EFFECTS OF ACQUISITIVE PRESCRIPTION RELATIVE TO ITS JURIDICAL NATURE

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ABSTRACT. NONE OF THE THEORIES FORMULATED ABOUT THE JURIDICAL CHARACTER OF ACQUISITIVE PRESCRIPTION BASED ON THE FUNCTIONS PERFORMED BY THIS INSTITUTION (MOBILIZING, SANCTIONING, OF PROVING, SOCIAL, ECONOMIC) CAN BE CONSIDERED SELF-SUFFICIENT IN ORDER TO EXPLAIN THE REASONING OF ITS TWO MAIN EFFECTS.WE ADMIT THAT THE ACQUISITIVE PRESCRIPTION IS BOTH A COMPLEX JURIDICAL FACT RESULTING FROM THE LAW AND AN ORIGINAL WAY OF ACQUIRING REAL RIGHTS TO WHICH ITS EXTINCTIVE EFFECT IS ACQUIRED BY SIMPLY ACKNOWLEDGING THE RISE OF NEW RIGHT, BEING INDISSOLUBLE RELATED TO THE ACQUISITIVE EFFECT.

KEY WORDS: EXTINCTIVE EFFECT OF ACQUISITIVE PRESCRIPTION, ACQUISITIVE EFFECT.

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1. The Extinctive Effect of Acquisitive Prescription as a Consequence of its Punitive Character

For those in whose favor it operates the extinctive prescription is a way of extinguishing the juridical obligation (implicitly of civil responsibility) [1] correlative to the right which was not defended by its holder trough the action which is presumed- personal or real [2], and the acquisitive prescription is mainly a way of acquiring a main real right.

For the one against whom it operates the prescription, both extinctive and acquisitive is a sanction, if the moralizing and mobilizing function hasn't had any results; the sanctioning role of the acquisitive prescription consisting in losing the right mainly explained from a sociological perspective occurs as a result of the holder's carelessness in exerting the prerogatives given by its right and expressed over a long period of time. This justification is far from being satisfactory, as it is stated that, on the one hand, the sanction intervenes as a result of infringing the juridical norms [3], and on the other hand the passivity of the holder in exerting its right is one of the prerogatives included in the content of that right [4], not being able to be sanctioned like failure to amply with an obligation [5].

However, the idea of sanction is sustained also in the ground that losing the right doesn't occur simply by its non- exerting on, it is maintained by when this non- exerting is a result of a serious disinterest for that right manifested by complete neglect for the asset and for a period long enough in the hand of another person who acts a genuine titular and who fulfils the conditions- useful possession exerted for a certain time determined by law. So on, besides the condition of exerting in a positive way of the right of invoking prescription- for acquiring this right as an effect of uzucapion.

Considering acquisitive prescription as a sanction appears to be insufficient not only in terms of justification, but also for the fact that it appears only from one direction that of the initial titular; sanctioning the initial titular, obviously, justifies only the extinctive effect of acquisitive prescription and not the acquisitive effect.

2. The Extinctive Effect of Acquisitive Prescription as a Result of Assumption of the titular's renouncing his right

The fact of considering acquisitive prescription as a legal assumption of the initial holder's renouncing his right cannot be accepted as shown, because the producing of the effects of acquisitive prescription is not conditioned by the knowledge the initial titular of the state of fact of possession exerted on his asset, so, nevertheless, acquisitive prescription can not be considered a renunciation in favor of a particular person, which would justify, more then the extinctive effect, the possession of the letter of the initial titular's right. Besides, this interpretation excludes a relative assumption which can be inverted by contrary evidence.

3. Acquisitive Effect - a derived acquisition of real rights (?)

The attempt to consider the acquisitive effect as belonging to a juridical act [6], with the consequence that the uzucapioning possessor being the successor with particular title of the initial titular, we can not speak about an original way of acquiring that right with all that it means, but a derived one is a far- fetched one even for the start term prescription [7] if we consider even only the concept of civil juridical act- a manifestation of will/ will agreement with the purpose of producing of certain juridical effects. Concerning acquisitive prescription, we are not dating with a will agreement but the acquisitive effect is produced on the grounds of the law which stipulates it in certain circumstances.

