

SOLVING SOME LAW CONFLICTS IN TIME REGARDING THE MATTER OF AQUISITIVE PRESCRIPTION

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ABSTRACT. The legal rules applicable to aquisitive prescription in some particular area of the country and some moment, constituted one of the problems that the instances had to face, the solutions that were pronounced are far from being characterized as uniform. Considering the following legislative moments: the application of the Romanian Civil Code of 1864 together with extending the civil law across the Carpathians, the application D.L. no. 115/1938, as well as Law no. 7/1996 coming into force, normative acts regulating aquisitive prescription in a different way, controversies have arisen regarding the law which is applicable to a certain area of the country if aquisitive prescription extends over two legislative epochs.

KEY WORDS: aquisitive prescription, D.L. nr. 115/1938, law conflicts.

The juridical character applicable to acquisitive prescription in the land book territories has been one of the problems that judiciary instances were confronted, and the solutions pronounced in these cases were far from being characterized as uniform.

More precisely, the issue of applicable law comes from succession in Transylvania and Bucovina, of some regulations different for this juridical institution which essentially extends over long periods of time which makes possible its beginning under the impact of a law and accomplishing the circumstances respectively, producing its effects under the impact of another law.

Neither the territories with real advertising through registers of transcriptions and inscriptions are excepted from these law conflicts in time regarding the regulation of acquisitive prescription considering that the coming into effect of Law no.7/1996.

Precisely, the law is arguable, on the one hand, concerning its transiting provisions and on the other hand the fact that although it implicitly maintains acquisitive prescription in the system of the Civil Law, it changes the field of real advertising, land register advertising in the present day formula proves to be inconsistent with a series of aspects and regarding the acquisitive prescription of the buildings.

Considering the following legislative moments: applying the Romanian Civil Code of 1864 together with extending the civil law over the Carpathians, applying D.L. no.115/1938 but also the coming into effect of Law no.7/1996, normative acts regulating the acquisitive prescription in a different way arguments arose about the applicable law in a certain territory of the country, if the complex juridical fact leading to acquisitive prescription over two legislative

epochs. In comparison with two moments, over the time, for certain historical regims, the problem of solving some law conflicts was as follows :

- a) from the local laws (Austrian and Hungarian) the Romanian Civil Law and D.L. no. 115/1938 arising in the moment of extending civil legislation in land register territories [1];
- b) from the Romanian Civil Code and D.L. no. 115/1938 arising in the land register territories along with applying the latter law;
- c) from D.L. no. 115/1938 and Law no. 7/1996.

Solving each of these conflicts implies distinct analysis, the moment of the beginning of running the term of acquisitive prescription being, in all the transitory provisions, the decisive element.

In spite of all these, as simple as the legal solution may appear, the subsequent measure is justified by a multitude of situations (determined not only by the temporal element of the beginning of the acquisitive prescription term which gave rise to the problem of including them in the transitory norm hypothesis and, of course, by the diversity of approaching and solutions they received).

Solving some Law Conflicts between the Romanian Civil Code of 1864 and D.L. no. 115/1938, for the historic territories of land registers

D.L. no. 115/1938 was applied in Bucovina on the 15th of October [2] and in Transylvania on the 12th of July 1947 [3].

The problem of legislative subordination of the acquisitive prescription begun after the application of the D.L. no. 115/1938 appears as against a different regulation of this juridical institution, a special one, in comparison with the provisions of the Civil Code, and later after the coming into effect of Law no. 7/1996, as against some arguable transitory provisions. Thus, we have in mind the conflict between the Romanian Civil Code and D.L. no. 115/1938 in comparison with two different legislative moments: the application of D.L. no. 115/1938 and the coming into effect of Law no. 7/1996.

Discussions regarding the applicability of the Romanian Civil Code after applying D.L. no. 115/1938

After the application of D.L. no. 115/1938, the juridical character of the acquisitive prescription begun after this moment, both at the level of a theoretical hypothesis and when the problem of actual solving a certain case arose, has arisen discussions regarding the conflict of laws between the provisions of the new normative act and the provisions of the Romanian Civil Code.

Although, as we will show further on, the solution adopted basically favour the (which the real owner is alive) from those regulated by article 27-28 from D.L. no.115/1938[4]. In the same respect, we have a jurisprudential solution[5], according to which, by applying D.L. no. 115/1938 the provisions of the Romanian Civil Code previously extended in the territories from across the Carpathians haven't been abrogated.

