navednih normi pozitivnog prava, analizaraćemo primere iz sudske prakse.

## Primeri iz sudske prakse

U praksi nije redak slučaj da se stanje u katastru nepokretnosti ne poklapa sa faktičkim stanjem, pa često i lice koje je u katastru navedeno kao vlasnik ili držalac određene nepokretnosti to suštinski nije.

Istraživanjem i analizom aktuelnog stanja u sudskoj praksi, koja se tiču problematike pravno valjanog zalaganja objekta u izgradnji, ukazaćemo na činjenice o kojima hipotekarni poverilac mora voditi računa. Pokušaćemo da damo smernice za dalji razvoj pravne nauke u ovoj oblasti i da ukažemo na neophodnost izmena normi pozitivnog prava.

**Primer 1.**

Analizirali smo situaciju iz jedne sudske odluke. U katastar nepokretnosti u vreme zaključenja ugovora. o kupoprodaji nije upisana ni zgrada, ni stan u predmetnoj zgradi. Prodavac je investitor zgrade u izgradnji. Tužilac je kupac posebnog dela stambeno-poslovnog objekta (stana). Pored investitora, tužena je banka, kao hipotekarni poverilac i investitor kao hipotekarni dužnik. Kupac, u ovom slučaju tužilac je isplatio kupoprodajnu cenu u celosti i uselio se u stan. Nakon toga, investitor je overio založnu izjavu radi obezbeđnja potraživanja izvršnom vansudskom hipotekom. Založnom izjavom investitor u svojstvu hipotekarnog dužnika je garantovao da ne postoji treće lice koje ima neposrednu državinu predmetne nepokretnosti, zakupac ili sl., odnosno da neposrednu državinu na nepokretnosti ima investitor kao zalogodavac. Hipoteka je uspostavljena na stanu u izgradnji. Zalogodavac je, međutim, kao što je rečeno, pre zalaganja raspolagao stanom u korist kupca.

Iz odredbi ZOH proizlazi da na poseban deo objekta u izgradnji (stan) hipoteku mogu staviti i investitor i kupac stana u izgradnji. Primenom odredaba materijalnog prava, sud izvodi zaključak da je u konkretnom slučaju bitno da je pre davanja založne izjave tužilac stekao status kupca posebnog dela objekta u izgradnji, a investitor je nakon prodaje stana bez znanja i odobrenja kupca, prodati stan opteretio hipotekom, čime je postupio nesavesno i nepošteno. Hipoteka nastaje upisom u nadležni registar nepokretnosti na osnovu založne izjave shodno članu 8 ZOH. U situaciji kada objekat u toku izgradnje promeni vlasnika, novi vlasnik stupa u prava i obaveze prethodnog vlasnika prema licima u čiju korist je upisana hipoteka,

that in carrying out obligations relating to his professional activity, a party to obligation relations shall be bound to act with increased care, according to the professional rules and usage (the standard of care of a good expert).

Article 103 of LOO regulates that a contract contrary to compulsory regulations, public policy or fair usage shall be void unless the purpose of the rule violated refers to another sanction, or unless the law provides for something else in the specific case. Should entering into a particular contract be prohibited to one party only, the contract shall remain valid, unless otherwise provided by law for the specific case, while the party violating the statutory prohibition shall suffer appropriate consequences.

Based on the above cited provisions we shall provide analysis of the following examples from the case law.

## Case Law

It is not uncommon in the case law that the data in the real estate cadastre do not match the facts regarding that real estate, and it often happens that a person registered in the real estate registry as the owner or possessor of a certain real estate is not the actual owner or possessor.

By research and analysis of the case law that pertains to the legally sound pledging of buildings under construction, we shall point to the facts that the mortgagor should pay attention to. We shall try to offer some instruction as to the future development of the legal science in this area and to indicate the necessity of changing the legislation.

**Case 1.**

We have analyzed the circumstances of a court decision. At the time of entering into the sales contract neither building nor an apartment in that building were registered in the real estate registry. The seller was the investor of the building under construction. The claimant was the buyer of a part of the residential-business building (the apartment). Along with the investor, who acted as the mortgagee, the action was directed against a bank, as the mortgagor. The buyer, claimant in this case, paid the purchase price in full and moved into the apartment. Subsequently, the investor certified a mortgage bond in order to secure the claim established by extra-judicial mortgage. By the mortgage bond, the investor, acting as the mortgagee, offered guarantee that there is no third party that has direct possession over the mortgaged real estate, lessee, etc. Further, the investor claimed that he, as the mortgagee, holds direct possession over the mortgaged real estate. The mortgage has been established on an apartment under construction. However, the mortgagee, as stated previously, has sold the apartment to the buyer.

