ABSTRACT OF THE DOCTORAL THESIS

POSSESSION

Key words: possession, possessor, material element, intentional element, useful possession, precarious detention, inversion, good faith, just title, acquisitive prescription, usucaptio, disturbance of possession.

Possession, as a state of things, has represented the object of human preoccupations since ancient times. Initially, in the Roman law it was mistaken for property, the occupant of a land being its possessor and at the same time, its owner. In the course of time, the property right becomes separated from the occupation per se, the concept of possession being separated from that of property.

In the Roman law, possession appeared in connection with public property. Later on, during the Republic, the concept of possession extended also to assets that were susceptible of being private property. Regarded as a simple state of things report, without any juridical support, it begins to be guarded by means of interdictions. The simple state of things starts triggering juridical consequences; the possessor, by the mere fact that he owns, has more rights than the non – possessor. They hat to fulfill two considerations: a material element, consisting in owning the asset and an intentional element consisting in the intention of owning the asset for oneself. When the second element is absent, we find ourselves in a case of detention – which is a lawful state, resulting mainly from contractual relations (leasehold, rental, accommodation contract and others).

The role of possession is one growing constantly more important; being sufficient to remind the fact that useful possession becomes the main condition in order to obtain the property right. As a consequence, its legal guardianship was found in each historical epoch. We took this into consideration when drafting our thesis. Even more so, since the period in which we have researched this theme was a special one, of passing from the Civil Code from 1865 to the New Civil Code, which was implemented at the end of the year 2011. This transgression represented a challenge for us, and so we –probably-are among the first authors of studies regarding the possession as it is seen in the new

legislation. We could but not leave out the study of possession according to the old Civil Code, because, for some many years from now, in the case of usucaptio processes (as an effect of possession) one will still apply the old Civil Code, meaning the applicable legislation from the beginning of the act of the possession. The civil law has no retroactive effects – as it is expressly stipulated even in the new Civil Code, so that the first usucaptio which will have the new legislation as legal basis, are to be tried beginning in the autumn of the year 2016 – for tabular usucaptio - , and 2021 for extra tabular usucaptio.

Our thesis is structured in eight chapters. The large part of the thesis deals with theoretical aspects. Still, taking into account the fact that the fathoming of such issues becomes a lot easier when theory is complemented by practical examples, we have dedicated a chapter to legal practice issues. Moreover, we have tried to bear our own activity in mind. Even if they are not instances of the High Court of Cassation and Justice (which, however, are published and are at the disposal of any interested party), we believe that they come to complement our work for drafting the present thesis.

The first chapter deals with general issues. We have created a short insight in the history of the problems of possession. Without growing on the subject (because, in our view, the thesis is not a historical one, but rather an instrument of study for the interested parties), we have analyzed the etymology of the term "possession" and we have performed a quick presentation of its importance in several different historical periods.

A section of the first chapter was dedicated to the definition that is to the legal nature of possession. Regarding the definition, we conclude that the explanatory dictionary of the Romanian language attributes to the term „possession" more than one meaning, out of which we here mention the following: the action of possessing (which does not clear things up too much); the owning of a thing; the right to use, to dispose of something. This last phrase was taken over –we think- from the very definition of possession as it was stipulated in the Civil Code from 1864, which in article 2 looked as follows: "Possession is the owning of a thing or the use of a right, either of the two exercised by ourselves or by another person in our name".

In current speech, more meanings of the term "possession" are accepted. As our study is concentrated on the research of possession as it is comprised in the applicable

legislation, we shall refer, naturally, to the legal meaning of the term. Out of this point of view, the legal definition quoted in the above, was criticized in the specialized literature, as being inexact and incomplete. It is presumed that possession is the equivalent of detention, which does not correspond to the truth, as we shall show within the content of our paper.

The definition is criticized in the specialized literature due to the fact that it took into consideration only the material element of possession and left out the intentional element. It is an opinion which we criticize because, in our view, the intentional element results implicitly out of the definition given by the Old Civil Code, that is, by the phrase: "by ourselves or by another person in our name".

The New Civil Code brings about improvements in the field, in the sense that, in the process of defining possession one also took into account the (solid) criticism from the specialized literature. According to article 916 paragraph 1 of the N.C.C.: "possession is the exercising de facto of the prerogatives of the property right for an asset, by the person owning it and acting as an owner."

Even though it is a rather recent legislation, criticism did not fail to appear with regard to this new definition as well. For instance, it is shown that by using the term "owner" one does not take into account the other real rights. This is criticism that we do not agree to entirely, because the letter of the law must be regarded as a whole. Or, paragraph 2 of the article 916 practically fills the – apparent – omissions of the definition, stating that other real rights are also taken into account, with the exception of the real warranty rights.

Finally, after analyzing the elements, the effects that are attributed to possession by the letter of the law, we have tried to give our own definition to possession, considering that it a state of things which is protected by the law, consisting in the material ownership of an asset and the use of that asset in one's own interest by a person – who is not an owner – but who can become the owner of that asset, under the terms of the law.

