 vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52571

# THE SPECIAL URBAN INDIVIDUAL AND COLLECTIVE USUCAPION BY *INTERVERSIO POSSESSIONIS* OF PRECARIOUS *TENÇA* IN POSSESSION *AD USUCAPIONEM PRO MORADA*, *PRO LABORE* E *PRO MISERO*

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**ABSTRACT**

It is a research that applies concepts of the civilistic and problematic of the possessory right to the special urban usucapion (collective and individual). It aimed to investigate answers and understandings around the questioning whether or not there is the intervention of possession of precarious *tença*, a matter that is still a problem in the scope of Civil Law for configuring possession *ad usucapionem*. Subsequently, he applied the conclusions obtained in that investigation to the usucapion institute, in its individual and collective urban modalities, as well as applied, also, to the right of housing in the urban space. In addition to the national and foreign bibliographic review, the research also had as a documentary sample judged by the Superior Court of Justice that dealt with the subject. Following a qualitative and quantitative method, the investigation proceeded with the statistics of the judges to verify whether there is jurisprudence around the matter. After a historical analysis of the *precarium* and the *precario* of Roman Law, the research concluded that the association of precarious possession with eternal detention does not find historical or legal support, so that nothing justifies maintaining the idea that the conversion of illicit detention for precariousness in possession generating special urban usucapion.
**Keywords:** *Precarium*. Precarious possession. *Interversio possessionis*. Special urban usucapion. Social function of possession.

## 1. INTRODUCTION.

Despite an old and recurrent theme, the possibility or not of resolving the vice of precariousness and its transformation from vicious detention into *ad usucapionem possession* has not yet found a firm and unanimous answer.

The initial and main questioning of this research was precisely whether or not there is *interversio possessionis* of precarious *tença*[2], having traced the following investigation path: first, to verify how the matter was in Roman Law; second, to systematize the legal regime of the matter in Brazilian legislation and legal literature; third, to apply the conclusions obtained from the bibliographical research to the special

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[2] *Tença* is a word in Portuguese related to possession.

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DOI: 10.12957/rdc.2021.52571

urban usucapio in the individual and collective modalities, as a way of guaranteeing housing and work; and fourth, to carry out a qualitative and quantitative analysis of the judgments of the Superior Court of Justice (Superior Tribunal de Justiça - STJ) to verify if there is any jurisprudence on the matter.

As for urban *usucapio*, the research approached it as an institute of urban law and treated its definitions and issues as presuppositions, as the objective was to bring conclusions and concepts of civil law and possession rights to matters of urban aspects, demonstrating how it could be done.

It is interesting to anticipate that Brazilian Law gave very particular contours to "precariousness", substantially different from those found in Roman Law and some Civil Law countries in Europe and South America that were analyzed in the research.

Therefore, this research proposed an investigation of how the *interversio possessionis* of precarious *tença* is defined and how it can be applied, from a theoretical perspective, to special urban *usucapio* and the right to housing and work. But, obviously and preliminary to everything, it was necessary to ask: does this possibility exist in the Brazilian legal system?

The answers, based on the understanding of the Superior Court of Justice and the legal literature, were not unanimous and were not always positive. Therefore, parallel to the qualitative and quantitative investigation in the special instance, the research sought to systematize the opinions of Brazilian and foreign authors regarding the possibility of *usucapio* based on an originating precarious *tença*.

The general objective of this research was to identify whether it is currently possible to recognize *the ad usucapionem* inversion of precarious *tença* and its reason. In order to implement this objective, statistics on the judgments of the Superior Court of Justice were carried out to verify whether there is jurisprudence on the subject. As a premise, the research probed the notions of vices and *interversio possessionis* identified in the legal literature.

For that, an object screening was necessary: of the documents of judicial nature, only those of the Superior Court of Justice were used, due to its unifying role of the federal jurisprudence. Accordingly, the research was developed with a qualitative and quantitative approach.

The research concludes that, in the case of someone or an urban nucleus precariously owning a property, but using it for housing or work purposes for years, this situation cannot be a mere *tença*. There is an interest in society to consider this situation relevant, especially if it concerns poor people. Therefore, it makes perfect sense to speak of a right to ownership of those who continued to enjoy and give the property a lawful purpose. In other words: these holders, under these conditions, have a right to *interversio possessionis* of the precarious *tença* in *ad usucapionem* possession so that, in the urban space, they have regularized their dominion situation.

The research, therefore, intends to offer Law operators the recent and current understanding of the Superior Court of Justice and the Brazilian legal literature about the characterization of the *interversio possessionis* of the so-called "precarious possession" (*rectius*: precarious *tença*) and, with that, practical resources to the legal community for the operability of the matter in court.

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## 2. "*PRECARIO*" AS VICE AND OTHER SENSES.

*POSSESSION NEC VI, NEC CLAM, NEC PRECARIOUS*.

All *ad usucapionem* possession - and, consequently, *usucapio* itself - has its origin in a dispossession, that is, in the impossibility of free exercise of possession by the legitimate owner due to the seizure of the thing by the squatter (whether in bad or good faith).

The dispossession, together with the disturbance and the threat or risk, constitute the inconveniences of possession, which are situations that prevent the legitimate possessor or owner from exercising the powers inherent to domain and possession (SILVESTRE, 2019).

Dispossession and disturbance can — and often — have their origins in the so-called vices of possession, which concern the way in which it was acquired. In the Brazilian legal system, the existence of three vices — or defects — of possession are recognized: *vi* (violence), *clam* (clandestine) and *precario* (precariousness) (BEVILÁQUA, 2003) (GONÇALVES, 2008).

Violence (*vi*) - from which "violent possession" will result - occurs when someone takes possession of someone else's property through irresistible acts of aggression or physical or moral coercion against the legitimate owner or someone in their family or their workers, or even against the thing itself. It is an act against which it is not possible to resist (SILVESTR, 2019).

Clandestineness (*clam*) — which gives rise to "clandestine possession" — is surreptitiously acquired by imperceptible and hidden acts until the actual occurrence of the dispossession or disturbance. One might say of possession obtained silently, without violence or destruction of things and protections. In practical terms, the distinction between violent and clandestine possession is not as relevant for purposes of interdict or 'publician' (*usucapio*) protection, as the consequences are the same. This distinction makes sense, perhaps, for the purpose of characterizing the extent of the damage in possible indemnity for losses and damages and moral damages, which tends to be greater in the case of violence (SILVESTRE, 2019).

Precariousness (*precario*) — which will constitute "precarious possession" — is a circumstance in which possession loses its authorized aspect and becomes an unauthorized detention. The possessor or mere holder has the authorization of the legitimate holder of the thing to exercise its use and usufruct up to a term *ad quem* or *sine die*, fixed in advance by agreement or notification. However, the person who has the thing does not fulfill the provision of returning it to the rightful owner, keeping in possession of the thing improperly and without authorization (MOREIRA ALVES, 1997). Therefore, this precarious possession originates in a business default (MOREIRA ALVES, 1987). This is the case, for example, of the lessee who does not return the property at the end of the contract, as long as there is no legal hypothesis of extension of the contract for an indefinite period provided for in Law 8.245/1991, § 1 of article 46:

> Art. 46. In leases agreed in writing and for a period equal to or greater than thirty months, the contract will be terminated after the stipulated period, regardless of notification or notice.

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> § 1. After the agreed period, if the lessee remains in possession of the rented property for more than thirty days without opposition from the lessor, the lease will be presumed to be extended for an indefinite period, maintaining the other clauses and conditions of the contract.
> [...] (free translation)

This will also be the case of a friend who does not return the borrowed beach house to the owner for a weekend (SILVESTRE, 2019).

The almost common opinion is that precariousness never ceases (never rectifies) and, consequently, is useless for adverse possession (MAIDAME, 2002).

But "*precario*" that appears in the formula *possessio nec vi, nec clam, nec precario* has nothing to do with the meaning of "*precario*", "*precaria*" and "*precarium*" built over more than two thousand years of Roman Law history (VOLTELINI, 1922) (RICCOBONO, 2012). Hence a first conclusion: “precariousness” in Possession Law is a polysemic concept and this can bring consequences and difficulties in understanding its legal regime.

Therefore, first of all, it is necessary to keep in mind, as Luciano de Camargo Penteado (2014, p. 616) adds, that one thing is precarious possession, originating from the abuse of trust, and another thing is possession on a precarious basis, derived from a contractual situation of dependency.

The problem is that these concepts got mixed up with time and interfered with the way in which the *ad usucapionem* effects that have or do not have precariousness are understood.

*Precarium* or *precario* (or “precarious possession”) did not have a uniform meaning in Roman Law, nor does it have a uniform meaning in current Civil Law systems, as pointed out by Rudolf von Ihering (2007). It appears that “*precario*” is a polysemic legal term.

Friedrich Karl von Savigny (1866) points out that initially in Rome, *precarium* consisted of a gracious concession of land that patricians (*patricii* or *paterfamilias*) realize in favor of clients: it was a revocable agreement for the use of land, very similar to the feudalism (DE LAS CASAS, 2019) (LAMA MORE, 2011, p. 63).

In addition, Roman territorial expansion led to the acquisition of land by the state as war booty. These territories or lands were designated *ager publicus* and were handed over to customers for cultivation and housing. However, as highlighted by Héctor Enrique Lama More (2011, p. 64), only *possessio* was granted, and not property (*ager privatus*) and as this assignment could be revoked at any time, the title of possession was designated as *precarium*: “ello no los hacía propietarios, solo mantenían la *possessio*, por lo que dichas extensiones de territorio permanecía como *ager publicus*. Éste derecho de ocupación solo era ejercido por los patricios; eran considerables los territorios que eran cultivados por los esclavos o los *clientes*, a quienes hacían concesiones a título esencialmente revocable (*precarium*)”[3].

[3]In free translation: “he did not make them owners, they only maintained possession, so these extensions of territory remained as *ager publicus*. This right of occupation was only exercised by the patricians; territories that

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Miguel Moreno Mocholi (1951, p. 26), even states that *precarium* was the only form of enjoyment for the other in those times. And Héctor Enrique Lama More (2011, p. 65) states that the institute is at the base of the origins of the so-called "*domain limited real rights*".

In the imperial period, the *precarium* changes its meaning: it is a contract that creates the obligation to return a given thing and considers the assignee as a possessor for the purposes of interdict guardianship via *interdicta precarium* (SAVIGNY, 1866). Precarist was the assignee-possessor of the thing.

According to António dos Santos Justo (2015, p. 40 and on and 100), through this nameless contract, the precarist became the holder of the thing as a result of the *precarium* contract. For him, it is at this moment that the so-called "doctrine of two possessions" appears: on the one hand, the true possession of the *precario dans*, which is *ad usucapionem*; and on the other, detention, which was the possession of the *precario accipiens*. Detention here has to do with the fact that the precarist exercises possession on behalf of the grantor. Also in this sense, Paolo Ferretti (FERRETTI, 2020).

According to Gerson Barboza De las Casas (2019, p. 5), Pietro Bonfante (Corso di Diritto Romano, vol. III) presents a plausible justification for granting to *precarium* the quality of possession and not mere tenancy: preventing the *usucapio* (*usureceptio*) while the debt is pending:

> Otra de las explicaciones —tal vez, la más contundente— de la conservación de la figura del precario es la expuesta por BONAFANTE [*sic*], para quien «[…] *la razón de la supervivencia del precario deriva de la función secundaria, accesoria la cual fue destinada* [la garantizadora], *y que es sustancialmente esta: en relación a la* [enajenación en] fiducia *el precario servía a impedir la usucapión (*usureceptio*) de parte del fiduciante antes que fuese satisfecha la deuda […] Pues, el fiduciante, permaneciendo normalmente en la posesión de la cosa […] y en la justa posesión, aquella que* nec vi nec clam nec precario*, conforme a los antiguos requisitos de la usucapión, habría podido usucapir*». Así se salvaba la contradicción de permitir el uso e impedir la usucapión; y es probable que esta fuese la única función del precario[4].

Note, then, that originally the "*possessio precario*" was not a vice, but a special legal situation: from the assignee to the assignor, with the aim of preventing the *usureceptio*; and from the transferee to third parties, with the aim of enabling the transferee's interdict possession protection via *interdicta precarium* (RICCOBONO, 1911) (SCIALOJA, 1981) (RICCOBONO, 2012).

were cultivated by slaves and clients were considered, to whom concessions were made on an essentially revocable title (*precarium*)".

[4]In free translation: "Another explanation — perhaps the most vigorous — for the preservation of the precarious figure is that given by BONAFANTE [sic], for whom '*[...] the reason for the survival of the precarious derives from the secondary function, ancillary to which was destined [the guarantor] and which is substantially this: in relation to the [disposal in] trust, the precarious served to prevent usucapio (usureceptio) of the creditor before the debt was satisfied [...] Well, the creditor normally remaining in the possession of the thing [...] and in fair possession, that which nec vi nec clam nec precario, according to the old requirements of usucapio, could have it granted*. Thus, the contradiction of allowing use and preventing adverse possession was saved; and that was probably the only function of the *precario*".

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The precarist enjoyed *the interdictum uti possidetis* against third parties, but not against the grantor; this one, moreover, could oppose the *exceptio vitiosæ possessionis* against the *precario dans* (VOLTELINI, 1922). Thus, there were two defined types of possession: fair *possessio*, from *precario dans*, and unjust *possessio*, from *precario accipiens* (JUSTO, 2015, p. 45 and 100).

Accordingly, António dos Santos Justo (2015, p. 46) wonders why the *precario accipiens* (precarist) would have "unfair" possession if he obtained it because he asked for it and was granted it. And find some answers. The first is that

> [...]o precarista possui injustamente desde o momento em que recusa restituir a coisa ao *precario dans*. No entanto, se, antes desta recusa, a *possessio* do precarista não é *iniusta*, só pode ser *iusta* e, então, persiste o problema: como é possível que o concedente e o precarista possam ter duas *possessiones iustae*?[5]

Persisting with other answers, António dos Santos Justo (2015, p. 46) finds the second opinion:

> [...] a posse é ao mesmo tempo justa e injusta: aquela goza de proteção jurídica; esta, não. Por isso, a posse do *precario dans* seria justa, porque protegida pelo *interdictum quod precario*; a do precarista seria injusta, porque não é tutelada contra o concedente. No entanto, porque é tutelada contra terceiros, em relação a estes a posse do precarista é justa e, assim, o problema mantém-se: pode haver duas posses justas (a do concedente e a do precarista)?[6]

The third answer found would have been the existence of an anomalous possession of the precarist, since he did not have the thing with *animus domini* and, therefore, he is not a true possessor. Or, if it is a modality of possession, the precarist does not have *pro alieno,* but *pro suo,* a *sui generis* modality of a possessory situation (JUSTO, 2015, p. 46 and 47).