Provisions of the Mortgage Law state that a mortgage may be established on a separate part of the building under construction (apartment) by the investor and the buyer of the apartment under construction. By applying the provisions of the relevant substantive law, the Court came to the conclusion that, in this case, it is relevant that prior to issuing the mortgage bond, the claimant acquired the status of the buyer of the separate part of the building under construction, and that the investor, after selling the apartment and without the knowledge of the buyer, placed the mortgage on the apartment that he has previously sold, thereby failing to act in good faith and honesty. According to Article 8 of the Mortgage Law, a mortgage is created by registration in the competent real estate registry on the basis of the mortgage deed. In a situation where the owner of the building is changed in the course of construction, the new owner shall enter into all of the previous owner's rights and duties regarding the persons in favor of whom the mortgage has registered, as set in paragraph 3 of Article 11. In accordance with Article 33 of the LEPLR, the ownership may be acquired upon registration in the real estate registry. Accordingly, the investor could not have pledged the apartment because he had previously sold it to the buyer, prior to issuing the mortgage deed. The claimant, by signing the sales contract, acquired the status of the buyer of a separate part of the building under construction. Paragraph 2 of Article 10 of the Mortgage Law states that a mortgage deed may be entered into by the owner or some other person having the right of disposal, as well as the investor and buyer of a building under

a što je propisano čl. 11 st. 3 ZOH. Svojina se stiče upisom u katastar nepokretnosti, shodno članu 33 ZOSPO. Prema tome, investitor nije mogao opteretiti hipotekom predmetni stan, jer ga je prodao tužiocu kao kupcu pre davanja založne izjave. Tužilac je sa potpisivanjem ugovora o kupoprodaji stekao svojstvo kupca posebnog dela objekta u izgradnji. Članom 10 stav 2 ZOH je propisano da ugovor o hipoteci može da zaključi vlasnik ili drugo lice koje ima pravo raspolaganja, kao npr. investitor i kupac objekta u izgradnji ili posebnog dela objekta u izgradnji, u smislu člana 3 ovog zakona. Kako je tužilac stan u izgradnji kupio i u isti se uselio pre davanja založne izjave od strane tuženog - investitora, to se u konkretnom slučaju ne može primeniti čl. 11 st. 3 ZOH. Odredba čl. 11 st. 3 ZOH se može primeniti samo u situaciji ako je u trenutku davanja založne izjave hipotekarni dužnik jedini vlasnik posebnog dela objekta u izgradnji (stana) iz prostog razloga što ni stan nije bio upisan u katastar nepokretnosti, ističe se u presudi. To što je zalogodavac u katastru nepokretnosti upisan kao držalac objekta izgrađenog bez odobrenja za gradnju ne znači da je ovaj objekat izgrađen bez odobrenja za gradnju, niti znači da zalogodavac ima u državini ovaj objekat. Postojanje odobrenja za gradnju se dokazuje rešenjem nadležnog organa uprave, a državina je faktičko pitanje koje hipotekarni poverilac može utvrditi izlaskom na lice mesta. U vreme davanja založne izjave stan nije upisan u registar nepokretnosti pa tuženi - investitor nije vlasnik u smislu čl. 33 ZOSPO. Naime, tuženi - investitor je bio vlasnik i posebnog dela objekta u izgradnji (stana) sve do momenta prodaje stana u izgradnji, a nakon zaključenja ugovora i useljenja u stan investitor više ne može raspolagati tim delom, u smislu člana 10 stav 2 ZOH. Kako hipotekarni dužnik nije bio isključivi vlasnik stana u smislu člana 10 stav 2 ZOH, to i nije mogao opteretiti sporni stan. Investitor je izvršnom vansudskom hipotekom opteretio poseban deo objekta u izgradnji koji je prodat i na taj način je postupio nesavesno to jest protivno načelu savesnosti i poštenja koje je propisano čl. 12 ZOO. Prilikom donošenja ovakve odluke sud je imao u vidu činjenicu da banka nije ulazila u sporne nepokretnosti i na taj način proverila tvrdnje zalogodavca da je stan u njegovoj državini. Sud smatra da je banka bila dužna da prilikom prihvatanja založne izjave tuženog - investitora postupi sa povećanom pažnjom i proveri tvrdnje zalogodavca da je držalac stana odnosno da je vanknjižni vlasnik stana. Banka je morala postupiti sa povećanom pažnjom koja je propisana članom 18 stav 2 Zakona o obligacionim odnosima (Privredni sud u Sremskoj Mitrovici, P. 92/2014 od 21. 05. 2014. godine).

Prvostepena odluka potvrđena je odlukom Privrednog Apelacionog suda. Dajući obrazloženje za svoj stav, drugostepeni sud ističe da, prema članu 14. stav 1 Zakona o hipoteci, jednostrana hipoteka nastaje na osnovu založne izjave, a prema stavu 2 ovog člana založna izjava je isprava sačinjena od strane vlasnika, kojom se on jednostrano obavezuje, ukoliko dug ne bude isplaćen od dospelosti, da poverilac naplati svoje obezbeđeno potraživanje iz vrednosti te nepokretnosti, na način propisan zakonom. Prema stavu 3 založna izjava po formi i sadržini odgovara ugovoru o hipoteci. Ugovor o hipoteci je ugovor između vlasnika nepokretnosti i poverioca, a mogu ga zaključiti vlasnik ili drugo lice koje ima pravo da raspolaže sa nepokretnošću koju opterećuje hipotekom, a kako tuženi kao zalogodavac (investitor) nije vlasnik niti može da upotrebljava nepokretnost, nije mogao da da založnu izjavu i zasnuje hipoteku na stanu koji je prethodno otuđio (Privredni apelacioni sud u Beogradu, 6Pž. 6793/2014 od 03. 12. 2015. godine).