The legal nature of possession has represented an element of study, after the definition of possession. One must understand that the legal doctrine is not unanimous in

with regard to this problem either. Controversies are connected to the qualification of possession either as a right, or as a simple state of things. We are obliged to mention the main currents. In this respect, we mention on the one hand, the theory of Rudolf von Ihering, according to which possession constitutes a right. Therefore, its place is among the real rights, next to the property right.

On the other hand, the theory of Savigny, by which one argues that possession is a state of things. The stress lies here on the will to possess - animus possidendi-, the mere owning of a thing, in the lack of the intentional element, meaning detention and not possession. The new Romanian legislation takes over these aspects, showing that: "it is not possession when an asset is owned by the precarious holder, as: the tenant, the superficiary, the depository, the pledgee" (art. 918 N.C.C.).

There is a third theory, according to which, possession is a state of things generating rights. This cannot be argued with. We will see, when we debate upon the effects of possession, that useful possession can build the premises for obtaining the property right. As the well-known specialists in the field used to show: "if, at its origin, a fact tends to crystallize into a right by the will of the owner" (O.Ungureanu, C.Munteanu; Tratat de drept civil. Bunurile. Drepturile reale principale. Ed. Hamangiu, 2008, p.378).

Chapter II deals mainly with the elements of possession - animus and corpus; the achievement of possession directly by the possessor or by means of another person; the preservation of possession; its loss, its cessation, also analyzing the causes for the cessation as they are expressly stipulated in Article 921 of the N.C.C.

Regarding the material element of possession, this represents the ownership of the asset in terms of its material character. This ownership differs according to the nature of the asset, or of the right it is exercised on. This way, there is one way of exercising possession on a construction and another way to exercise it on an orchard, or on a vineyard, for instance. We must insist on the fact that it is not necessary for the possession of an orchard to exist on a daily basis, since it is sufficient to pick the fruit, to take care of the orchard when needed, in order to have the "corpus".

The „corpus" element can also be exercised by means of another person, which is by means of the lessee, the depository, the superficiary. The latter, being precarious holders, do not use the asset in their own name, but in the name of the possessor.

The loss of the corpus element can be achieved by the disappearance of the asset or by its being transferred into the possession of another person, without the will of the possessor. One can also lose the material element by the will of the possessor, when the latter sells/ donates the asset, remaining only as a (precarious) holder. This is the situation of the integrated possessor.

With regard to the second element of possession, the intentional element - animus: one takes into account the intention of possessing for oneself, as a true owner. It is instituted by the N.C.C., a presumption regarding the intention of the person who owns the asset to act as a true owner or as the holder of another real right (art. 916 N.C.C.). The lack of intention is equivalent with the lack of possession.

The new legislation also institutes other relative presumptions to the intentional element of possession. In this respect, we mention the following: "until the opposite is proved, the one owning the assed is considered as being the presumed possessor (art. 919 paragraph 1 N.C.C). Moreover, it is presumed, that the one possessing is considered as owner, with the exception of the real estates registered in the Land Register (art. 919 paragraph 3 N.C.C.). We think that this last presumption will have a rather limited propagation in the future, due to the fact that the Law no. 7/1996 of the cadastre stipulates that the entire land surface of the country should be registered in the Land Register.

The acquirement of possession: is achieved by the reunion of its elements directly in the person of the owner or by means of another person. The asset, once it is owned by a person, is presumed that the respective person owns the asset for itself.

The preservation of possession is performed directly by the possessor or by means of another person. The first situation does not require any explanations, taken into account the exact presumptions that were indicated in the above. Regarding the second situation, we take into account the provisions of the article 917 of the N.C.C. As long as the possessor holds the animus, the precarious holder has the asset not for himself, but for the possessor. The preservation of possession is materialized in the performance by the

possessor of a series of legal actions, for instance: the payment of the taxes, cashing in the rent.

It is shown in the specialized literature that the possessor preserves his possession in the case that the person who holds the asset for the possessor changes his/her will, intending to possess for himself/ herself. We do not share this opinion, the presented example being just one of the cases when possession is inverted.

Regarding the legal person, the latter acquires and preserves possession by means of its representatives. We must take into account the principle of specialization which was comprised in the legislation previous to the N.C.C., together with the new legislation which allows the legal person „to have any civil rights and obligations, with the exception of those which by their nature or according to the law can belong only to a natural person" (art. 206 N.C.C.). We suggest, de lege ferenda- that an exception from the principle of the law's retroactivity – the acknowledgement, in the case of legal entities incorporated before the new legislation became valid, of the same rights with regard to possession, that are granted to those incorporated after the new legislation, because in our understanding of the law, the legislative content must be interpreted as follows: the same categories of persons must benefit from the same laws, regardless of their "age".

The loss of possession: the new legislation, as opposed to the Old Civil Code, stipulates expressly the cases of the cessation of possession (art. 921 N.C.C.), which are: its transformation into precarious detention; the alienation of the asset; the abandonment of the moveable asset; the registration in the land register of the waiver declaration for the property right over a moveable asset; the extinguishment of the asset; the transfer of the asset to public property; the registration of the property right of the commune, the town or the city; dispossession for longer than a year. These cases of cessation can be classified in terms of how the possession can be voluntary/ involuntary, or whether one or both elements of possession are lost. The importance of these classifications is rather for the sake of the didactic learning.

