

J. Y. Interpretation No.451 ( March 27, 1998 ) \*

**ISSUE:** Is the directive issued by the Ministry of the Interior unconstitutional in prescribing that a co-owner may not claim and acquire superficies by prescription?

**RELEVANT LAWS:**

Articles 769, 770, 772, 827, Paragraph 2, and 828, 945 of the Civil Code ( 民法第七百六十九條、第七百七十條、第七百七十二條、第八百二十七條第二項、第八百二十八條、第九百四十五條 ) ; Interpretation No. 291 ( 司法院釋字第二九一號解釋 ) ; Section 3, Subsection 5 of Guidelines for Review on the Registration of Superficies Acquired by Prescription ( 時效取得地上權登記審查要點第三點第五款 ) .

**KEYWORDS:**

prescription ( 時效 ) , positive ( acquisitive ) prescription ( 取得時效 ) , superficies ( 地上權 ) , owner of superficies ( 地上權人 ) , usufruct ( 用益物權 ) , co-owners; owners in common ( 共有人 ) , common property ( 共有物 ) , joint owners ( 共同共有人 ) , unauthorized possession ( 無權占有 ) , recording ( 登記 ) .\*\*

**HOLDING:** The prescription system is intended for the public interest.

**解釋文：**時效制度係為公益而設，依取得時效制度取得之財產權應為

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\* Translated by Raymond T. Chu.

\*\* Contents within frame, not part of the original text, are added for reference purpose only.

That a property right acquired by acquisitive prescription is protected by the Constitution was made clear in our Interpretation No. 291. Superficies is the right to use the land of another person for the purpose of owning thereon structures or other work or bamboo stands or trees. It is a right of using the land owned by another person, and is by nature a type of usufruct. While a co-owner of land is, by operation of his ownership, entitled to use the whole common property and collect fruits therefrom in proportion to his own share, he must obtain the consent of all the other co-owners before he can use and collect fruits from the specific part of the common property. Upon the unanimous consent of all co-owners, an encumbrance may be created on the common property, and a superficies may likewise be created in favor of one or more of such co-owners. The same holds true where a superficies is created on jointly owned land in favor of one or more of the joint owners. It then follows that one owner or several co-owners or joint owners who has/have taken possession of land under ownership in common or joint ownership with

憲法所保障，業經本院釋字第二九一號解釋釋示在案。地上權係以在他人土地上有建築物，或其他工作物，或竹木為目的而使用其土地之權，故地上權為使用他人土地之權利，屬於用益物權之一種。土地之共有人按其應有部分，本於其所有權之作用，對於共有物之全部雖有使用收益之權，惟共有人對共有物之特定部分使用收益，仍須徵得他共有人全體之同意。共有物亦得因共有人全體之同意而設定負擔，自得為共有人之一人或數人設定地上權。於共同共有之土地上為共同共有人之一人或數人設定地上權者亦同。是共有人或共同共有人之一人或數人以在他人之土地上行使地上權之意思而占有共有或共同共有之土地者，自得依民法第七百七十二條準用同法第七百六十九條及第七百七十條取得時效之規定，請求登記為地上權人。內政部中華民國七十七年八月十七日台內地字第六一四六四號函發布時效取得地上權登記審查要點第三點第五款規定，共有人不得就共有土地申請時效取得地上權登記，與上開意旨不符，有違憲法保障人民財產權之本旨，應不予適用。

the intention to exercise superficies over the land of other persons is/are entitled to apply to have himself/themselves recorded as owner(s) of superficies by reason of acquisitive prescription under Articles 769 and 770 of the Civil Code made applicable mutatis mutandis pursuant to Article 772 of the Code. The Guidelines for Review on the Registration of Superficies Acquired by Prescription issued by the Ministry of Interior per letter Tai-Nei-Ti No. 62146 dated August 17, 1988, which prescribe in Section 3, Subsection 5, that a co-owner may not apply for the registration of superficies by reason of acquisitive prescription over land under ownership in common, are inconsistent with the essence of our opinion given above and also contrary to the purpose of the Constitution in protecting the property right of the people. Thus, this provision must be held inoperative.