António dos Santos Justo (2015, p. 47) concludes that the precarist's possession is truly anomalous: "não age como proprietário e, todavia, é um verdadeiro possuidor porque tutelado pelos expedientes que tutelam a posse, excetuando contra o concedente[7]". And even possessing *pro suo*, the *accipiens* could not have the *usucapio* granted related to the domain of the thing. From then on, the precarist loses space as a possessor to start being considered a holder in historical periods and in the consequent similar figures.

One could risk saying that — it seems — here there is an association of "*precarium*" with vice and detention (*vitiosæ possessionis*) and with unfair possession (*possessio injusta*).

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[5] [...] the precarist unjustly owns from the moment he refuses to return the thing to the *precario dans*. However, if, before this refusal, the precarist's *possessio* is not unfair, it can only be fair, and then the problem persists: how is it possible that the grantor and the precarist can have two *possessiones iustae*? (Free translation)

[6] [...] possession is at the same time fair and unfair: the former enjoys legal protection; the latter does not. Therefore, the possession of the *precario dans* would be fair, because it is protected by the *interdictum quod precario*; that of the precarist would be unfair, because it is not protected against the grantor. However, because it is protected against third parties, in relation to them, the precarist's possession is fair and, thus, the problem remains: can there be two fair possessions (the grantor and the precarist)? (Free translation)

[7] he does not act as an owner and, however, he is a true possessor because he is protected by the expedients that protect the possession, except against the grantor. (Free translation)

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Thus, if this conception of *precarium* was maintained over time, then “precarious possession” could not be able to give rise to adverse possession.

According to Gerson Barboza De las Casas (2019, p. 6), in the post-Justinian period, the *precarium* became an “unnamed contract”, similar to what today is a loan for use. By such an agreement, a *precario dans* ceded a thing to a *precario accipiens* (precarist or *accipiente*); the latter acquired an *ad interdicta* possession - but not an *ad usucapionem* possession - and could enjoy the thing with the obligation of restoring it when required by the *precario dans*. If the precarious owner refused to return the thing, the *precario dans* had at its disposal a special interdictal guardianship, the *actio præscriptis verbis*. And concludes:

> lejos de haberse mantenido inmutable durante ese período la figura estudiada tuvo variaciones que determinaron sus elementos característicos. Primero debemos rescatar su carácter posesorio, pues el poseedor precario era considerado como un auténtico poseedor, sin embargo, no era un poseedor *ad usuapionem*. Asimismo, era una posesión conforme a derecho, pues no constituía una forma ilícita de posesión, debido a que siempre tuvo una autorización (el precarista) por parte del propietario para entrar en posesión del bien como correlato se le proporcionó una tutela posesoria directa al propietario para recuperar el mismo. De último, notamos el vínculo previo que existía entre el *precario dans* y el *precario accipiens*, un auténtico acuerdo, una forma contractual (DE LAS CASAS, 2019, p. 6)[8].

In the Justinian period, the *precarium* was signed as a real unnamed contract of the *ut des* ("I give you so that you return it to me") in good faith (*bonæ fidei*) (JUSTO, 2015, p. 82).

During this period, according to António dos Santos Justo (2015, p. 82), the transformation of the institute into a real contract of free revocation by the *precario dans* had as its main effect the “transformation of that anomalous possession of the precarist into mere detention whose cause is the contract itself”. Furthermore, there was a strengthening of the transferor as the true possessor, following the principle of the classical period that two people cannot possess the same thing at the same time (Digesto 41,2,3,5). Accordingly, the *precario accipiens* is the mere holder of the thing delivered in precarious terms: it possesses (*possessio corpore*) in the name of the true possessor (*vera possessio*, with *animus domini*), that is, the *precario dans*.

António dos Santos Justo (2015, p. 84) explains the differences between the *vera possessio* of the *precario dans* and the *possessio corpore* of the *precario accipiens*: “Aquela tem por titular o *precario dans* e conduz à usucapião; esta tem por sujeito o precarista, não leva à usucapião, porque é mera detenção e é

[8] “far from remaining unchanged during this period, the figure studied presented variations that determined its characteristic elements. First, we must rescue its possessory character, since the precarious possessor was considered an authentic possessor, however, he was not a possessor *ad usuapionem*. Likewise, it was a possession under the law, as it did not constitute an illegal form of possession, as it always had an authorization (the precarist) from the owner to enter into possession of the property as a correlate, he received direct property protection to retrieve it. Finally, we note the previous link that existed between the precarious and the *precario accipiens*, an authentic agreement, a contractual form”. (Free translation)

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qualificada de *iusta possessio* porque tem a sua *iusta causa* no contrato *precarium*. A primeira é tutela por *interdicta* contra terceiros e contra o precarista; a segunda é tutelada apenas contra terceiros[9]".

Also in this period, the precario dans came to have yet another instrument to protect its possession: the *exceptio vitiosæ* (or *precariæ possessionis*), which was a defense presented by it when the precarist tried against the *interdictum uti possidetis* against that true possessor (JUSTO, 2015, p. 89).

Héctor Enrique Lama More (2011, p. 67-68) says that *precarium* existed when someone, free of charge, transferred possession of a thing to someone else, who would have as consideration the return of the thing in the first claim of the assignor. Over time, this (unnamed) contractual figure was absorbed by the lending.

Against the overdue precarista in returning the thing, the *precario dans* kept the *interdictum quod precario*, defined by the *Digesto* (43,26,2.1) as restitutory: "*Hoc interdictum restitutorium est*" (JUSTO, 2015, p. 70).

The anomalous possessory situation of the *precarium* made the precarist possessor ad *interdicta*. Because of this, according to António dos Santos Justo (2015, p. 73), the *precario accipiens* had the *interdictum uti possidetis* (or restitutory interdicts) to recover the thing, and the *interdictum utrubi* (prohibitory interdicts) to prevent disturbance.

However, the *Digesto* (43,26,17) forbade the *precario accipiens* to bring the *interdictum uti possidetis* against the *precario dans*: "*Qui precario fundum possidet, is interdicto uti possidetis adversus omnes, præter eum, quem rogavit, uti potest*".

António dos Santos Justo (2015, p. 96 to 98 and 101) points out that in the Middle Ages the *precarium* and its interdictions began to decline and two other figures emerged: the *precaria* and the *stipendium*. So they are characterized by it:

- *Precaria*: contract by which a church, religious order or natural person allowed a private person to exploit something for a certain time, and this transfer could be free or costly, but as a rule it was costly (unlike the *precarium*); its characteristic was the irrevocability of the contract during the established term, as opposed to the precarious; and
- *Stipendium*: concession that bishops made to their clergy and laity; initially it had *ad nutum* revocability, but with time conditions for revocation began to be demanded.

Néstor A. Pizarro (1943, p. 845) highlights that in the medieval canonical legal regime of possession, *vi, clam and precario* were extended notions to characterize the unjust possession and the possession of the *pro possessore possidens*, the unjust possessor. Indeed, the *actio spolii* and the *interdicta precario* also

[9] "The first has the *precario dans* as titleholder and leads to adverse possession; the latter has as subject the precarist, it does not lead to adverse possession, because it is mere detention and is classified as *iusta possessio* because it has its *iusta cause* in the *precarium* contract. The first is guardianship by *interdicta* against third parties and against the precarist; the second is only protected against third parties". (Free translation)

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had their scope expanded, demonstrating a varied meaning. For Rudolf von Ihering (2007, p. 130 ff.), the same idea was extended to common civil law.

French Right after Code Napoleón conceives the *precarium* not like possession, but like arrest.

According to Marcel Planiol and Georges Ripert (1955), the transferee's absence of *animus domini* made the transferee have the thing in a precarious way. Consequently, the possessory interdicts and *usucapio* lacked legitimacy. Accordingly, precarious was the person who had the thing, enjoyed it, but did not have it with *animus domini*. In this same sense, Ambroise Victor Charles Colin and Henri Capitant (1914) affirm that the contemporary meaning is different from the old meanings: to possess in a precarious way is to detain.

Louis Josserand (1938) understands it the same way. For him, owning for someone else's account makes the transferee a mere holder, and not a possessor even in cases of legitimate and authorized use (when there could be an unfolding of possession). For him, in these cases, the precarist has the title of someone else and, therefore, recognizes the possession and ownership of someone else.

According to Héctor Enrique Lama More (2011, p. 72-73), *precario* has gained three contours or meanings in Spanish law and those of Spanish-speaking South American countries designated as "Possessive situations within the *precario*": 1) *posesión concedida*; 2) *posesión tolerada*; e 3) *posesión sin título*.

The first two types of precarious tenure are voluntary and derive from business agreements similar to lending; on the other hand, precarious untitled possession is that of those who lack any title to own or possess by virtue of a null title. It is against this third situation of precariousness that the *desahucio por precario* or *desalojo por precario* actions were conceived (LAMA MORE, 2011, p. 72) (AVENDAÑO VALDEZ et alii, 2013).

For António dos Santos Justo (2015, p. 98) the figure of the precarious (*precarium*) disappeared in the Middle Ages and contemporary legislation absorbed the institute in the figure of lending. In this case, the precarious situation can be seen mainly in the case of indefinite lending.

But in the case of Brazil, the situation is different: it is possible to affirm that the legal regime of lending in the Civil Code did not absorb the *precarium*, since the revocability of that contract is not entirely *ad nutum*. If concluded for an indefinite period, its duration is presumed and the lender must prove that the borrower has already used the thing for sufficient time for the purpose for which the contract was intended; and if for a specified period, the revocation is subject to the unforeseen and urgent need of the lender. See, *in verbis*:

> Art. 581. Se o comodato não tiver prazo convencional, presumir-se-lhe-á o necessário para o uso concedido; não podendo o comodante, salvo necessidade imprevista e urgente, reconhecida pelo juiz, suspender o uso e gozo da coisa

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> emprestada, antes de findo o prazo convencional, ou o que se determine pelo uso outorgado[10].

Note, now, that the first two situations of precarious tenure raised by Héctor Enrique Lama More (2011, p. 72-73) are close to the Roman *precarium* of concession of the *ager publicus* and with the nameless contract of *precario*; the third type of precarious possession is similar to the idea of possession vitiated by abuse of trust that exists in Brazilian Law (arts. 1200 c/c 1208 of the Civil Code). This becomes even clearer when analyzing Article 1921 of the Civil and Commercial Code of Argentina:

> Article 1921. Posesión viciosa. La posesión de mala fe es viciosa cuando es de cosas muebles adquiridas por hurto, estafa, o abuso de confianza; y cuando es de inmuebles, adquiridos por violencia, clandestinidad, o abuso de confianza. Los vicios de la posesión son relativos respecto de aquel contra quien se ejercen. En todos los casos, sea por el mismo que causa el vicio o por sus agentes, sea contra el poseedor o sus representantes[11].

Miguel Moreno Mocholí (1956), in turn, understands that *precarium* is not a type of possession that is revoked by the will of a lender; nor that it is a special contractual type. As he understands, *precarium* is a special possessory situation that gives rise to a "very singular co-possession" between owner and precarist (*singularísima coposesión*), without a binding or contractual relationship.

Clóvis Beviláqua (2003, p. 51) understands that precariousness is not a vice; what is vicious in the situation is the refusal to return the thing: "O vicio, naturalmente, não está na precariedade da posse. É perfeitamente licita a concessão da posse de uma coisa, a titulo precário, isto é, para ser restituida, quando o proprietário a reclamar. — O vicio está na recusa da restituição, a que se obrigara o possuidor[12]" [sic].

Astolfo de Resende (1937, p. 388), in turn, understands that *precarium* is the legal situation established between two individuals when the thing is temporarily transferred:

> Aquêle que concede a outrem o exercício do direito de propriedade, isto é, a posse natural, reservando-se a faculdade de revogar à sua vontade essa

[10] Article 581. If the loan does not have a conventional term, it will be assumed what is necessary for the granted use; the lender cannot, unless due to unforeseen and urgent need recognized by the judge, suspend the use and enjoyment of the loaned thing, before the end of the conventional period, or that which is determined by the use granted (Free translation).
[11] Article 1921. Vitiated possession. Bad faith possession is vitiated when it comes to movable things acquired through theft, fraud or breach of trust; and when it comes to real estate, when acquired through violence, clandestinity or breach of trust. The vices of possession are related to the one against whom they are exercised. In all cases, whether by the same person causing the defect or by its agents, whether against the owner or its representative (Free translation).
[12] The vice, of course, is not in the precariousness of possession. It is perfectly legal to grant ownership of a thing, on a precarious basis, that is, to be returned when the owner claims it. — The vice lies in the refusal of restitution, which the possessor is obliged to do. (Free translation)

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> autorização, goza, com efeito, desta faculdade, e a relação jurídica que assim se forma, entre essas duas pessoas, chama-se *precarium*[13].

With this, it becomes clear that "*precarium*", "*precario*" and "*precariousness*" have multiple historical and legal meanings. Thus, "*precarious possession*", then and in this context, would not necessarily be a vitiated or illicit possession (the precarious *tença*); it could be a special possessory situation of a special legal transaction (the precarious).

From the national codifications, the *precarium* gained different contours in the legal systems. Jorge Avendaño Valdez (1986, p. 62) states: "El concepto de poseedor precario no tiene cabida sin embargo en los regímenes posesorios inspirados por lhering. En efecto, el poseedor inmediato, a pesar de su temporalidad y aún cuando reconoce un propietario, es verdadero poseedor porque ejerce de hecho poderes inherentes a la propiedad. No hay entonces precariedad sino posesión legítima"[14].