Chapter III is meant for the study if the qualities and vices of possession. Regarding the qualities of possession we bore in mind mainly the dispositions of Art. 1847 of the Old C.C. , respectively: continuous, undisturbed possession (or amicable).

Continuity represents a quality of possession stipulated in the Old C.C. As we showed at the moment when we debated the situation of the elements of possession, continuity does not entangle permanent contract with the asset. Therefore, the possession of an arable land means its cultivation, maintenance and harvesting. From the harvesting and up to the next seeding, there can be a short or a long period of time, and this does not mean discontinuity in any way.

We do not agree with the doctrine opinions which consider continuous possession and uninterrupted possession equal. The law maker enumerated both in the frame of the art. 847, separated by comma, and this way we can only conclude that each is considered a distinct quality.

Possession must be undisturbed. This quality means that possession will not be grounded on acts of violence. It must be public. It is public when it is "exercised without any mystery, in the view of third parties, in an apparent and normal way; at the same time, a possession is not clandestine by the mere fact that the deeds of possession are not seen by third parties" (I.Adam, Drept civil. Drepturi reale principale, Ed. All Beck, Bucuresti, 2005, page 495).

A separate research regards the "unequivocal" which, even it is not enumerated among the qualities of possessions in art. 1847 O.C.C., it still constitutes a quality of possession, this idea being shared by a portion of the specialist literature which we acquiesce to. A case of possession is unequivocal when there is no doubt regarding the existence of the two constitutive elements – corpus and animus.

The vices of the profession are nothing else but the "reverse" of the qualities, meaning: discontinuity, violence, clandestinity. Since we have mentioned the "unequivocal", in the sense that this would constitute a quality of possession, the equivocal on the other hand, though it is not expressly mentioned, constitutes a vice of possession, since neither the existence, nor the lack of the intentional element can be certain.

The instance of precariousness is rather interesting. Sometimes mistaken for the equivocal, it represents in our view, a distinctive issue, meaning the exact absence of the

intentional element, which is the absence of an element which is essential for possession. This issue is dealt with separately in our thesis, within the next chapter.

Therefore, Chapter IV is entirely dedicated to precariousness – or to precarious detention. We consider the definitions given to precarious detention in the specialist literature, as well as in the legislation. One can derive the general idea that the deeds committed by the attendants, depositors or users with regard to the object to which they have the enumerated quality, are not similar to possession. We have separated precarious detention from the equivocal, that is from possession, our conclusion being that the two institutions – possession and precarious detention – cannot coexist and the exclude each other.

We take into consideration the legal characters of precarious detention: absolute, perpetual, partial ineffectiveness.

According to article 1862 paragraph 1 of the O.C.C.: „If the vice of possession lies in its discontinuity, in its interruption or in its precariousness, then, whoever has an interest, so that the prescription should not be fulfilled, can oppose it".

In contradiction with useful possession which produces erga omnes effects, precarious detention does not produce any kind of effect, its ineffectiveness being also, erga omnes.

Regarding to the perpetual character of precariousness, the N.C.C. has instituted two presumptions, as follows: the owning of an asset by the precarious holder does not constitute possession (art. 918 paragraph 1), respectively, precarious detention, once proven, it is presumed that it will maintain until the proof of its inversion (art.919 paragraph 2 N.C.C.). The two presumptions do not contradict the perpetual character of precariousness. We consider that, on the contrary, it is not precarious detention which can lead to the acquisition of the real right by usucaptio, but possession. As long as there is precariousness, there is also the legal impossibility from the part of the precarious holder to acquire any real rights over the held asset.

The specialized literature speaks also of the partially inefficient character of precarious detention. Indeed, ineffectiveness is not total, both the Old Civil Code and the new legislation granting the precarious holder the right to make use of the possessory actions.

Regarding the categories of precarious holders which we have enumerated in the above, one must add according to the N.C.C.: the lessee, the pledgee, the superficiary, the holders of the user and habitation rights, the owners of the servitude right. A special situation is that of the co-owners, each of them being precarious holders "as to the quota which rightfully belong to the other co-owners"(art. 918 para.1 letter c of the N.C.C).

The inversion of precariousness in possession is stipulated both in the Old and in the New Civil Code, and basically, one takes into account the following: the inversion of the possession originating in the deed of a third party and the inversion originating from the deed of the precarious holder, either by means of unequivocal resistance deeds with regard to the intention of acting like a true owner, or by alienating the asset to a good-faith acquirer.

In the first case of inversion: the precarious holder must sign in good faith a document which transfers the property right with a private title, with another person who is not the owner of the asset (art.920 paragraph 1 letter a of the N.C.C., corresponding to art. 1858 pt.1 O.C.C.): it is the case of possession inversion which stems in the deed of a third party. For example: the tenant buys the real estate from another person than the landlord, being mistakenly convinced that he had bought it from the owner. While no longer paying the rent and acting like a real owner, precariousness is replaced by useful possession which can lead to the obtainment of the property right. The essential thing is the existence in good faith of the precarious holder at the time of the acquisition.

