

ACQUIRING OWNERSHIP BY USUCAPTION, A PARALLEL BETWEEN THE FORMER PROCEDURE AND THE NEW PROCEDURE

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Abstract

On October 1, 2011 the new Romanian Civil Code (CC) entered into effect and on February 15, 2013 the new Romanian Code of Civil Procedure (CPC) entered into force, both codes containing both substantive and procedural provisions regarding the acquisition of property rights by means of usucaption. Both in doctrine and in judicial practice there has been much controversy as to how the new rules should be applied in relation to usucaptions commenced during the period of the former codes. The purpose of this paper is to present the hypotheses of application over time of the old and the new procedure, the problems encountered in practice and our opinion on the applicability of the new procedure.

Keywords: *usucaption, former procedure, new procedure, ownership, possession.*

1. Introduction

On February 15, 2013, CPC entered into force, containing the procedural rules governing the civil process. Together with the rules of substantive law, it created the current legislative framework. Although they have been fewer in number, there have also been difficulties with the applicability of the procedural rules over time. One such example is the procedure relating to the acquisition of property by usucaption. CPC has introduced a number of novelties with regard to this mode of acquisition of ownership, thus creating a special, separately regulated procedure.

Usucaption is a means of acquiring ownership of property and is characterized by a long, *bona fide* possession of a movable or immovable property.

2. Types of usucaption under the old (CC 1864) and new Romanian Civil Code (CC)

Within real estate usucaption, there were significant differences in the two sets of rules.

CC 1864 contained provisions regulating two types of real estate usucaption: long usucaption – of thirty years and short usucaption – from ten to twenty years. Subsequently, Law no. 7/1996 was enacted, but it was only applied in the regions of the country where the real estate publicity system based on the registers of transcriptions and inscriptions was in operation.

CC contains provisions regulating two types of usucaption: tabular usucaption and extra-tabular usucaption. In addition, CPC creates a distinct framework for the procedure, with many elements which are new compared to the old procedure.

The long usucaption of thirty years is the most common type of usucaption invoked before the courts in order to acquire ownership of immovable property by virtue of usucaption. This is the case where the possessor does not hold a title deed and wishes to be recognized as the true owner through this type of action. The possessor has acquired the property on the basis of hand receipts, either from the true owner or from another possessor who did not have just title. In this situation, the current possessor must bring the action against the true owner, *i.e.*, the person who is the rightful owner.

With regard to short-term usucaption, in addition to the requirement of useful possession exercised within the minimum period of ten years, there are certain additional conditions relating to the existence of a title and the good faith of the possessor. Unlike long-term usucaption, where possession could also be in bad faith, in the case of short-term usucaption, possession must be based on the good faith of the possessor, *i.e.*, the possessor must be convinced that he is the owner of the property, based on a just title.

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There has been much discussion, both in judicial practice and in doctrine, as to what constitutes a real estate title on the basis of which the possessor bases his possession in good faith. The real title is any legal act transferring ownership but originating from a non-owner.

The doctrine has established that a title which is absolutely null and void cannot constitute a real title for the purposes of abridged usucaption; on the other hand, the possessor may rely on a title which is relatively null and void, unless it is opposed to the person entitled to invoke the relative nullity, the latter exception only operating as long as the extinctive prescription of the action for declaration of relative nullity has not expired.¹

The doctrine has also established that a real estate title cannot exist subject to a suspensive condition, as it must exist for certain, it must be real. Likewise, a putative title (its existence being present only in the possessor's imagination) cannot be included in the concept of just title.² Thus, CC 1864 laid down two types of usucaptions of immovable property, each of which required special conditions.

With regard to the court procedure, in the case of usucaptions based on the old rules, the ordinary court procedure applied, as there was no special procedure. By contrast, as regards usucaptions based on the CC provisions, there is a special, non-contentious procedure.

Thus, a first distinction between the old and the current rules is the existence of procedural rules governing the application of the rules and the procedure before the court.

In terms of substantive rules, the current rules refer to two types of usucaption which are distinct from the old rules: extra-tabular usucaption and tabular usucaption. These types of usucaption refer to the way in which the immovable property has or has not been entered in the land register. Whereas in the case of usucaption under the old rules, the focus was on the duration of possession and whether or not the possessor had just title, under the new rules, the focus is on whether or not the property was entered in the land register. However, the duration of possession is not omitted either, the term being reduced to ten years.

