

## USUCAPIO IN ROMAN AND CONTEMPORARY MACEDONIAN LAW

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### Abstract

This paper analyses usucapio as an original manner for acquiring ownership in Roman and contemporary Macedonian law. The objective is to examine how usucapio has evolved from Roman to modern times, and whether it changed in nature and function. In the first section of the paper the conditions for usucapio in Roman law are analyzed. Six such conditions are identified and they are: things eligible to be owned by individuals, the possessor being a person who could legally own things, legal base for ownership – *iustus titulus*, *bona fide* of the possessor, possession that is public, permanent and undisputed by the rightful owner and the expiration of the term for usucapio. The second section examines the regulation pertaining to usucapio in Macedonian contemporary law. Subject of analysis are the legal requirements for usucapio set forth by the general law - the Law of Ownership and Other Real Rights, both for regular and exceptional usucapio. The paper classifies the legal requirement for usucapio in Macedonian contemporary law into three groups: 1. Basic legal requirement - *bona fide* on part of the possessor; 2. Additional legal requirements: *iustus titulus*, possession and expiration of the prescribed terms for usucapio and 3. Implicit legal requirements: eligibility of the object for usucapio and the capacity of the person for acquiring right of ownership. Each legal requirement is analyzed separately from the scope of its significance and interpretation in contemporary law and in comparison to Roman law.

**Key words:** usucapio, ownership, possession

### I. INTRODUCTION

Ownership is a transferable real right in civil law relations. Depending on how the transfer is conducted, civil doctrine recognizes two types of acquisition of ownership – derivative acquisition and original acquisition.

The derivative acquisition of ownership results from transfer of ownership from the predecessor to the successor based on mutual consent expressed in a legal agreement for transfer of ownership (*iustus titulus*). For the derivative acquisition to take place, alongside the agreement

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there must also be legal manner of transfer (*modus aquirendi*) that consist of giving away the possession over the movable things to the successor<sup>1</sup>, or by registration of the right of ownership in public records (cadastre, land records and etc.).

When there is an original acquisition, the transfer of the right of ownership is conducted regardless of the will of the predecessor. This is an acquisition by law if the successor meets the legal requirements. For example, ownership is acquired originally over newly created things (*specificatio*).

Legal systems prescribe original acquisition of the right of ownership only under exceptional circumstances, which is why it is considered to be a legislative instrument used to legalize certain factual situations<sup>2</sup>.

Usucapio is one of the original manners for acquiring ownership that dates since the period of Roman law, and persists until today. In the course of time the institute usucapio has been subjected to changes resulting from the development of civil law relations. However, its function and importance in civil law have remained the same. The basic function of usucapio is to enable the possessor of things belonging to another to acquire ownership over such things independently of the will of the previous owner in cases when due to legal deficiencies the derivative acquisition hasn't been completed. The most important role of usucapio is to provide legal security for the possessor and for third parties with respect to the acquisition of the right of ownership.

The text that follows will elaborate the institute of usucapio under the Roman law and under the Macedonian contemporary law.

## II. USUCAPIO IN ROMAN LAW

According to historical sources usucapio has been present in the legal scene since the Law of Twelve Tables where it was regulated as an original manner for acquiring ownership<sup>3</sup>. By usucapio the right of Quiritian ownership was acquired in cases when during the transfer of the right of ownership the parties haven't obeyed by the prescribed forms for transfer such as *manipatio* or *in jure cessio*<sup>4</sup>. In Roman law all things that could be owned were classified into two groups - *res mancipi* and *res nec mancipi*. This classification wasn't based on nature of things it was based on the manner in which the right of ownership was being transferred from one person to another. The right of ownership on things in the category *res mancipi* could only be transferred by *manipatio* (or *in jure cessio*), while the right of ownership over things in the *res nec mancipi* category could be transferred by *traditio*<sup>5</sup>. When the right of ownership over things *res mancipi* has been transferred by simple *traditio*, and not in the prescribed form, according to roman scholars, the predecessor kept the right of ownership *ex jure quiritium*, and the successor only held the thing *in bonis*, meaning that the successor had the exclusive right of use but not

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<sup>1</sup> The transfer may be factual, symbolic or fictitious. Живковска, Р., *Стварно право*, Европа 92, Скопје, 2005, pp. 246-247.