The second case of inversion: the precarious holder commits against the owner unequivocal acts of resistance regarding his intention to start acting like a true owner (art. 920 paragraph 1 let. b N.C.C., corresponding to art. 1858 pt. 2 O.C.C). We present the situation of the inversion of possession by the deed of the precarious holder. As it is concluded from the title, it consists in acts of resistance on the part of the precarious holder to the person who had entrusted the asset to him/her, or according to the case, to the successors of the respective person. Acts of resistance are those from which it clearly results that the holder wishes to possess for himself / herself. An example of an act of resistance is the following: the non-payment of the rent, preceded by a notification based on which the holder no longer acknowledges the quality as an owner of the person he/she used to pay the rent to.

The final part of art. 920 paragraph 1 let. b of the N.C.C. brings but an element of newness as compared to the old legislation, meaning that in the case of acts of resistance, inversion will not be fulfilled before the reaching of the term for the restitution of the asset.

The third case of inversion: the precarious holder alienates the asset by means of a document with private title transferring the property right, under the provision that the acquirer must be of good faith (art. 920 paragraph.1 let c. N.C.C., corresponding to art. 1858 pt. 3 of the O.C.C.); actually, we are in the situation opposite to the first case which was already presented. This time, the good faith does not regard the precarious holder who buys in good faith from the one who is not an owner, but regards the third party buyer who buys from the precarious holder. The non-fulfillment of the good faith condition by the third party buyer makes him also a precarious holder and not an owner. With regard to the good faith, the new legislation shows that: "in the case of immoveable assets registered in the land register, the acquirer is of good faith if he registers the right for his own use based on the content of the land register" (art. 920 paragraph 2 N.C.C.). This article limits pretty much the applicability of the cases of possession inversion. This, because on the one hand, there are rather rare cases when the content of the land register does not coincide with the registered right; on the other hand, the Law no. 7/1996 stipulates the registration in the land register of all real estates – land surfaces within the country.

Finally, the fourth case of inversion: the transmission of possession from the holder to another is performed by a document with universal title, if this successor is of good faith (art. 1858 ct. 4 O.C.C.); this case of inversion is no longer to be found in the New Civil Code. It is but necessary to research this aspect as well, since the Old Civil Code still applies for the usucaptions begun previous to the year 2011.

Actually, this is the situation in which, following the passing away of a person, its inheritors accept the inheritance, considering in good faith that all assets found in the deceased's patrimony de cujus belonged to the deceased. In the case when their belief proves to be wrong, the present article of the law entitles them to consider the begun possession as being useful possession.

It is a case of inversion of precariousness which is criticized in the legal doctrine. It is known that universal successors and those who hold a universal title are held by all obligations of their predecessor. In this situation, if de cujus was a precarious holder, having the obligation to restitute the asset, this obligation is imposed on his successors as well. This is the reason for which the new legislation no longer revises this article.

The specialized literature speaks of another case of inversion of precariousness that in which a co-inheritor decides to become the sole owner of an asset which is undivided (T.Dârjan. Uzucapiunea.Monitorul Oficial, Bucuresti, 2010, page 83).

In our opinion, the above example does not constitute a particular case of the inversion of precariousness sine qua non, representing merely a practical example of the inversion of precariousness which is stipulated under art. 920 paragraph 1 let. b N.C.C.; the holder – in our case, the co-inheritor – commits against the other co-inheritors acts of unequivocal resistance in terms of his intention to act like a real owner.

Chapter V is dedicated to the effects of possession. In this chapter we analyzed the following: the presumption of property, the acquisition of the benefits due to the possession in good faith, the occupation, the acquisition of: moveable assets due to the possession in good faith. Naturally, real estate usucaptio is also an effect of possession, maybe even the most important one. It is studied separately, exactly due to its extraordinary importance, and also to its extent, following that it will be analyzed in detail.

There are issues regarding the possession actions as well, since they are considered by part of the doctrine also as effects of the possession. Due to the fact that the new legislation – Chapter IV, art. 949- 952 of the New Civil Code – treats them separately from the possession, we understood to research them separately within the structure of our thesis, in a separate chapter. This, even though, undoubtedly, they are a consequence of possession, constituting at the same time, a protection mode, a way to defend it.

Regarding the presumption of property, the O.C.C. stipulated in art. 1854 the following: “it is presumed that the possessor owns for himself, under the name of an owner, if it was not proved that he possesses in the name of another”. It is a presumption

taken over also in the N.C.C. in art. 919, which we have analyzed in the chapter dedicated to the elements of possession. We only add that good faith constitutes an essential condition; in its absence, the presumption of ownership ceases to operate, both in the case of moveable assets, and in the case of immoveable assets.

Regarding the acquirement of the benefits by possessing in good faith: both the old legislation and the new one refer to this aspect. Out of the legal texts one can conclude the elements which are to be analyzed in the following, meaning: benefits/ products, good faith. "The possessor does not acquire the possession over the benefits unless s/he possesses them in good faith" (art. 485 O.C.C., requirements taken over also by art. 948 paragraph 1 of the N.C.C.).