Neither in judiciary practice is there a unitary view on the matter whether in the regions which are governed by D.L. no. 115/1938, acquisitive prescription is regulated by the provisions

of this law or those from the Civil Code. The solution which became essential about the acquisitive prescription begun after the 12th of July 1947 was and remains that of applying the stipulations of article 27-28 from D.L. no. 115/1938[6].

Thus, noting that “in the judiciary practice there isn't a unitary point of view regarding that if in the regions where the transmission of real estate rights is subject to the law for unifying the land book provisions from the 27th of April 1938, acquisitive prescription is regulated by the provisions of this law or those from the Civil Code.[7]”.

Although this orientation has been constant up to our days[8], our supreme court[9], after almost thirty years, had to give its verdict again on this aspect, starting from the the same reasons that win the system of land register based on the topographic identification of the buildings and the principle of integral advertising, the real rights referring to buildings are transmitted, instituted, modified or extinguished by registering in the land register and the right of property of the buildings is gained, with the exceptions of the cases deliberately stipulated by the law only by registering them in the land register and in the case of acquisitive prescription this registering can be made only under the conditions deliberately stipulated by D.L. no. 115/1938, stated that “the different provisions from the Civil Code, referring to the acquisitive prescription of building property right, are not applicable in the territories governed by the regime of land register advertising”, based on the provisions of article 48 from Law no. 241/1947.

Coming into Effect of Law no. 7/1996 brings into focus the problem of the law applicable in the conflict between D.L. no. 115/1938 and the Civil Code

The problem of the conflict between the two normative acts regarding the regulation of the acquisitive prescription is, as we have shown, the consequence of some transitory dispositions conceived with higher degree of generality and in a superficial wording.

Further on, the analysis of the consequences of coming into effect of Law no.7/1996 on acquisitive prescription only takes into account only the situation of the owner who began possession in the territories of land register before coming into effect of the Law no. 7/1996 but whose acquisitive prescription term was not achieved before this moment.

The matter of the beginning of possession under D.L. no. 115/1938 and acknowledging their effects on the grounds of article 27 and 28, after coming into force of Law no. 7/1966, is closely related to the controversy about the field of applying the new law. In other words, if before finalizing the land register and the real advertising registers for the territory of each country in part, the new dispositions will be exclusively applied or, on the contrary, they will continue to apply the previous real advertising systems, respectively that of the transcription and inscription registers and that of the old land registers.

The point of view expressed by the doctrine and in the judiciary practice can be concentrated in two main and diametrically opposed opinions. According to one opinion[10], exclusively based on the provisions of article 72, paragraph 1-3 (which became will be applied only after the finalization of land registering and of real advertising land registers in each country in part, where, at the same time it will stop the applicability of legal provisions which regulate the real advertising systems applicable up to this moment[11]. Thus, they maintain the coexistence on the country's territory, for a determinable period of time, of several systems of the existing real advertising systems (the transcription and inscription registers, the land registers, and the land

advertising registers), simultaneously with the one which was introduced by Law no. 7/1996, through land registers.

Along with the provisions of article 72, paragraph 1-3, it is shown, in order to support this view, that it is not possible to register real rights on grounds of Law no. 7/1996 in the present day land registers, as it is a application in the land register regions implies new land measurements and new land registers.

The reflection of this view concentrated, in practice[12], on the idea of not abrogating the provisions of D.L. no. 115/1938, by the coming into effect of Law no. 7/1996. As a result being apprehended after the 24th of June 1996, with actions aiming at the ascertainment of acquiring the ownership right through acquisitive prescription, these instances based their solutions on the dispositions of article 27-28 form D.L. no. 115/1938[13].

In justifying this point of view the principle previously established was revealed in the matter, although it wasn't expressed *expresis verbis, de lege lata*, namely that possession begun on the grounds of a normative act can produce only the effects which have been acknowledged since its beginning, irrespective of the moment of term fulfillment, because of the fact that people who tend to acquisitive prescription subject their actions, to the regulations in force at the moment, without being able to foresee the eventual legislative transformations/modifications that will appear until the fulfillment of the acquisitive prescription term.

Although, finally, this is the right solution, in the way the High Court of Justice has stated, being informed in this respect, with an appeal in the interests of law, we can not agree with the interpretation of the transitory dispositions of Law no. 7/1996. In the sense of simultaneous functioning on the country's territory, until the final form of general land registering of several systems of real publicity.

According to another view[14], based on the systematic interpretation of article 72 paragraph (2) and (3) referring to article 58 paragraph 1, article 59 and 59 of Law no.7/1996 in the original form, they have come to the conclusion that after coming into effect of Law no.7/1996, the previous real publicity system stop their applicability being replaced by the new real publicity system based on the land register, with only effects of opposability towards third parts of translative juridical act or constitutive to real immobiliary rights[15].

