INVOKING THE EFFECTS OF ACQUISITIVE PRESCRIPTION

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ABSTRACT. THE LEGAL ACT THAT INVOKES THE ACQUISITIVE PRESCRIPTION, CONDITION SINE QUA NON FOR TRIGGERING THESE EFFECTS, HAS CONTENT THE RIGHT OF OPTION'S PERSON WHO IS CONCERNED TO INVOKE THE AACQUISITIVE PRESCRIPTION, NAMELY THE POSITIVE EXERTION OF THIS RIGHT, WHICH IS PRODUCED, MOST OF THE TIMES IN AN ACT OF REVENDICATION OR IN ASCERTAINING, IF PROCEDURAL REQUIREMENTS ARE FULFILLED BUT ALSO BY MEANS OF EXTRA-JUDICIAL ACTION.

KEY WORDS: ACQUISITIVE PRESCRIPTION, RIGHT OF OPTION, USUCAPION.

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The effects of the acquisitive prescription can not be invoked ex officio by the judge who ascertains the fulfillment of the acquisitive prescription's requirements of 10-20 years or 30 years (if we consider this enumeration of the acquisitive prescription's conditions presented in most of the specialized works) [1] and does not appear de facto by virtue of a legal automatism, without being a simple juridical fact stricto sensu, but only in the presence of the volitional aspect, in its positive form, from the possessor [2].

The juridical act of invoking the acquisitive prescription is that manifestation of will which, as a rule, appears under the form of a unilateral act, but and a convention (renunciation with an onerous title) contains the right of option of the person interested in invoking acquisitive prescription, namely the positive form of exerting this right or renouncing its effects – the negative form of exerting.

Regarding the right of option in the way of the invocation of acquisitive prescription, which is analysed in the doctrine as part of potestative rights category [3], arises in the moment of meeting the other requirements/conditions of acquisitive prescription, as against the prescription typology and implies a faculty – the invocation of acquisitive prescription's effects - which its titular can exert in a positive or negative form, more exactly he can choose between

invoking the benefit of acquisitive prescription or renouncing its effects.

Those Who and Against Whom Can Exert the Right of Invoking the Effects of Acquisitive Prescription

The right of option regarding the invocation of acquisitive prescription arises in the person-possessor, who fulfills all the other conditions of prescription. In its positive way, it can be exerted by other persons like its universal successor and with universal title, as continuers/successors of their author's personality, as well as by the possessor's "creditors" and "anyone who is concerned", according to article 1843 form the Civil Code.

Invoking the acquisitive prescription by other persons than the one who fulfilled the conditions of acquisitive prescription.

In order that the universal successors and those with the possessor's universal title could exert this right both in its positive and negative way, it is necessary that all the conditions of acquisitive prescription should have been fulfilled before the succession/inheritance begins or the transfer of the patrimony in the case of reorganizing the juridical person or, otherwise we could discuss the exertion of the option right about its possession function, in which the successor joins his possession and his author's possession in order to accomplish the term of acquisitive prescription.

Concerning the successor with a particular title, we can also [5] consider that he can invoke acquisitive prescription on the grounds of article 1843 from the Civil Code as creditor of the transmitter. The possessors who had the legal obligation to effect acts of interrupting acquisitive prescription in the name of those they represented can not invoke acquisitive prescription for their benefit.

The foreign citizens and stateless persons can not invoke for their benefit the acquisition through acquisitive prescription, the property right on lands in Romania, considering the previsions of article 44, paragraph 2, form the Constitution [6].

The creditors can invoke the prescription of their debtor, as well as any other person who may be concerned [7].

If the possessor has renounced his potestative right, the debtor's action has a double nature: it appears, in the first stage as a paulian action and in the second stage as an oblique action. If he has not renounced yet, the creditor's action appears directly as an oblique action[8].

Thus, the previsions of article 1843 from the Civil Code are correlated both with the prevision of article 975 of the Civil Code and the previsions of article 974 from the Civil Code [9].

The action introduced by other persons who are concerned, even if it does not appear as a paulian action, is similar to it. As far as the fraud is concerned, the previsions of article 1843 from the Civil Code do not impose such a condition.

Any of these actions can be formulated separately, irrespective of a trial of revendication against the possessor or even the respective process, by means of a request of a main intervention.

Regarding the persons against the right of invoking acquisitive prescription is exerted, according to article 1875 from the Civil Code "The prescription runs against any person who could not invoke an exception established by law". Thus, as a rule, acquisitive prescription can be invoked by the possessor or by the persons stipulated in article 1843 from the Civil Code against any person who claims a property right about the possessed asset [10].