<sup>2</sup> Rašović, Z.P., *Stvarno pravo*, Podgorica, 2008, p. 155. Kovačević Kuštrimović, R.; Lazić, M., *Stvarno pravo*, Niš, 2009, p. 105.

<sup>3</sup> Mousorakis, G., *Roman law and the Origins of the Civil Law Tradition*, Springer International Publishing, Switzerland, 2015, p. 117. Ромац, А., *Римско право*, Народне новине, Загреб 1989, p. 166.

<sup>4</sup> Пухан, И.; Поленак Акимовска, М., *Римско право, IV издание*, Скопје, 2008, p. 164. Poste, E., *Institutes of Roman law*, Fourth Edition, Oxford, Clarendon Press, pp. 152-153.

<sup>5</sup> Mousorakis, G., *op. cit.*, p. 118. Poste, E., *op. cit.* pp.152-153.

ownership in full sense of the word<sup>6</sup>. In such cases the successor who had possession over the thing was allowed to fully acquire the right of quiritian ownership by usucapio, which would enable him to exercise all powers deriving from the right of quiritian ownership. Also, usucapio was used by those to whom right of ownership was transferred with tradito by a person who wasn't the true owner, or in cases of transfer of ownership over things subject to inheritance (usucapio pro hereditas).

Acquiring ownership by usucapio in Roman law was allowed when the strict legal requirements have been fulfilled such as: the thing had to be eligible to be owned by individuals, the possessor had to be a person who could legally be an owner, there had to be a legal base for ownership – iustus titulus, the possession had to be bona fide, the possession had to be public, permanent and undisputed by the true owner, and the prescribed time period had to expire<sup>7</sup>.

The first legal requirement - the eligibility of the object of ownership meant that ownership by usucapio could be acquired only on things that could be object of private ownership. This legal requirement was placed in order to prevent for ownership to be acquired by usucapio on public goods, on land and sacred places (divini juris), roads leading to cemeteries, provincial land, landmarks and etc<sup>8</sup>.

The second legal requirement – the possessor to be a person who could legally be an owner meant that only persons who are sui iuris were allowed to acquire ownership by usucapio<sup>9</sup>. Persons who had status peregrinus were not allowed to acquire ownership over things in the res mancipi category. According to the opinion of Roman scholars, peregrines had only the right of use (usus) over things res mancipi. This meant that peregrines had solely possession over res mancipi, but they couldn't own such things, and therefore couldn't acquire ownership on things res mancipi by usucapio.

The third legal requirement – the legal base (iustus titulus) had to exist, and also it had to be a legal base for transfer of ownership such as gift, sale and etc<sup>10</sup>. The fact that the legal base (iustus titulus) was in its essence defected and unfit to provide derivative transfer of the right of ownership didn't affect the acquisition of the right of ownership by usucapio as long as the possessor was able to demonstrate its existence. If there was no iustus titulus to be presented, then usucapio wouldn't be allowed. This was because Roman law didn't allow usucapio on things that were stolen or taken into possession by force without any legal base (iustus titulus)<sup>11</sup>. Ownership on things belonging to women under tutorship also couldn't be acquired by usucapio with exception of things res mancipi that she had transferred by traditio with the authorization of her tutor<sup>12</sup>. Also, things left in deposit, pledge or rented weren't eligible for the right of ownership to be acquired by usucapio, because in such cases (even if there was legal base for the possession) it wasn't the type of legal base that expressed an intent for transfer of ownership<sup>13</sup>.

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<sup>6</sup> Mousorakis, G., *op. cit.*, p. 119.

<sup>7</sup> Lassaffee, R., *Argument from Roman law in Current International law, Occupation and Acquisitive Prescription*, The European Journal of International Law, Vol. 16, No 1, EJIL, 2005, p. 47.

<sup>8</sup> Пухан, И.; Поленак Акимовска, М., *op. cit.*, p. 164. Poste, E., *op. cit.*, p. 148, 152.