The possessor is of good faith then, when he is convinced that he is the owner of the asset, on the basis of an agreement transferring property rights, regarding which he has no knowledge of any inapplicability causes (art. 948 paragraph 4 N.C.C). We conclude from the above definition and the element of „ just title", constituting: „any document meant to cause the possessor acquire property right for an asset or to constitute a real right in his favor" (O.Ungureanu, C.Munteanu, , Civil right. Real rights; Edition III, Ed. Rosetti, Bucharest, 2005, page 258). We also presented the situation of the bad faith possessor, the latter being forced to return the benefits, and also the "counter value of those he failed to retrieve"(art 948 paragraph 5 N.C.C.).

There lies the question whether the pre-contract for the sales of an asset constitutes a just title. We consider that it does not, the pre-contract does not transfer the property right. Still, if by signing the pre-contract for the sale of the asset, the asset was given to the potential buyer, from that moment on, the benefits can be taken by the latter, regardless whether the price was paid or not. The taking over of the benefits in the above presented case is not performed as a consequence of the signed document (which does not represent a just title, as we have shown), but based on the agreement of the parties.

Naturally, nor can the rental, the lease, deposit or mandate contracts be considered a "just title", because they cannot transfer the property of the asset which is the contractual object.

Regarding the putative title, one must ask whether this constitutes a just title. Our answer is yes, as long as the title exists in the imagination of the good-faith possessor. As the just title is an element of good faith, it is sufficient that the possessor believes in the existence of the just title in order to be entitled to take the derived benefits.

The title declaring rights also constitutes a just title in our understanding of the term. Even though the old legislation referred to "documents transferring the property right" phrase taken over in the N.C.C. –art. 948 as well, we believe that, de lege ferenda, the text of the law should be completed also with the phrase "declarative documents". We argument for instance, by giving as an example the document of partition which is declarative of rights. If the successors, based on a partition document, take over the possession of some assets in good faith, we do not believe that they should restitute the benefits. There are equity premises which would impose this, if we refer to the very effects of the putative title that we have mentioned.

Apart from the just title, the law conditions the existence of good faith by the lack of knowledge of the possessor regarding the vices of the property transferring document. By not knowing the vices, we understand the error state in which the possessor finds himself regarding the validity of his title. Examples of vices which can affect the property transferring document are: absolute or relative nullity of the document; the resolution, the termination or the revocation of the document, the acquisition of the asset from a person who was not entitled to transfer its property.

One must ask the question: in which case was the possessor unable to know the vices of the title? We give as an example the de facto error: the possessor is convinced that he possesses from the true owner. Another example is: the situation of the real estates registered in the land register. In this case the situation is evident: if the person transferring is registered in the land register, even based on vitiated documents, one cannot hold against the buyer that he lacks good faith, unless, maybe, if the registration was performed by fraud and the buyer had knowledge of this aspect.

The second condition for acquiring and keeping the benefits by the possessor is their perception. Good faith and perception must coexist. In this respect, art. 948

paragraph 2 of the N.C.C. stipulates that: „the possessor must be of good faith at the time of the perception of the benefits".

I have also presented the situation of the bad-faith possessor, the latter being obliged to restitute the perceived benefits, as well as the "counter value of those he omitted to perceive" (art. 948 paragraph 5 N.C.C.). The owner has the right to receive from the possessor the benefits, and if the latter had consumed them or omitted to harvest them the owner will receive their counter value.

The acquisition of the benefits created by the assets which are public property is permitted neither to good faith possessors, nor to bad faith possessors. They are but all entitled to receive the necessary and useful costs for which they had paid in connection with the asset.

Occupation represents another effect of possession, being comprised in the N.C.C. in art. 941-947-„The effects of possession". It is characterized by taking into possession an asset that has no owner. It has limited applicability; it regards abandoned moveable assets, which have no owner by their nation, forest fruit, medicinal and aromatic plants; wild animals and eatable mushrooms from the spontaneous flora and others of this kind. One must make the difference between a lost asset and an abandoned asset. We also take into account the fact that for part of the above there are special laws (for eg. regarding hunting).

Within the section dedicated to occupation, we have shown that the N.C.C. makes differences between the legal regime of the lost asset and that of the abandoned asset, of the two categories only the latter being capable of constituting the object of occupation.

Also in the frame of occupation, the N.C.C. disposes also on the found thesaurus, showing the owner of the real estate in which it was found, has the right to one half, and the person discovering it, to the other half. This is not valid in the case of the assets discovered by chance or following some archeological research and nor is it valid in the case of the assets which are public property (art. 946 N.C.C.).

The acquisition of moveable property by means of the possession in good faith represents another effect of possession. It is regulated both by the new and the old Civil Code. The prescription is practically instantaneous, the passing of a certain period of time

is not necessary if the legal conditions are met: the owner must declare freely that he no longer owns the asset; the precarious holder must alienate the asset without the approval of the owner; the third party should be of good faith; the possession should meet both the Chapter VI refers, as shown, also to an effect of possession, that is "usucaptio".

