

USUCAPTION AS A MEANS OF ACQUIRING THE OWNERSHIP TITLE

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Abstract

According to the Civil Code in force, the ownership title may be acquired, according to law, by convention, legal or testamentary inheritance, accession, usucaption, as effect of the good-faith possession in case of movable assets and fruits, by occupation, tradition, as well as by court decision, when it is not conveyancing by itself. Moreover, according to the law, the ownership title may also be acquired by to the effect of an administrative act, and the law may further regulate other means of acquiring the ownership title.

Therefore, the usucaption is that modality of acquiring the ownership title and other main real rights by exercising an uninterrupted possession over an asset, within the term and under the conditions provided for by the legislation in force.

In Romanian modern law, referred to as acquisitive prescription, usucaption was first regulated in the Civil Code adopted on 1864, which stipulated two types, i.e.: short-term usucaption, of 10 to 20 years and long-term usucaption, of 30 years.

The institution of usucaption is justified, in relation to the situation of the owner, as the need for stability of the situations and of the legal relations imposes, at a certain time and subject to compliance with certain conditions provided for by the law, the acknowledgment of certain legal effects to the long appearance of property, until transforming a situation de facto in a situation de jure. Concurrently, as the courts also considered, in justifying the institution of usucaption one cannot put aside the situation of the former owner, meaning that, indirectly, the usucaption is also a sanction against the former owner's passivity, who waived his own good and has not been interested in it for a long time, leaving it in the possession of another person who behaved as owner or as holder of another main real right.

Depending on the nature of the asset susceptible of usucaption, the usucaption may be of two main types: immovable usucaption and movable usucaption. In its turn, immovable usucaption may be extra-tabular immovable usucaption and immovable tabular usucaption.

As one will establish during the study, the extra-tabular usucaption operates in favor of the holder of the asset representing the subject of an ownership title over an immovable asset that was not registered with the land register, tabular immovable usucaption operates in the favor of a person who is registered in the land register as the rightful owner of a key immovable property right, only if the registration was made without "legitimate grounds".

Keywords: *usucapio, right of ownership, possession, real estate usucapio, movable assets usucapio.*

1. Introduction

The article presents the usucapio as a modality of acquiring the right of ownership and other main real rights by exercising an

uninterrupted possession over an asset, within the term and under the conditions provided for by the legislation in force. It should be mentioned that were taken into consideration the relevant dispositions of the

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Civil Code and the most important jurisprudence in the field.

2. Content

2.1. Means of Acquiring the Ownership Title

If in the 1864 Civil Code¹, the listing of the means to acquire the ownership title was *imprecise* and *incomplete*², being often criticized for the conflict it generated to the rules and principles of law³, in the Civil code in force⁴, art.557 with the marginal title “*Acquiring the Ownership Title*” orders, under paragraph (1), in a more rigorous and clearer systematization, that “*The ownership title may be acquired according to the law, by convention, legal or testamentary inheritance, accession, usucaption, as an effect of the good-faith possession in the case of movable assets and of the fruit thereof, through occupation, Traditio, as well as by court order, if it involves property transfer as such*” (our emphasis). Moreover,

according to the law, the ownership title may also be acquired by to the effect of an administrative act (paragraph 2), and the law may further regulate other means of acquiring the ownership title paragraph (3).

At the same time, according to art. 557(4), except for certain situations stipulated under the law, in the case of fixed assets, the ownership title is acquired by registration with the real estate register, in compliance with the provisions in art.888 of the Civil Code⁵. According to art. 56(1) of the Law no.71/2011 on the enforcement of the new Civil Code, the provisions in art. 557 (4) only apply after the completion of the of cadaster works for each administrative-territorial unit and the opening, upon request or *ex-officio*, of the real estate registers for the respective properties, according to the provisions in Law no. 7/1996 on cadaster and real estate publicity, republished, as amended and supplemented⁶.

It should be mentioned that usucaption should not be mistaken for occupation⁷,

¹ Published with the Official Journal no. 271 of 4 December 1864, no. 7 (suppl.) of 12 January 1865, no. 8 (suppl.) of 13 January 1865, no. 8 (suppl.) of 13 January 1865, no. 8 (suppl.) of 14 January 1865, no. 11 (suppl.) of 16 January 1865, no. 13 (suppl.) of 19 January 1865.