With regard to usucaption based on the CC provisions, the focus is on the way in which the property is entered in the land register. Extra-tabular usucaption applies to possessions exercised for a period of at least 10 years in three hypotheses. The first is where the owner entered in the land register has died or ceased to exist. The second situation is where a declaration of renunciation of ownership has been entered in the land register. The third hypothesis applies if the immovable was not entered in any land register.

Thus, in the case of extra-tabular usucaption of immovable property, the focus is on the way in which the former owner has lost his ownership of the property, in the light of the entries in the land register. However, the last hypothesis, where the immovable had no open land register, covers situations often encountered in practice as there is not yet a complete land register system in the country.

In practice, extra-tabular usucaption under the CC is similar to the usucaption procedure under the CC 1864. It is similar to the old procedure, especially in the absence of an entry in the land register.

Next, concerning extra-tabular usucaption, art. 930 para. (2) CC states that the new owner may acquire his right by virtue of usucaption only if another person has not registered his own application for registration of the right in his own name. If another person were to register the ownership right in the land register, this would constitute an interruption of possession, and the action based on usucaption would be dismissed.

The hypothesis of the application of extra-tabular usucaption provided for in art. 930 para. (1) letter a) CC adds, in addition to the previous regulation, the specification that extra-tabular usucaption is also possible against legal persons who have ceased to exist, in a similar way to natural persons who have died or have renounced their right. The aforementioned situation applies if, prior to the registration of the application for registration in the land register of the usucapient's right, another interested person has not, for a legitimate reason, registered the same right in the land register for his own benefit.³

CC introduces a novelty regarding tabular usucaption. According to art. 931 CC, if a person has entered his right in the land register, without legitimate cause but in good faith, and has possessed the real estate for five years, he will be able to acquire the right of ownership of the real estate by virtue of usucaption. It can be seen that the time limit for the exercise of possession has been reduced quite significantly, both in comparison with the old rules and with the new rules relating to extra-tabular usucaption. The reason for this short period is that

¹ G. Boroi, M.M. Pivniceru, T.V. Rădulescu, C.A. Angheliescu, *Drept civil. Drepturi reale principale*, Hamangiu Publishing House, Bucharest, 2010, p. 162.

² *Ibidem*.

³ R. Peptan, *Uzucapiunea în noul Cod Civil*, in *Dreptul* no. 8/2010, p. 15.

the possessor has exercised possession in good faith and in public, his alleged right of ownership having been established by means of the land register.

A similar provision was contained in art. 27 of Decree-Law no. 115/1938, which stated that in the case of the registration of rights *in rem* acquired by usucaption, they will remain validly acquired if the holder of the right has possessed them in good faith, in accordance with the law, for ten years. In the past, therefore, there was a similar way of acquiring property rights to the tabular usucaption of the present day, the difference being made mainly by the length of the period of time during which possession must be exercised, *i.e.*, ten years under Decree-Law no. 115/1938 and five years under CC.

Also, the institution for the joining of possessions is included in the current regulation. Art. 933 para. (1) and (2) CC specify that, although each possessor starts a new possession in his own weight, in order to invoke usucaption, the current possessor may join his own possession with the possession exercised by his author, in order to fulfill the condition regarding the duration of the period of exercise of possession.

In both laws „it would seem that a necessary and sufficient condition for the present possessor to acquire the status of author is that the person in question must be someone other than the true owner of the right *in rem*. Doctrine, however, has made it clear that it is also necessary to fulfill a subsequent condition, that of not being a mere precarious possessor. Otherwise, since precarious possession cannot be taken into account in calculating the period of usucaption, the acquirer will only be able to intervert possession and start a new useful possession in his person”.⁴

3. Goods subject to usucaption in the old (CC 1864) and new Romanian Civil Code (CC)

According to art. 929 CC, inalienable property cannot be usucapted. The legal provision refers to both public domain goods and goods forming the subject matter of private property rights insofar as they have been declared inalienable by law.⁵ Therefore, only individually determined immovable property which is in the civil circuit may be usurped.

As far as the CC 1864 is concerned, short usucaption applies only to individually-determined immovable property, thus excluding movable property and universalities, even if they include immovable property.

These requirements as to the scope of the short usucaption apply not only where the aim is to acquire ownership, but also where the aim is to acquire a dismemberment of ownership.