Besides the fact that the real will of the parties is an uncertain matter, with real difficulties of evidence, we can not admit that the purpose of the will was, from the beginning of possession that of finally acquiring in this difficult way, the real right of the possessor. If in the case of short term prescription animus domini / animus rem sibi habendi based on the possessor's belief in the validity of the title, on the "legal" right which he acquired, it is opposed to the idea of cauza remota in terms of a future acquisition, in the case of long term prescription the will of verus domino can not be interpreted in the way that, by his passivity, he would deliberately pursue the transmission of his right to the possessor

4. Acquisitive Prescription: a complex juridical fact, whose effect is based on a legal assumption

Insisting on the idea of existing a juridical relation between the initial titular of the right and the possessor, who, if it doesn't have a juridical act as a source, it must came into being from a juridical fact, whose effects, even though they are not followed by the parties, are produced as a result of a legal assumption, in the specialty literature [8] it was shown that the elements of the content of this juridical relation consisting in *"the right of the owner to claim the asset com*ing *out of possession and its correlative, the possessor's obligation to restore it"* [9] have underwent transformations through the effect of acquisitive prescription in the sense that the *"owner's right to act for claiming his asset will stop, concurrent*ly with extinguishing the *possessor's right to restore it, as a civil obligation"* [10].

This Juridical fact is a complex one, resulting from the *"reunion of a human action*-possession- and of a natural fact- respectively elapsing a certain term, stipulated *by the law"* [11]. The transformation of the de facto state into the de jure fact is produced trough the mechanism of legal assumption whose character expressly stipulated by law, is juris tantum, which becomes by accomplishing the requirements of acquisitive prescription a juris et de jure and, thus the appearance is consolidated and transformed into a genuine right [12].

In this direction the idea of consolidating the initial title is sent and it can not proved, otherwise but an assumption - a neighbouring and connected fact - ownership under certain circumstances stipulated by law. Priority is thus given to the probatory function, the acquisitive effect doesn't appear as a main one of the institution, it appear only in the subsidiary, without considering that not always the de facto situation is according to the law, in the absence of the possibility of proving it [13].

In the litigations concerning property, uzucapion can not limited to a simple probatory rule even if it operates according to a mechanism based on a series of assumptions acting against each of the parties; it is obviously a rule of substance. In fact, invoking uzucapion is meant firstly, not to replace a means of evidence but to protect its interest by availing itself from a norm which turns the state of a fact into law.

From all the theories about juridical character of the acquisitive prescription we consider that his one, the acquisitive prescription is a complex juridical fact, explains in the best way the juridical qualification of the institution, but rephrasing, the context of this concept.

Thus the acquisitive prescription is a complex juridical fact in whose structure can be included the de facto states- possession and elapsing of time- with the provisions stipulated by law, and the juridical act of invoking acquisitive prescription, in the sense of producing its effects, in such a way that it becomes more than an essential element of the institution, the instrument triggers its effects.

The legal assumption indicating the possessor as the titular of the right is nothing but an instrument an instrument on a probatory domain whose justification can be found in social considerations

5. The Extinctive Effect of Acquisitive Prescription, the Premise of Original Acquiring of the Right

The generally accept conclusion in the sense that acquisitive prescription is a way of acquiring the real rights, completed by some authors[14] with the reflection that this regulations do not refer to the extinctive effect of this prescription, too.

About this final reflection, we note that, indeed the legal definition of acquisitive prescription can be replaced with the truncation in different texts, as well as an insufficient substantiation of its functions and effects, and the absence of mentioning extinctive effect triggers focus on the fact that the inclusion of acquisitive prescription among the original means of acquiring the real rights belongs to the doctrine, never being indicated by the law; the means of original acquiring [15] implying, if that right was in the patrimony of another person, its extinguishing in order to be required by a new right with the same object and the same nature in the patrimony of another person , the extinctive effect being the essence of certain [16] means of originary acquiring, among which we can distinguish uzucapion.

We conclude that none of the theories maintained about the juridical nature of acquisitive prescription based, in turn, in the functions performed by this institution (mobilizing, sanctioning, of proving, social, economic), cannot be considered sufficient in itself, to explain the reasoning of its two main effects.

