

PH. D. THESIS SUMMARY

“Usucapio as special means of property acquisition”

The present work focuses on “Usucapio as special means of property acquisition”. Nevertheless, it approaches the concept of property, both in a wide and in a limited acceptance, the other manners of property acquisition, the concept of Land Register and forays the jurisprudence of national courts and the jurisprudence of the European Court of Human Rights.

In the first title a synthesis on property is made, such as the economic category and the right of property such as the legal category. Chapter I aims the aspects related to the economic coordinates of property. Chapter II refers to the concept and classification of the concept of right of property as its legal form. Chapter III approaches the background involving the means to acquire movable and immovable assets, which is split in section 1 regarding the identification and definition of the manners of property acquisition and section 2 provides a comparative view of the means in which property can be acquired.

The property has both an economic and a legal part. Property is an old institution which evolved along time, having the feature of holding, using and disposing of an asset in an exclusive, absolute and continuous way, under the limits stipulated by the laws.

In the European area, the first information in land property appears with the Celts, in the 3rd millennium B.C. From a legal point of view, the right of property appears in the Roman legal system as an individual right to property.

The right to property is a part of the category of rights in rem, together with:

1. The right of superficies;

2. The right of beneficial interest;
3. The right of usage;
4. The right of occupation;
5. The easement right;
6. The right of administration;
7. The right of concession;
8. The right of user;
9. Warranty rights in rem.

The holders of the right to property are natural persons, legal entities of private law, the state and administrative-territorial units.

From an economic point of view, the right to property is a right of appropriating certain tangible or intangible assets.

The property is of various ways. The use of the asset in joint ownership can be exerted by any of the joint owners without preventing the other joint owners from using the asset and without changing the manner in which the asset is used. The fruits are thus reaped depending on each joint owner's share. The joint owners have the right to obtain the advantages of the assets also before joint possession termination, regardless of the nature of the fruits. The sanction involving the loss of the right to fruits is not provided by the laws. The joint owner who spent money on fruit production is entitled to demand the other owners depending on their share on, a pro rata basis. Joint ownership termination per shares can intervene as follows:

- by partition;
- if a joint owner purchases the shares from the other owners or by means of donation or succession;
- by usucapio from the joint owner who turned undisputed possession in a useful one;

- property alienation to a third part, carried out by all the joint owners together;
- asset expropriation;
- asset destruction because of an act of God or a force majeure;

Another legal form of the right to property is joint, forced and perpetual property per shares. Such is the case in the following situations:

- the capacity upon joint parties and assets from buildings with several flats;
- joint ownership of necessary or useful common assets for the use of two neighbouring real estates (access ways, water sources, etc.);
- joint property upon common bulkheads (walls, fences. Nevertheless, there is a tradition in the rural areas that the fence between neighbours, if it was built only by one of them, should be placed with the back (fence chain) to the owner);
- capacity upon family assets;

The indivisible joint ownership is that common property of which no shares were assigned for each joint owner. The origin of indivisible joint ownership is the law and that of the joint ownership per shares can be: contracts, succession, usucapio.

As per the Civil Code, property is acquired and transmitted by natural real estate accession, artificial real estate accession, by prescription, by the laws, by occupation, by succession, by convention, by agreements, by tradition and by court decision.

Onerous or gratuitous acquisition exists. Transfer of property between living being and transfer by death exist. The right to property is an absolute right, opposable to everyone, the most complete right which cannot be lost if it is not used, just as the action guaranteeing it and by which it can be validated is not lost by extinctive prescription. The owner can demand and obtain at any moment legal protection for its right by means of an action for the recovery of possession.

Title II establishes the coordinates of possession between the precarious possession and the right to property as the basis of research of the usucapio institution. Chapter I regards the correlation between the precarious possession and the right to property in Roman law. Chapter II briefly discusses the precarious possession, possession and the right to property in the system of the Romanian Civil Code of 1864, referring to regulations taken from the French Civil Code of 1804.

Chapter III develops very briefly the regulation between the three legal entities: precarious possession, possession and the right to property in the new Romanian Civil Code.