construction or a separate part of a building under construction as referred to in Article 3 of the present Law. Since the claimant purchased the apartment under construction and moved into it prior to the date on which the respondent - investor, signed the mortgage deed, the Court could not apply the provision of paragraph 3 of Article 11 of the Mortgage Law, to the present case. The provision of paragraph 3 of Article 11 of the Mortgage Law may be applied only in a situation in which at the time of issuing the mortgage deed, the mortgagee is the sole owner of the part of the building under construction (apartment), as the apartment was not registered in the real estate registry. The fact that the mortgagee was registered in the real estate registry as the possessor of the building constructed without the building permit, does not mean that this building was constructed without the building permit nor that the mortgagee holds the possession over this building. The existence of the building permit is demonstrated by a decision of the competent administrative body, while the possession is a factual question that the mortgagor may obtain answer to by inspecting the premises. At the time of granting the mortgage deed the apartment was not registered in the real estate registry, and thus the respondent - investor, was not the owner within the meaning of Article 33 of LEPLR. Namely, the respondent - investor was the owner of the separate part of the building under construction (the apartment) up to the moment of sale of the apartment under construction. After signing the sales contract and vacating the apartment, the investor could not have disposed of this part of the building, as stipulated by Paragraph 2 of Article 10 of the Mortgage Law. As the mortgagee was not the exclusive owner of the apartment, as stipulated by Paragraph 2 of Article 10 of the Mortgage Law, he could not have pledged the apartment. The investor, by signing the extra-judicial mortgage had pledged the separate part of the building under construction that had been already subject to sale, and by doing so the investor acted contrary to the principles of good faith and honesty that are set by Article 12 of the Law on Obligations. When deciding in the present case, the Court was mindful that the bank did not enter into the real estate in order to check the validity of claims made by the mortgagee, namely that the apartment is in his possession. The Court is of the opinion that the bank, at the moment of accepting the mortgage deed of the respondent, was obliged to act with increased care that has been prescribed by Paragraph 2 of Article 18 of the Law on Obligations (Commercial Court of Sremska Mitrovica, P.92/2014 dated 21 May 2014).

The first-instance judgment was confirmed by the decision of the Commercial Appellate Court. In the reasoning of its decision, the appellate Court pointed out that according to Paragraph 1 of Article 14 of the Mortgage Law, a unilateral mortgage shall be originated on the basis of a mortgage bond, and that according to the wording of Paragraph 2 of this Article, the mortgage bond shall be a document drawn up by the owner committing himself unilaterally to allow the creditor, should the debt be not paid when due, to collect his secured claim from the value of the real estate in the manner provided by the law. According to Paragraph 3 of this Article, the mortgage bond shall correspond to a mortgage deed, in terms of form and content. A mortgage deed is a contract between the owner of the real estate and the creditor that may be signed by the owner or by a third party holding the right to dispose of the mortgage real estate. In the event when the respondent, as the mortgagee (investor) was not the owner, he could not have disposed of the real estate nor could have he issued the mortgage bond and constituted the mortgage on the apartment that he has previously sold (Commercial Appellate Court of Belgrade, 6Pž.6793/2014 dated 3 December 2015).

**Case 2.**

In the second example, the first-instance Court determined that the mortgage bond was given after entering into the contract for the sale of an apartment. Therefore, the investor, not being the owner, disposed of the claimant's apartment to the benefit of the 2nd claimant - the bank. Article 14 of the Mortgage Law sets that the mortgage bond shall be a document drawn up by the owner, and the provision of Article 103 of the Law on Obligations states that a contract contrary to compulsory regulations, public policy or fair usage shall be void unless the purpose of