² For details, see Corneliu Bîrsan, *Civil Law. Key Real Property Rights in the New Civil Code*, Hamangiu Publishing House, Bucharest, 2013, p. 353.

³ Claudia Vişoiu, *Usucaption Procedure. Regulated by the 1864 Civil Code, Law Decree no. 115/1938 and by the New Civil Code*, Hamangiu Publishing House, Bucharest, 2011, p. 9.

⁴ Law no. 287/2009 regarding the New Civil Code, published with the Official Journal of Romania, Part I, no. 511 of 24 July 2009. The Civil Code came into force on 1 October 2011, according to the Law no. 71/2011 regarding the enforcement of Law no. 287/2009 on the Civil Code, published with the Official Journal of Romania, Part I, no. 409 of 10 June 2011 (hereinafter referred to as Official Journal).

⁵ Art.888 of the Civil Code stipulates that the entry of the acquisition of an ownership title with the real estate publicity register is carried out “*on the basis of the authenticated notary document, of the final court order, of the heir certificate or on the basis of any other document issued by the administrative bodies, if so stipulated under the law.*”

⁶ Published with the Official Journal of Romania, Part I no. 459 of 25 June 2015. For a detailed review of the usucaption regulation, see Adrian Stoică, Anthony Murphy, *Review of Usucaption as regulated under the New Civil Code*, in “Dreptul” Journal no. 7/2016, p. 66-76.

⁷ According to art. 941 of the Civil Code, “(1) *The holders of an asset pertaining to no one becomes the owner of the respective asset, by occupation, as of the date on which they came into the possession of the same, but only if such coming into possession abides by the legal provisions.* (2) *Stray assets are abandoned movable and fixed assets, as well as assets that, through their very nature, do not have an owner, such as wild animals, fish and living aquatic resources in natural fish habitats, forest fruit, spontaneous flora edible mushrooms, medicinal and aromatic plants and other such.* (3) *Movable assets of very low value or extensively damaged that are left in a public area, including on a public road or on public transportation means, are regarded as abandoned assets*”.

regulated by art.941 of the Civil Code, and which is another primary means of acquiring title, even though the two institutions are similar, since they both are effects of possession.

2.2. Acquiring the Onwership Title through Usucaption

2.2.1. Preliminary Remarks and Notion

Usucaption, “this benevolent tribute of the law before this status quo-possession”⁸, was first mentioned in Romanian Laws of the XII Tables (*lex duodecim tabularum*) of 449 BC and it was defined as “*usus autoritas fundi biennium, ceterarum rerum annuus est usus*”, which imposed an ownership period of two years in the case of fixed assets and of one year in the case of movable assets⁹.

In Romanian modern law, referred to as *acquisitive prescription*¹⁰, *usucaption* was first regulated in the Civil Code adopted on 1864, which stipulated two types, i.e.: *short-term usucaption*, of 10 to 20 years (art.1895) and *long-term usucaption* (*logissimi temporis*), of 30 years (art.1890).

In the Civil Code enforced on 1 October 2011, usucaption, which the editors of the 1804 French Civil Code described as “*the most necessary for social order of all civil law institutions*”¹¹, is legally regulated in Book III (*On Assets*), Title VIII (*Possession*), Chapter III (*Effects of Possession*), where a number of 8 articles are dedicated to it (art.928-934 and art.939).

Usucaption is defined as “the means of acquiring the onwership title and other key property rights by exerting uninterrupted possession over an asset, within the term and under the conditions stipulated in the laws in force”¹². Other opinions describe usucaption as “a means of acquiring the key property rights through the possession of assets representing their subject throughout the period stipulated under the law and through the positive exertion of the right of option with regards to the usucaption, as a discretionary option”¹³, or “a means of acquiring the ownership title or other property rights concerning a certain asset, through the uninterrupted possession of the respective asset for the period set under the law”¹⁴.