Due to its importance and to its extent, we found it only naturally to research this subject in the frame of a separate chapter. Still, it is not about an exhaustive research, the theme of our thesis being "possession" and usucaptio is nothing but one of its effects.

We took the applicable legislation into consideration, starting with the: Austrian Civil Code, moving on with the O.C.C., D.L no. 115/1938 for the unification of the dispositions regarding land registers, the Law no. 7/1996 of the cadastre and of the property advertisement and last, but not least, the New Civil Code.

We considered the following: the definition of usucaptio, rights that can be acquired by means of usucaptio. We invoked, de lege ferenda, the necessity of modifying the legislation in the sense that one should give real chances for the usucaptio of the assets which are the private property of the state, because, at least in the areas of the country where there are land registers, this possibility is rather theoretical, even if the private property undergoes the same laws, regardless of their owner.

Distinctly, we tackled upon the subject of usucaptio which is highly important in our view – especially, against whom one can introduce action in usucaptio, related exactly to the above subject – the private property of the state and of the administrative territorial units. Moreover, the situation of co-owners in the frame of usucaptio actions is an exceptional one, regardless if we consider the active or the passive subject of the action.

The term of usucaptio is a theme of a separate section. We took into consideration the beginning and the end of the acquisitive prescription term; the adjournment of the term; its cessation; the effects of the adjournment and/ or of the cessation.

The conjugation of the possessions is represented by another section. We considered the conditions for the invocation of the conjugation, the possibility of invoking the conjugation also in the extra tabular usucaptio stipulated in the D.L.115/1938, since there are controversies in the field.

Distinctively, we conceived a special section dedicated to the types of usucaptio, dealing distinctly with the usucaptio stipulated under the O.C.C.(from 10- 20 years, respectively the 30 year usucaptio) and the one under the D.L. 115/1938, with its two forms: tabular (art. 27), and extra tabular (art 28). Distinctly, we took into consideration the usucaptio stipulated in the New Civil Code, with its two forms: the tabular usucaptio - art. 931 N.C.C. and the extra tabular usucaptio - art. 930.NCC.

Regarding the definition of usucaptio: the Civil Code since 1864 does not comprise in its content the term "usucaptio", instead, the term "prescription" was used. The New Civil Code, even though it regulates usucaption by three sections, art. 928-940, it does not give a definition to usucaptio. One can only presume that it takes into consideration the acquirement of the property right for a real estate, following the possession over a certain period of time. The doctrine is the one defining usucaption, but significant is the definition of the professor Ovidiu Ungureanu: „Usucaption or acquisitive prescription is that original way of acquiring possession or other real rights over a real estate asset by its being possessed by a person, under the conditions and terms of the law. It implies the element of time" (O.Ungureanu. C.Munteanu, quoted op. page 399).

By usucaption one can acquire the property right. We repeat but that it is only the case of private property, not of the public property, the latter being inalienable, unapproachable and imprescriptible.

According to the Romanian Constitution, art. 44 paragraph 2: „Private property is is guaranteed and protected equally by the law, regardless of the titular". This provision is taken over by special laws, for example: the Law no. 213/1998 regarding the status of public property, the Law no. 18/1991 of the Land Fund. In this situation, there should be no doubt regarding the possibility of usucapting the assets that are the private property of the state. We still feel that there is a problem. This way, in the areas of the country in which there are land registers, to usucaptions the Law Decree 115/1938. is applied, that is Art. 28 of the named law shows stipulates that the asst can be usucapted if there was useful possession in its case for at least 20 years since the death of the registered owner. This condition of the registered owner's death cannot be fulfilled, of course, in the case of the state or of the administrative – territorial unit.

The New Civil Code does not offer more possibilities, either. Art. 930 indicates the requests for extra tabular usucaption, among which the one that the owner registered in the Land Register should be dead or should have ceased its existence. Evidently, this condition cannot refer to the state or to the administrative-territorial unit (strictly theoretically speaking, the administrative-territorial unit can actually cease to exist).

Other conditions of the New Civil Code also prevent the usucaption of assets that are the private property of the state. For instance, it is requested – this time, alternatively to the above condition – that there should be registered in the land register the waiver declaration to the property right. We do not know any situation in which the state should have given up a property right. Moreover, we do not believe that would be possible, the state being the only one having the right – the obligation, we say – to accept vacant inheritances, and also since it is the only one which has vocation to those.

In this situation, de lege ferenda we consider that it is necessary to change the legislation in this field, so as to stipulate real possibilities of usucapting assets that are the private property of the state or of the administrative-territorial units. If not, even though there are plenty articles in the laws which invoke the same legal regime for private property, regardless of its owner, these articles will have no applicability, at least in what usucaption is concerned.

Also by usucaption, besides the private property right, one can acquire its dismemberments: the use of usufruct, the habitation, continuous and apparent servitudes, the superficies, the N.C.C. mentioning these issues expressly in article 930.

The surety rights cannot constitute the object of usucaption, for the simple reason that these are not susceptible of being possessed.