Hence, this research aimed to investigate the Civil Codes of some countries: 1) whether there is a *precarium* or similar institute; 2) what *precarium* means in that legislation; and 3) whether precariousness is a possession vice. The result could be summarized as follows:

Table 1— Legal regime of precariousness in some Civil Codes.

| Country | legal foundation | How is the precariousness |
|---|---|---|
| Germany | *Bürgerliches Gesetzbuch*: § 858. | This is the prediction of defects in the acquisition of possession: possession obtained as a result of illegal and defective interference is vitiated. See that the list of vice is not exhaustive. The defect consists in depriving the owner of the thing against his/her will (illegal interference with possession). However, here, *precario* does not expressly appear as a vice. This leads to the conclusion that the *BGB* did not deal specifically with this matter, as did the Civil Code in Brazil. |
| Argentina | 2014/2015 Código Civil y Comercial de la Nación: Articles 1921 and 1915. 1869 Código Civil de la República Argentina: Articles 2,364, 2,473 and 2,480. | As in Brazil, the Argentine *Codex* lists the vices of possession, also associating them with bad faith (as in the *caput* of article 1.201 of the Brazilian Civil Code). Despite the terminology "*abuso de confianza*" (abuse of trust) , this can be understood as precariousness, as it is the traditional definition. In fact, the Civil Code of 1869 spoke of precarious, violent or clandestine possession. The "interversión" of Article 1,915 draws attention for having a different meaning from that which exists in the Brazilian Civil Code. "En el derecho argentino la *detención precaria* – a título de precario– no confiere jamás la posesión, sino la |

[13] Anyone who grants to others the exercise of the right to property, that is, natural possession, reserving the power to revoke this authorization at his will, enjoys, in effect, this power, and the legal relationship thus formed, between these two people, it's called precarium. (Free translation)
[14] The concept of precarious possession does not fit without embargo in possession regimes inspired by lhering. In fact, the immediate possessor, despite its temporality and only when it recognizes an owner, is a true possessor because it exerts powers inherent to the property. There is no precariousness but legitimate possession (Free translation).

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| | | |
|---|---|---|
| | | simple tenencia, en consecuencia la ley no le confiere el derecho a las acciones posesorias[15]" (LAMA MORE, 2011, p. 69). |
| Brazil | Civil Code: arts. 1,200 c/c 1,208.<br>1916 Civil Code: arts. 489 and 497. | Vice: the possession or detention that derives from it is irregular, that is, the possession is unfair, according to the classification of the Civil Code (art. 1200). This is a peculiarity of Brazilian law and a tradition that dates back to the 1916 Civil Code. |
| Chile | Civil Code: arts. 915, 2194 and 2195. | Precarious is a special lending figure that attributes possession to the precarist and a special petition, the *acción de precario* (LEMAITRE, 2017). |
| Spain | Civil Code: Articles 433, 441 and 444. | *Precario* does not appear as a vice. |
| France | Civil Code: Articles 2263, 2266, 2267, 2268 and 2269. | Precariousness is when someone owns the thing for someone else, but French law designates the situation as "precarious detention". This qualification is intended to prevent *usucapio* of the thing given to others, or prohibition to prescribe the domain. |
| Italy | Civil Code: Art. 1141, 1144, 1147, 1163 and 1164. | Possession in good faith is not linked to ignorance of the existence of vices, but to ignorance that owning the thing harms the rights of others. Precariousness is not seen as a vice. |
| Portugal | Civil Code: Articles 1253, 1261, 1263, 1265 and 1297. | The following conclusions were possible: 1) precarious possession is synonymous with detention; 2) violence and concealment are vices of possession, but not precariousness; 3) there is no prediction as to the situation in case of breach of trust; and 4) there is the *interversio possessionis*, whereby possession becomes *ad usucapionem* when it becomes peaceful (no violence) and public (no longer hidden). |

Source: Own elaboration, 2020.

The choice of these countries has to do with the proximity and influence that their legislation and legal literature have on Brazil.

The survey of foreign legal experience revealed that Brazil attributed to precariousness a different meaning from that seen historically and mostly in some contemporary legal systems. It approaches the Roman figure to ward off adverse possession and the French figure to qualify it as detention and prevent adverse possession. While the vice that sustains violent, clandestine and precarious possession persists, such a situation is not, truly, possession, but a type of unauthorized detention, the *tença* (PONTES DE MIRANDA, 1971).

Moreover, here in Brazil, "precariousness" has yet another meaning attributed by the jurisprudence of the Superior Court of Justice (STJ) - which maintains an old jurisprudential tradition around the matter -, namely: in the case of occupation of public assets by private individuals, it is

[15] In Argentine law, precarious detention - as *precario* title - never confers possession, but simple tenure, consequently the law does not confer the right to possessory actions (Free translation)

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considered that this situation constitutes a “mere detention of a precarious nature” (TORRES and MOURA, 2018). Note that precariousness is not marked as that vice of art. 1,200 of the Civil Code, as there is no abuse of confidence in this case; whether it is a question of possessing it on a precarious basis, as there is no authorization subsequently revoked. It seems more like it is about the creation of a fourth kind of detention, created by jurisprudence. Examples that reveal this meaning are the following judgments: STJ, AgRg. no REsp. nº. 851.906/DF, 4ª Turma, Rel. Min. Antonio Carlos Ferreira, j. in December 04, 2014; STJ, AgRg. no REsp. nº. 1.319.975/DF, 3ª Turma, Rel. Min. João Otávio de Noronha, j. in December 01, 2015; STJ, REsp. nº. 1.296.964/DF, 4ª Turma, Rel. Min. Luis Felipe Salomão, j. in October 18, 2016; STJ, AgInt. no REsp. nº. 1.448.907/DF, 4ª Turma, Rel. Min. Maria Isabel Gallotti, j. in March 16, 2017; and STJ, REsp. nº. 1.762.597/DF, 2ª Turma, Rel. Min. Herman Benjamin, j. in October 16, 2018.

This characterization made by the special instance and by other courts should not be surprising. Note that this "mere detention of a precarious nature" of public goods by private individuals is very close to the transfer of the *ager publicus* in ancient Rome, however with the difference that in Rome precariousness was a possessory situation (*ad interdicta*), and here is held for detention, as to public goods.

When analyzing art. 1,208 with the *caput* of art. 1.198, all from the Civil Code, it is possible to detect two categories of detention and their species in the Possession Law in Brazil:

Table 2— Types of detention in the Brazilian Civil Code.

| DETENTION | |
|---|---|
| *lawful detention* | *unlawful detention* |
| 1. Servitude of ownership (*caput* of art. 1.198): they are the family members or servants of ownership; and<br>2. Tolerance or mere permission (art. 1208, *ab initio*): situation of seizure of the thing by grantees duly authorized by the legitimate owner. | *Tença* (art. 1208, in fine): is the unauthorized seizure and obtained through defects. |

Source: Own elaboration, 2020.

Accordingly, *tença* is not possession, but an illicit detention of the thing (PONTES DE MIRANDA, 1971). Therefore, *tença* does not induce *usucapio*, since this special modality of prescription requires the existence of a possession, that is, the *possessionio ad usucapionem*. Therefore, the time taken to seize the thing elapsed under the occurrence of vices does not count towards the adverse possession (SILVESTRE, 2019).

In this context, the classification of ownership as fair and unfair emerges. Article 1,200 of the Civil Code classifies possession as fair when it is not violent, clandestine or precarious; therefore—and a

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*contrario sensu* — possession obtained and maintained under violence, clandestinity or precariousness will be unjust.

This classification, in some countries, refers to regular and irregular possession or even legitimate and illegitimate possession (LAMA MORE, 2011, p. 76). And the factors of this classification also vary — although they all converge to the legality of acquisition of possession —, it is thus possible to systematize the meanings found in the legal systems and literature of the countries analyzed:

1. mode of protection of possession by Law;
2. exercise of possession in accordance with legal rules;
3. origin of possession in a constituted legal relationship;
4. presence of title that justifies ownership;
5. presence of valid title that justifies ownership;
6. existence of a vice or defect in the acquisition of possession;
7. existence of vice or defect in the cause of possession (*causa possessionis*); and
8. publicized exercise of ownership.

Finally, this classification, regardless of the name given, concerns the legality of acquiring ownership, that is, whether it was obtained by lawful and regular means and is thus exercised. See, also, that all are objective criteria for investigating the legitimacy of possession, and not subjective, when the classification would be in good faith and bad faith possession (art. 1201).

Jorge Avendaño Valdez (1986) presents precarious possession as a synonym for "*posesión ilegítima*". In Spanish tradition, the classification of possession as legitimate and illegitimate is also called fair and unjust possession, respectively. Precarious (illegitimate) possession is, in fact, a possession in good faith as to the vices that invalidate the title (AVENDAÑO VALDEZ, 1986, p. 59). Note, then, that precariousness is still a vice, but not in the same sense as in Brazil. (Perhaps even this may be the reason why the Superior Court of Justice considers the possession of public property as private as "precarious detention", due to the absence of title; perhaps, that was also why in Special Appeal No. 844,098 /MG the 3rd *Turma* understood that the precariousness resulted from the lack of title of the holder).

In the case of Brazil, the classification considers the existence or not of a vice or defect in the acquisition of possession (art. 1200) and, that, according to art. 1,208, as long as there are acts of violence and clandestinity, there will be no possession; and, by the provisions of art. 1,200, when there is violence and clandestinity possession is unfair. This allows us to conclude that, then, unjust possession is not really possession, but *tença*. (Do not consider the question of precariousness yet, as it will require further discussion).

Note that in the normative formulation of art. 1,200: "It is fair the possession that is not violent, clandestine or precarious". Note, now, that the phrase "that is not" makes it clear that possession is fair if it is not violent, clandestine or precarious. The normative formulation does not say, for example, "when it

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is not obtained". Thus, no longer existing violence, clandestinity and precariousness, possession becomes fair, according to the final part of art. 1,208 which has the function of immunizing vices.

**3. THE CONVALESCENCE OF VIOLENT AND CLANDESTINE *TENÇAS* IN POSSESSION AND THEIR *DIES A QUO*.**

One of the *sine quibus non* conditions of adverse possession is *tempus* (time), which consists of exercising ownership continuously for a period determined by law in years.

Necessarily, possession must be continuous, that is, the owner must exercise domain powers for a period (time lapse) so that, finally, the adverse possession is implemented (RIBEIRO, 2007). The terms established by law may be fifteen, ten, five, three or two years, depending on the modality of adverse possession, the factual and legal situation and the movable or immovable nature of the thing.

The *dies ad quem* of the term may be a specific resolution term, with a determined date. But nothing prevents that, in order to privilege the social function of ownership, it is considered as a term *ad quem* a certain time, which would consist of an indeterminate historical moment, but capable of being defined (SILVESTR, 2019).

Still with regard to the chronological requirement of possession *ad usucapionem*, it is worth highlighting some issues about the *dies a quo* of the term.

In those cases in which possession is acquired through vices, *interversio possessionis* is required to start counting the term. It is convalescence—conversion, transmutation, or interposition—from unjust possession to just possession. Unfair possession is not really possession, but *tença*, a form of detention; therefore, there is no way to generate adverse possession. Fair possession, on the other hand, is *ad usucapionem* (MACCORMACK, 1974).

Dilvanir José da Costa (1998, p. 112) understands that it is a mistake to speak of violent, clandestine or precarious "possession", since "na verdade os três fenômenos produzem típica e flagrante detenção, e não posse. Isso em relação à vítima do atentado à posse. Em relação a terceiros, o ofensor goza de proteção possessória, o que mostra a complexidade da posse e as razões sociais da sua proteção[16]".

António Menezes Cordeiro (2004, p. 105) defines the inversion of the title of ownership as "uma operação pela qual o detentor obtém, *ex novo*, uma situação possessória, com referência à coisa que já detinha[17]". Similarly, Karl Olivecrona (1938), Salvatore Riccobono (1911) and Vittorio Scialoja (1981).

According to S. F. D. [*sic*] (1861, p. 65), the *interversio possessionis* was a rule of Roman law whereby a man who was the possessor of a thing with a title emanating from another possessor could not begin to maintain himself independently of the title that his possession was subordinate, according to the formula

[16] In fact, the three phenomena produce typical and flagrant detention, and not possession. This in relation to the victim of the attack on the possession. In relation to third parties, the offender enjoys possessory protection, which shows the complexity of possession and the social reasons for its protection (Free translation)
[17] An operation whereby the holder obtains, *ex novo*, a possessory situation, regarding the thing he already held (Free translation)

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*cum nemo causa sibi possessionis mutare*. No one was allowed to change the cause of his possession and to oppose adversely the right under which he owned a thing. It was the maximum *nulla extrinsecus accedente causa*.

Katia Mascia (2007, p. 19) reveals that also in Italy, holders cannot acquire property through adverse possession, even when *interversio possessionis* is operated.

The *interversio possessionis* depends on the cessation of acts of violence and clandestinity practiced for the seizure of possession, as prescribed in the final part of art. 1,208 of the Civil Code: "Art. 1.208. Não induzem posse os atos de mera permissão ou tolerância assim como não autorizam a sua aquisição os atos violentos, ou clandestinos, senão depois de cessar a violência ou a clandestinidade[18]".

But, parallel to this, another discussion arises, which revolves around the moment when the conversion will take place after the violence or clandestinity ceases. In the meantime, four points of view emerge in the legal literature that deserve to be highlighted:

For the first theoretical line, as soon as the acts of violence and clandestinity cease, unjust possession changes into just. From then onwards, possession is held *ad usucapionem*. According to João Manoel de Carvalho Santos (1997, p. 355 ff.), after that cessation there will be “useful possession”.

The second theoretical line understands that as long as the acts of violence and clandestinity last, there is no possession, but mere detention (or *tença*). After the cessation, unfair possession arises, which for this thesis is possession *ad usucapionem* and the stigma of "unfair" is due to the way in which it was acquired, being a conceptual issue to distinguish it from fair possession, which is the one acquired without vices. Accordingly, José Carlos Moreira Alves (1997, p. 358), Francisco Cavalcanti Pontes de Miranda (1971, p. 58), Eduardo Espínola (1956, p. 100 et seq.) and Francisco Eduardo Loureiro (2011, p. 1008) .

Francisco Eduardo Loureiro (2011, p. 1,092), for example, sees unfair ownership as a stigma, but it is still ownership (including, *ad usucapionem*). As long as violence and clandestinity persist, there is mere detention; after such acts, possession arises, but given its origin, it must be considered unfair:

> enquanto perdurar a violência e a clandestinidade, nem posse existe, mas mera detenção. Quando cessam é que nasce a posse injusta. A posse injusta somente se converte em posse justa se mudar o que ela tem de ilícito, ou seja, a sua causa. Logo, somente com a inversão da *causa possessionis*, da razão pela qual se possui, é possível a conversão da posse injusta em justa, porque se retira a ilicitude de sua origem[19].

For the third theoretical line, represented by Silvio Rodrigues (2003, p. 30 and on) and followed by Maria Helena Diniz (2004, p. 63), unfair possession is transmuted into fair one year and one day after the

[18] Art. 1,208. Acts of mere permission or tolerance do not induce possession, nor violent or clandestine acts authorize their acquisition, unless after the violence or clandestineness has ceased (Free translation)
[19] As long as violence and clandestinity persist, there is no possession, but mere detention. When they cease, unjust possession arises. Unfair possession only becomes fair possession if it changes what is illegal in it, that is, its cause. Therefore, only with the inversion of the causa possessionis, of the reason one possesses, it is possible to convert the unfair possession into a fair one, because the illegality of its origin is removed. (Free translation)

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acts of violence and clandestinity, if there is no opposition to the dispossession on the part of the legitimate owner.