Usucaption, as a means of acquiring key property rights¹⁵, has a complex structure reuniting the stricto sensu legal fact

⁸ For details, see Philippe Jestaz, *Prescription et possession en droit français des biens*, Recueil Dalloz-Sirey, 1984, Chronique, 5e Cahier, p. 27, *apud* Eugen Roșioru, *Usucaption in Romanian Civil Law*, Hamangiu Publishing House, Bucharest, 2008, p.1.

⁹ Eugen Roșioru, *op.cit.*, p. 7.

¹⁰ The Calimach Code, compiled by Christian Flechtenmacher and Anania Cuzanos, with the contribution of Andronache Donici, Damaschin Bojincă and of other jurists of the time, passed in 1817, regulated “*usucaption*” (art. 1907) distinctly from “*extinctive prescription*” – “*loss of a right*” (art. 1906), even though the two phrases are equivalent. See Eugen Roșioru, *op.cit.*, p. 5-6.

¹¹ See the Recitals to the title “*De la prescription*”, in Marcel Planoil, Georges Ripert, *Droit civil français*, t. III: *Les Biens*, Librairie Générale de Droit et Jurisprudence, 2nd issue, Paris, 1952, p. 697, *apud* Ana Boar, *Certain Aspects Regarding the New Regulation of Usucaption in the New Civil Code*, in “*Studia Universitatis Babeș-Bolyai, Jurisprudentia*”, no. 4/2013, p. 9.

¹² Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Civil Law Course. Key Property Rights*, 2nd issue, revisited and supplemented, Hamangiu Publishing House, Bucharest, 2013, p. 272.

¹³ Valeriu Stoica, *Civil Law. Key Property Rights*, 3rd issue, C.H. Beck Publishing House, Bucharest, 2017, p. 363.

¹⁴ Corneliu Bîrsan, *op.cit.* (2013), p.385.

¹⁵ The High Court of Cassation and Justice, 1st Civil Division, Decision no.123 of 19 January 2017 passed in closed session, available at www.csj.ro [last access on 04.02.2018].

of possession with all the determinations imposed under the law and a unilateral legal act, i.e., the manifest will of the person interested in acquiring a certain key material right¹⁶. It may be stated that usucaption, as a manner of acquiring key property rights, encompasses possession. In other words, “possession is an element of usucaption”¹⁷.

*Usucaption also is a primary means of acquiring property, but, at the same time, as the law courts have also statuated, in justifying the usucaption institution, the former owner status cannot be disregarded, in that usucaption indirectly also is a sanction against the passive attitude of the former owner who relinquishes its asset and left it unattended for a long period of time, leaving it in the possession of another person who behaved as the owner or holder of a different key material right*¹⁸. Moreover, as Professor Corneliu Bîrsan also appreciated, usucaption “concerns a legitimate general interest purpose, meant to favor legal security, by paralyzing the possible action for recovery of possession lodged by the actual owner”¹⁹.

2.2.2. General Scope

Even though in everyday activity it is stated that assets are acquired through usucaption, in reality, usucaption allows for the acquiring of the ownership title and of other key property titles over the assets representing the subject of these rights, such as: usufruct, superficies, and servitudes. In so far as easements are concerned, according to art.763 of the Civil Code, tabular usucaption allows for the acquiring of all types of servitude, whereas extra-abular usucaption only allows for the acquiring of positive servitudes²⁰. Moreover, according to art.928 of the Civil Code, the holder may acquire the ownership title over the possessed asset or, as applicable, the ownership title over its fruit. Receivables may not be the subject of usucaption²¹.

Usucaption may not apply in the case of public property fixed assets because both the Constitution of Romania, in art.136 (4)²², and other regulations, such as the provisions in art.120 (2) of the Local Public Administration Law no.215/2001, republished²³, in art.5 (2) of the Law

¹⁶ For details, see Corneliu Bîrsan, *op.cit.*, p. 386 and the following, Valeriu Stoica, *op.cit.*, p. 361 and the following.

¹⁷ Valeriu Stoica, *The Right of Option Regarding Usucaption*, in “Dreptul” Journal, no. 4/2006, p. 47.