<sup>9</sup> Poste, E., *op. cit.*, p. 152. Mousorakis, G., *op. cit.*, p. 51.

<sup>10</sup> Poste, E., *op. cit.*, p. 156. Ridin, M., *Fundamental Concepts of Roman law*, California Law Review, Vol. 13, Issue 3, March, 1925, p. 221.

<sup>11</sup> According to historical sources the acquisition of ownership on stolen things by usucapio was explicitly prohibited by the Law of Twelve Tables, and the acquisition of ownership on things taken into possession by force was prohibited by Lex Julia Et Plautia. Poste, E., *op. cit.*, p. 148. Mousorakis, G., *op. cit.*, p. 42, 118.

<sup>12</sup> Poste, E., *op. cit.*, p. 148.

<sup>13</sup> Poste, E., *op. cit.*, p. 151. Nicholas, B., *An introduction to Roman law*, Oxford: Oxford University, 1962, p. 112.

The fourth legal requirement demanded for the possession to be bona fide<sup>14</sup>. The possession was considered to be bona fide when the possessor wasn't aware of the circumstances that prevented the derivative transfer of the right of ownership on the thing he had possession over. When possession was transferred by a person who wasn't the true owner, then it was considered that the possessor had bona fides possession if he wasn't aware that the thing was given to him by a person falsely representing himself as the owner<sup>15</sup>. However, it is important to note that in cases of usucapio pro herede there was no need for the bona fide possession. This meant that the possessor could acquire ownership by usucapio on things object of inheritance even when he was fully aware of that fact<sup>16</sup>. The reason for this exception from the legal requirement of bona fide possession was to force the heirs to take care of their inheritance by immediately taking possession over it<sup>17</sup>. The heirs who had possession of their inheritance had the obligation to pay sacra (obligation of religious nature), and were responsible for payment of the debts of the deceased<sup>18</sup>.

Bona fide possession was required only in the moment of taking possession. If the possessor later found out that there were circumstances preventing the acquisition of the right of ownership over the thing in his possession, that wasn't an obstacle for him to acquire the right of ownership by usucapio<sup>19</sup>.

The fifth legal requirement was for the possession to be exercised permanently, publicly and undisputed by the true owner<sup>20</sup>. The permanence of the possession meant that it must last until the expiration of the time period for usucapio. If during this period the possessor had lost the possession, then usucapio would have been terminated. Also, it was necessary for the possessor to exercise the possession publicly, meaning that he had to behave as the owner before all third parties. The possession also had to be undisputed by the true owner. It was considered that the true owner disputes the possession by entering the real estate, breaking branches of trees and similar actions<sup>21</sup>.

The sixth legal requirement is the expiration of the prescribed time period for usucapio which, according to historical sources, was one year for movable things, and two years for immovable things. These time periods were prescribed by the Law of Twelve Tables<sup>22</sup>. In the time of Justinian, when the division of things on res mancipi and res nec mancipi has been abandoned, changes were implemented with respect to usucapio. The so called usucapionis et longi temporis possessionis (longi temporis possessio) was implemented. This type of usucapio required three years time period of possession for movable things, and ten years time period of possession for immovable things if the predecessor and the successor lived in the same area, or twenty years time period of possession if they didn't live in the same area<sup>23</sup>. If the possessor couldn't demonstrate iustus titulus for his possession then a thirty years' time period of possession was required for usucapio (longissimi temporis praescriptio)<sup>24</sup>.

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<sup>14</sup> Poste, E., *op. cit.*, p. 156. Ridin, M., *op. cit.*, p. 221.

<sup>15</sup> Poste, E., *op. cit.*, p. 147.

<sup>16</sup> Poste, E., *op. cit.*, p. 149. Mousorakis, G., *op. cit.* p. 137.

<sup>17</sup> Ibid.

<sup>18</sup> Poste, E., *op. cit.*, p. 150.

<sup>19</sup> Пухан, И.; Поленак Акимовска, М., *op. cit.*, p. 165. Poste, E., *op. cit.*, p. 147, 156.

<sup>20</sup> Poste, E., *op. cit.*, p. 150.