A positive as a negative way exertion, and not exerting it in a term of decline of this right, too, lead to its extinction. It follows that not intervening revocation of this right, so simple neexercitare not attract to extinction [11].

A positive exertion in the way of produced the effects of acquisitive prescription implies, most of the times an act of revendication or in ascertaining, if procedural requirements are fulfilled but also by means of extra-judicial action.

a. Invoking the benefit of Acquisitive Prescription in the Civil Trial can be made in a revendication (against the possessor or by the possessor who, after the fulfillment of acquisitive prescription, lost possession of the asset) and by an action of ascertaining the right which was acquired through the effect of acquisitive prescription introduced against a third party or against the initial titular.

The right option in the right direction by his owner who is a defendant in the action claim gave rise to disputes of a process: invocation uzucapiunii by a defense fund uzucapiunii invocation or by a counterclaim. Both doctrine and practice has varied between solutions uzucapiunii invoked by the defense fund, with the exception of substance [12], and invoked by a claim [13].

We also consider that the invocation of acquisitive prescription is an essential defence, without being a claim in itself as long as there is a connection between this right and the juridical relation deducted from the judgement (the claimer pretends that he is the owner of the asset in the possession of the accused and the latter claims that he has acquired the right of ownership of the same asset through acquisitive prescription) and, besides the 1848 article itself allows the invocation until the passing of the final decision by the appeal court or, the acquisitive prescription can not be invoked in the appeal through an reconventional petition.

However interest holder the right to invoke the acquisitive prescription is better protected if his right is exercised through an action counterclaim, even if the acquisitive prescription was opposite in the fund defending, because if the action is rejected then could create practical difficulties in realizing the right of it. In this way was pronounced French law, too: if the owner obtains successful issue in the first instance, but for another reason than acquisitive prescription is limited to require the opponent to call off its decision to maintain the court fund, it is clear that a decision court of appeal to the contrary given by the fund, but does not have, also on the acquisition prescription, does not justify opposition against the owner [14].

b. The invocation of acquisitive prescription by extrajudicial means

If the invocation of the acquisitive prescription is achieved through a unilateral act, prior to suing somebody at law, it must be a deliberate one, not a simple act of exerting a main, real

right, which means that the possessor is aware that the right he exerts came into being when all the other conditions of acquisitive prescription were fulfilled and they preceded the condition of invoking its effects.

Of practical interest of extra judiciary invoked is small: it can not be evidence for compliance with the other conditions necessary to produce the acquisitive prescription effects, its limited to removing uncertainty about waiving the right holder. No communication of such invocation not of practical interest, while the original holder (or his heirs) may bring action in any claim in which the owner must prove that the conditions prescription purchase and ask the court's express finding that the production effects. In addition, this legal act does not provide evidence for conditions of acquisitive prescription can not be entered in the land, according to art. Article 20. 1 of L. No. 7 / 1996 or this Act, which does not provide evidence for conditions of acquisitive prescription, may not be legal entry in the **Land Registry.**

In conclusion, the proof of fulfilling the necessary conditions for the arising of this right can be made only by means of judicial action, through the actions and trial ways we have shown, so that the extra juridical unilateral act produces its effects (triggering the efficiency of acquisitive prescription by a deliberate juridical confirmation).

Ascertaining the production of the acquisitive effect gains a juridical force only if it is made by the court. This juridical force appears as an authority only for the parties at trial, for third parties it has only a probatory significance. The persons who are not parties in the trial can request administering evidence in a second trial to prove that the conditions for arising the option right are not fulfilled (the possession is not useful, the term was suspended or interrupted, the right or asset is not liable to be acquired through acquisitive prescription, the title which was invoked as a just title is null or, even harder to prove, the lack of good-faith in the moment of acquiring the asset, etc.)

References

[1] D. Alexandresco, The Theoretical and Practical Explanation of the Romanian Civil Law, ed., a II-a, vol. III, partea I Atelierele Grafice Soccec&Co., Bucureşti, 1909, p. 65-72; C. Hamangiu, I. Rosetti Bălănescu, Al. Băicoianu, Treaty of Civil Romanian, vol. II, Editura *Naţională, Bucureşti, 1929*, p. 294-295; ; V. Stoica, Civil Law. The Main Realy Rights, Vol. II, Humanitas Publishing House, 2006, p. 270.