Maria Helena Diniz (2004, p. 63), when analyzing art. 1,203 of the Civil Code, verifies that the provision expresses a *juris tantum* presumption. Possession will retain the character of its acquisition (vicious or not, in good faith or not) even if transmitted to third parties, due to the rule *nemo si ipsi causam possessionis mutare potest* (no one can change, by itself, the cause of possession):

> sendo *juris tantum*, tal presunção admite prova em contrário. De modo que, se o adquirente a título clandestino ou violento provar que sua clandestinidade ou violência cessaram há mais de ano e dia, sua posse passa a ser reconhecida (CC, art. 1.208), convalescendo-se dos vícios que a maculavam. O mesmo não ocorre com a posse precária, isto porque a precariedade não cessa nunca[20].

When analyzing the requirements of adverse possession, Maria Helena Diniz (2004, p. 166) understands that the possession that induces adverse possession must be fair:

> Tal posse há de ser *justa*, isto é, sem os vícios da violência, clandestinidade ou precariedade, pois se a situação de fato for adquirida por meio de atos violentos ou clandestinos ela não induzirá posse enquanto não cessar a violência ou clandestinidade e, se for adquirida a título precário, tal situação não se convalescerá jamais[21].

Synthetically, this point of view seems to be the following: after the acts of violence and clandestinity cease, the unjust possession becomes just within a year and a day; *usucapio* will only be granted if there is fair possession. This reasoning leads to the following question: so, are the legal terms of adverse possession increased by one year and one day? For example, the term of collective adverse possession is five years; then, would such a period become six years and one day? There was no answer to these questions in the literature or in the courts (SILVESTR, 2019).

The fourth theoretical line is based on the theory of the social function of possession. It is said that convalescence occurs at the moment of the first opportunity that the legitimate possessor had to oppose the dispossession, however, he did not act, soon after the acts of violence and clandestinity had ceased. In this case, it is understood that there was a resignation regarding the dispossession. Therefore, such an analysis would depend on the specific case. This is the case, for example, of Flávio Tartuce and José Fernando Simão (2009, p. 60 ff.), Sílvio de Salvo Venosa (2010, pg. 88) and Marco Aurélio Bezerra de Melo (2003, p. 18 and on).

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[20] Being *juris tantum*, such a presumption admits evidence to the contrary. So that, if the purchaser under a clandestine or violent title proves that his clandestinity or violence ceased more than a year and a day ago, his possession is recognized (CC, art. 1,208), recovering from the vices that marred it. The same does not happen with precarious possession, this because precariousness never ceases. (Free translation)

[21] Such possession must be fair, that is, without the vices of violence, clandestinity or precariousness, because if the situation is in fact acquired through violent or clandestine acts, it will not induce possession until the violence or clandestineness ceases and, if it is acquired on a precarious basis, such a situation will never recover. (Free translation)

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In particular, it is possible to offer another point of view. In this context, it is also necessary to consider the theory of *actio nata*, whereby the intention to act depends on knowledge of the situation. Art. 1,224 of the Civil Code adopted the *actio nata* for the purposes of loss of possession: " Art. 1.224. Só se considera perdida a posse para quem não presenciou o esbulho, quando, tendo notícia dele, se abstém de retornar a coisa, ou, tentando recuperá-la, é violentamente repelido[22]".

Note that loss of possession, that is, dispossession, depends on two cumulative requirements. The first is the science of dispossession by the rightful owner ("... having news of it..."). (Of course, for the possessor present at the dispossession, science is concomitant to the act of violence and clandestinity). The second requirement is the non-opposition or resignation of the legitimate owner in the face of dispossession ("... he abstains from returning the thing, or, trying to recover it, is violently repulsed"). Please note that the cessation of violence or clandestinety is not required here.

However, art. 1224 must be interpreted systematically in conjunction with the final part of art. 1,208, also of the Civil Code. By this normative formulation, *in fine*, only after the acts of violence and clandestinity cease will the ouster effectively take possession (SILVESTRE, 2019).

That is, the loss of possession occurs when the legitimate owner becomes aware of the dispossession and does nothing to resume the thing, after the acts of violence and clandestinity cease (art. 1224 c/c art. 1208, *in fine*) (SILVESTRE, 2019 ).

It is known that dispossession is the loss of possession - that is, the impossibility of exercising control - of a certain thing. It is also known that adverse possession depends on the dispossession. However, in this case, the *dies a quo* of the usucapting term is the moment of loss of possession by the legitimate owner in the manner established by arts. 1,224 and 1,208. Then yes, from that moment on, the *interversio possessionis* occurs, transmuting unfair possession (*tença*) into fair possession, *ad usucapionem*, with the exception that unfair possession is not possession, but *tença* (SILVESTRE, 2019).

It may seem, at first sight, that the requirement of science of despoil by the legitimate owner is anachronistic, after all, imagine, for example, the owner who surrounds a piece of land and moves to another country, where he lives for twenty years without returning to Brazil. During this period, the property is occupied for fifteen years. Wouldn't he give in to adverse possession?

The science requirement must be analyzed in a mitigated way. The lack of knowledge of the dispossession cannot result from disinterest, negligence and carelessness on the part of the legitimate owner. This "science" must be understood as the possibility of coming to know within the standard of diligence and care with the things that are expected from the *bonus pater familiæ* (average man). The diligence expected of an owner is care for his thing, interest in what goes on in it. (Even because, if the

[22] Art. 1,224. Possession is only considered lost to those who did not witness the dispossession, when, having news of it, they abstain from returning the thing, or, trying to recover it, are violently repulsed (Free translation)

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property is being unduly unusable, it may harm the social function of the property provided for in § 1 of art. 1,228 of the Civil Code).

**4. THE DIVERGENCES AROUND THE INTERVERSION OF THE PRECARIOUS *TENÇA* AND THE UNDERSTANDING OF THE SUPERIOR COURT OF JUSTICE ABOUT THE *INTERVERSIO POSSESSIONIS* OF THE PRECARIOUS *TENÇA* IN A*D USUCAPIONEM* POSSESSION.**

With regard to precariousness, the divergence as to a possible term *a quo* of validation of the vice will also have consequences in the counting of the *usucapio* term.

It is said “possible” because before this divergence there is another one that involves “precarious possession”, which is: if the precarious *tença* is validated in possession *ad usucapionem*. (Or, in other words, whether or not there is *interversio possessionis* of precariousness).

Regarding precarious possession, there is discussion and diverging understandings in the legal literature and in judicial bodies as to whether or not it has an *ad usucapionem* nature, that is, whether “precarious possession” has the power to give rise to adverse possession. Marcus Dantas (2013, p. 32) points out that Brazilian authors diverge on the possibility of remedying this vice.

The precarious *tença* is the one that results from an abuse of trust by someone (direct owner or mere holder), who does not fulfill the duty to return the thing to the legitimate owner. If there is authorized possession, then it is not exercised with *animus sibi habendi* (or *animus domini*), being possession *ad interdicta*, without *usucapio* effects. In this sense, José Augusto Lourenço dos Santos (2012, p. 5.523): “Quando alguém tem o controle material de uma coisa com a obrigação de devolvê-la ao proprietário ou possuidor legítimo e não o faz, pratica abuso de confiança, caracterizando-se a posse precária, isto é, a posse sem *animus domini*[23]”.

In the Brazilian legal literature there are those who, when interpreting art. 1,208 of the Civil Code, understand that the *interversio possessionis* of unfair “possession” based on precariousness in fair possession is not possible, like Silvio Rodrigues (2003, p. 29).

The strict interpretation of art. 1,208 leads to the conclusion that only the thing obtained through violence and clandestinity can be the object of possession, after such acts cease. In the normative formulation, precariousness is not mentioned.

When the acts of violence and clandestinity cease, there will be a transition of the title of ownership, that is, the convalescence of unjust ownership into a fair one. It is called *interversio possessionis* or transmutation of possession (RICCOBONO, 1911) (SCIALOJA, 1981). Such convalescence would not occur, however, in precariousness, as that theoretical point of view points out.

[23] When someone has material control of something with the obligation to return it to the owner or legitimate possessor and does not do so, he practices abuse of trust, characterizing precarious possession, that is, possession without *animus domini* (Free translation)

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If it were accepted that precariousness is a cause of adverse possession — therefore, precarious possession would be *ad usucapionem* —, the *dies a quo* would be the moment when the default on the return of the thing occurs, that is, from the moment the possession becomes unauthorized. But here there is a difference in terms of unfair possession resulting from violence or clandestinity: for detention to become possession in these cases, the vice must cease. On the other hand, precariousness will never cease, so there will not be, here, the necessary *interversio possessionis*. And, by not admitting that precarious possession is *ad usucapionem*, there would not be, *in casu*, possession, but mere detention, so that there would never be *usucapio* and, therefore, the count of term does not matter (SILVESTRE, 2019).

Marcus Eduardo de Carvalho Dantas (2016, p. 23) criticizes the understanding - according to him of almost all specialists in Brazil - that the vice of precariousness cannot convalesce, which would be, in his opinion, contradictory with the defense of repairing of other vices:

> Trata-se de uma interpretação no mínimo insólita, pois acaba tornando o vício da precariedade mais grave que os outros: se o esbulhador usa a violência física contra a pessoa do esbulhado, ele pode ver tal vício sanado das formas mais diversas; se a aquisição se dá pela recusa da restituição isso não seria de forma alguma possível, pela “quebra da confiança”. Mas por que a “quebra da confiança” é mais grave que o uso da força física? Além de não parecer razoável, trata-se de uma interpretação que atribui uma vantagem injustificável em favor do proprietário. Independentemente do que ele tiver feito ou deixado de fazer para retomar o bem, o fato da posse ser injusta bloquearia a usucapião para sempre[24].

However, in Brazil, there are those who admit the convalescence of precarious possession, which, consequently, guarantees *usucapio* to the precarist.

Márcio Manoel Maidame (2002) understands, for example, that the understanding that precariousness never generates effects and will never be *ad usucapionem* is an “interpretação que dá à propriedade caráter absoluto, em detrimento de outros direitos fundamentais, como o de moradia. Por isso incompatível com a nova ordem jurídica[25]”.

Also José Augusto Lourenço dos Santos (2012, p. 5.527) reaches a conclusion by the reversal of precariousness, interpreting the sole paragraph of art. 1,198 and art. 1,203, all of the Civil Code:

> O precarista, como definido alhures, enquanto se encontrar nessa situação, equipara-se ao detentor. E, nessa condição, os efeitos da posse lhe são estranhos

[24] This is an unusual interpretation to say the least, as it ends up making the vice of precariousness more serious than the others: if the ouster uses physical violence against the person who is dispossessed, he can see that vice remedied in the most diverse ways; if the acquisition takes place through the refusal of restitution, this would not be possible at all, due to the “breach of trust”. But why is “breach of trust” more serious than the use of physical force? In addition to not seeming reasonable, it is an interpretation that attributes an unjustifiable advantage in favor of the owner. Regardless of what he did or did not do to regain the good, the fact that possession was unfair would block adverse possession forever. (Free translation)
[25] Interpretation that gives property an absolute character, to the detriment of other fundamental rights, such as housing. Therefore, it is incompatible with the new legal order. (Free translation)

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> não podendo se valer deles. Esta situação era coerente com a redação do artigo 487 do Código Civil revogado, o que justificava a afirmação de que a precariedade não admitia convalescimento. Após a entrada em vigor do Código Civil de 2002 a situação modificou-se. De fato, o artigo 1.198 trouxe uma inovação, no seu parágrafo único, ao permitir a realização de prova que elida a presunção de detenção. Não bastasse isso, o artigo 1.203, apesar de estabelecer que a posse mantém o mesmo caráter com que foi adquirida, admite a prova em contrário. Da interpretação conjunta destes artigos concluímos, sem maior esforço, que a posse precária pode perfeitamente transformar-se em posse capaz de gerar a aquisição da propriedade pela usucapião, bastando que o possuidor em nome alheio inverta o título da posse [26][...].

The normative formulations of the sole paragraph of art. 1,198 and art. 1,203 would indicate that if the precarist started to behave like a holder with *animus domini*, the title would be reversed. His "ownership" would then cease to be precarious and would become *ad usucapionem*. For this, the possessor must practice unequivocal outward acts of opposition to the former possessor and of exercising the *animus domini*.

Accordingly, Katia Mascia (2007, p. 33) emphasizes that reversal is not a subjective and internal volitional act of the holder: "L'inversione del possesso non può consistere in un semplice atto volitivo interiore del detentore, ma deve estrinsecarsi in uno o più atti dai quali possa comunque desumersi la modificata relazione di fatto con la cosa detenuta in opposizione al possessore"[27].

That is how Maurizio De Giorgi (2011, p. 18) argues that the interversion takes place through the "manifestazione esteriore dalla quale sia consentito desumere che il detentore ha cessato di esercitarlo il potere di fatto sulla coisa nomine alieno e ha iniziato a esercitarlo esclusivamente nomine proprio"[28]. In other words, the holder stops possessing in the name of someone else and starts using the thing as if it were his own and with complete independence from the legitimate holder.

According to José Augusto Lourenço dos Santos (2012, p. 5.529), the *ad usucapionem* possession of the precarist will be characterized if there is an external and objective behavior that changes the cause of possession: "o precarista tem que agir de tal forma que não mais reconheça a superioridade do direito

---

[26] The precarist, as defined elsewhere, as long as he finds himself in this situation, is equated with the holder. And, in this condition, the effects of possession are foreign to him, and he cannot make use of them. This situation was consistent with the wording of article 487 of the revoked Civil Code, which justified the assertion that precariousness did not allow convalescence. After the entry into force of the Civil Code of 2002 the situation changed. In fact, article 1,198 introduced an innovation, in its sole paragraph, by allowing evidence to be carried out that elides the presumption of detention. As if this were not enough, article 1203, despite establishing that possession maintains the same character with which it was acquired, admits evidence to the contrary. From the joint interpretation of these articles, we conclude, without further effort, that precarious possession can perfectly be transformed into possession capable of generating the acquisition of property by adverse possession, as long as the holder in another's name reverses the title of possession. (Free translation)

[27] The inversion of possession cannot consist of a simple internal volitional act of the holder, but must be manifested in one or more acts from which one can infer the modified factual relationship with the thing held in opposition to the owner. (Free translation)

[28] External manifestation from which it is possible to infer that the holder stopped exercising his *de facto* power in someone else's name and began to exercise it exclusively in his own name. (Free translation)

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do esbulhado de reaver a coisa, sendo esse comportamento o responsável pelo surgimento do *animus domini*[29]". Likewise, Francisco Eduardo Loureiro (2011, p. 1118) understands that "a mudança de comportamento do precarista, pela inversão do título, permite a transformação da posse *ad interdicta* para posse *ad usucapionem*[30]".