<sup>21</sup> Пухан, И.; Поленак Акимовска, М., *op. cit.*, p. 166.

<sup>22</sup> Ibid.

<sup>23</sup> Poste, E. *op. cit.*, p.155-156. Ridin, M., *op. cit.*, p. 7.

<sup>24</sup> Poste, E., *op. cit.*, pp.156-157. Lassaffeer, R., *op. cit.*, p. 55. Nicholas, B., *op. cit.*, p. 128.

During the time period for usucapio the possessor had the right to protect his possession against third persons with interdicts. The possessor didn't have legal protection against the true owner, but in certain situations the possessor was able to use *exceptio doli* and *exceptio rei venditae et traditae*<sup>25</sup>.

### III. USUCAPIO IN MACEDONIAN CONTEMPORARY LAW

Usucapio as a manner of acquiring ownership has not lost its importance even in contemporary legal systems. In the Macedonian legal system usucapio is regulated by the Law of Ownership and Other Real Rights<sup>26</sup> in Chapter IV – Acquisition, Protection and Termination of the Right of Ownership; Title 1 – Acquisition on the Bases of Law. The legislator recognizes two types of usucapio regular and exceptional, and both are applicable for movable, as well as immovable things<sup>27</sup>. In the Law of Ownership and Other Real Rights regular usucapio is regulated in article 124, paragraphs 1 and 2:

*The bona fide and lawful possessor of movable thing owned by another acquires ownership by usucapio upon expiration of three years term.*

*The bona fide and lawful possessor of immovable thing owned by another acquires ownership by usucapio upon expiration of ten years term.*

Exceptional usucapio is regulated by article 124, paragraphs 3 and 4 of the Law of Ownership and Other Real Rights:

*Bona fide possessor of movable thing owned by another acquires ownership by usucapio upon expiration of ten years term.*

*Bona fide possessor of immovable thing owned by another acquires ownership by usucapio upon expiration of twenty years term.*

By analyzing the provisions of article 124 of the Law of Ownership and Other Real Rights we can conclude that the regulation of usucapio in Roman and contemporary Macedonian law has many similarities with respect to the legal requirement for acquiring the right of ownership. All basic requirements present in Roman law, are prescribed in contemporary Macedonian law as well – *iustus titulus*, *bona fide* possession, peaceful possession and etc. Basic legal requirement for acquiring ownership by usucapio is the *bona fide*. Dependent of the type of usucapio (regular or exceptional) there are additional legal requirements such as: *iustus titulus*, possession and expiration of the prescribed terms. Besides the legal requirements that are explicitly prescribed for usucapio by law, we would like to note that there are other requirements that must be fulfilled as well, such as: eligibility of the object for usucapio (it must be a movable or immovable thing on which ownership may be acquired and transferred) and the capacity of the person for acquiring right of ownership (the possessor shouldn't be banned by law from acquiring ownership over the thing that he or she possesses). We call these implicit requirements because

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<sup>25</sup> Mousorakis, G., *op. cit.*, p. 52.

<sup>26</sup> Official Gazette, number 18/2001, 92/2008, 139/2009 and 35/2010.

<sup>27</sup> Civil doctrine makes the distinction between regular and exceptional usucapio based on the quality of the possession. If the possession has a high degree of qualification meaning that it is *bona fide*, lawful and peaceful, in that case the right of ownership is acquired by usucapio in shorter timelines. If the possession is of lower degree of qualification, meaning it is only *bona fide* and peaceful then ownership by usucapio is acquired in longer timelines. Rašović, Z. P., *op. cit.*, p. 159. Ковачевић – Куштримовић, Р.; Лазић, М., *op. cit.*, p. 127. Попов, Д., *Квалификована Државина у функцији стицања права својине одржајем*, Зборник радова Правног факултета у Новом Саду, бр. 1/2011, pp. 111-112. Бабић, И., *Грађанско право – Увод у грађанско право и стварно право*, Правни факултет у Бањој Луци, Бања лука, 2008, p. 239.

even if they are not mentioned in the provisions of article 124 of the Law of Ownership and Other Real Rights they effect the acquisition of ownership by usucapio.