**Primer 2.**

U drugom slučaju, prvostepeni sud je utvrdio da je založna izjava data nakon zaključenja ugovora o kupovini predmetnog stana, pa je investitor, kao nevlasnik, raspolagao tužiočevim stanom u korist drugotuženog - banke. Kako je članom 14 ZOH propisano da je založna izjava isprava sačinjena od strane vlasnika, odredbom člana 103 ZOO je propisano da ugovor koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima je ništav ako cilj povređenog pravila ne upućuje na neku drugu sankciju ili ako u određenom zakonu se ne propisuje šta drugo. Odredbom člana 104 istog Zakona propisano je da će prilikom odlučivanja sud voditi računa o savesnosti jedne, odnosno obeju strana, o značaju ugroženog dobra ili interesa, kao i moralnim shvatanjima. Polazeći od navednih pravila, prvostepeni sud je usvojio tužbeni zahtev i utvrdio je da su založna izjava, kao i ugovor o dugoročnom kreditu (u delu koji se odnosi na zasnivanje hipoteke) apsolutno ništavi i da kao takvi ne proizvode dejstvo *ex tunc*. U konkretnom slučaju, između tužioca i prvotuženog nije zaključen ugovor o prodaji nepokretnosti već ugovor radi kupoprodaje stana u fazi izgradnje, pre nego što je predmet prodaje, stan, bio izgrađen. Stan u izgradnji ne ispunjava uslove iz člana 1 stav 2 Zakona o prometu nepokretnosti da bi se smatrao završenom nepokretnošću. Isti stan se ne može predati kupcu od strane prodavca, već se radi o kupovini stvari koja će tek nastati, stanovište je suda. Prodajom stana u izgradnji investitor je istim stanom raspolagao, pa je to pravo izgubio, odnosno ako je investitor već prodao pojedine delove objekta, onda bi njegova založna izjava proizvodila dejstvo samo na onom delu objekta koji još nije prodat trećim licima (Privredni apelacioni sud u Beogradu, 4 Pž. 2013/14 od 08. 05. 2014. godine).

**Primer 3.**

Analiza sudskih odluka je interesantna ne samo sa stanovišta nastanka i pravne valjanosti hipoteke, već i sa stanovišta stavova kada nastaje svojina na objektu u izgradnji. Konsekventno, od trenutka nastanka odnosno prestanka svojine hipotekarnog dužnika zavisiće punovažnost hipoteke.

U jednoj presudi sud je usvojio tužbeni zahtev i utvrdio da je svojina nastala u trenutku predaje nepokretne stvari (objekta u izgradnji) kupcu u državinu, a ne u trenutku upisa kupca kao vlasnika nepokretnosti u registar nepokretnosti. Sud je mišljenja da tužilac ima pravni interes da traži da sud odlukom utvrdi da je tužilac stekao svojinu na stanu nakon upisa hipoteke u registar nepokretnosti, kako bi tražio brisanje hipoteke. Pravni interes tužioca sud je našao naročito u okolnosti da u vreme podnošenja tužbe predmetna višestambena zgrada nije bila etažirana, odnosno da nisu bili izvršeni upisi prava svojine na posebnim delovima zgrade, da je tužilac svoje pravo ostvario u postupku pred katastrom kada su se za to stekli uslovi, te da u situaciji kada je na istom stanu ustanovljena hipoteka, tužilac ima pravni interes da podnetom tužbom traži da se utvrdi da je svoje pravo stekao tačno određenog datuma, bez obzira što je u međuvremenu uspeo da se upiše u katastru nepokretnosti. Osvrtom na odredbu člana 33 ZOSPO sud je stao na stanovište da je tužilac svojinu stekao upisom u registar nepokretnosti, a vanknjižnu svojinu na stanu u izgradnji ulaskom u državinu u sporni stan na osnovu kupoprodajnog ugovora. Citiraćemo jedan deo obrazloženja presude koji glasi: „U konkretnom slučaju sud nije ni utvrđivao sticanje prava svojine na stanu... kao posebnom delu zgrade koji je upisan u katastar nepokretnosti nego je utvrđivao sticanje prava svojine na stanu... u izgradnji kao posebnom delu zgrade (pre završetka stana i upisa stana nakon izgradnje u katastar nepokretnosti), a polazeći od činjenice da Zakon o hipoteci dozvoljava mogućnost da se i na posebnom delu zgrade, stanu u izgradnji može upisati hipoteka, a nakon završetka zgrade i upisa posebnog dela zgrade odnosno stana u katastar nepokretnosti..." (Presuda Privrednog suda u Sremskoj Mitrovici, P. 97/2016 od 27. 05. 2016. godine). Iz navedene odluke proizlazi da je i vanknjižno sticanje svojine na objektu u izgradnju prepreka za opstanak hipoteke zasnovane na osnovu pravnog posla sa knjižnim vlasnikom. Vanknjižno sticanje svojine se vezuje za zaključenje punovažnog pravnog posla (ugovora o kupoprodaji) i sticanje državine. Sasvim je izvesno da će ovakvo postupanje sudova voditi opadanju broja hipoteka na objektima u izgradnji.

the rule violated refers to another sanction, or unless the law provides for something else in the specific case. Further, Article 104 of the cited law states that when rendering the decision, the Court shall consider the good faith of each and both parties, the significance of endangered property or interests, as well as the existing conceptions of morality. Based on the above cited provisions, the first-instance Court accepted the claimant's claim and determined that the mortgage bond, as well as the long-term loan agreement (part relating to the establishment of the mortgage) are null and void and that, as such, they do not produce any legal effects *ex tunc*. In the present case, the claimant and the respondent did not enter into the contract for the sale of real estate but rather they have entered into a contract for the sale of the apartment under construction, before the object of the sale - the apartment - was constructed. The apartment under construction does not fulfill requirements set by Paragraph 2 of Article 1 of the Law on Transfer of Real Estate in order to be deemed as constructed real estate. The apartment may not be sold to the buyer by the seller. It is the Court's position that this is the case of purchase of a future thing to come. By sale of the apartment under construction, the investor disposed of the apartment, and thus exhausted such right. This means that, if the investor already sold individual parts of the building, his mortgage bond may only have effect on parts of the building that have not yet been sold to third parties (Commercial Appellate Court of Belgrade, 4 Pž.2013/14 dated 8 May 2014).

