

## **MANIFESTATION OF WILL IN THE SENSE OF PRODUCING THE EFFECTS OF THE ACQUISITIVE PRESCRIPTION**

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### **Abstract in original language:**

Prescripția achizitivă reprezintă un fapt juridic complex în a cărui structură intră stările de fapt – posesia și trecerea timpului – cu determinările prevăzute de lege, și actul juridic al invocării prescripției achizitive, în sensul producerii efectelor sale, astfel că acesta este, mai mult decât un element esențial al instituției, pârgă de declanșare a efectelor sale.

### **Key words in original language:**

Efectele prescripției achizitive; prescripția achizitivă; uzucapiunea.

### **Abstract:**

The Acquisitive prescription is a complex juridical fact in whose structure we can include de facto conditions – possession and passing of time - with the determinations stipulated by law and the juridical act of invoking acquisitive prescription in the sense of producing its effects, so that this is more than an essential element of the institution, the instrument of triggering its effects.

### **Key words:**

The acquisitive prescription; effects of acquisitive prescription; usucapion.

## **1. THE JURIDICAL ACT OF INVOKING ACQUISITIVE PRESCRIPTION AND THE RIGHT OF OPTION FROM ITS CONTENT**

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

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

### **1.1 THE JURIDICAL ACT OF INVOKING THE ACQUISITIVE PRESCRIPTION**

This manifestation of will which, as a rule, appears under the form of a unilateral act, but nothing opposes to being presented as a convention (renunciation with an onerous title) contains the right of option of the person interested in invoking acquisitive prescription, namely the positive form of exerting this right or renouncing its effects – the negative form of exerting.

## **1.2 THE RIGHT OF OPTION CONCERNING THE INVOCATION OF ACQUISITIVE PRESCRIPTION**

The right of option regarding the invocation of acquisitive prescription, analysed in the doctrine as part of potestative rights category, arises in the moment of meeting the other requirements/conditions of acquisitive prescription, as against the prescription typology and implies a faculty – the invocation of acquisitive prescription's effects – which its titular can exert in a positive or negative form, more exactly he can choose between invoking the benefit of acquisitive prescription or renouncing its effects.

The right of option of invoking acquisitive prescription is extinguished by exerting it in a positive way it's exerting in a negative way or not exerting it in a term of decline. It results that by non-intervention of declining this right, simply non-exerting does not bring about its extinction.

## **2. POSITIVE EXERTION OF THE OPTION RIGHT CONCERNING ACQUISITIVE PRESCRIPTION**

### **2.1 WAYS OF INVOKING THE EFFECTS OF ACQUISITIVE PRESCRIPTION IN A POSITIVE WAY**

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

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

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

b. The invocation of acquisitive prescription by extrajudicial means

If the invocation of the acquisitive prescription is achieved through a unilateral act, prior to suing somebody at law, it must be a deliberate one, not a simple act of exerting a main, real right, which means that the possessor is aware that the right he exerts came into

being when all the other conditions of acquisitive prescription were fulfilled and they preceded the condition of invoking its effects.

In conclusion, the proof of fulfilling the necessary conditions for the arising of this right can be made only by means of judicial action, through the actions and trial ways we have shown,

so that the unilateral act made outside the judicial process produces its effects (triggering the efficiency of acquisitive prescription) only by a formal juridical confirmation.

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

## **2.2 THE TITULARS OF THE RIGHT TO INVOKE ACQUISITIVE PRESCRIPTION**

### **2.2.1 THOSE WHO CAN EXERT THE RIGHT OF INVOKING THE EFFECTS OF ACQUISITIVE PRESCRIPTION**

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

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

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

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

The foreign citizens and stateless persons can not invoke for their benefit the acquisition through acquisitive prescription, the property right on lands in Romania, considering the provisions of article 44, paragraph 2, from the Romanian Constitution . The creditors can invoke the prescription of their debtor, as well as any other person who may be concerned.

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

Thus, the provisions of article 1843 from the Civil Code are correlated both with the provision of article 975 of the Romanian Civil Code and the provisions of article 974 from the Romanian Civil Code.

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

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

## **2.2.2 AGAINST WHOM THE RIGHT OF INVOKING ACQUISITIVE PRESCRIPTION IS EXERTED**

According to article 1875 from the Civil Code “The prescription runs against any person who could not invoke an exception established by law”. Thus, as a rule, acquisitive prescription can be invoked by the possessor or by the persons stipulated in article 1843 from the Romanian Civil Code against any person who claims a property right about the possessed asset [Even against the state or a local community since “The state, public establishments and villages, in matters of their private domain, are subject to the same provisions like private persons and, like them, they can oppose them”(article 1845, the Romanian Civil Code). If the asset is part of the public domain, the property right on that asset is imprescriptible in both extinctive and acquisitive aspect.].

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