### *Bona fide on Part of the Possessor*

The bona fide on part of the possessor is the main legal requirement for acquisition of ownership by usucapio in both regular and exceptional usucapio. There is bona fide on part of the possessor when according to his or her perception there were no legal impediments for acquiring the right of ownership, and that his or her possession derives from the acquired right of ownership. The possessor acts in bona fide if he or she sincerely believes that has the right of ownership even when in reality that isn't the case. The bona fide is a psycho-ethical condition that exists in the conscience of the possessor. However, when it needs to be determined if the legal requirements for usucapio are fulfilled, that must be done on bases of an objective assessment. The Law of Ownership and Other Real Rights defines the bona fide of the possessor as a condition where the possessor doesn't know, and couldn't have known that has no legal base for possession<sup>28</sup>. Since the provisions of the law don't determine how the bona fide possession is to be determined we consider that the legal standards such as good host, good practice, average person and etc. should be used, since they are the only possible objective assessment criteria that can be applied. Using the legal standard we can determine if there is bona fide possession on part of the possessor by assessing whether he or she has shown the necessary attention required for entering into civil law relations, but still didn't became aware that there are deficiencies in the manner that the right of ownership has been acquired on his or her part. The use of the legal standard, although imperfect, it still is best way to determine the existence of bona fide on part of the possessor, since the try psycho-ethical condition of the possessor is impossible to be determined objectively.

Bona fide on part of possessors who are natural persons without full legal capacity and juridical persons is determined intermediary. The bona fide of possessors without full legal capacity is assessed on bases of the actions of their legal representative since the legal representative undertakes all legal actions in the name of the person without full legal capacity<sup>29</sup>. With respect to juridical persons the bona fide is being assessed from the actions of natural persons authorized to take possession and act on part of the juridical person<sup>30</sup>.

Heirs by law take possession of the estate of the deceased in the moment of death, therefore they are considered to have bona fide by law even in cases when there hasn't been bona fide on part of their predecessor. The heirs could be deemed without bona fide if they had some knowledge that their predecessor had no bona fide with respect to his or her possession<sup>31</sup>. Similar provisions were found in Roman law where usucapio pro herede was regulated and it didn't require bona fide possession. The reason why Macedonian contemporary law accepts the same legal solution is to provide efficient protection of the estate of the deceased and protection of the rights of heirs. Also for fiscal reasons, because sooner the heirs take possession and acquire ownership over the estate, sooner they will start paying the inheritance taxes and the estate taxes.

For practical purposes in Macedonian law there is a legal presumption of bona fide on part of the possessor<sup>32</sup>. This means that the possessor isn't obligated to provide evidence attesting to the fact

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<sup>28</sup> Art. 179, par. 3, Law of Ownership and Other Real Rights...

<sup>29</sup> Art. 179, par. 6, Law of Ownership and Other Real Rights...

<sup>30</sup> Ibid.

<sup>31</sup> Art. 124, par. 5, Law of Ownership and Other Real Rights...

<sup>32</sup> Art. 179, par. 4, Law of Ownership and Other Real Rights...

that he or she has taken possession in good faith in order to acquire ownership by usucapio. However, any person with legal interest can dispute the existence of bona fide on part of the possessor. According to the Law of Ownership and Other Real Rights bona fide on part of the possessor is terminated in the moment when the possessor becomes aware that he or she has no right to possession over the immovable or movable thing<sup>33</sup>. The Law does not precisely determine all acts that may lead to termination of bona fide on part of the possessor. However, it is prescribed that when a lawsuit has been served to the possessor in which the lawfulness of his or her possession has been disputed, then the possessor loses his or her bona fide with respect to the possession<sup>34</sup>. The plaintiff filing the lawsuit can also provide evidence that the loss of bona fide has occurred sometime before the lawsuit has been filed. Providing such evidence is in interest of the plaintiff, since the main objective of filing a lawsuit against the possessor is to terminate his or her bona fide possession and by doing so to prevent him or her from acquiring the right of ownership by usucapio. There are no directives provided by law with respect to how termination of bona fide is to be proven, therefore we can conclude that all types of lawfully acquired evidence can be used such as legal documents, official notification by authorities, failure on part of the possessor to register his or her right, witness statements, cross examination of the possessor during the court proceedings and etc. With respect to the court proceedings we would like to note that even if by law the possessor isn't required to provide prove that his or hers possession is in bona fide, he or she could be asked to give a statement explaining why he or she believes to have the right of possession or more precisely why he or she believes to be the rightful owner. This statement need not be backed with material evidence, because as we mentioned, the possessor need not prove the bona fide of the possession, but the statement will be subject to free and impartial judicial assessment on its credibility. Concerning the legal action against the possessor, we would like to note that it will lead to termination of the bona fide possession only if the proceedings are concluded in favor of the plaintiff. If the lawsuit is denied or thrown away by the court, in that case it is considered that no termination of the bona fide possession has occurred.