Now, after modifying Law no.7/1996, trough Law no.499/2004I[16] and Law no.277/2005[17], we consider that this latter opinion undoubtedly reflects, trough the correct interpretation of article 60I[18] (which became article 58 after republishing it), Law no.7/1996, in the sense of existing a unique system of real publicity, but which doesn't exclude the application to transitory situations of the old law provisions (D.L. no.115/1938), but on grounds of the transitory norm stipulated on the new law.

In the present day regulation[19], article 58, paragraph 1 from Law no. 7/1996 republished it is stipulated that “in the regions of land register, subject to Decree- Law no.115/1938 for unifying the dispositions regarding the land registers, or accordingly, the law no. 242/1947 for transforming the temporary land registers from the Old Realm in land publicity registers, the registering regarding buildings, included in land registers or, accordingly, in the land publicity registers, abiding by the provisions of this law”.

This opinion was included in the practice of instances[20] and, even in the case of a right interpretation of the application of the only system of real publicity introduced by Law no7/1996 which doesn't establish the special cases of acquiring a property trough *usucapion* written down

in article 27- 28 from D.L. no.115/1938, which leads to the conclusion that it is also applied in the territories that have previously been subjects to its disciplines, the common law usucapion regulated by the Civil Code.

In the same respect, the doctrine, involves the provisions of article 60 (in initial drafting) according to which the actions introduced on grounds of article 22, 33, 28 and 34- 40 from Decree- Law no. 115/1938[21] on trial at the date of coming into effect of the new law, will be solved according to the above mentioned prescriptions and not according to those stipulated by the new law; the same article also stipulates that the juridical decision according to which these actions have been admitted ”will be registered in the land register” (the new land register) in order to produce the consecutive effects, according to the existing juridical regime at the date of being the trial (article 59 applicable by analogy “per a contrario the actions of land register written down since the 25th of June 1996, will be judged on ground of the norms of Law no.7/1996. Only that Law no.7/1996 doesn’t include any dispositions regarding usucapion and thus the usucapion actions introduced by juridical instances beginning with the 25th of June 1996 will be judged on grounds of the norms of the Romanian Civil Code”[22], irrespective of the moment of being or accomplishing the term of acquisitive prescription. The application, further on, of the D.L. no.115/1938 will make article 60 useless, or, *actus interpretandus est potius ut valeat quam ut pereat*.

Given the purpose for which article 60 of Law no. 7/1996 was initially adapted, it was concluded that this opinion must be maintained after the modification of its content, through O.U.G no. 41/2004 (determined by the fact that the transitory situations this legal text referred to have passed), from reasons of juridical logics and practically.

Thus the appeal instance[23] stated that “in fact the two instances misinterpreted that the dispositions of D.L. no. 115/1938, regulating usucapion in the conditions of land register in the cases stipulated by article 27 and article 28 were abrogated at the time of coming into effect of Law no. 7/1996, a law which doesn’t regulate usucapion as a way of acquiring the property and allows the application of article 1890 from the Civil Code constituting the common law. Thus according the article 73 paragraph 2, from Law no. 7/1996, only at the finalization of land registering work and of real publicity registers for the whole administrative territory of a county its applicability ends and the Decree- Law no. 115/1938, and according to paragraph 3 of the same article, after finalizing the land registration in the whole county, among other dispositions Decree- Law no. 115/1938 is also abrogated. As a consequence, until the finalization of land registering and real publicity registers, Law no. 7/1996 regulating the new land registers *technically based on land registering, is not applied the legislator’s will, deliberately expressed in the above –shown dispositions being that of postponing its coming into force, with the consequence of still applying of the old dispositions of Decree- Law no. 115/1938 in the regions with a real publicity system through land registers”*.

The actuality of this matter as we tend to believe, has stopped at the moment of admitting, by the Supreme Court, of the appeal declared by the general prosecutor of the Prosecutor’s Office from the High Court of Justice[24], in the sense, that in the case of the acquisitive prescription begun on the grounds of D.L. no. 115/1938 and accomplished after the coming into effect of Law no. 7/1996, the actions of ascertaining the acquisitive of property law through usucapion in the condition of land register is governed by the dispositions of the old law, respectively of D.L. no. 115/1938.