As a matter of fact, for Cristiano Cícero (2005), by the way, the *animus domini* is irrelevant for the *interversio possessionis*, according to an analysis carried out based on Roman and contemporary Law.

Examples of this interversion can be the following, based on the precarist's actions (SILVESTRE, 2019): proposition of a possessory action in the face of some ouster or disturber; payment of taxes levied on the property, which it did not do before; performs useful and voluptuous improvements; sublease; refusal to be accountable to the grantor; and makes changes to the property to meet its own needs.

Therefore, convalescence, when it comes to precariousness, depends on the precarist's alteration of the *causa possessionis*: it will go from possession (*ad interdicta*) consented by the legitimate possessor to a *tença* resulting from a default to later become a dispossession (possession *ad usucapionem*) with *animus domini*.

That is, alteration of the *causa possessionis*, with the emergence of a new possession with different characteristics from the first PONTES DE MIRANDA (1971). Thus, there will be a typical transformation of *possessio naturalis* into *possessio civilis* (CORMACK, 1880) (ALBERTARIO, 1933).

Note that the differences regarding the (in)usucapibility of precariousness are limited to answering the question: is there *interversio possessionis* of precarious *tença*? Three interpretative lines are revealed to answer this question, which can be systematized as follows:

Table 3— Different theoretical views on the convalescence of precariousness.

| IS THERE *INTERVERSIO POSSESSIONIS* OF THE PRECARIOUS *TENÇA*? | | |
|---|---|---|
| *1st line of interpretation* | *2nd line of interpretation* | *3rd line of interpretation* |
| Do not transmute into possession *ad usucapionem* | Transmute in possession *ad usucapionem* | Transmute in possession *ad usucapionem* |
| The normative formulation of art. 1,208 restricts the transformation of *tença* into possession after the cessation of acts of violence and illegality only, without mentioning the vice of precariousness. Therefore, by excluding it, the law indicates that the precarious *tença* cannot become possession. Reinforces this understanding, the | The normative formulation of art. 1,208 was silent about precariousness because it never ceases to exist, as it is a default. As there is nothing left to exist — as it is in acts of violence and clandestinity —, precariousness is already possession per se, that is, *ipso jure*: there is no act (violence or clandestinity) that would need to cease for | Taking the sole paragraph of art. 1,198 with art. 1,203, it is understood that the detention that characterizes precariousness is a *juris tantum* presumption. Thus, if the initial presumption of *tença* in precariousness is elided, the seizure of the thing will imply possession. And so it will be because the situation maintains |

[29] The precarista must act in such a way that they no longer recognize the superiority of the right of the dispossessed to recover the thing, this behavior being responsible for the emergence of the *animus domini*. (Free translation)
[30] The change in the precarist's behavior, through the inversion of the title, allows the transformation from *ad interdicta* possession to *ad usucapionem* possession. (Free translation)

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| | | |
|---|---|---|
| normative formulation of art. 1,200, by which fair possession is one that is not violent, clandestine or precarious. Only when there is no violence, clandestinity and precariousness would an unfair possession become fair. It so happens that violence and clandestinity cease (art. 1208), but precariousness does not. | possession to exist. By the way, when it comes to precariousness, there would not even be detention: there would have been possession since its inception. | its initial character, that is, as it was acquired (art. 1,203). Therefore, if the precarist behaves as a possessor, and not as a keeper, there will be *interversio possessionis* and the precarious "possession" translates into *ad usucapionem* possession. |

Source: Own elaboration, 2020.

And yet, S. F. D. [*sic*] (1861) presents another view: reversal is only effective when it is supported by a possession that is neither ambiguous nor clandestine. It is necessary, to effect a change in the ownership character, that the owner is aware of the new title, that is, of the precarist's new way of acting. The example is a sublet that is not authorized by the contract. For S. F. D. [*sic*] (1861) it is important that there is, in this case, a denial of the owner's right by the precarist.

António Menezes Cordeiro (2004, p. 106) understands that for the inversion of the title, the holder must assume "uma posição mais enérgica e atuação mais efetiva[31]", publicizing his situation as a true holder, that is, that he holds in his own name.

Silvio Rodrigues (2003, p. 30), in turn, understands that "precarious possession" never convalesces, never ceases: "o dever do comodatário, do depositário, do locatário *etc.*, de devolverem a coisa recebida, não se extingue jamais, de modo que o fato de a reterem, e de recalcitrarem em não entregá-la de volta, não ganha jamais foros de juridicidade, não gerando em tempo algum, posse jurídica[32]".

Indeed, the duty of the precarist and the right of the creditor are never extinguished; but the claim of the creditor, legitimate possessor, is liable to extinction, so that, with time, the creditor will no longer be able to exercise it.

Particularly, here it is understood in a different way from the three previous lines. The sampling of documents from the legal literature consulted in this research did not reveal an understanding similar to what will be exposed. Thus, in case there is someone with a hermeneutic proposal in the same sense and who was not mentioned, the excuse is sincere and in good faith, but the bibliographic research did not point to such a source.

All the hypotheses of precariousness raised — verified in examples from the legal literature, concrete real cases and judged in the appeal and special instance — deal with the abuse of trust in

[31] A more energetic position and more effective action. (Free translation)
[32] The duty of the borrower, the depositary, the lessee, etc., to return the thing received, is not extinguished never, so that the fact of retaining it, and refusing to hand it back, never wins legal jurisdiction, not generating at any time, legal possession. (Free translation)

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business situations (not only and specifically contractual). *Rectius*: the hypotheses were about business default regarding the provision of restitution of the thing. (By the way, talking about "abuse of trust" as an element that characterizes precariousness is empty; it is preferable, it seems, to talk about default of a legal transaction).

Before precariousness, there is an agreement between the legitimate owner and someone, that is, a consent to seize the thing. Inevitably, then, there will be a split of ownership in direct and indirect and at the source of this dismemberment of full ownership there will always be a legal transaction, even if tacit (art. 1,197 of the Civil Code).

So much so that Edmundo Pereira Lins (1914, p. 171) points out that since the *Digesto*, precarious possession (*precarium possessionis*) depends on the owner having made contracts with whoever is in possession of his property. It also points out that since the *Digesto* these are the types of possession dependent on contracts, including precarious possession: *emptio possessionis; conductio possessionis; precarium possessionis; possessionis depositum et commodatum;* and *stipulatio possessionis*.

The precariousness occurs in the default of the obligation of the (former) direct possessor to return the thing to the legitimate owner. Default extinguishes the split of possession and creates a situation of unlawful detention (*tença*), generally referred to as "unfair possession", pursuant to art. 1,200.

For the precarious *tença* to become a fair possession (and, consequently, *ad usucapionem*), art. 1,200 demands that the vices of violence, clandestinity and precariousness do not exist.

Violence and clandestinity cease to exist, according to the final part of art. 1,208, when the acts of *vi* and *clam* cease. It is *interversio possessionis*. But what about precariousness? In addition to the answers to the three lines of interpretation, it seems that the precarious *tença* is converted into possession when there is a prescription of the claim that exists around business default (art. 189 of the Civil Code).

In the case of *jus possessionis* (with an *ad usucapionem* character), there is no need to talk about extinguishing prescription, as there is no splitting of possession as a result of a legal transaction (in this case there would be a *jus possidendi*, which has only an *ad interdicta* character).

But precariousness entails a different situation: the *jus possidendi* will become *tença*, which only after the end of the obligation enforceability in the legal business will it become *jus possessionis* (with an *ad usucapionem* character).

Note that all of this is said before the legitimate owner, because before third parties the precarist has possession and, in fact, he is not precarist (art. 1.196). And so it has been for centuries. In this sense, Edmundo Pereira Lins (1914, p. 163):

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> porque o possuidor que adquiriu a posse violentamente, não a póde fazer valer contra o violentado, que se defenderá com a *exceptio vitiosae possessienis*, só o podendo contra terceiros. Estes, porém, não soffreram violência alguma, e, portanto, relativamente a elles, a posse não é violenta, como o ensina Paulo : « *Justa an injusta* adversus coeteros *possessio sit, in hoc interdicto* nihil refert[33]"

Another thing: this thesis does not refer to the "prescription" of possession interdictions. Prescription, here, has a single effect: to convalesce the precarious *tença* in possession, that is, to provoke *interversio possessionis* so that *ad usucapionem* possession arises. This will only interfere with the *usucapio* terms, but in no way affect the exercise of *rei vindicatio* by the legitimate owner.

What about the statute of limitations applied to the hypothesis?

An extensive interpretation of the phrase "debt" in item I of § 5 of art. 206 of the Civil Code, in order to encompass the notion of "obligation", leads to the hypothesis of a five-year term: " Art. 206. Prescreve: [...]. § 5º Em cinco anos: I – a pretensão de cobrança de dívidas líquidas constantes de instrumento público ou particular; [...][34]".

"Debt", in the normative formulation of item I, must be read as "debt", and not necessarily as "amount in money". Therefore, it refers to debts in obligations to give, do and not do, and the debt may fall on the *dare*, o *fare* and o *non fare*.

However, this period of five years applies when there is a public or private instrument that represents the legal transaction. In the absence of this formality/solemnity, that is, if the act was completed in verbal form, then there will be no hypothesis of a special term in art. 206, and the general term of 10 years of art. 205 must be applied.

Finally, honestly, nothing prevents the possessory reversal of precarious detention from taking place, as occurs with cases of violence and clandestinity.

Dilvanir José da Costa (1998, p. 114) understands that all vicious detentions can be transformed *into ad usucapionem* possessions, as long as the holder meets the requirement of "owning as his", which marks his intention from the beginning. It also understands that changes around the concept of possession and the addition of value and social utility to the institute mean that new readings must be made to transform into domain the pretensions that are illegitimate in their origins:

> Tanto que se reconhece hoje a posse do ladrão como apta à prescrição aquisitiva, ante a omissão da vítima e o decurso do prazo legal. São as mudanças de concepções, decorrentes da socialização do direito e da autonomia da posse

[33] Because the possessor who violently acquired possession could not enforce it against the victim, who will defend himself with the exceptio vitiosae possessienis, and can only do so against third parties. These, however, did not suffer any violence, and therefore, in relation to them, the possession is not violent, as Paul teaches: "« *Justa an injusta* adversus coeteros *possessio sit, in hoc interdicto* nihil refert. (Free translation)

[34] Art. 206. Prescribe: [...]. § 5 In five years: I – the intention to collect net debts contained in a public or private instrument; [...] (Free translation)

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> como valor ou utilidade social, capaz de se transformar em domínio independente de sua origem criminosa. O ato ilícito ou criminoso será cobrado na alçada própria, preservadas as técnicas de aquisição dos bens no interesse maior da sociedade como um todo[35] (COSTA, 1998, p. 114).

Marcus Eduardo de Carvalho Dantas (2016, p. 16) understands that convalescence is not a requirement for *usucapio* and removes the influence of time in cleaning up the vices of possession:

> As estratégias de saneamento têm como objetivo transformar uma posse inicialmente injusta em uma posse justa, no pressuposto de que tal requisito é imprescindível para que se possa usucapir. Mas tais estratégias são tão amplas e variadas que o saneamento se torna praticamente inevitável: para uma parte da doutrina, a simples manutenção da posse pelo curto período de 1 ano faz com que ela perca o vício de origem e se torne apta a viabilizar a usucapião[36].

Also according to Marcus Eduardo de Carvalho Dantas (2016, p. 29), "o exercício da posse, seja qual for a sua qualificação, é mais forte do que o não uso[37]".

This research proceeded with the collection of judgments of the Superior Court of Justice on the main questioning of the investigation, that is, if there is *interversio possessionis* of the precarious *tença*.

The search result revealed that many appeals would face the matter if Precedent nº. 07 was not applied: "A pretensão de simples reexame de prova não enseja recurso especial[38]". Therefore, either the appeals were not known or they were dismissed.

The methodology used in the research was as follows:

Table 4— Judgment search procedure.

| website | https://scon.stj.jus.br/SCON/ |
|---|---|
| Date | June 29, 2020 |
| time frame | there was not |
| search term | "possession and *precaria* and *usucapiao*" |
| Species of selected judgments | only judgments |
| Total judgments found | 23 |

[35] So much so that today the possession of the thief is recognized as suitable for acquisitive prescription, given the omission of the victim and the expiration of the legal term. These are the changes in conceptions, resulting from the socialization of law and the autonomy of possession as a social value or utility, capable of becoming a domain independent of its criminal origin. The illicit or criminal act will be charged within its own jurisdiction, preserving the techniques of acquisition of goods in the greater interest of society as a whole. (Free translation)
[36] Repair strategies aim to transform initially unfair possession into fair possession, on the assumption that such a requirement is essential for *usucapio*. But such strategies are so wide and varied that repairing becomes practically inevitable: for a part of the doctrine, the simple maintenance of possession for a short period of 1 year makes it lose its original vice and become able to make the adverse possession viable. (Free translation)
[37] The exercise of possession, whatever its qualification, is stronger than the non-use. (Free translation)
[38] The claim of a simple re-examination of evidence does not entail a special appeal. (Free translation)