Some scholars point out that the termination of the bona fide possession could result not only from legal actions, but also from factual acts<sup>35</sup>. With respect to this opinion we would like to comment that factual acts, unlike legal actions, are less likely to lead to lawful termination of the bona fide with respect to possession and the plaintiff still has to prove before the courts that such factual acts have occurred.

There is a difference between termination of bona fide and the termination of the possession as such. The termination of bona fide could occur without termination of the possession and vice versa. For example if the possessor is made aware of the fact that the legal transaction on bases of which he or she had acquired ownership and possession is null and void, then the knowledge of the nullity of the legal transaction leads to termination of bona fide, but not of the possession. On the other hand if the possessor loses the possession that doesn't automatically mean that his or hers bona fide has terminated as well. It is important to note that if bona fide is terminated, then regardless of the fact that the possessor managed to maintain his or her possession, such a possession could never lead to acquisition of the right of ownership by usucapio.

Scholars' debate on the fact whether bona fide should exist only in the moment of acquisition of the possession, or it should last the whole time until the term for usucapio expires. We hold the

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<sup>33</sup> Art. 179, par. 5, Law of Ownership and Other Real Rights...

<sup>34</sup> Art. 158, par. 7, Law of Ownership and Other Real Rights...

<sup>35</sup> Kovačević Kuštrimović, R.; Lazić, M., *op. cit.*, pp. 131 – 132.

opinion that the bona fide must last until the term for usucapio expires because that is in accordance to the principle of acting in good faith as basic principle in the civil law regulation<sup>36</sup>. The Law of Ownership and Other Real Rights doesn't explicitly prescribe that the bona fide of the possession should last until expiration of the term for usucapio. However, judging from the fact that the law regulates the termination of bona fide with respect to the possession we conclude that it implies intention on part of the legislator for the bona fide possession to last from the first to the last day of the term for usucapio<sup>37</sup>. If bona fide is terminated before expiration of the term for usucapio, the right of ownership won't be acquired.

### *Lawful possession*

The presence of legal base for the possession (*iustus titulus*) makes for lawful possession which is an additional legal requirement for regular usucapio. Regular usucapio leads to acquisition of the right of ownership in shorter timelines (three years for movable things, and ten years for immovable things).

In the Law of Ownership and Other Real Rights lawful possession is defined as *possession obtained by the possessor with a valid legal base*. It is important to note that the *valid legal base* must be by nature eligible for transfer of the right of ownership, and it must be concluded in accordance to the law at least formally. Agreements such as rent agreement, deposit and other similar legal transactions are not eligible to provide the possessor with a possession that could lead to acquisition of the right of ownership by usucapio. In such cases it could also be argued that the possessor doesn't act in good faith, meaning that there is no bona fide with respect to his or her possession since there is awareness that the object of possession is owned by another person.

The fact that the Law of Ownership and Other Real Rights defines lawful possession as one acquired with a valid legal base poses a question why such a legal base doesn't lead to acquisition of the right of ownership since the validity of the legal base is assessed objectively (whether the legal transaction is in accordance to the law) and not subjectively (whether the possessor believes that the legal transaction is valid). Consequently, if the legal base is valid, then it should lead to derivative acquisition of the right of ownership. However, there are cases when the legal transaction is by all appearance valid, but it has been concluded with a person that wasn't the true owner, or there were legal impediments for transfer of the right of ownership that the parties weren't aware of. In such cases the existing defects in the derivative transfer of ownership prevent the lawful acquisition of the right of ownership.