In reason for the decision included the non- uniformity of the solutions pronounced in the practice of judiciary instances regarding the legal dispositions applicable in the case of actions coming at ascertaining the acquisitive of property law through usucapion in the territories in which the provisions of D.L. no.115/1938 were applied, if the acquisitive prescriptions were accomplished after coming into effect of Law no. 7/1996.

The Supreme Court retained as should have all the transitory dispositions of Law no. 7/1996 republished art 69 paragraph(2) and (3)[25], and also referred to the conformity of this interpretation with the principle of regulating the transitive dispositions of different normative acts which regulated acquisitive prescription along the time, in various regions of the country, as well as the general principles regarding the application of the civil law in time.

REFERENCES

- [1] This conflict receives different solutions as against a series of actual hypotheses such as : 1. the acquisitive prescription begun in Bucovina before adopting D.L. no. 511/1938, which applies D.L. no. 115/1938 and not accomplished so far; 2. the acquisitive prescription begun in Transylvania before the extension of the Romanian Civil Code and not accomplished before that; 3. the acquisitive prescription begun in Transylvania from the 15th of September 1943, respectively the 4th of April 1945 for Northern Transylvania to the 12th of July 1947. The practical interest towards these hypotheses is less and less apparent, only as far as the right of property gained through useful possession in one of these periods, is invoked. But these will be the object of a future paper.
- [2] Through Law-Decree 511 from the 15th of October 1938 for applying in Bucovina the law for unifying the provisions regarding land books, namely Law-Decree no. 115/1938 for unifying the provisions about the land registers.
- [3] Through Law no. 241/1947 for applying in Transylvania the law for unifying the provisions regarding the land registers. from the 27th of April 1938.
- [4] P. Demeny, The Law of Land Books no. 115/1938, commented and annotated, Cordial Lex Publishing house, Cluj Napoca, 1995, Romanian Academy Edition, Cluj Branch, Socio-human Research Institute, Juridical Science Department, p. 48-49.
- [5] See civil sentence no. 2027/28th of February 2001 (final), Satu Mare Law Court, nr. 2563/2001.
- [6] Thus, noting that “*in the judiciary practice there is no unitary point of view about the problem whether, in the regions where the transmission of real rights are subject to the law for unifying the provisions of land book from the 27th of April 1938, acquisitive prescription is regulated by the provisions of this law or those from the Civil Code*” the plenum of the former Supreme Court decided, for ensuring a unitary judiciary practice, to give the following guidance: “*in the regions where the transmission of real rights is subject to the regime of the law for unifying the provisions of land book from the 27th of April 1938, acquiring these rights through acquisitive prescription is regulated by the provisions of article 27 and 28 from this law and not from the provisions of the Civil Code*” (T.S. Guidance decree no. 15/8th of December 1966 in CD, p35-37 and in RRD no. 1/1967, p. 101-102).

[7] T.S. Guidance decree no. 15/8th of December 1966 in CD, p. 35-37 and in RRD no. 1/1967, p. 101-102

[8] For instance, in the same respect is passed, three years later, the Supreme Court no. 542/22.03.1968, in C.D. 1968, p. 80-82.

[9] The Supreme Court civil decision no. 1264, in the Law no. 7 Magazine/1994, p. 96-97.

[10] Gh. Vidican, Towards a new system of land advertising, in Law Magazine no. 7/2003; I. Albu, Building Advertising in Romanian law. New land registers, in Law magazine no. 11/1996, p. 5 and p. 7-8; Radu Iosif, Controversies regarding the Application of Law no. 7/1996 and Decree-Law no. 115/1938, Juridical Trend Review, no. 1-2/2003, p.112-113; N. Grecu, The competence of the law courts regarding the transcription of dislodging and pursuit of property, as well as the inscription of privileges, mortgages and pawning in Law no. 7/996, p77; Al. Basarab Șinc, Land registers and real publicity or the Hell is paved with good intentions, in the Public Notaries Bulletin no. 4/1999, p10-11; E. Chelaru, Juridical Circulation of lands, All Beck Publishing House, 1999, p. 407-409; M. Ionescu, Basic principles of real publicity and of the new system of publicity adopted by Law no. 7/1996, Law Review no. 6/1997, p. 44; M. D. Bocsan, The juridical nature of the action in tabular conscription, in Law Review no. 10/1998, p. 23, note 2.