We admit that acquisitive prescription both a complex juridical fact, resulting from law, and an original way of acquiring the real rights, against which its extinctive effect is achieved by simply acknowledging the rise of a new right, complementary and completely related to the acquisitive effect [17].

Concerning substantiation of the extinctive effect in the retroactivity of the effects of uzucapion [18] we consider that this characteristic explains the extinguishing of the right at most, respectively the rise of a new right, from the moment of beginning of possession, as well as a series of other implicit effects, consequences of retroactivity, analyzed later on as side effects of institution.

References

[1] M. Nicolae, The Extinctive Prescription, Rosetti Publishing House, Bucharest, 2004, p. 40-68.

[2] in their case, except the property right.

[3]In this respect A. Boar, The Uzucapion – Prescription, the Possession and the Publicity of Rights, Lumina Lex Publishing House, 1999, p. 204-205. Indeed, in spite of the role and place of the sanctions in our Juridical System, the concept of sanction is not yet sufficiently outlined from a theoretical point of view (C. Oprisan, Sanctions in the Romanian Civil Law- a Possible Synthesis in R.R.D. no.1/1982, p.11). In a general definition, sanction is "a measure taken against the desire and the will of the individual who infringes the provisions of the norms *of the law"*; the same author reveals as essential functions of the juridical sanctions, irrespective of the law branch, the preventive educational and repressive (restoring sometimes)- intimidating (Gh. Bobos, The general Theory of The State and Law, Didactical and Pedagogical Publishing House, Bucharest, 1983, p.226-227).

[4] The Subjective, generic right is defined as the possibility/ faculty of the holder to enjoy the prerogatives of his right, requiring the action of the passive subject and when it is necessary, the coercive force of the state. But this very possibility is contrary of the idea of obligation as well as the concept of right is opposed to that of obligation the titular of the right being able to chose to exert it or not.

[5] For the so- called real obligations, which are related to owning an asset, see I. Lula, I. Sferdian, Civil Law. Real Rights, Univeritas Timisensis Publishing House, 2000, p.38- 45; L. Pop, M. Harosa, Civil Law. Main Real Rights, Juridical Universe Publishing House, 2006, p. 38-46.

[6] Acquisitive Prescription being in fact, "an agreement for producing juridical *effects"*, between the initial titular's will of not exerting his right or of not preventing the prescription and the possessor's will, derived from animus possidendi and subsequently, by exerting the right of the invoking uzucapion (A.Boar, p. 206).

[7] In the case of wich, this theory, is maintained of justifying itself *"a fortiori"*(M. Djuvara, The Juridical Cause in the Light of the General Theory of Law, 1932, IV^{-th} part, p.42.)

[8] A. Boar, op. cit., p. 209.

[9] idem.

[10] idem.

[11] idem.

[12] "If a person owns an asset or right for a long time, without its would be titular claiming in there are strong reasons to presume that he or predecessors have previously alienated it, so that prescription appears less as a way as acquiring and wore as a clue of a previous title which can not be proved." (A. Boar, p.210), Although the authoress alludes to the consolidation of the initial title which can not be proved in another way than trough assumption- a neighbouring and connected fact- ownership under certain circumstances stipulated by the law.

[13] In the same respect, E. Roșioru, Uzucapion in the Romanian Civil Law, Hamangiu Publishing House, 2008, p.489- 490.

[14] A. Boar, p.209; even the extinctive effect of acquisitive prescription is mistaken for the extinctive effect of extinctive prescription- the former related to the subjective right, the latter to the material right in the action of defending the subjective right (E. Roșioru, op. cit., p.497).

[15] V. Stoica, Civil Law. Main Real Rights, vol 2, Humanitas Publishing House, 2006, p. 178-179.

[16] Such as the expropriation of the assets for a cause of public urtility, the retrocession of the expropriated effect, acquisition of the mobile assets trough good- faith possession trough article 1909 and article 1910 of the Civil Code, the acquisition of immobile assets based on apparent property or the transfer of assets from the private to the public domain of the state or inversely.

[17] In the same sense see M. Nicolae, paragraph no.226, p.386: "…both juridical effects - a positive and a negative one - without being able to dissociate them since they are in a cause - effect relationship".

[18] E. Roşioru, op. cit., p. 497.