Some scholars hold the opinion that possession acquired on relatively null legal transaction is also a lawful possession<sup>38</sup>. We concur that possession based on relatively null legal transaction could be considered lawful, but only after the expiration of the deadlines for their nullification. Upon expiration of these deadlines, the terms for regular usucapio will start to run as well because that is the moment when the possession turns lawful.

It needs to be noted that the bona fide of the possession and the lawfulness of the possession should be evaluated separately. This is necessary because bona fide possession could be deemed as unlawful if the possessor isn't able to provide legal base for the possession. On the other hand a lawful possession doesn't mean that it is also bona fide possession since there is always a possibility for the possessor to be aware of circumstances that prevented him or her to acquire

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<sup>36</sup> Kovačević Kuštrimović, R.; Lazić, M., *op. cit.*, p. 129. Rašović, Z. P., *op. cit.*, p. 161.

<sup>37</sup> Art. 179, par. 5, Law of Ownership and Other Real Rights...

<sup>38</sup> Rašović, Z. P., *op. cit.*, p. 159. Попов, Д., *op. cit.*, p. 113.



the right of ownership. In the later case, the possessor that has lawful possession, but has no bona fide could never acquire the right of ownership by usucapio since the existence of bona fide is a *conditio sine qua non*.

### *Possession*

Usucapio requires a so called qualified possession. A qualified possession is a possession that is peaceful, bona fide and lawful (for regular usucapio) or peaceful and bona fide (for exceptional usucapio). In addition, the possession must be proprietary and permanent.

Peaceful possession is a kind of possession acquired by lawful transfer without the use of force, fraud or abuse of trust. The Law of Ownership and Other Real Rights treats peaceful possession as a type of lawful possession. However in civil doctrine peaceful possession is identified separately from the lawful possession because base for assessment whether the possession is peaceful or not is the manner of transfer and base for assessment whether the possession is lawful or not is the existence of *iustus titulus* for transfer<sup>39</sup>. Taking this into consideration we can conclude that peaceful possession could be transferred lawfully without the existence of a valid *iustus titulus* for transfer, and lawful possession could be acquired without lawful transfer by use of force, fraud or abuse of trust. When possession is acquired without a lawful transfer, in that case the term for usucapio won't start to run until the expiration of the deadlines in which the previous possessor is authorized to seek legal protection (thirty days from the moment he became aware of the dispossession, but no later than one year from the moment that the dispossession took place.). After the expiration of the deadlines for seeking legal protection the possession turns peaceful.

As it was mentioned before, the possession is lawful if it is acquired on a valid legal base.

The possession must be proprietary, since only the possessor who believes and acts as if he or she is the rightful owner could acquire ownership by usucapio.

Permanence of the possession is crucial for acquiring ownership by usucapio. If the possessor loses possession and he or she fails to retrieve it, then usucapio will be terminated. When the possessor had lost the possession but has managed to retrieve it, upon repossession the term for usucapio restarts to run. This however doesn't apply when the possessor has managed to retrieve possession in the deadlines prescribed by law for protection of possession. In such case running of the term for usucapio is neither interrupted, nor terminated.

### *Expiration of the term for usucapio*

The right of ownership by usucapio is acquired upon expiration of the terms for usucapio. The terms for regular usucapio are: three years for movable things and ten years for immovable things. Exceptional usucapio requires longer terms which are: ten years for movable things and 20 years for immovable things. The term for usucapio starts to run from the day possession has been taken by the possessor and it expires on the last day of the term prescribed for usucapio<sup>40</sup>. With respect to circumstances that interrupt or terminate the expiration of the term for usucapio the provisions from the Law of Obligations regulating prescription are applicable<sup>41</sup>. It is important to note that when the expiration of the term for usucapio has been interrupted, after the

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<sup>39</sup> Kovačević Kuštrimović, R.; Lazić, M., *op. cit.* p. 128. Попов, Д., *op. cit.*, p. 114.

<sup>40</sup> Art. 124, par. 1, Law of Ownership and Other Real Rights...