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| Number of judgments that dealt with the object of the research | 17 (Note: because of the terms used, some judgments appeared in the search result because they contained the searched words, but they did not concern the object of the research and were disregarded). |
|---|---|
| Analysis method | Quali-quantitative |
| Judges who understood that the *interversio possessionis* of precarious possession was possible | • STJ, REsp. no. 154,733, 4th Panel, Rel. Min. Francisco Cesar Asfor Rocha, j. on May 12, 2000; and<br>• STJ, REsp. no. 1.552.548/MS, 4th Panel, Min Rapporteur Marco Buzzi, j. on June 12, 2016 |
| Judges who understood that it was not possible *interversio possessionis* of precarious possession | • STJ, REsp. no. 844.098/MG, 3rd Panel, Reporting Minister Nancy Andrighi, Reporting for Judgment Minister Sidnei Beneti, j. on June 11, 2008 |
| Judges who did not analyze the matter, not even tangentially, as a result of Precedent no. 07. | • STJ, AgInt. in AREsp. nº 1.172.704/PR, 4th Panel, Min. Rel. Luis Felipe Salomão, j. on February 27, 2018;<br>• STJ, AgInt. in AREsp. No. 990.262/SP, 4th Panel, Rel. Min. Conv. Lázaro Guimarães, j. on February 06, 2018;<br>• STJ, AgInt. in AREsp. nº 1.012.678/GO, 4th Panel, Min. Rel. Luis Felipe Salomão, j. on September 26, 2017;<br>• STJ, AgInt. in AREsp. nº 800.813/SP, 4th Panel, Min. Rel. Maria Isabel Gallotti, j. on August 02, 2016;<br>• STJ, AgRg. in AREsp. nº 473.529/SC, 3rd Panel, Min. Rel. Paulo de Tarso Sanseverino, j. on August 6, 2015;<br>• STJ, AgRg. in the nº 1.299.340/CE, 4th Panel, Min. Rel. Luis Felipe Salomão, j. on March 24, 2015;<br>• STJ, AgRg in REsp. nº 1.415.166/SC, 3rd Panel, Min. Rel. Marco Aurelio Bellizze, j. on October 21, 2014;<br>• STJ, AgRg. in AREsp. nº 180.559/RS, 4th Panel, Min. Rel. Luis Felipe Salomão, j. on December 17, 2013;<br>• STJ, REsp. nº 932.972/RS, 4th Panel, Min. Rel. Luis Felipe Salomão, j. on September 27, 2011;<br>• STJ, REsp. nº 241.814/SP, 4th Panel, Min. Rel. Luis Felipe Salomão, j. on December 09, 2008;<br>• STJ, AgRg. at Ag. nº 579.417/SC, 4th Panel, Reporting Min. Aldir Passarinho Junior, j. on June 05, 2004;<br>• STJ, REsp. nº 143.976/GO, 4th Panel, Min. Rel. Barros Monteiro, j. on April 06, 2004;<br>• STJ, REsp. nº 328.348/MG, 4th Panel, Min. Rel. Ruy Rosado de Aguiar, j. on February 26, 2002; and<br>• STJ, REsp. nº 5.232/MS, 3rd Panel, Reporting Min. Waldemar Zveiter, j. on November 13, 1990. |

Source: Own elaboration, 2020.

Graphically, the survey reveals the following statistic:

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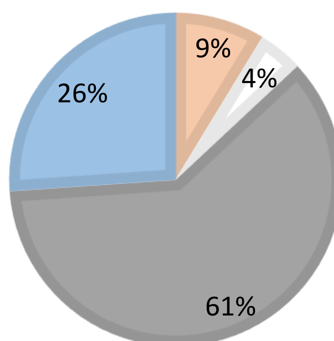
Graph 1 — Statistics of judgments of the Superior Court of Justice (STJ) on possessory inversion of precariousness.




Source: Own elaboration, 2020. Caption translation in top-down order: Precarious possession convalesces; Precarious possession does not convalesce; Precedent n. 07; Decisions on another matter involving precarious possession.

Note that, regarding the matter, the Superior Court of Justice is divided, not presenting jurisprudence on the possibility of inversion of precarious possession. However, there are both favorable and contrary precedents.

The first precedent is Special Resource no. 154.733/DF, which recognized the usucapability of a thing based on precarious possession:

> CIVIL. USUCAPIÃO EXTRAORDINÁRIO. COMPROVAÇÃO DOS REQUISITOS. MUTAÇÃO DA NATUREZA JURÍDICA DA POSSE ORIGINÁRIA. POSSIBILIDADE. O usucapião extraordinário — art. 55, CC — reclama, tão-somente: a) posse mansa e pacífica, ininterrupta, exercida com *animus domini*; b) o decurso do prazo de vinte anos; c) presunção *juris et de jure* de boa-fé e justo título, “que não só dispensa a exibição desse documento como também proíbe que se demonstre sua inexistência”. E, segundo o ensinamento da melhor doutrina, “nada impede que o caráter originário da posse se modifique”, motivo pelo qual o fato de ter havido no início da posse da autora um vínculo locatício, não é embaraço ao reconhecimento de que, a partir de um determinado momento, essa mesma mudou de natureza e assumiu a feição de posse em nome próprio, sem subordinação ao antigo dono e, por isso mesmo, com força *ad usucapionem*. Precedentes. Ação de usucapião procedente. Recurso especial conhecido, com base na letra “c” do permissivo constitucional, e provido. (STJ, REsp. nº. 154.733, 4ª Turma, Rel. Min. Francisco Cesar Asfor Rocha, j. em 05/12/2000)[39].

[39] CIVIL. EXTRAORDINARY USUCAPIO. PROOF OF REQUIREMENTS. MUTATION OF THE LEGAL NATURE OF ORIGINAL POSSESSION. POSSIBILITY. The extraordinary adverse possession — art. 55, CC — claims only: a) gentle

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The Special Appeal discussed matters involving the filing of an adverse possession action against a company in Taguatinga-DF. According to the Rapporteur's vote, the usucapient filed the suit in 1992, when she had 23 years of continuous and peaceful possession. Socially, it was recognized as the owner, paid the applicable taxes and carried out improvements and access to the property. At the beginning of the lessee relationship, the usucapient paid the rent to the company, which later ceased, never paying rent again, nor was it urged to pay.

The lower court upheld the action. Appealing the owner company to the Court of Justice of the Federal District and Territories (TJDFT), the 2nd Civil Panel reformed the previous decision, understanding that the *usucapio* configuration requirements were not present: "a decisão reformadora desprestigiou o requisito da posse, por ter sido ela originada de avença locatícia e, segundo a Turma Julgadora, insusceptível de ter a sua natureza transfigurada, com aptidão para gerar o usucapião[40]" [sic]. This is an excerpt from the TJDFT Appeal's Decision contained in the Special Appeal Rapporteur's Vote:

> Civil. Usucapião. Ausência dos requisitos específicos. Sentença Reformada. Provimento da Apelação. 1. Para obter o domínio da coisa por via de usucapião, exigem-se, além dos requisitos genéricos intrínsecos da petição inicial, os requisitos específicos, não se admitindo possa o usucapiente, unilateralmente, mudar a natureza da posse. 2. Em decorrência, e porque evidenciado que a posse teve origem em relação locatícia, expressamente admitida pela autora, desmerece prestigiada a sentença que, olvidando esse pormenor, acolhe a pretensão deduzida. 3. Apelo Provido[41].

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and peaceful, uninterrupted possession, exercised with *animus domini*; b) the expiration of the period of twenty years; c) *juris et de jure* presumption of good faith and fair title, “which not only dispenses the exhibition of this document but also prohibits the demonstration of its inexistence”. And, according to the teaching of the best doctrine, "nothing prevents the original character of possession from changing", which is why the fact that there was a leasehold bond at the beginning of the author's possession is not an embarrassment to the recognition that, from a given time, it changed its nature and assumed the appearance of possession in its own name, without subordination to the former owner and, for that very reason, with force ad usucapionem. Precedents. Proceedings of adverse possession. Known special appeal, based on letter “c” of the constitutional permissive, and provided. (STJ, REsp. No. 154.733, 4th Panel, Reporting Minister Francisco Cesar Asfor Rocha, j. on December 05, 2000). (Free translation)

[40] The reforming decision discredited the possession requirement, as it was originated from a lease agreement and, according to the Judging Panel, incapable of having its nature transfigured, with the ability to generate adverse possession. (Free translation)

[41] Civil. Usucapion. Absence of specific requirements. Reformed sentence. Provision of the Appeal. 1. In order to obtain possession of the thing through adverse possession, in addition to the generic requirements intrinsic to the initial petition, specific requirements are required, and the usucapient cannot unilaterally change the nature of possession. 2. As a result, and because it is evidenced that the possession originated in a leasehold relationship, expressly admitted by the plaintiff, the judgment which, forgetting this detail, accepts the deduced claim, is discredited. 3. Appeal Provided. (Free translation)

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The usucapient appealed to the STJ. The Rapporteur, Min. Francisco Cesar Asfor Rocha, understood that there had been an *interversio possessionis* from the moment the precarist started to act as if she were the owner, to the detriment of the company's resignation:

> Admitindo-se que de início tenha havido, mesmo que no plano intencional, a relação locatícia, nada impediria a transmudação da natureza da posse, em decorrência de fatores circunstanciais, notadamente o abandono por parte do proprietário que em nenhum momento cuidou de implementar os cometimentos impostos ao locador, *v.g.*: a instrumentalização da avença; a cobrança dos aluguéis; o manejo das ações cabíveis para reprimir a mora *etc. etc*. A esse desiderato, tenho como presente e acoplo o entendimento de [*nome omiti*], segundo o qual — "o *que possuía como Locatário, por exemplo, desde que tenha repelido o proprietário, deixando de pagar os aluguéis e fazendo-lhe sentir, inequivocadamente a sua pretensão dominial, é fora de dúvida que passou a possuir como dono*" (Da Prescrição Aquisitiva, 3ª ed., n° 22, pág. 123). Em conseqüência, válida, também, a argumentação segundo a qual: "*O animus domini está presente, tanto mais porque, no usucapião o critério para a sua aferição é objetivo, resultando de atos que revelam, ostensiva e cumpridamente, a sinceridade da crença do usucapiente em ser dono das terras*". (Revista dos Tribunais, vol. 567, pág. 214). Tomado tudo isso em consideração e tendo-se em conta a situação contextual dos autos, tenho que a decisão divergente melhor aplicou o direito à espécie, porque lastreada em diretriz que melhor revela os requisitos do usucapião extraordinário, assim sintetizada: '*É certo, outrossim, segundo o ensinamento da melhor doutrina, que* '*nada impede que o caráter originário da posse se modifique*', *motivo pelo qual o fato de ter havido no início da posse da autora um vínculo locatício, não é embaraçado ao reconhecimento de que, a partir de um determinado momento, essa mesma mudou de natureza e assumiu a feição de posse em nome próprio, sem subordinação ao antigo dono e, por isso mesmo, com força ad usucapionem*'. '*Assim, a relação locatícia de que cogita a v. sentença é um acontecimento antigo, perdido na noite do tempo, e que foi definitivamente substituído pelo fato atual e inconteste da posse animo domini da autora, que já vem perdurando há muito mais de vinte anos*'. Na esteira dessas considerações, dou provimento ao recurso e restabeleço a sentença de primeiro grau. É como voto[42].

[42] Assuming that at the beginning there was, even if intentionally, the lease relationship, nothing would prevent the change in the nature of possession, as a result of circumstantial factors, notably the abandonment by the owner, who at no time took care to implement the commitments taxes to the lessor, eg: the implementation of the agreement; the collection of rents; the handling of appropriate actions to repress the delay, etc. etc. To this desideratum, I have as a present and I attach the understanding of [name omitted], according to which - "*what he possessed as Lessee, for example, as long as he rejected the owner, failing to pay the rents and making him feel, unequivocally his dominion claim is beyond doubt that he came to possess it as the owner*" (Da Prescrição Aquisitiva, 3rd ed., no. 22, p. 123). Consequently, valid, too, the argument according to which: "*The animus domini is present, all the more so because, in adverse possession, the criterion for its measurement is objective, resulting from acts that reveal, ostensibly and faithfully, the sincerity of the belief of the usucapient in owning the land*" . (Revista dos Tribunais, vol. 567, p. 214). Taking all of this into account and taking into account the contextual situation of the records, I believe that the divergent decision best applied the right to the species, because it was backed by a guideline that best reveals the requirements of extraordinary adverse possession, summarized as follows: *'It is true, as well, according to the teaching of the best doctrine, that 'nothing prevents the original character of possession from changing', which is why the fact that there was a leasehold bond at the beginning of the author's possession is not hindered by the recognition that, from a certain point onwards, it*

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In 2007 and 2008, in Special Appeal nº. 844.098/MG, which was processed in the 3rd Panel, the Justices comprising this body differed substantially as to the legal characterization of the existence of possession *ad usucapionem* in a case involving fiduciary alienation.

The Rapporteur for the process was Min. Nancy Andrighi, but other Ministers asked for successive views of the appeal, diverging from the Rapporteur.

It was a case of extraordinary adverse possession of movable property (a car), proposed by the appellant, against a Bank that financed the acquisition of the vehicle by another person (fiduciary debtor).

In 1997, the appellant purchased the financed vehicle from the debtor of the fiduciary alienation with the Bank, paying the respective price and exercising the calm, peaceful and uninterrupted possession of the vehicle for 07 years, without opposition from the defendant Bank. It requested the acquisition of its property through adverse possession, pursuant to art. 1,261 of the Civil Code.

The judgment dismissed the request, "sob o fundamento de que o veículo em questão estava gravado com cláusula de alienação fiduciária em garantia decorrente de contrato firmado entre o ora recorrido e a pessoa que negociou o veículo com a ora recorrente[43]".

The decision of the Court of Justice of the State of Minas Gerais dismissed the appeal of the appellant in the Special Appeal:

> USUCAPIÃO — CERCEAMENTO DE DEFESA — INOCORRÊNCIA — VEÍCULO — ALIENAÇÃO FIDUCIÁRIA — PRESCRIÇÃO AQUISITIVA — IMPOSSIBILIDADE — *ANIMUS DOMINI* — AUSÊNCIA — Se os documentos contidos nos autos permitem com segurança o julgamento do processo nos termos do artigo 330, inciso I do Código de Processo Civil sem a necessidade da instrução probatória, não há que se falar em cerceamento de defesa. — A cessão a terceiro de veículo objeto de alienação fiduciária em garantia, na vigência do contrato, não é suscetível de aquisição pelo cessionário, via usucapião, em face da ausência do requisito indispensável do *animus domini*. Inteligência do artigo 619 do Código Civil[44].

*changed its nature and assumed the appearance of possession in its own name, without subordination to the former owner and, for that very reason, with force ad usucapionem'*. 'Thus, the lease relationship that the sentence considers is an ancient event, lost in the night of time, and which has been definitively replaced by the current and undisputed fact of the author's possession *animo domini*, which has lasted for much more than twenty years'. In the wake of these considerations, I grant the appeal and reinstate the sentence of the first degree. It is the vote. (Free translation)

[43] On the grounds that the vehicle in question was recorded with a fiduciary alienation clause as a guarantee arising from a contract signed between the respondent and the person who negotiated the vehicle with the appellant. (Free translation)

[44] USUCAPION — LIMITATION OF DEFENSE — INOCCURRENCE — VEHICLE — FIDUCIARY ALIENATION — ACQUISITION LIMITATION — IMPOSSIBILITY — ANIMUS DOMINI — ABSENCE — If the documents contained in the case file safely allow the judgment of the case pursuant to article 330, item I of the Code of Civil Procedure

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The proposed Special Appeal alleged violation of art. 1,261 of the Civil Code of 2002, equivalent to art. 619 of 1916 Civil Code, because, " ao contrário do entendimento do acórdão recorrido, estariam presentes os requisitos exigidos para a configuração da usucapião prevista no referido artigo[45]".