**Case 3.**

The analysis of court decisions is interested not only from the point of creation and legal validity of mortgages, but it is also interesting to determine the position of the courts regarding the moment of creation of ownership over buildings under construction. Consequently, the moment of creation, or termination, of the ownership rights of the mortgagee shall be critical for determining the validity of the mortgage.

In one judgment, the Court adopted the claimant's claim and determined that the ownership rights have emerged at the moment of transfer of possession over the real estate (building under construction) to the buyer and not at the moment of registration of the buyer as the owner of the real estate in the real estate registry. The Court was of the opinion that the claimant had a legal interest to seek from the Court a decision that would determine that the claimant acquired ownership of the apartment after the mortgage had been entered into the real estate registry, in order to seek the mortgage to be deregistered. In particular, the Court found legal interest of the claimant in circumstances that at the time of filing the action before the Court the apartment building was not yet divided into individual apartments, that is, ownership over individual apartments was not registered. Further, the Court determined that the claimant obtained this right in the procedure before the competent real estate registry, when the conditions were met. However, in a situation where the apartment has been mortgaged, the claimant has legal interest to ask the Court to determine that he has acquired his ownership right at a specific date, regardless of the fact that he has managed to register his ownership rights in the real estate registry. Referring to the provision of Article 33 of the LEPLR, the Court determined that the claimant obtained ownership at the moment of registration of the real estate, while he obtained an off-register ownership at the time of obtaining possession of the apartment under construction by virtue of the sales agreement. We shall cite a part of the Court's reasoning: "In the present case, the Court did not determine the facts regarding the acquisition of ownership of the apartment… as a separate part of the building that was registered in the real estate registry. Rather, the Court was trying to establish the moment of obtaining ownership over the apartment … under construction, as a separate part of the building (before the apartment was constructed and before the apartment was registered in the real estate registry following the completion of construction). This is because the Mortgage Law allows for the possibility that a mortgage may be registered on an individual part of the building, an apartment under construction, after the completion of the building and registration of the individual part of the building, the apartment, in the real estate registry…" (Judgment of the Commercial Court of Sremska Mitrovica, P.97/2016 dated 27 May 2016). From the above reasoning of the Court

**Primer 4.**

Sudovi u zaštiti interesa „vanknjižnih vlasnika" idu korak dalje proglašavajući nedopuštenim izvršenje na nepokretnosti javnom prodajom, a na osnovu rešenja o izvršenju čija je zabeležba izvršena u vreme kada tužilac nije bio upisan kao vlasnik nepokretnosti u javnoj knjizi. U obrazloženju odluke drugostepenog suda se navodi: „U konkretnom slučaju, sud je nesumnjivo utvrdio da je tužilac stekao predmetni lokal na osnovu punovažnog ugovora i aneksa, koji su izvršeni u celosti, što znači, da se isti ne nalazi u imovinskoj sferi izvršnog dužnika, niti se nalazio u vreme dozvole i sprovođenja izvršenja radi namirenja potraživanja tužene banke kao izvršnog poverioca. Navedeno potvrđuje i odredba čl. 50 st. 1 ZIO, koja, kada govori o pravu koje sprečava izvršenje, to pravo ne sužava na pravo svojine i njegovo sticanje po čl. 33 ZOSPO. Nije odlučna ni tvrdnja žalioca da se pouzdao u činjenicu da je u katastru nepokretnosti bio upisan tuženi (*dužnik iz obligacionog posla*), iz razloga što načelo pouzdanja u javni registar ne oslobađa obaveze provere na terenu vlasničkog i posedovnog stanja u odnosu na predmet izvršenja". Sud smatra da je od momenta zaključenja punovažnih ugovora i aneksa, koji su izvršeni i predaje lokala u posed tužiocu predmetni lokal u imovinskoj sferi tužioca. Od tada je tužilac vanknjižni vlasnik, odnosno kvalifikovani (svojinski) držalac nepokretnosti. Kao takav u potpunosti, smatra sud, uživa i pravnu zaštitu koja pripada vlasniku u odnosu na treća lica (član 41 i 42 ZOSPO), izvršnog poverioca, kao i u odnosu na izvršnog dužnika koji je bio upisan kao vlasnik predmetne nepokretnosti u javnom registru. Izvršenje na lokalu koji se u vreme dozvole izvršenja vodio kao svojina izvršnog dužnika (jer tada nije bilo upisano pravo svojine tužioca) bilo bi suprotno članu 58 Ustava RS i članu 1 Protokola broj 1 Evropske konvencije za zaštitu prava i osnovnih sloboda, s obzirom da je tužilac pravo svojine na lokalu stekao na osnovu pravnog posla u smislu člana 20 ZOSPO, dok je na osnovu člana 70 ZOSPO stekao savesnu državinu na predmetom lokalu", navodi se u presudi (Presuda Apelacionog suda u Novom Sadu, Gž. 1361/16).