[11] Art 17, 20 and 72, paragraph 1 and 2, Law no. 7/1996

[12] In spite of the legislative modifications of Law no. 7/1996 through Law no. 499/2004 and Law no. 277/2005 (especially article 60, which after republishing the law became article 59), the decision from 2005 of the Supreme Court of Justice, unified sections, no.21/2005 (published in Official Gazette no.225 of the 13th of March 2006) is an absurd one: The Court, summoned by the representative of The General Prosecutor of The Prosecutor’s Office from The High Court to give his verdict on the appeal in the interests of law in the sense of establishing that after the coming into effect of Law no. 7/1996, the provisions system real publicity has ended the applicability and were replaced by the new system based on the evidence of general land registering and the new land registers has established on the contrary that: “the actions of land register (in tabular labor prescription and tabular rectification) aiming at writing down un the land register of some real rights stipulated in juridical acts validly completed before the coming into force of Law no.7/1996, are governed by the dispositions of the old law, respectively the Decree- Law no.115/1938”

For the criticism of this decision see, A. Rusu, Real Publicity. Land Registers. Judiciary Practice, Hamangiu Publishing House, Bucharest, 2006, p.115.

[13] Satu Mare Law Court Carries out from the provisions of D.L.no.115/1938 after the coming into force of Law no.7/1996, admitting the appeal against the decision of the instance which ascertained the uzucapion that has begun and was not fulfilled under D.L.no.115/1938, under the conditions of the civil Code:” The interpretation given by the instance regarding the application of the general law and of The special law...is far-fetched in the matter of acquisitive prescription there is a special law, applicable on the territories where the system of real publicity is achieved through land registers which cannot be applied alternatively with the general law in these territories”. (Civil Decision no.101/A/19.02.2003 of Satu Mare Law Court, given in legal document no.5813/2002).

[14] Fr. Deak, Civil Law Treatise. Special Contracts, 3rd edition brought up-to-date and completed, Juridical Universe Publishing House, Bucharest 2001, p 19- 21, I.P. Filipescu, Civil

Law. Right of Property and other Real Rights, revised and completed edition, Actami Publishing House Bucharest, 1998, p.341- 343; F. Tuca, House Law no. 114/1996, *based on living tenant's* legislation, All Publishing House Bucharest 1997, p.108- 109.

[15] this interpretation was taken into account in my paper (see also Chapter 2 of the paper , coming into effect of Law no.7/1996) materializing the particularities of the coming into effect of Law no.7/1996: the immediate application of the new law begins about the inapplicability of D.L. no 115/1938 and of Law no. 242 /1947, operating in the same land registers can be made under the conditions of Law no.7/1996 (art 21 and the following) and as a consequence the removal of the constitutive effect of registering in the land register, in other regions too, the dispositions of the personal system of publicity is abrogated since the coming into effect of Law no.7/1996 (article 61, paragraph 1).

[16] Law no. 499/2004 regarding ratification of Urgency Order of Government no. 41/2004 for the modification and completion of Land Register Law and real publicity no.7/1996 which modify article 3 paragraph 2, article 5 letter k), paragraph 9, article 20, paragraph 1² and paragraph 1³, article 50 paragraph 1, the introducing part and letter a), article 52 paragraph 2, article 56 paragraph 1.

[17] Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjoining measures.

[18] Article 60: “The sections introduced on grounds of article 22, 23, 27, 28 and 34- 40 from Decree- Law no. 115 from the 27th of April 1938 for unifying the dispositions regarding the land registers on trial at the date of coming into effect of the present law, will be solved according to the above- mentioned legal dispositions. First Court decisions through which these actions were admitted, will be written up in the land register”.

[19] as a result of the modification it through Title XIII from Law no. 247/2005.

[20] Civil Sentence no.7222/11.10.2002 of Satu Mare Law Court, given in legal document no.7475/2002.

[21] actions in labour circumscription and tabular rectification, the action for registering the rights acquired through usucapion.

[22] C. Ap. Cluj, civil section, dec. no.1731/1999, in Law no.12/2000, p. 113, with explicative and approving note by Tr. Darjan.

[23] C. Ap., civil section, dec.1588/2002, in Law Revue no.3/2003, p. 236. See also C. Ap. Braşov, civil section, dec. no. 792/R/2002, Aurelia Rusu op. cit, nr. 96, p. 277-278.

[24] The High Court of Justice, united sections, Decree no. LXXXVI (86)/10.12.2007, published in the Official Gazette, 1st part no. 697 from the 4th October 2008.

[25] “From article 69 paragraph 2 from Law no. 7/1996 results the obvious will of the legislator to induce a gradual application of the new law, with the consequence of the incidence of the old *dispositions f D.L. no. 115/1938 in the conditions of land register*” (*The High Court of Justice, united sections, Dec. no. LXXXVI (86)/10.12.2007*).