Regarding the assets that can be usucapted, the N.C.C. indicates the possibility of usucapting both moveable assets and immoveable assets, so that all controversies are hereby eliminated. Of course, we are referring to the assets which find themselves in the civil circuit.

The active subjects of usucaption can be natural persons, legal entities and the state. Regarding natural persons, it is only in the case of co-owners that some nuances must be stipulated, especially regarding common indivisible ownership. The typical case,

marriage partners can be active subjects in the action of usucaption if at the beginning of the possession they find themselves in the relationship of marriage, so the usucapted assed will be in common.

Passive subjects can be the same categories that were indicated as active subjects. We must but not ignore the problems related to the possibility that the state or the administrative-territorial units can sue a usucaption action, as we have shown under the section: assets/rights that can be acquired by usucaption.

Regarding the term of usucaption, meaning the period of time in which possession must be useful in order to be prescribed acquisitively, we took the following into consideration: the moment when possession began, the reaching of the term for acquisitive prescription, the suspension, the interruption of the term; the conjugation of possessions. An naturally, the applicable legislation as well.

In order to analyze the beginning of the usucaption period – which actually means the beginning of the useful possession, we related to the type of usucaption, together with the applicable law. In this respect: in the situation of short-term usucaption (from 10 to 20 years), stipulated in the Old Civil Code, the term for acquisitive prescription begins at the moment of entering into possession, under the condition that other legal requests are fulfilled: the existence of good faith and of the just title. For the long-term usucaption which is stipulated in the O.C.C. there are no further requests beside the useful possession. Therefore, the moment of entering into possession constitutes the beginning of the usucaption period, if the possession is useful.

Regarding the usucaption regulated by the L.D. 115/1938, the moment of the beginning of the acquisitive prescription term is the moment when the registered owner died. Previous to that moment there is no useful possession.

The New Civil Code comprises a series of conditions which must be met. The beginning of the prescription term differs in terms of how we relate to the tabular or to the extra tabular usucaption. In the case of tabular usucaption, the term begins from the date when the request for the registration of one's right in the land register was presented and the entering into possession in good faith. In the case of extra tabular usucaption, useful possession begins from the moment when the asset was taken over, if the real

estate was not registered in any land register or, when the owner registered in the land register died or ceased to exist, or when the waiver statement was registered in the land registered with regard to the property right (art. 930-931 N.C.C.).

The meeting of the term: moreover, depending on the type of usucaption, it can be after: five, ten, from ten to twenty years, or of 30 years from the beginning of the possession, if no cause for the suspension of acquisitive prescription had appeared.

Regarding the suspension/ interruption of the acquisitive prescription, we mainly referred to the provisions of the N.C.C. which comprises the cases of suspension/ interruption under art. 2532 and 2537.

Cases of suspension: as long as the marriage lasts and the partners are not separated de facto; between parents/ tutor and the ones lacking the ability of acting; between those who administrate the assets of others and those whose assets are being administrated, following a court order or another legal document; in the case of the ones lacking the capacity to act, when the holder of the right is part of the armed forces; in case of an Act of God.

Cases of interruption: by a voluntary document of enforcement or of the acknowledgement of the right, made by the one in the case of which the prescription is applied; by the introduction of a sue petition or by invoking as an exception the right corresponding to the prescribed action; by constituting as a civil part throughout the criminal prosecution or before court until the beginning of the legal prosecution; by any other document by means of which the beneficiary of the prescription is delayed, other cases (the lack of use on the asset for longer than a year, the asset cannot be prescribed).

As a main result of the interruption we consider the deletion of the prescription begun before the apparition of the interruption cause; after the ending of the interruption course, a new period of acquisitive perception starts.

As effects of the suspension of the acquisitive prescription, we enumerate the following: for the period of the suspension, the course of the prescription is stopped and the suspension period is not calculated in the whole of the prescription period; after the ending of the suspension cause, the prescription continues its course, the period previous to the suspension being added to the period that starts after the ending of the suspension.

A very important aspect is that the suspension within the last six months of the prescription period prolongs the prescription period by another six months.

Another problem that is tackled upon in this chapter is: the conjugation of possessions, stipulated both in the old legislation and in the new one. As conditions of the conjugation we mention the following: there should be a legal relation between the author and the successor; the period for acquisitive prescription should not be complete as related to the first possession; both possessions for which the conjugation is invoked should be useful; other conditions, specific to certain types of usucaption, for instance, the good faith in the case of short-term usucaption.

We only want to show also that in legal practice there are two different interpretations related to the admissibility of the conjugation of possessions. We have presented an example in which – wrongfully – in our opinion – the court invoked the fact that the L.D 115/1938 would not allow the conjugation of possessions. De lege ferenda we consider that it can be imposed expressly by the High Court of Cassation and Justice, by means of a decision in an appeal, for the best interest of the law, the fact that the conjugation of the possessions is possible in any situation then when usucaption is invoked, if the other legal requirements are met.