Title III presents the coordinates of acquisitive prescription in the context of the New Civil Code. Chapter I includes a brief history on the property acquisition by acquisitive prescription which is structured in section 1, referring to the Roman law and the old Romanian enactments in the matter of acquisitive prescription and in section 2, which refers to the Civil Code of 1864 on acquisitive prescription which had a different name in the provisions of the previous legislation, being thus approached in relation to the provisions of the New Civil Code. Chapter II presents the tradition and novelty in the legal regulation of acquisitive prescription pursuant to the New Civil Code.

Acquisitive prescription or usucapio is the means of acquiring property of something by a possession extended over a determined period of time, that is to say it is a manner in which property or other rights in rem can be acquired with respect to something by an uninterrupted possession of that thing over the period assigned by the law.

A first regulation took place in Ancient Greece by the Laws of Solon, in the Law of the XII plates. The Romanian Civil Code of 1864 regulated two types of acquisitive prescription: that of 30 years, also known as the long usucapio and that of 10 up to 20 years, also known as the short usucapio.

The 30 years usucapio can also be found under the name of *logissimi temporis* or long lasting usucapio, it is acknowledged in favour of the holder of the asset who can prescribe 30 years without having the obligation to produce any title and without putting mala fide forward. It thus results that, in order for it to acquire property of the asset by extended usucapio, the holder must comply with two conditions:

- a. to hold the asset over the period provided by the law, namely 30 years;
- b. the possession must be useful, meaning not affected by vices, and this is presumed, being in the task of the one claiming that the invoked possession is affected by a vice to provide this proof.

The holder invoking long-term usucapio does not have to be of good faith; even a mala fide possession is able to lead to acquiring the real right after the term is completed.

In the case of usucapio of 10 up to 20 year, the one winning in good faith and by a right cause an immovable asset shall prescribe the property of that asset by 10 years if the real owner lives in the judicial circuit of the county court of law where the immovable asset is situated and by 20 years if it lives outside the respective judicial circuit. With regard to the field of application of the short usucapio:

- a. usucapio of 10 up to 20 years shall apply only to immovable assets;
- b. usucapio of 10 up to 20 years shall apply only to immovable assets regarded as determined *ut singuli*, not to certain universalities, such as succession patrimony.

Based on the idea that the just title is a title translativo of ownership in judicial practice, the following mentions have been made:

- location, deposit, commodatum conventions cannot serve as a just title;
- declarative court decisions cannot serve as a just title;
- sharing conventions standing as declaratory rights cannot serve as a just title;
- certificate of inheritance, which does not represent a title to property as it rather confirms only the quality of heir and the extent of succession rights, cannot be invoked as a just title;

Nevertheless, the following are deemed to serve as a just title:

- the transaction which, even declarative of rights, is assimilated to the translativo deed;
- court order of adjudging an asset and that acknowledging a translativo convention between the parties of a trial.

Usucapio is the means of acquiring private property immovable assets or those making the object of its dismemberments, beneficial interest, use, habitation, easement respectively, provided that they are continuous and apparent, and superficies. It cannot apply to public property immovable assets because both the Constitution and provisions included in other laws such as Law no. 18/1991 stipulate that they are unassignable and inalienable and they belong only to the state and to administrative-territorial units.

Usucapio is a general way of acquiring the right to property but it also represents an indirect sanction against the previous owner of the immovable asset who negligently left it for a long period of time in another person's possession, the former's passivity allowing the latter to publicly behave as an owner. As such, the capacity to actively pursue the proceedings in the request for acknowledging the right to property by usucapio can belong only to the previous owner of the immovable asset and, since the Plaintiff did not prove ownership of the land in

litigation and the Defendant constantly showed the court that the Plaintiff never had the respective land in its patrimony, it is obvious that the Plaintiff does not have the capacity to actively pursue the proceedings.

Art. 930 of the Civil Code provides the following conditions requested to the holder for usucapio:

- the owner recorded in the Land Register is deceased or ceased to exist;
- the waiver to property declaration was recorded in the Land Register;
- the immovable asset was not recorded in a Land Register.

The rights of claim cannot make the object of usucapio. Possession and time are the essential elements for usucapio. The rights of claim are not susceptible of being held.