<sup>41</sup> Art. 370-382, Law of Obligations, Official Gazette, number 18/2001, 4/2002, 5/2003, 84/2008, 81/2009, 161/2009 and 123/2013.

circumstances that caused the interruption are removed, the term continues to run adding the time passed before the interruption. However, when the expiration of the term for usucapio is terminated, the term could restart if the circumstances that caused the termination are removed and the possessor manages to maintain or retrieve the required qualified possession.

With respect to the calculation of the term for usucapio, the Law of Ownership and Other Real Rights recognizes the possibility for the successor to calculate the time passed in favor of his or her predecessor in the full term required for usucapio. However, the law doesn't state how the term should be calculated when the degree of qualification of the possession differs between the predecessor and the successor. This refers to situations when one possessor has peaceful and bona fide possession and the other has lawful, peaceful and bona fide possession. There is a very acceptable opinion among legal scholars that in such cases the calculation of the time passed should be in percentages related to the full term required for usucapio<sup>42</sup>. For example if a person has peaceful and bona fide possession over an immovable thing for 10 years, the time passed expressed in percentages will amount to 50% of the required term for usucapio which is 20 years. If that person later transfers the possession onto another person who in that regard will have lawful, peaceful and bona fide possession, the term for usucapio for the successor will expire after five years from the day he or she has taken possession over the immovable thing. This is because lawful, peaceful and bona fide possession over immovable things requires 10 years term for usucapio, but by calculating in the time passed in favor of his or her predecessor which is 50% from the respected term for usucapio, we conclude that only additional five years need to pass for the term to expire.

#### IV. CONCLUSION

Usucapio is one of the original manners for acquiring ownership that dates since the period of Roman law, and persists until today. In the course of time it has been subjected to changes resulting from the development of civil law relations but its function and importance in civil law have remained the same - to enable the possessor to acquire ownership independently of the will of the previous owner and to provide legal security for the possessor and for third parties with respect to the acquisition of the right of ownership.

Historical sources show that usucapio has been present in the legal scene since the Law of Twelve Tables where it was regulated as an original manner for acquiring ownership.

Roman law demanded strict legal requirements for usucapio and those were: things had to be eligible to be owned by individuals, the possessor had to be a person who could legally be an owner, there had to be a legal base for ownership – *iustus titulus*, the possession had to be bona fide, the possession had to be public, permanent and undisputed by the rightful owner, and the prescribed time period for usucapio had to expire.

In Macedonian contemporary law usucapio is regulated by the general Law of Ownership and Other Real Rights. The Law recognizes two types of usucapio dependant on the degree of qualification of the possession – regular and exceptional usucapio.

Legal requirement for usucapio in Macedonian contemporary law are similar to those in Roman law. They can be classified into three categories: 1. Basic legal requirement - bona fide of the possessor; 2. Additional legal requirements such as: *iustus titulus*, possession and expiration of the prescribed terms for usucapio and 3. Implied legal requirements: eligibility of the object for usucapio and the capacity of the person for acquiring right of ownership.

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<sup>42</sup> Орлић, М.; Станковић, О., *Стварно право*, Номос, Београд, 1996, р. 94.

The basic legal requirement for usucapio – the bona fide can be defined as psycho-ethical state of sincere conviction on part of the possessor that he or she enjoys the right of ownership even when in reality that isn't the case. The Bona fide of the possessor must persist until the expiration of the term for usucapio, if not the right of ownership can't be acquired.

The presence of legal base for the possession (iustus titulus) makes for lawful possession which is an additional legal requirement for regular usucapio.

Usucapio requires a so called qualified possession which needs to be peaceful, bona fide and lawful (for regular usucapio) or peaceful and bona fide (for exceptional usucapio). In addition, the possession must be proprietary and permanent.

The right of ownership by usucapio is acquired upon expiration of the terms for usucapio. The terms for regular usucapio are: three years for movable things and ten years for immovable things. Exceptional usucapio requires longer terms which are: ten years for movable things and 20 years for immovable things. The term for usucapio starts to run from the day possession has been taken by the possessor and it expires on the last day of the term prescribed for usucapio.

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