[2] The decisive role of the possessor's will in completing the mechanism of acquisitive prescription[1] can appear from the previsions of article 1841 from the Civil Code, according to which *"In Civil matters, the judges can not invoke the prescription if the one who is interested has not appealed to these means".*

[3] The category of potestative rights was mentioned in the specialty literature since 1989 by M. Eliescu as secondary rights. See also Ionel Reghini, Considerations about the rights in Roman pandects no.4/2003.

[4] According to article 1843 from the Civil Code "The creditors and any other person who may be concerned can oppose the acquired prescription to their debtor or codebtor or owner, even if that debtor, codebtor or owner renounces it".

[5] See A. Boar, *Uzucapiunea, prescripţia, posesia şi publicitatea dreptur*ilor, Lumina Lex Publishing House, 1999, p. 200.

[6] See A. Boar, op. cit. p107. The author concludes that foreign legal persons could acquire through acquisitive prescription the very property right of lands in Romania, but her conclusion was invalidated by the Constitutional Court through decision no.342 from September the 20th 1997.

[7] în acest sens, a se vedea D. Alexandresco, The Theoretical and Practical Explanation of the Romanian Civil Law, vol. IX, ed. a II-a, vol XI, Tipografia *Cartea Medicală,* Bucureşti, 1926, p. 73, nota 2.

[8] See A. Boar, op. cit. p. 201.

[9] Although it was said, what is the isolated (D. Alexandresco, op. cit., p. 74, nota 3) that Article. 1843 C. civ. would establish an exception to the provisions of art. 975 C. civ., meaning that creditors would not have to prove fraud by the debtor, we, along with other authors, that the provisions of art. 1843 C. civ. not establish an exception to the provisions of art. 975 C. civ., creditors must prove all the necessary conditions for admissibility of the revocation action (C. Hamangiu, I. Rosetti Bălănescu, Al. Băicoianu, op. cit., p. 301 şi 302; A. Boar, op. cit., p. 201 şi 202 . Sometimes, he said that Article. 1843 C. civ. are related only with art. 974 C. civ. in the sense that it gives creditors the right to invoke the acquisitive prescription on the oblique path, but not right to attack the waiving of prescription (L. Josserand, Cours de droit civil *positive français*, tome premier, 3-eme édition, Requeil Sirey, Paris, 1938, p. 889). But retain the view that, on the contrary, the provisions of art. 1843 correlated with the art. 974 C. civ. and with art. 975 C. civ., whereas the text refers to waiver, or if it has occurred, the oblique action could not be exercised unless revoked the legal act of surrender. Added that the solution is rational because "if we recognize that creditors may disregard the negligence of their debtor, and invoke his acquisitive prescription, even when negligence is not fraudulent, the more must admit that they can ignore and attack illegal waiver debtor, as fraud is more serious active than passive negligence " " (C. Hamangiu, I. Rosetti Bălănescu, Al. Băicoianu, op. cit., p. 301).

[10] D. Alexandresco, op. cit., p. 75-77. Even against the state or a local community since "The state, public establishments and villages, in matters of their private domain, are subject to the same previsions like private persons and, like them, they can oppose them"(article 1845, the Civil Code). If the asset is part of the public domain, the property right on that asset is imprescriptible in both extinctive and acquisitive aspect.

[11] Term decay is at turns judgment on appeal (as shown in art. Civ. C. 1842), in the claim in (or action negatorie, if we consider uzucapiunea a dezmembrământ of property) started against the owner or when the deadline expired for the defendant to call the owner if the decision was final and irrevocable by neapelare.

[12] In this sense, the juridical literature (G. N Luţescu, *Teoria generală a dreptur*ilor reale. Teoria patrimoniului,. Clasificarea bunurilor. Drepturi reale principale, Bucureşti, 1947, p. 751; O. Ungureanu, C. Munteanu, Drept civil. Drepturi reale, Ediţia a III-a. revăzută şi adăugită, Editura Rosetti, 2005, p. 411, L. Pop, M. Haroşa, Drept civil. Drepturi reale principale, Editura Universul Juridic, 2006, p. 301) and juridical practice C.A. Suceava, s. civ. dec. nr. 183/1995, apud P. Perju, Sinteză teoretică a Jurisprudenţei Curţii de Apel Suceava în domeniul dreptului civil şi al celui procesual civil, semestrul I /1999, în Dreptul nr. 12/1999, p. 301).

[13] C.A. Suceava, s. civ. dec. nr. 1410/1994, apud P. Perju, op. cit, p. 302 şi 306.

[14] M. Planiol, G. Ripert, Traité practique de droit civil francais, Paris, tome I - Les personnes*: état* et *capacité*, Libraire Générale de Droit et de Jurisprudence, 1925, nr 749, p. 746.