**Mogućnost zabeležbe ugovora o kupoprodaji u registar nepokretnosti**

Odredbom člana 81 ZDPK propisano da je zabeležba upis kojim se u katastar nepokretnosti upisuju činjenice od značaj za zasnivanje, izmenu, prestanak ili prenos stvarnih prava na nepokretnostima, koje se odnose na ličnost imaoca prava, na samu nepokretnost ili na pravne odnose povodom nepokretnosti. Odredbom člana 82 istog ZDPK propisano je koje činjenice se upisuju u katastar kao zabeležba. U jednom slučaju, u rešenju katastra, navodi se da *priloženi ugovor ne predstavlja ispravu za upis zabeležbe u smislu napred navedenih odredbi* (Rešenje Potpredsednika Vlade, Ministarstva građevinarstva, saobraćaja i infrastrukture broj 952-01-00538/2011-09 od 16. 07. 2014. godine).

Proizlazi da kupac stana u izgradnji, u registar nepokretnosti ne može zabeležiti postojanje ugovora o kupoprodaji nepokretnosti.

## Zaključna razmatranja

Nema spora oko toga da je državina pokretnih stvari pretpostavka o postojanju prava čija se sadržina faktički vrši. Iz analizirane sudske prakse zaključujemo da se takvo pravno dejstvo državine ostvaruje i kada je reč o svojini na objektima u izgradnji. U takvoj situaciji

it appears that off-registry ownership over the building under construction is an obstacle for the continued existence of the mortgage based on the legal deed entered into by the registered owner. Off-registry acquisition of the ownership rights is tied to the moment of entering into the legal transaction with the lawful owner (sales agreement) and the moment of acquiring possession. It is quite clear that this type of reasoning will most probably result in a decreased number of mortgages established on buildings under construction.

**Case 4.**

The courts go a step further in protecting the interests of "off-registry" owners by declaring inadmissible enforcement procedures by public auction of real estate, based on the execution order that has been annotated in the real estate registry at the time when the claimant was not registered as the owner of the real estate in the public records. The reasoning provided by the second-instance court includes the following: "In the present case, the Court has indisputably determined that the claimant acquired the business premises on the basis of a valid contract and annex thereto, that have been fulfilled entirely, meaning that the said premises are no longer within the property realm of the debtor in these enforcement proceedings, nor were the business premises part of the property of the debtor during the time of enforced collection of the claim of the bank as the enforcement creditor. The above stated reasoning is confirmed by the provision of Paragraph 1 of Article 50 of the Enforcement and Security Law, which, when defining rights that prevent forced execution, does not restrict such rights to the right of ownership and the acquisition of such rights according to Article 33 of the LEPLR. The statement put forward by the appellant that he relied on the fact that the respondent (*debtor in the obligation relations*) was registered in the real estate registry, because the principle of reliance on public registry does not relieve of the duty to check the ownership and possession status at the location that is being the object of the enforcement proceedings, cannot be taken as a fully resolute one". The Court is of the opinion that from the moment of entering into the valid contract and annex thereto, which have been fulfilled entirely, and from the moment of transferring the possession over the business premises to the claimant, the said premises are within the property realm of the claimant. From that point onward, the claimant is off-registry owner or qualified (owner) holder of the real estate. As such, in the opinion of the Court, he fully enjoys legal protection that is provided to the owner against any third party (Articles 41 and 42 of LEPLR), enforcement creditor, as well as against the enforcement debtor that was registered as the owner of the said real estate in the public registry. Enforcement proceedings on the business premises that were registered into the name of the enforcement debtor at the time of issuing the decision on forced collection (because at that time the ownership of the claimant was not registered) would have been contrary to Article 58 of the Constitution of the Republic of Serbia and Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms, because the claimant acquired the ownership rights over the business premises by virtue of a legal transaction within the meaning of Article 20 of LEPLR, while obtaining good faith possession over the premises in accordance with Article 70 of LEPLR" (Judgment of the Appellate Court of Novi Sad, Gž. 1361/16).

**Possibility to Annotate the Purchase Contract in the Real Estate Registry**

The provision of Article 81 of the Law on State Land Surveying and Cadastre states that an annotation is a registration in the registry of facts pertaining to the acquisition, change, termination or transfer of property rights regarding the person of registered rights holder, the real estate itself or to the legal affairs regarding the real estate. Article 82 of LSLSC lists the facts that may be registered in the form of annotation. In one decision of the real estate registry, it is stated that the *attached agreement does not represent an instrument for registration of annotation within the meaning of the above cited provisions* (Decision of the Vice-President of the Government, Ministry of Civil Engineering, Traffic, and Infrastructure number 952-01-00538/2011-09 dated 16 July 2014).