Title IV is dedicated to the object of acquisitive prescription; thus, Chapter I sets out the acquisitive prescription of immovable property. Chapter II presents unregistered acquisitive prescription. Chapter III refers to registered acquisitive prescription. Chapter IV speaks about the junction of possessions with regard to the history and regulation in the New Civil Code, both concerning the conditions of invoking possession and the possibility of invoking possessions. Chapter V presents the terms in the matter of acquisitive prescription and cases of suspending the course of prescription, and Chapter V approaches movable property usucapio.

Acquisitive prescription is of various ways, namely acquisitive prescription of immovable property (registered and unregistered) acquisitive prescription of movable property. In the New Civil Code, usucapio is regulated within art. 930-934 for usucapio of immovable property and within art. 939 usucapio of movable property. The New Civil Code regulates usucapio of immovable property under the form of unregistered and registered usucapio, according to the pattern of the

Decree-law no. 115/1938 because, by Law no. 7/1996 the regime of publication by notice of sale was extended by Land Registers in the entire country.

Since the New Civil Code provides that the term of registered usucapio is 5 years and that of unregistered usucapio is 10 years, it means that only after the two terms of usucapio having these durations are fulfilled, calculated from the date the New Civil Code enters into force or from a subsequent date provided in the law for its application, will actions be able to be recorded to be settled based on the new regulations.

Unregistered usucapio is the specific way of acquiring the right to private property or a dismemberment of that right regarding an immovable asset by exerting useful possession of such an asset for over a 10 years' period, under the conditions provided by the laws. So as to operate unregistered usucapio, the following conditions must be met:

- a. the holder of the right to property regarding the immovable asset recorded in the Land Register is deceased, ceased to exist or waived its right;
- b. the heirs or the administrative-territorial unit did not record its right to property in the Land Register during the usucapio term or after its completion;
- c. exerting useful possession upon the asset recorded in the Land Register;
- d. the duration of useful possession should be 10 years both from the date when the holder died or ceased to exist or waived its right, and from the date of taking possession;
- e. the usucapio beneficiary requested the recording of its right to property in the land register and its request was approved.

Registered usucapio is the specific way of acquiring a non-ancillary right in rem over an immovable asset when the person not registered without a

legitimate reason as holder of the right in the land register exerts a possession free of any undue influence and in good faith for 5 years.

So that registered usucapio can produce legal effects, the possession must be useful, namely it must be made up of *corpus* and *animus*, to have the properties of being continuous, undisturbed, public and unambiguous, to be free of the vices of discontinuity, disturbance, surreptitiousness, equivocality.

If the current holder chooses possession junction, this can be achieved provided that the following conditions are met:

- a. to be about a proper possession because precarious detention cannot be joined with a possession;
- b. the one invoking possession junction must be its author's successor in rights as the one who usurped someone else's possession cannot invoke possession junction with that belonging to the person usurped because there is no legal relation between them and the current holder who attained possession by an action for the recovery of possession shall not benefit of the time while the person from whom it claimed the respective thing held it.

In order to operate the junction it is necessary that at least two successive possessions are exerted regarding the same immovable asset, of which one not fulfilled, belonging to the author and another one in the continuation and completion of the first, belonging to the successor until the usucapio term is fulfilled. Junction is excluded if possessions do not feature the same legal characteristics or if they do not have the same object.

Regardless of the type of usucapio, the term is calculated in the same way, per days and not per hours. The day when prescription begins is not taken into consideration. The day is calculated as having 24 hours and begins at zero hours,

ending at the following midnight. The prescription is deemed to be concluded upon fulfilment of the last day of the term.

The usucapio of movable asset institution is regulated by art. 939 NCC, where it is mentioned that the one holding someone else's asset for 10 years can acquire the right to property having usucapio as grounds. In consequence, possession creating the premises for usucapio of movable assets does not have to fulfil the conditions requested under the laws for property acquisition by possession in good faith.

Tule V details the effects of acquisitive prescription regarding immovable asset accession. Chapter I presents the substantive and formal issues of immovable asset accession, and section 2 presents the formal issues of immovable asset accession. Chapter II approaches the effects of acquisitive prescription regarding the extension of real rights. Chapter III forays in the case of immovable asset accession and acquisitive prescription.