¹⁸ See the High Court of Cassation and Justice, Panel of Judges for the settlement of certain legal matters, Decision no.24 of 3 April 2017, published with the Official Journal no. 474 of 23 June 2017; the High Court of Cassation and Justice, Civil and Intellectual Property Division, Decision no. 2550 of 31 March 2005 *apud* Gabriel Boroî, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p. 272.

¹⁹ ECHR, Grand Chamber, Decision of 30 August 2007, passed in the case of J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd vs. United Kingdom, §74, unpublished, www.echr.coe.int, *apud* Corneliu Bîrsan, *Civil Law. Key Real Property Rights in the New Civil Code*, 3rd issue, revisited and updated, Hamangiu Publishing House, Bucharest, 2017, p. 385.

²⁰ For details, see Irina Sferdian, *Servitude Usucaption in the New Civil Code*, in “Revista română de științe juridice” Journal, no. 1/2015, p. 59-71.

²¹ Also see Rodica Peptan, *Usucaption in the New Civil Code*, in “Dreptul” Journal, p. 12-13. For information on the regulation of usucaption in other law systems, see Dan Teodorescu, *Scope of Usucaption in the Austrian Law System*, in “Studia Universitatis Babeş-Bolyai, Jurisprudentia”, no. 4/2009, accessible at <https://studia.law.ubbcluj.ro/articol/316> [last access on 06.02.2018].

²² According to art. 136 (4) of the Constitution of Romania, “Public property assets are inalienable. According to the organic law, their administration may be assigned to the public companies or institutions or they may be granted under concession or leased; moreover, they may also be granted for free use to public utility units”.

²³ Republished in the Official Journal no. 621 of 18 July 2006 and rectified in the Official Journal no. 776 of 13 September 2006, where the texts were renumbered.

no.18/1991 on the Land Fund²⁴, stipulate that the assets that belong to the public or administrative-territorial unit domain are “inalienable, imprescriptible and unattachable”. It should be further mentioned that fixed assets belonging to the state or administrative-territorial unit public property are “*imprescriptible both extinctively and acquisitively*”²⁵.

2.3. Types of Usucaption in the Civil Code System in Force

Depending on the nature of the asset susceptible of usucaption, the usucaption may be of two main types: *immovable usucaption* (art.930-934) and *movable usucaption* (art.939). In its turn, immovable usucaption may be *extra-tabular immovable usucaption* and *immovable tabular usucaption*.

2.3.1. Extra-tabular Immovable Usucaption

According to art.930(1) of the Civil Code, with the marginal title “*extra-tabular usucaption*”, the ownership title over an immovable asset and its dismemberments may be entered with the land register, on the grounds of the usucaption, in favor of the party holding possession over the same for 10 years, if:

- a) the owner entered with the land register is deceased or if the owner was a legal entity that ceased to exist;
- b) the ownership waiver was entered with the land register;
- c) the property was not entered in any land register.

In all cases, according to the provisions in paragraph (2) of the same article, the usucapant may only acquire the right if the land register entry application was submitted before a third party entered its own application for the registration of the title in its favor, on the basis of legitimate grounds, during or even after the elapse of the usucaption term²⁶.

According to art. 932(1) of the Civil Code, in the cases stipulated under art. 930(1)(a) and (b), the usucaption term only starts lapsing after the decease or, as applicable, the cessation of the legal existence of the owner, respectively after the entry of the property waiver application, even if the entry into possession occurred at a prior date. In other words, in the case stipulated in art.930(1)(a) of the Civil Code, the 10-year term starts lapsing as follows: as of the possession commencement date, if the usucapant starts exerting the possession over the property prior to the decease of the physical person or, as applicable, the cessation of the existence of the legal person entered as owner in the land register; as of the decease or existence cessation date of the owner entered with the land register, if the usucapant started exerting possession prior to the decease or cessation of existence.

Moreover, in the case stipulated in art. 930(1)(b) of the Civil Code, the 10-year term shall start lapsing: as of the entry date of the property waiver, if the entry into possession occurred prior to or even on this date; as of the possession commencement date, if the usucapant started exerting possession subsequent to the entry of the property waiver.

With regards to the situation stipulated in art. 930(1) (c) of the Civil Code, the 10-

²⁴ Republished in the Official Journal no. 299 of 4 November 1997.