It appears that the buyer of an apartment under construction may not register in the real

postavlja se pitanje da li je provera državine na hipotekovanoj nepokretnosti uslov nastanka hipoteke i da li izostanak provere dovodi do nesavesnosti hipotekarnog poverioca koja vodi ništavosti pravnog posla na osnovu koga je hipoteka nastala.

Izloženi pravni okvir, savremeni trendovi, stanje u praksi sudova i katastra nepokretnosti iziskuju pre svega povećan stepen pažnje hipotekarnih poverilaca prilikom zasnivanja hipoteke na objektima u izgradnji, budući da iz analiziranih odluka sudova proizlazi da raspolaganje praćeno predajom državine, učinjeno pre zasnivanja hipoteke, može dovesti do ništavosti hipoteke. Pri tome nije bitno da li je hipotekarni poverilac znao za takvo raspolaganje ili ne.

Sticanje državine po osnovu punovažnog pravnog posla zapravo je trenutak vanknjižnog sticanja svojine, a državina je kvalifikativ postojanja svojine. To više nije upis u registar nepokretnosti. Zaključujemo da se sticanje svojine na nepokretnosti njenom predajom u državinu na osnovu punovažnog pravnog posla priznaje kao novi način sticanja svojine na objektu u izgradnji, iako to nije propisano ZOSPO. Polazeći od tako utvrđenog momenta sticanja prava svojine, sva raspolaganja nakon toga, imaju se smatrati ništavim. Rezultat je ništavost hipoteke koja je već ustanovljena.

Izneti stavovi sudova u skladu su sa stavom katastra nepokretnosti koji odbija zahtev za zabeležbu ugovora o kupoprodaji nepokretnosti sa obrazloženjem da zabeležba postojanja ugovora o kupoprodaji kao takva nije propisana ZDPK. Sa ovog stanovišta, sve analizirane odluke sudova su pravične. Međutim, sa druge strane, hipotekarni poverioci ostaju neobezbeđeni. Kao razlog za ništavost na strani hipotekarnog dužnika sudovi nalaze u postupanju suprotnom načelu savesnosti i poštenja, a na strani hipotekarnog poverioca nedovoljan stepen i odsustvo pažnje dobrog stručnjaka. Koji je to pravni standard koji se očekuje, pitanje je za svaki konkretan slučaj. Do kog nivoa se zahteva ispitivanje ko je držalac stvari, odnosno, pretpostavljeni vlasnik stvari. Ne treba zanemariti da spolja posmatrano često nije moguće utvrditi da li određeno lice određenu radnju prema stvari preduzima kao posredni ili kao neposredni držalac. Za ostvarivanje publicitetne funkcije državine potrebno je da se svaki držalac smatra samostalnim držaocem, a svaki samostalni držalac vlasnikom stvari, sve dok se ne utvrdi da je njegova državina nesamostalna i da stvar drži priznajući „višu vlast" drugog lica. Nakon takve konstatacije pretpostavke o pravu svojine treba da važe u odnosu na to lice dok se suprotno ne dokaže.

Proizlazi da poverilac koji ima hipoteku na objektu u izgradnji sve do njene realizacije ima hipotetičku pretnju njene ništavosti. Ovakva situacija nije dobra. Postavlja se pitanje da li je provera državine na hipotekovanoj nepokretnosti uslov nastanka hipoteke, a njen izostanak istovremeno prezumira nesavesnost hipotekarnog poverioca koja vodi ništavosti pravnog posla na osnovu koga je hipoteka nastala.

Mišljenja smo da je potrebno izmeniti odredbe pozitivnog prava. Pre svega, u oblasti upisa u registar nepokretnosti, unošenjem zabeležbe postojanja ugovora o kupoprodaji, poklonu, razmeni i sl., (u član 82. ZDPK). Na taj način bi se obezbedio publicitet postojanja ranijeg raspolaganja posebnim delom objekta u izgradnji. Time bi se skratio put provere za hipotekarne poverioce, povećao stepen pouzdanja u podatke sadržane u registru nepokretnosti i stvorili uslovi za potpuniju primenu načela pouzdanja.

Imajući u vidu pravna dejstva koja državina proizvodi, od velikog je praktičnog značaja detaljno uređenje sticanja, prenosa i prestanka svojine na objektu u izgradnji, da bi se sa sigurnošću znalo od kada i u čiju korist „deluje" svojina. U takvoj situaciji bi bilo korisno razmotriti mogućnost detaljnijeg uređenja načina i trenutka sticanja svojine na objektu u izgradnji.

Osim toga, u praksu katastra nepokretnosti bi bilo korisno uvesti upis državine na objektu na ime svakog sticaoca objekta ili dela objekta u izgradnji, shodnom primenom člana 96 st. 2. i 3., člana 97 st. 3. i 4. i člana 98 st. 3 ZDPK. Na taj način bi se smanjile mogućnosti zloupotreba i rizik od ništavosti pravnih poslova.

Implementacija ovih ideja u savremeno pravo je od ogromnog značaja iz razloga što se time izbegava narušavanje hipoteke kao stvarnog prava koje deluje prema svima.

estate registry the existence of the contract for the purchase of real estate.