In her vote, the Rapporteur understood that the appellant exercised "posse própria[46]" of the property, which is " posse como dono, a posse da coisa como sua[47]". In this sense, she went on to say that " encontra-se equivocado o acórdão recorrido ao afirmar que para a aquisição da propriedade pela usucapião extraordinária é necessário o *animus domini*[48]". And she also highlighted:

> Com efeito, de se notar o total descaso do recorrido para com o veículo em questão, porquanto se a devedora fiduciária tivesse deixado de cumprir o contrato de alienação fiduciária, nada justifica a inércia do ora recorrido em não ajuizar a ação competente para reaver a posse do veículo, o que poderia ter feito logo após a ocorrência do inadimplemento — mas que não foi feito até o momento[49].

Thus, for the Rapporteur, "a recorrente exerce uma posse autônoma, própria, que não depende, para existir, de qualquer relação jurídica negocial com o recorrido[50]". Furthermore, "se o financiamento não foi pago, deve o recorrido cobrá-lo da devedora fiduciária[51]". From this, the Rapporteur voted to know the Special Appeal and granted it, reforming the appealed decision, acknowledging in favor of the appellant the extraordinary adverse possession of the vehicle and declaring the ownership of the vehicle.

Minister Humberto Gomes de Barros asked to see the case file. In his vote-view, the Minister understood that in the transaction the appellant carried out with the trustee debtor, she did not buy the vehicle, as the trustee debtor held the asset for the trustee, maintaining only direct possession; indirect possession and (resolvable) property belonged to the Bank, the fiduciary creditor (trustee).

without the need for evidentiary instruction, there is no need to speak of curtailing the defense. — The assignment to a third party of a vehicle subject to fiduciary alienation in guarantee, during the term of the contract, is not susceptible to acquisition by the assignee, via adverse possession, due to the absence of the indispensable requirement of the animus domini. Intelligence of Article 619 of the Civil Code. (Free translation)

[45] Contrary to the understanding of the appealed decision, the requirements required for the configuration of adverse possession provided for in that article would be present. (Free translation)

[46] Own possession. (Free translation)

[47] Possession as owner, ownership of the thing as her/his own. (Free translation)

[48] The appealed decision is wrong in stating that for the acquisition of property by extraordinary adverse possession the *animus domini* is necessary. (Free translation)

[49] In fact, the defendant's total disregard for the vehicle in question should be noted, because the trustee had failed to comply with the fiduciary sale agreement, nothing justifies the defendant's inertia in not filing the competent action to regain possession of the vehicle, which it could have done right after the default occurred — but which has not been done so far. (Free translation)

[50] The appellant exercises its own autonomous possession, which does not depend, for its existence, on any legal business relationship with the defendant. (Free translation)

[51] If the financing has not been paid, the defendant must collect it from the trustee. (Free translation)

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Thus, for the Minister, the appellant did not acquire the vehicle, because whoever sold it did not own the domain (typical case of sale *a non domino*).

According to the Minister, to investigate the possibility of adverse possession, it is necessary, first, to determine the existence of possession based on arts. 1,200 and 1,208 of the Civil Code: "A posse injusta, porque violenta ou clandestina, pode dar ensejo à usucapião. Antes, porém, há que cessar a violência ou a clandestinidade[52]".

In this systematic interpretation, the Minister concluded that "não há, entretanto, no Código, previsão para que a posse precária autorize a aquisição do bem (por prescrição aquisitiva). Numa palavra: a posse precária não cessa, nem se converte[53]". This understanding is already opposed to that of Special Appeal no. 154,733/DF, 2000.

Continuing, Minister Humberto Gomes de Barros understood that the applicant's possession was clandestine:

> A clandestinidade da posse da autora é evidente. Clandestina é a posse omitida de quem tinha verdadeiro interesse em conhecê-la. No caso, o banco (exatamente porque a usucapião somente a ele pode prejudicar). Não há prova de que o banco recorrido tenha sido informado da posse, o que faria cessar a clandestinidade. Só com a citação, portanto, houve ciência do banco, que permitiria o início do prazo da prescrição aquisitiva. Como o banco recorrido se opôs à pretensão da autora, ora recorrente, não se consumou a usucapião (prazo iniciado com a citação)[54].

However, the Minister understood that, in addition to being clandestine, the applicant's possession was also precarious:

> Se o fiduciante se torna inadimplente perante o banco fiduciário, a posse que era justa e direta torna-se precária. Porque precária é a posse de quem tem o dever de restituí-la quando reclamada por quem de direito. O fiduciante inadimplente tem o dever de restituir a posse direta ao proprietário fiduciário. Se não o faz, expõe-se à busca e apreensão. Não importa que o fiduciante transmita a terceiro a posse direta da coisa antes de tornar-se inadimplente. Com o inadimplemento, a posse é contaminada e torna-se precária, seja quem for o possuidor[55].

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[52] Unfair possession, because it is violent or clandestine, can give rise to adverse possession. First, however, the violence or the clandestinity must stop. (Free translation)

[53] There is, however, no provision in the Code for precarious possession to authorize the acquisition of the asset (by acquisitive prescription). In a word: precarious possession does not cease, nor does it convert. (Free translation)

[54] The clandestinity of the author's possession is evident. Clandestine is the omitted possession of those who had a real interest in knowing it. In this case, the bank (precisely because adverse possession can harm only it). There is no proof that the defendant bank was informed of the possession, which would put an end to clandestineness. Only with the summons, therefore, was the bank aware, which would allow the beginning of the acquisitive prescription period. As the defendant bank opposed the claim of the plaintiff, now appellant, the adverse possession was not consummated (term beginning with the citation). (Free translation)

[55] If the trustee defaults to the trustee, the possession that was fair and direct becomes precarious. Because precarious is the possession of those who have the duty to return it when claimed by those with the right. The

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The Minister understood, then, that if the trustee is in default, the appellant's possession is precarious and, consequently, does not lead to adverse possession, as the trustee Bank has the right to demand the return of the thing from whoever holds it. That said, he voted not to grant the Special Appeal, being accompanied by Minister Ari Pargendler. Minister Sidnei Beneti asked for a view.

This last Minister understood that the situation is only about clandestine possession, and that, for contractual reasons, the factual situation was not able to generate adverse possession:

> Com efeito, a posse de bem por contrato de alienação fiduciária em garantia não pode levar a usucapião, por mais que passe o tempo, seja pelo adquirente, seja por cessionário deste, porque essa posse remonta ao fiduciante, que é a financiadora, a qual, no ato do financiamento, adquire a propriedade do bem, cuja posse direta passa ao comprador fiduciário, conservando a posse indireta (Ihering) e restando essa posse como resolúvel por todo o tempo, até que o financiamento seja pago. A posse é justa enquanto válido o contrato. Ocorrido o inadimplemento, transforma-se em posse injusta, incapaz de gerar direito a usucapião, não preenchendo os requisitos do art. 1261 do Cód. Civil/2002, equivalente ao art. 619 do Cód. Civil/1916. Atente-se, ainda, ao que dispõe o art. 1208 do Cód. Civil/2002 (correspondente ao art. 497 do Cód. Civil/1916): "Não induzem posse os atos de mera permissão ou tolerância, assim como não autorizam a sua aquisição os atos violentos, ou clandestinos, senão depois de cessar a violência ou a clandestinidade". A clandestinidade, no caso de conservação do bem ao inadimplemento do contrato de alienação fiduciária e cessão a terceiro é evidente, de maneira que, a rigor, no caso, nem mesmo se tem posse, nem mesmo direta, mas mera detenção, que não pode transformar-se em posse "*ad usucapionem*" por mais que passe o tempo — visto que "*quod ab initio vitiosum est, non potest tractu temporis convalescere*"[56].

defaulting trustee has the duty to return direct possession to the trustee. If it doesn't, it exposes itself to search and seizure. It does not matter that the trustee debtor transfers direct possession of the thing to a third party before it defaults. With default, ownership is contaminated and becomes precarious, whoever the possessor is. (Free transaltion)

[56] In fact, possession of assets under a fiduciary alienation in guarantee agreement cannot lead to adverse possession, no matter how long the time passes, either by the acquirer or by the transferee, because this possession dates back to the fiduciary, which is the lender, which, in the act of financing, acquires ownership of the asset, whose direct possession passes to the fiduciary buyer, keeping indirect possession (Ihering) and remaining this possession resolvable for all time, until the financing is paid. Possession is fair while the contract is valid. If the default occurs, it becomes unfair possession, incapable of generating the right to adverse possession, not meeting the requirements of art. 1,261 of the Civil Code/2002, equivalent to art. 619 of the Civil Code/1916. Also pay attention to the provisions of art. 1,208 of the Civil Code/2002 (corresponding to article 497 of the Civil Code/1916): "The acts of mere permission or tolerance do not induce possession, just as violent or clandestine acts do not authorize their acquisition until after the violence or clandestinity has ceased." The clandestinity, in the case of conservation of the property to the breach of the fiduciary alienation agreement and assignment to a third party is evident, so that, strictly speaking, in the case, there is not even possession, not even direct, but mere detention, which cannot transform itself into possession "*ad usucapionem*" no matter how much time passes—since *"quod ab initio vitiosum est, non potest tractu temporis convalescere*". (Free translation)

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Accordingly, the Minister considered that it was impossible to change the nature of the *ad usucapionem* possession of the property received into a fiduciary alienation as a guarantee, which is why he did not "know" about the Special Appeal. (In the language of the 3rd Panel, this means “denying provision”).

Despite basing his vote-view on the existence of a clandestine possession that has not been convalesced, it seems that the Minister's arguments are more directed towards a description of the precarious possession.

Finally, the summary of the Judgment of Special Appeal nº. 844.098/MG looked like this:

> CIVIL. USUCAPIÃO. VEÍCULO. ALIENAÇÃO FIDUCIÁRIA. INADIMPLEMENTO. PRESCRIÇÃO AQUISITIVA. IMPOSSIBILIDADE. POSSE INJUSTA. I.- A posse de bem por contrato de alienação fiduciária em garantia não pode levar a usucapião, seja pelo adquirente, seja por cessionário deste, porque essa posse remonta ao fiduciante, que é a financiadora, a qual, no ato do financiamento, adquire a propriedade do bem, cuja posse direta passa ao comprador fiduciário, conservando a posse indireta (IHERING) e restando essa posse como resolúvel por todo o tempo, até que o financiamento seja pago. II.- A posse, nesse caso, é justa enquanto válido o contrato. Ocorrido o inadimplemento, transforma-se em posse injusta, incapaz de gerar direito a usucapião. Recurso Especial não conhecido. (STJ, REsp. nº. 844.098/MG, 3ª Turma, Rel. Min. Nancy Andrighi, Rel. p/ Acórdão Min. Sidnei Beneti, j. em 06/11/2008)[57].

In 2016, the Court was asked to rule again on the hypothesis of transmutation, in REsp. No. 1.552.548/MS, which was processed in the 4th Panel:

> RECURSO ESPECIAL — USUCAPIÃO EXTRAORDINÁRIA — INSTÂNCIAS ORIGINÁRIAS QUE JULGARAM IMPROCEDENTE OS PEDIDOS — POSSE *AD USUCAPIONEM* E POSSE PRECÁRIA — TRANSMUDAÇÃO DA SUA NATUREZA — POSSIBILIDADE — NÃO OCORRÊNCIA NA ESPÉCIE — INEXISTÊNCIA DE ALTERAÇÃO FÁTICA SUBSTANCIAL ENTRE A AQUISIÇÃO DA POSSE E O SEU EXERCÍCIO — CONTRATO DE COMODATO — RECURSO ESPECIAL DESPROVIDO. Hipótese: A presente controvérsia consiste em aferir se, para fins de usucapião extraordinário, a posse originariamente precária pode transmudar-se a dar ensejo àquela exercida com *animus domini*. 1. Tanto sobre a égide do Código anterior, quanto do atual, os únicos requisitos exigidos para a aquisição da propriedade por usucapião extraordinário [*sic*] são a posse *ad usucapionem* e o prazo previsto em lei. 2. Para fins de aquisição da propriedade por usucapião admite-se tanto a acessão na posse, *accessio possessionis*, quanto a sucessão na

[57] CIVIL. USUCAPION. VEHICLE. FIDUCIARY ALIENATION. DEFAULT. ACQUISITIVE PRESCRIPTION. IMPOSSIBILITY. UNFAIR POSSESSION. I.- Possession of property under a fiduciary alienation contract in guarantee cannot lead to adverse possession, either by the acquirer or by its assignee, because such possession dates back to the fiduciary, which is the finance company, which, in the act of financing, acquires the ownership of the good, whose direct possession passes to the fiduciary buyer, retaining indirect possession (IHERING) and this possession remains resolvable for all time, until the financing is paid. II.- Possession, in this case, is fair while the contract is valid. Once the default occurs, it becomes unfair possession, incapable of generating the right to adverse possession. Special Feature not known. (STJ, REsp. No. 844.098/MG, 3rd Panel, Reporting Justice Nancy Andrighi, Reporting for Judgment of Justice Sidnei Beneti, j. on June 11, 2008). (Free translation)

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> posse, ou *successio possessionis*. 3. No caso dos autos, verifica-se que mesmo com a morte da primeira posseira, não houve alteração fática substancial a ponto de conduzir à transmudação da posse por ela exercida, já que durante todo o tempo a relação jurídica estabelecida entre as partes foi regida pelo comodato, primeiro verbal, depois escrito. Nas hipóteses em que a alteração fática autorizar, admite-se a transmudação da natureza da posse para fins de configuração de usucapião, todavia, tal não ocorreu na espécie, em que a posse originariamente adquirida em caráter precário, assim permaneceu durante todo o seu exercício. 4. Recurso especial não provido. (STJ, REsp. nº. 1.552.548/MS, 4ª Turma, Rel. Min. Marco Buzzi, j. em 06/12/2016)[58].