Pursuant to art. 567 NCC, by accession the owner of an asset become owner of everything associated to or incorporated in the asset except otherwise provided by the law. Accession appears as a primary means of acquiring property as it does not involve the transfer of the right to property over an asset by parties' will; the owner of the asset associated to or incorporated in another asset acquires, by the legal act restrictedly ascertained of accession, the right to property also regarding the incorporated or associated asset.

However, it was shown in judicial literature that accession has three interdependent senses:

- the material fact of incorporating an ancillary asset into a non-ancillary asset;

- the right to accession resulted from this legal fact in a restricted way in favour of the owner of the non-ancillary asset, if the two assets belong to different owners and the conditions provided by the law are complied with;
- Accession as means of acquiring the right to property over the ancillary asset by the owner of the non-ancillary asset, either directly as an effect of the material fact of association or incorporation, or as an effect of exerting the right to accession if the conditions provided by the law are complied with.

Immovable asset accession can be natural or artificial. Natural immovable asset accession consists in the association of two assets, of which at least the main asset is immovable, belonging to two different owners without man's intervention. The Civil Code regulates the following cases of natural immovable asset accession: alluvium, avulsion, islands and gravel, deserted bed accession and wild animal accession.

Artificial immovable asset accession is the result of human activity. Any construction, plantation or thing done in the ground or on the ground are presumed to be made by the owner of that land, at its own expense and that they belong to it unless otherwise proven.

The right to accession is born related to the incorporation of the materials in the field and the right to property regarding the works is acquired upon exerting the right to accession, which can take many forms, of which the introduction of an action based on evacuation, a notification by means of the judicial executor or filing an action for the recovery of possession.

Title VI is more complexly approached as it refers to the role of the court of law and the land register system in acquiring the right to property over immovable assets by acquisitive prescription. Chapter I mentions the competent court and its competence in acquiring the right to property by usucapio or, better said, by

acquisitive prescription. Chapter II mentions the instrument of ascertaining real immovable asset rights, which is the land register.

By the effects of a court decision as a consequence of a declaratory action, we understand the legal consequences deriving with the establishment of a right to property over an immovable asset. Res judicata is an effect of this decision, assuring the holder in good faith that it was just invested as owner and that its right shall not be challenged in the future anymore.

A significant effect of the court decision is the fact that it is an authentic instrument, a consequence of elaborating a civil legal act by a public clerk while performing its job attributions.

Land registers represent a publication system based on the topographic identity of the immovable assets and reflects every change occurred in the material and legal situation of the immovable assets. Immovable asset rights in rem recorded in the land register are defined as registered rights and the records these rights refer to make up the registered state. The Land Register includes full and accurate legal records of immovable assets, property of natural persons and legal entities from the same place as administrative-territorial unit. The object of the Land Register is represented by immovable assets, namely lands of any kind, as well as the assets associated to them either naturally or artificially.

Title VII provides a brief overview of the jurisprudence of the European Court of Human Rights in the matter of acquisitive prescription. Chapter I makes a few observations regarding the competence of the European Court of Human Rights in the matter of acquisitive prescription. Chapter II mentions the tendencies and regulations concerning the jurisprudence of the European Court of Human Rights in the matter of acquisitive prescription.

Anyone who wants its property acquisition by usucapio to be acknowledged and believes its “right to a fair trial” was broken can notify the European Court of

Human Rights. The latter has the competence of pronouncing a decision by assessing whether or not the provisions of art. 6 of the Convention were violated, which state that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law which shall decide either on breaking its civil rights and obligations or on the rationality of any accusation in criminal matter filed against it.”

The European Court of Human Rights believes that divergent judicial practice is not profound when national courts of law apply a clear provision of the law in matters in which the circumstances were actually different and it is not persistent unless a mechanism of coherence in its respect intervened after an acceptable period of time.

The effects of usucapio are retroactively produced, from the date of entering into possession. If the request for real estate registration is approved (by conclusion or court order) the right to property is recorded in the Land Book with the date when the request was recorded and the effects of usucapio are retroactively produced, from the date of entering into possession. Between the date of entering into possession and the date when the usucapio right is recorded in the Land Book, the holder is retroactively acknowledged a right of unregistered property.