## Concluding Remarks

There is no dispute about the fact that possession over movable things is a presumption of the existence of rights that are exercised over those things. From the analyzed case law we may conclude that such legal effect of the possession is exercised even in the case of property over buildings under construction. In that situation we have to ask ourselves whether on-site investigation of possession on the mortgaged real estate is the requirement for the establishment of the mortgage and whether the absence of such on-site investigation is a sign of a lack of diligence of the mortgagor that may lead to nullity of the legal transaction on which the mortgage is based on.

The presented legal framework, modern tendencies, practice of the Courts and real estate registry institutions, primarily require the greater diligence of mortgagors when establishing mortgages on buildings under construction, bearing in mind that, from the examined Court decisions, it appears that transfer of property followed by surrender of possession done prior to the mortgage origination, may lead to the mortgage being declared void. Further, it seems that it is not decisive whether the mortgagor had knowledge about such transfer.

Acquisition of possession by virtue of valid legal transaction is the moment of acquisition of off-registry ownership, while the possession is the condition for the existence of ownership. Therefore, the moment of registration into the real estate registry is no longer the moment of acquiring the ownership. We conclude that acquisition of ownership over real estate by transfer of possession on the basis of a valid legal transaction is accepted as a new mode of acquiring ownership over buildings under construction, although such model is not envisaged by the ELPLR. Starting from this new moment of acquiring the ownership, all subsequent dispositions of the real estate are to be deemed null and void. The consequence is the nullity of registered mortgage. The opinions of the Courts are in line with the position of the real estate registry to reject the request for annotation of the purchase contract with the explanation that the annotation regarding the existence of the purchase contract is not prescribed by the LSLSC. If we were to accept this position, all reviewed decisions of the courts seem to be just. On the other side, in this situation the mortgagors are left unsecured. The courts find the reasons for nullity on the part of the mortgagee to be actions contrary to the principles of good faith and honesty, while they regard lack of diligence and care of good experts as reasons for nullity on the side of the mortgagor. What is the expected legal standard is to be determined in each and every case. Up to what point do we have to investigate to determine who is the possessor, or the presumed owner of the property. We should not forget that sometimes, looking from the outside, it is not possible to determine whether a person undertakes certain actions towards the property as indirect or direct possessor. In order to meet the principle of publicity we have to regard every possessor as independent, and every independent possessor as the owner of that thing, until it is determined that his possession is not independent and that he holds the thing while accepting 'higher authority' of another person. After such finding, the presumptions regarding the ownership rights should apply to that person until contrary is proven.

It seems that the creditor that has a mortgage established in his favor on a building under construction is faced with the threat of nullity of such mortgage up to the point the mortgage is realized. This situation is not good. The question put forward is whether the investigation of possession over the mortgaged real estate is the requirement for the origination of the mortgage, and whether the absence of such investigation is seen as lack of diligence of the mortgagor that leads to the nullity of the legal transaction on which the mortgage is based on.

We are of the opinion that it is necessary to change the existing law. First of all, in the field of registration of real estate in the registry by introducing annotation regarding the existence of the purchase contract, gift deed, deed of exchange, etc. (Article 82 of LSLSC). By doing so, we would provide for the principle of publicity of prior disposition of an individual

Ništavost i samim tim, nemogućnost realizacije hipoteke svela bi se na minimum. Sveobuhvatna evidencija (državine i prava na državinu) bi omogućila usklađivanje državinskog stanja sa pravom na državinu i pojednostavio bi se postupak provere svojinskog statusa nepokretnosti. Na kraju, mada ne i najmanje bitno, stepen pravne sigurnosti bi bio podignut na mnogo viši nivo od postojećeg, kako za buduće kupce, tako i za hipotekarne poverioce.

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part of the building under construction. This would shorten the investigation for the mortgagor, increase the level of certainty in the data entered in the real estate registry and crate conditions for application of the principle of reliance.

Having in mind the legal effects generated by possession, it is of a great practical importance to define in detail the acquisition, transfer, and termination of ownership on buildings under construction in order to know with certainty in whose favor does the ownership 'exists'. In such situation it would be useful to examine the possibility of a more detailed regulation of the modes and timing of acquisition of property over buildings under construction.

Furthermore, it would be useful to introduce in the real estate registry a registration of possession over buildings in favor of each and every person that has acquired a building under construction or part thereof, by the respective application of paragraphs 2 and 3 of Article 96 and paragraphs 3 and 4 of Article 97 and paragraph 3 of Article 98 of LSLSC. In doing so we would reduce the possibility for misuse and risks of nullity of legal undertakings.

The implementation of these ideas into the modern law is of enormous importance because it would leave mortgages unaffected, as property rights with *erga omnes* effect. The nullity, and the associated inability to use the mortgage, would be minimal. A comprehensive database (of possession and rights to possession) would enable the harmonization of factual possession with the right to possession and would render investigation into the status of the real estate simpler. Last, but not least, the level of confidence in the legal system would be raised to a much higher level than it is at present, for both future buyers and mortgagers.