A last section of the present chapter is dedicated to types of usucaption. Since we have presented previously a lot of problems that are common to all types of usucaptio, all what is left is to enumerate them, as related both to the legislation previous to the year 2011 (the year when the New Civil Code became valid) and to the legislation of the New Civil Code. Of course, in terms of the specific characteristics of each. We took into account the following: the Civil Code from 1864, which comprises two types of usucaption: 30 years - usucaption and the usucaptio between 10 and 20 years; the usucaptions regulated by the L.D.115/1938, respectively, the tabular usucaption and the extra tabular one; and finally, the usucaption regulated by the New Civil Code – the tabular and the extra tabular one, each with its own characteristics.

Chapter VII comprises practical problems referring to possessions and which the undersigned have been involved, as a lawyer. The Court of Law in Saliste was the place where I have carried out my activity for the past 10 years, I felt that I should show the

way of solving many of the problems that I referred to in the present paper. It is no coincidence that the theme of the thesis is “possession”, since at the time of the selection of the theme I had already experienced a quite intense practical activity in this field. This. also due to the fact that many of the trials of the Court of Law in Saliste refer to possession as a premises for obtaining the property right by usucaptio. Several collections of sentences of the High Court of Cassation and Justice or of the C.A are at the disposal of the interested persons. Fewer diverse sentences of a court of law and even fewer sentences to which the author should have brought his contribution to (more or less), which we consider that it is an innovative element, less usual and less current.

By the presented practical content, I considered on the one hand provisions of the Old Civil Code and on the other hand provisions of the D.L. no. 115/1938. Last but not least, other necessary conditions for the exploitation of useful possession, regardless of the applicable legislation. In practice:

-the conjugation of the possessions according to the code from 1864. I considered the ending of the usucaptio term within the possession period of the claimant; the expiration of the 30 years during the possession of the author (with different variants); the lack of relevance of the possession of the authors;

- conditions stipulated under the D.L. 115/1938: 20 years from the passing away of the tabular owners, together with a useful possession for 20 years of the claimants, the impossibility to present the death certificate of the registered owner, the situation of the co-owners – the inversion of the possessions, with several variants;

- other situations: the breakdown of the real estate, conjunction of the possessions, delegation of a curator; passive process quality of the state (U.A.T or the Ministry of Finances?); active process quality of the state.

Chapter VIII, and the last of our thesis is dedicated to possessory actions. These constitute means of defending possession. We are not mistaken if we consider them as effects of possession as well, as they are classified by part of the specialized literature.

Possessory actions are actions before a court of law by means of which possession as such is defended against any disturbances, with the purpose of maintaining or regaining possession, if the latter was lost.

The New Civil Code regulates possessory actions in art. 949- 952 and the N.C.P.C. comprises trial norms for the possessory claims in art. 988-990.

Regarding the juridical nature of the possessory actions: the possessory action has the character of a claim. In the court of law, one does not discuss the legal background, that is, the property right, but only the aspects connected with the state of things. It has real character, protecting relative possession to a corporal asset. It has moveable and immoveable character, aiming both the protection of moveable assets and of immoveable ones.

The N.C.C. distinguishes between the action of complaint and the action of reintegration. The action as complaint represents the main possessory action, which can be exercised in all disturbance or dispossession cases. On the other hand, the action for reintegration can be introduced only in the case of dispossession by means of violence.

Regarding the conditions that are necessary for the admission of the possessory actions: there should not be longer than a year from the disturbance or dispossession (common requirement). Moreover, for the complaint, it is also necessary that the applicant can prove that he had possessed the respective aspect at least one year before the disturbance.

Regarded as a subspecies of the complaint action, the N.C.C. refers to the "preventive possessory action". This consists in the possibility to ask the court to implement certain measures in order to avoid the risk of losing, destroying, deteriorating a possessed asset, if sufficient proof is presented in this respect.

The holders of the possessory actions can be of course, the possessor of the asset, and moreover, the N.C.C. allows the precarious holder to initiate an action as such, justified by the fact that the disturbance is related to the material element, the corpus. Furthermore, the owner can initiate the possessory action, without having to present proof of the property right, but only of the possession, the testimonial phase being this way a lot simpler.

The last section of our thesis refers to defending possession by means of the criminal law. We do not consider our thesis as an interdisciplinary one. Nevertheless, we

wouldn't have considered it complete without showing the possibility to defend possession by all legal means.

The Criminal Code from 1968 stipulated in article no. 220 that: "the full or partial unrightful occupation of a real estate which in the possession of a different person, without the latter's consent or the refusal to evacuate it" is considered a crime.

Moreover, the Law no. 7/1996 of the Land Register and Property Advertising enumerates situations which also constitute the crime of "possession disturbance". However, the dispositions of the Law no.7/1996 that we refer to, can also be found in the content of the text of the article 254 of the New Criminal Law, which came into force on the 1st of February 2014.

The importance of possession is not to be contested. We take into consideration not only its main effect – the obtainment of the property right by acquisitive prescription – but also the fact that possession corresponds exactly to the property right. Under these circumstances, defending property both by means of the civil law and of the criminal law only constitutes situations of normality which are in accordance with the Romanian Constitution and also with the European legislation.