²⁵ Corneliu Birsan, *op.cit.* (2017), p. 386.

²⁶ For further information, please see Valeriu Stoica, *The Discretionary Right of Extra-Tabular Immovable Usucaption*, in “Revista română de drept privat” Journal, no. 3/2013, p. 9-23.

year term starts lapsing as of the possession commencement date²⁷.

However, as it also follows from the review of art. 930(2) of the Civil Code, for the three cases of extra-tabular usucaption, it is not sufficient to only exert useful possession, but, instead, it is mandatory that the usucapant submits the land register application before a third party enters its own application for the registration of the title in its favor, on the basis of legitimate grounds, during or even after the elapse of the usucaption term²⁸.

Pursuant to the above, it may be stated that in order to acquire a key property title by extra-tabular usucaption, certain conditions must be fulfilled, i.e.: the possession over the asset must extend over 10 years; the possession must be useful, i.e., untainted, because, according to art.922(1) of the Civil Code, it is only the useful possession that is able to produce legal effects²⁹ and the last condition is that the usucapant enter is title registration application in its favor before a third party enters its own title registration application, on the basis of legal grounds, during or even after the lapse of the usucaption term³⁰.

Finally, the specialized literature defines extra-tabular usucaption as “the means of acquiring the private property right or a dismemberment of this right over a fixed

asset by exerting the property title over such asset for 10 years, according to the legal provisions”³¹.

2.3.2. Tabular Immovable Usucaption

According to art. 931(1) of the Civil Code, “The rights of the person who was registered, without due grounds, with the land register as owner of an asset or holder of a different property right, may no longer be challenged if the person registered in good-faith possessed the immovable asset for 5 years as of the entry of the registration application, if the possession was not tainted”. Moreover, paragraph (2) of the same article stipulates that “it is sufficient that the good-faith exists upon the entry of the registration application and upon the entry into possession”³².

Starting from these provisions, Professor Corneliu Bîrsan has defined tabular immovable usucaption as “*the means of acquiring a key property right over an immovable asset through the exertion, by the person registered in the land register without legitimate grounds as the holder of*

²⁷ Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p. 230.

²⁸ Also see Sergiu I. Stănilă, *Exceptions from the Constitutive Nature of the Land Register Entry. Inheritance. Usucaption*, in “Revista română de științe juridice”, no. 1/2013, p. 200-209.

²⁹ According to art. 922 of the Civil Code, “(1) Except for the situations stipulated under the law, only useful possession may produce legal effects. (2) Discontinuous, disturbed or clandestine possession is not regarded as useful. Until proven differently, possession is presumed useful”. Also see Bujorel Florea, *Civil Law. Key Property Rights*, “Universul Juridic” Publishing House, Bucharest, 2011, p. 173.

³⁰ See Eugen Chelaru, *Civil Law. Key Real Property Rights in the New Civil Code*, 4th issue, “C.H. Beck” Publishing House, Bucharest, 2013, p. 437.

³¹ Corneliu Bîrsan, *op.cit.* (2017), p. 403.

³² The provisions in art. 931 of the Civil Code on immovable usucaption only apply if the possession started after the enforcement date thereof. For the cases in which the possession started prior to this date, the provisions regarding usucaption in force as on the possession start date shall apply. Concerning the properties for which, upon the possession start date, prior to the enforcement of the Civil Code, no land registers were open, the provisions regarding usucaption in the 1864 Civil Code shall continue to apply (see art. 82 of the Law no. 71/2011).

*the right, of untainted and good-faith possession for 5 years*³³.

A review of the legal text (art.931 of the Civil Code) reveals that in order for tabular usucaption to operate, the following preconditions must be observed³⁴:

- a real estate property right must be registered with the land register, without any legitimate grounds;
- the registered individual must have exerted useful possession over the asset representing the subject of the immovable property, i.e., the property must be untainted and in good-faith;
- the possession must extend for at least 5 years.

Generally, the phrase “without legitimate grounds” used in art. 931(1) of the Civil Code, as shown by Professor Valeriu Stoica, designates “*an invalid acquisition title, because it is affected by a cause of absolute nullity and which, in most cases, emanates from the actual owner, and from a non dominus*”³⁵.