By contrast, the right of mortgage cannot be acquired by short usucaption, so that if the mortgage is constituted by a third party on the immovable property of another, the creditor cannot oppose the mortgage to the true owner.⁶

4. The procedure for registering rights acquired by virtue of usucaption in the old (CC 1864) and new Romanian Civil Code (CC)

As mentioned above, CPC now contains a special procedure regulating the conduct of civil proceedings in actions based on usucaption.

The court of the place where the immovable property is situated has exclusive jurisdiction. An action based on usucaption shall contain the particulars of the person claiming ownership of the property by virtue of the usucaption, the type of usucaption invoked (tabular or extra-tabular) and the name of the former owner if known.

At the same time, the plaintiff will have to attach to the statement of claim the documents indicated in art. 1051 para. (3) CPC. In our opinion, if the plaintiff fails to submit the indicated documents, he may be asked to fill in the missing documents during the regularization procedure, without, however, being subject to the sanction of annulment of the summons if he fails to submit them. We consider that art. 200 CPC is of strict interpretation and cannot be applied in *extenso*. If the plaintiff is not asked to make up these deficiencies before the first term of judgment, we consider that the court will be able to order the plaintiff to complete the application at any time during the judicial investigation.

⁴ E. Roşioru, *Comentarii, doctrină şi jurisprudenţă, Noul Cod Civil*, Hamangiu Publishing House, Bucharest, 2012, p. 1337.

⁵ V. Stoica, *Drept civil. Drepturile reale principale*, 3rd ed. revised and added, C.H. Beck Publishing House, Bucharest, 2017, p. 388.

⁶ *Idem*, p. 371, apud <https://mitran.ro/procedura-recunoasterii-uzucapiunii-in-vechile-si-noile-dispozitii-civile/>.

The procedure provided by art. 1050-1053 CPC seems to create a complete framework for the conduct of proceedings in actions based on the right of usucaption. However, the provisions do not also refer to the need to draw up an expert's report identifying the immovable property. In our opinion, a technical expert's report is necessary in view of the fact that the immovable property must be clearly individualized. In the absence of an expert's report, the size and boundaries of the property will be unclear and out of date.

Therefore, we consider that, in addition to the documentation submitted and the evidence indicated to be administered as required by the provisions of art. 1051 CPC, it is also necessary to administer topographical expert evidence in order to establish the boundaries of the property and to clearly identify the property.

Another very important aspect is related to the passive procedural standing in actions based on the new procedure of usucaption. Whereas under the usucaption procedure based on the CC 1864, the passive legal standing was vested in the owner of the property (or his successors) or the administrative territorial unit within the area of which the property is located, under the new procedure, the passive legal standing is not determined. Therefore, the new procedure can be considered as a non-contentious procedure.

Art. 1052 CC refers to certain objections that interested persons may make to the plaintiff's action. The manner in which interested persons may become aware of the action before the court is not the subject of this paper, which is why we will only emphasize that by virtue of usucaption the plaintiff acquires a property right over a real estate, so that the legislative requirements should be at a high level.

At the same time, it was noted that this new regulation was determined by the change in the approach regarding the effects of the registration of the property right in the land register: in the old regulation, the registration in the land register ensured the opposability against third parties, while in the CC system, the registration produces constitutive effects, according to the regulation art. 557 para. (4) and art. 885 CC.

Under CC 1864, the system of registers of transcriptions and entries was a system of personal publicity, consisting in the registration and transcription of legal acts relating to property in registers kept by the courts, operations carried out in the names of individuals or legal entities, and not in the names of real estate as in the land register system.⁷

The system of the register of transcriptions and inscriptions, according to CC 1864, was a system of personal publicity, and consisted in the registration and transcription of legal acts relating to property in registers kept by the courts, operations carried out in the names of individuals or legal entities, and not on real estate as in the system based on land registers.⁸

5. Conclusions

In conclusion, actions based on the acquisition of property rights by virtue of usucaption are actions which require greater rigor on the part of the courts. Whether the usucaption is based on the CC or on the CC 1864 provisions, it is necessary to carry out increased checks in relation to the conditions. The provisions of the new procedure lead to a simplification of the process, particularly in view of the fact that the procedure is currently apparently non-contentious. Despite the simplification of the procedure, the legislator has conferred constitutive effects, in contrast to the old rules, which ensured enforceability against third parties.

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⁸ *Ibidem*.