As can be seen from the analysis of the beginning and end of the Judgment, the body understood that precarious possession can be converted into *ad usucapionem*: " POSSE *AD USUCAPIONEM* E POSSE PRECÁRIA — TRANSMUDAÇÃO DA SUA NATUREZA — POSSIBILIDADE — NÃO OCORRÊNCIA NA ESPÉCIE[59]". However, in the factual situation, that is, in that specific case, there was no such conversion, as the *tença* kept the title of precarious at all times. Conclusion: this judgment admits the *interversio possessionis* of precarious possession.

Accordingly, the conversion of *tença* as precariousness into possession *ad usucapionem* does not present a uniform and convergent understanding within the scope of the special instance. And this not only because of the confusion between precariousness and clandestinity, but also, for sometimes recognizing that the precarious *tença* generates adverse possession and sometimes recognizing that it does not generate it.

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[58] SPECIAL APPEAL — EXTRAORDINARY USUCAPION — ORIGINARY BODIES THAT RULED THE REQUESTS UNFOUNDED — POSSESSION *AD USUCAPIONEM* AND PRECARIOUS POSSESSION — CHANGE OF ITS NATURE — POSSIBILITY — NO OCCURRENCE OF ITS TYPE — INEXISTENCE OF MATERIAL FACTUAL CHANGE BETWEEN THE ACQUISITION OF OWNERSHIP AND ITS EXERCISE — LEASE AGREEMENT SPECIAL — REMEDY DENIED. Hypothesis: The present controversy consists in assessing whether, for the purposes of extraordinary adverse possession, the originally precarious possession can be transmuted into giving rise to that exercised with animus domini. 1. Under both the previous and current Code, the only requirements required for the acquisition of property by extraordinary usucapion [sic] are possession *ad usucapionem* and the period provided for by law. 2. For the purposes of property acquisition by adverse possession, both accession in possession, *accessio possessionis*, and *successio possessionis*, are admitted. 3. In the case of the case file, it appears that even with the death of the first squatter, there was no substantial factual change to the point of leading to the change of possession exercised by her, since throughout the time the legal relationship established between the parties was governed by lending, first verbal, then written. In the cases in which the factual change authorizes, the transmutation of the nature of possession for the purposes of usucapion configuration is admitted, however, this did not occur in the species, in which the possession originally acquired in a precarious nature, remained so throughout its exercise . 4. Special appeal not provided. (STJ, REsp. No. 1.552.548/MS, 4th Panel, Min. Rel. Marco Buzzi, j. on December 06, 2016). (Free translation)

[59] *AD USUCAPIONEM* POSSESSION AND PRECARIOUS POSSESSION — TRANSMENDATION OF ITS NATURE — POSSIBILITY — NO OCCURRENCE IN THE SPECIES. (Free translation)

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## 5. THE INDIVIDUAL AND COLLECTIVE URBAN *USUCAPIO* RESULTING FROM THE VALIDATION OF THE PRECARIOUS *TENÇA*: GUARANTEE HOUSING AND WORK

Possession has, according to Cornelia Munteanu (2008), a certain "*beatitudine*" ("beatitude"), as it is the heart of rights over things ("*inima dreptului proprietății*" or "*cœur du droit des biens*"). Therefore, whoever exercises useful powers over the thing exercises a true possession that deserves to be protected.

So, there are no reasons that justify considering the power that the precarist exerts over the thing as a mere detention instead of a possession that fulfills its socioeconomic function, especially when it comes to the exercise of possession with social aspects.

There is, at present, a classification of possession parallel to those traditional and known for a long time. Luciano de Camargo Penteado (2014, p. 623) speaks of a classification by the social aspect or by the qualification of possession. Hence there would be:

- Possession of work: that which is exercised with the performance of a labor and productive activity on the property;
- Social possession: that exercised for housing or work purposes by poor people, who will receive special guardianship for this reason;
- Housing possession: that intended for housing the owner and his/her family;
- Legitimate possession: that which results from recognition by the municipal government, via the legitimation title, and intended for land title regularization and subsequent acquisition of property.

This classification of possession has repercussions on modalities of adverse possession that will have terms and requirements more favorable to the usucapient.

The "precariousness" of possession (*rectius*: detention or *possessio naturalis*) arising from *precarium*, *precario*, *precaria* and *stipendium* contracts - and which would be an unmodifiable condition *ad perpetuate*, even after years of default - is, it seems, the root of treating precarious possession as incurable. Default in real contracts, today, is close to that Roman idea of default in precarious conditions. Hence the inevitable historical association. However, Rome was a different time and with different values from those of today. An example is the property right, which no longer has the absolute character of before and is currently subject to a social function.

There is, however, a "but" here.

Marcus Eduardo de Carvalho Dantas (2016, p. 20-23), when analyzing the convalescence of precariousness to give rise to fair possession, is opposed to talking about "saneamento pelo cumprimento da função social[60]". This would have led to a situation in which, according to him, " nos tribunais fala-se em cumprimento da função social quando a posse de um terreno é utilizada para criação de galinhas[61]". He

[60] Rapairing for the fulfillment of the social function. (Free translation)
[61] In the courts there is talk of fulfillment of the social function when the possession of land is used for raising chickens. (Free translation)

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warns that there are usucapion modalities that do not require the usucapient to behave within the characteristic standards of the social function, that is, he/she does not exercise possession for housing and as a source of work.

Adapting this understanding to remedy the vice of precariousness, if the *interversio possessionis* of the precarious *tença* is being conditioned to the fulfillment of a social function of possession, then there is no need to talk about the possibility of extraordinary usucapion of the caput of art. 1,238 of the Civil Code in this case. In this modality there can be usucapion even with the property sealed and unused for years (as long as it does not constitute dereliction). What social function is there in this possession?

Therefore, there is only consistency in associating the *interversio possessionis* of precarious *tença* with the fulfillment of a social function if the "precarious possession" is *pro morada*, *pro labore* and/or *pro misero*, that is, in those hypotheses of special adverse possession, such as rural and the urban (individual and collective).

Thus, the idea that the simple possession by the precarist already means the virtue of fulfilling the social function of possession is not adequate; it may even be that the dispossessed has better socioeconomic intentions to give to that thing.

Giving a social function means using something in a socially relevant way, such as housing and work. Thus, raising chickens (DANTAS, 2016, p. 20-23) can mean the fulfillment of the social function, as long as it is, for example, the support of a needy family.

For example, Emerson Affonso da Costa e Moura and Maurício Jorge Pereira da Mota (2015, p. 1301) clarify that the problematic issues surrounding urban housing are not only a consequence of irregularly divided urban land, or urban areas without infrastructure and housing conditions, or the occupation of environmental protection areas.

It makes perfect sense, because in parallel to all this, there is also the regularization of possession and ownership of many families - generally poor -, who have in the special urban possession (whether individual or collective) their instrument to enforce their right of domain and of housing.

Josué Mastrodi and Ederson dos Santos Alves (2017) state that after General Recommendation No. 4 of the United Nations Committee on Social, Economic and Cultural Rights, the right to housing must be adequately guaranteed, and one of the ways to guarantee such adequacy is through the legal security of possession. As they write, this element consists of the following:

> A segurança jurídica da posse garante que uma pessoa ou um grupo deve ter a garantia de alguma proteção legal, ou seja, que seja assegurada a continuidade temporal contra desalojamento forçado, independentemente do tipo de posse, evitando qualquer ameaça ou lesão ao direito de moradia, uma vez que essa falta de proteção compromete ou deteriora a qualidade de vida dessas pessoas.

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> Assim, caberia aos Estados-Parte do PIDESC trabalharem visando à construção dessa segurança (MASTRODI e ALVES, 2017, p. 35)[62].

Therefore, the urban property used *pro morada*, even if it is a precarious *tença*, must have its possession guaranteed, protected and assured, as a commitment signed by the States with the United Nations. See, then, that there is one more argument in favor of *interversio possessionis*, at least for the purposes of protecting possession, *pro morada*, *pro labore* and *pro misero* in urban perimeters.

In addition, Josué Mastrodi and Ana Carolina Batista (2016, p. 1552) question whether there is a "fundamental right to ownership" and identify that "mais do que a simples relativização do conceito de propriedade, é possível defender, no âmbito da propriedade urbana, a subordinação da propriedade do imóvel residencial urbano à moradia – direito social fundamental que, concretamente, identifica o uso efetivo do imóvel segundo sua função social[63]".

They argue that possession is much more than a component of property rights: it is the basis of the right to housing, which is the "aplicação finalística e concreta do uso de uma propriedade urbana[64]". Therefore, since housing is a fundamental right, possession for housing purposes is a fundamental right (MASTRODI and BATISTA, 2016, p. 1552).

Imagine, now, someone or an urban nucleus that precariously owns a property - not because it is a public property, but because it is a legal transaction between individuals whose return of the property has been defaulted - and that has been used for housing or work purposes for years. This circumstance is not that of a mere *tença*; there is an interest in society to consider this situation relevant, especially if it concerns poor people. In this context, it makes perfect sense to speak of a right to possession of those who continued to enjoy and give the property a lawful purpose. In other words, these holders, under these conditions, have a right to *interversio possessionis* of the precarious *tença* in possession *ad usucapionem*, in order to regularize their dominion situation in the urban space.

And, once again, it appears that the precariousness of art. 1,200 of the Civil Code cannot be read, interpreted and applied based on Roman precariousness. The precariousness of today does not have the contours of the precariousness of that historical moment. In classical, imperial and post-classical Rome (late antiquity) precariousness was conceived precisely for this: to be detention before the original possessor (to rule out the possibility of adverse possession) and to be a possession *ad interdicta* before *penitus extranei* to the business of *precarium* and *precario*.

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[62] The legal security of possession guarantees that a person or a group must be guaranteed some legal protection, that is, that temporal continuity is ensured against forced eviction, regardless of the type of possession, avoiding any threat or injury to the right to housing, since this lack of protection compromises or deteriorates the quality of life of these people. Thus, it would be up to the State Parties to the ICESCR to work towards the construction of this security (MASTRODI and ALVES, 2017, p. 35). (Free translation)
[63] More than a simple relativization of the concept of property, it is possible to defend, in the context of urban property, the subordination of ownership of urban residential property to housing – a fundamental social right that specifically identifies the effective use of the property according to its social function. (Free translation)
[64] Finalistic and concrete application of the use of an urban property. (Free translation)

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So does it really make sense to maintain this historical reading of vice? It seems not, because this reading was lost over time and the idea of precariousness is another, after all, the precarist was once the direct possessor of the thing, and not necessarily a holder.

So, today, why precariousness would be incurable if there is not even an express prohibition in this regard? Because of its gravity, it shouldn't be, after all, abusing trust is no more serious than an act of violence*, a priori*.

Well then. The conclusion reached is that the precariousness of today (vice) is quite different from that initially conceived in Rome; therefore, it makes no sense to read it today from the effects of the *precarium*, the *precario*, the *precaria* and the *stipendium*, as there is no necessary correspondence. So that the social function of possession - fulfilled in the conditions of *pro morada*, *pro labore* and *pro misero* - mitigates the impossibility of convalescence of precarious *tença*, as a way of giving rise to individual or collective urban special usucapion to guarantee housing and work .

## 6. CONCLUSION

*Interversio possessionis* — through possession *pro morada*, *pro labore* and *pro misero* — guarantees the precarious holder that, through usucapion (especially the urban one), he/she has legal security of possession and his/her rights to housing and work are guaranteed. However, despite this, there is no consensus neither in the legal literature nor in the special instance on the *interversio possessionis* of the precarious *tença* in possession *ad usucapionem*.

First, because “precariousness” revealed itself to be a polysemic concept — in a historical and legal sense — taking on meanings such as: an act of liberality; freely revocable loan agreement (*ad nutum* revocability), a modality absorbed by the lending over time; detention; possession *ad interdict*; subjective vice; formal vice; absence of title; null title (or title legitimacy); and possession in bad faith.

And second, because the (inevitable) association of precariousness with the abuse of trust seems to give more serious connotations to this vice, in order to verify a resistance to considering that a situation like this can benefit the precarist with the acquisition of property through adverse possession.

But recent understandings and already used in the Superior Court of Justice have argued for the possibility of *interversio possessionis* in case of precarious detention.

This research identified that the inversion of the title due to the presence of the *animus domini*, which before the precariousness was absent (or irrelevant), becomes an essential requirement for the inversion. In fact, it is about the *animus rei sibi habent*: it will not necessarily be the intention to be the owner, but to act as the owner, expressing the *imago domini* (objective theory). Thus, the inversion would take place from the way in which precarist began to behave in relation to the thing and the owner.

After reflecting on the convalescence or not of precarious detention in *possession ad usucapionem*, it was found that there is no reason, motive or cause for not recognizing its possibility. On the contrary: if

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the *regulæ juris* of the social function of possession is used for the interpretation of legal rules, then the title's inversion will be mandatory, as the property will be guaranteed to those who are useful and serve the socioeconomic interests of the thing.

However, the association of *interversio possessionis* of precarious *tença* with the fulfillment of a social function was made only in relation to “precarious possession” *pro morada*, *pro labore* and/or *pro misero*, that is, in those hypotheses of special adverse possession.

If the non-recognition of the *interversio possessionis* of detention in these precarious cases is due to the protection of individual contractual trust — arising from ethical duties that affect particular relationships — then the social function of possession will eventually override the protection of trust, since the consequences of interpreting the rules according to the social function attend to social interests regarding the correct socioeconomic destination of things.

As a matter of fact — being a bit of a pandectist-historicist — there are not even historical reasons for not admitting this inversion of the title. It is that *precario* is not, historically, a vice, but a contract.

Everything seems to indicate that precariousness as a vice is an association made with the default in returning the thing in the *precarium* and in the *precario* of the Romanistic tradition and in the *precaria* of the canonical tradition. The *precario accipiens* (precarist) could not enforce usucapion of the property because it had no possession before the *precario dans* (grantor); he was a holder. But he was the holder during the contract and also after the default.

Thus, the figure of the *precarium* was conceived so that the *precario accipiens* would never have possession and would never become usucapient in the face of the *precario dans*. But this has nothing to do with a viciousness of the *precarium*, but with its legal-contractual regime.

So that to associate - conceptually or as to the effects - the vice of the precariousness of art. 1,200 of the Civil Code to the "precarious detention" of Roman Law in order not to conceive the possessory inversion and usucapability, is not a correct historical interpretation.

It seems, then, that there is no longer any *ratio legis* or *ratio juris* for the inconvertibility of the precarious *tença* in possession. If it ever existed, the social function of possession, the legal security of possession in urban spaces and the right to housing from the legal system protect it; and if it still exists, the *regulæ juris* of the social function overrides such reasons for its existence.

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**Trabalho enviado em 08 de julho de 2020**
**Aceito em 20 de julho de 2021**