Good-faith means “*the mistaken belief of the holder that he acquired the asset from the actual owner*”. Good-faith must exist, according to the provisions in art. 931(2) of the Civil Code, upon the entry of the registration application and upon the entry into possession. The fact that the holder subsequently realized the error is of no relevance (*mala fides superveniens non impedit usucapionem*)³⁶.

The ownership title is acquired on the basis of the title entered with the land register, the acquisition time being the date of the application for the entry of the right with the land register³⁷.

2.3.3. Movable Usucaption

The possibility to acquire a movable asset by usucaption is, for the first time, regulated in the Romanian civil law³⁸. Thus, according to art.939 of the Civil Code, “The person possessing another person’s asset for 10 years, under other conditions than the ones stipulated herein, may acquire the ownership title, on the grounds of usucaption. The provisions in art. 932(2), art. 933 and 934 shall duly apply”. Pursuant to the review of the aforementioned text, it may be noted that this actually is a subsidiary means, applicable to the holder who cannot invoke good-faith possession as a means of acquiring the ownership title over the asset.

Hence, movable usucaption may be invoked only if the following conditions are observed:

- the possession exerted by the holder must be useful, i.e., untainted. All taints shall suspend the course of the usucaption, in which case the provisions in art. 932(2) of the Civil Code shall apply, according to which “The tainting of possession suspend the course of the usucaption”;

³³ Corneliu Bîrsan, *op.cit.* (2017), p. 406. For a review of tabular usucaption, see Marian Nicolae, *Tabular Usucaption in the New Civil Code. Material and Transitory (Intertemporal) Law Aspects*, in “Dreptul” Journal, no. 3/2013, p. 13-48.

³⁴ Regarding these preconditions, please see Valeriu Stoica, *op.cit.* (2017), p. 395; Gabriel Boroi, Carla Alexandra Angheliescu, Bogdan Nazat, *op.cit.*, p.232; Corneliu Bîrsan, *op.cit.* (2017); Eugen Chelaru, *op.cit.*, p.436-437; Iosif Robi Urs, Petruța Elena Ispas, *Civil Law. Theory of Property Rights*, 2nd issue, revisited and supplemented, “Hamangiu” Publishing House, Bucharest, 2015, p. 165-166; Cristian Jora, *Civil Law. Property Rights in the New Civil Code*, “Universul Juridic” Publishing House, Bucharest, 2012, p. 290.

³⁵ For details, see Valeriu Stoica, *op.cit.* (2017), p. 394-395.

³⁶ Ion P. Filipescu, Andrei I. Filipescu, *Civil Law. Ownership Title and Other Property Rights*, “Universul Juridic” Publishing House, Bucharest, 2006, p. 320.

³⁷ Valeriu Stoica, *op.cit.* (2017), p.395.

³⁸ Iosif Robi Urs, Petruța Elena Ispas, *op.cit.*, p.166.

– the holder must possess the asset for 10 years, whether it is in good- or ill-faith³⁹.

As professor Gabriel Boroi & Co have shown⁴⁰, in “*the absence of explicit legal provisions, we only have to admit that movable usucaption does not apply retroactively, hence, the holder becomes an owner as of the elapse of the 10-year term, and not as of the possession commencement date*”.

3. Conclusions

At the end of this research, it may be concluded that usucaption is a means of acquiring key property rights, but not a

primary one of acquiring the ownership, which is why it is appreciated that it is the most necessary civil law institution, useful for social order, seeking a legitimate, general interest purpose, meant to favor legal safety.

Moreover, it may be noted that while *extra-tabular usucaption* operates in favor of the holder of the asset representing the subject of an ownership title over an immovable asset that was not registered with the land register, *tabular immovable usucaption* operates in the favor of a person who is registered in the land register as the rightful owner of a key immovable property right, only if the registration was made without “legitimate grounds”.

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³⁹ See Corneliu Bîrsan, *op.cit.* (2017), Valeriu Stoica, *op.cit.*, 2017, p. 396; Eugen Chelaru, *op.cit.*, p. 441; Iosif Robi Urs, Petruţa Elena Ispas, *op.cit.*, p. 166.

⁴⁰ Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p. 234.

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