**REASONING:** The prescription system is intended for the public interest. That a property right acquired by acquisitive prescription is protected by the Constitution was made clear in our Interpreta-

**解釋理由書：**時效制度係為公益而設，依取得時效制度取得之財產權應為憲法所保障，業經本院釋字第二九一號解釋示在案。地上權係以在他人土地上有建築物或其他工作物或竹木為

tion No. 291. It is explicitly provided in Article 832 of the Civil Code that superficies is the right to use the land of another person for the purpose of owning thereon structures or other work or bamboo stands or trees. It is a right over things existing on the land owned by another person for the purpose of using such land, and is by nature a type of usufruct. While a co-owner of land is, by operation of his ownership, entitled to use the whole common property and collect fruits therefrom, such right may be exercised only in proportion to his own share. If a co-owner makes use of or collects fruits from the common property in excess of his share, his act will result in injuries to the interests of other co-owners and thereby constitute infringement of the ownership of other persons. Therefore, a co-owner must obtain the consent of all other co-owners before he can use and collect fruits from the specific part of the common property, rather than enjoying any right to freely use or collect fruits from the whole or any part of the common property. It follows that one or more of the co-owners may enter into an agreement with all the other co-owners

目的而使用其土地之權，為民法第八百三十二條所明定。故地上權為存在於他人土地上之物權，以使用他人土地為目的，屬於用益物權之一種。土地之共有人本於所有權之作用，對於共有物之全部，雖有使用收益之權，惟此使用收益權，仍應按其應有部分而行使，若共有人逾越其應有部分之範圍而為使用收益，即係損及他共有人之利益而與侵害他人之所有權同。故共有人對共有物之特定部分使用收益，仍須徵得他共有人全體之同意，非謂共有人得對共有物之全部或任何一部有自由使用收益之權利。從而共有人之一人或數人自得與他共有人全體訂定共有土地之分管契約，共有物亦得因共有人全體之同意而設定負擔，自得為共有人之一人或數人設定地上權。又土地為數人共同共有者，各共同共有人之權利，及於共同共有土地之全部，此觀民法第八百二十七條第二項之規定自明。惟依民法第八百二十八條規定：「共同共有人之權利義務，依其共同關係所由規定之法律或契約定之。」「除前項之法律或契約另有規定外，共同共有物之處分及其他權利行使，應得共同共有人全體之同意。」準此，共同共有人之一人或數人依其共同關係所由規定之法律或契約而使用收益

for separate administration of the land owned by them in common, and that, upon the unanimous consent of all co-owners, an encumbrance may be created on the common property, and a superficies may likewise be created in favor of one or more of such co-owners. Where the land is jointly owned by several persons, the right of each joint owner extends to the whole of the land under joint ownership. This is expressly stated in the Civil Code in Article 827, Paragraph 2. Nevertheless, the Code also provides in Article 828 that "the rights and duties of joint owners shall be determined in accordance with the law or contract whereby the joint relationship is prescribed," and that "unless otherwise provided by the law or contract as specified in the preceding paragraph, the disposition of the property under joint ownership and the exercise of other rights pertaining thereto are subject to the consent of all joint owners." Hence, where one or several joint owners, by operation of the law or contract whereby the joint relationship is prescribed, make use of or collect fruits from the land under joint ownership, the act constitutes an exercise of the rights

共同共有之土地者，係本於共同關係而行使權利，若共同共有人全體將共同共有之土地為共同共有人之一人或數人設定地上權，則為共同共有物之處分行為，地上權人因該處分行為而取得用益物權。地上權既為一種物權，自得因時效而取得，然地上權取得時效之第一要件須為以行使地上權之意思而占有他人之土地。若依其所由發生之事實之性質，無行使地上權之意思者，非有變為以行使地上權之意思而占有之情事，其取得時效不能開始進行。從而占有土地之始係基於共有人之地位、共同共有人因共同關係享有之權利、抑或無權占有之意思者，既非基於行使地上權之意思，嗣後亦非有民法第九百四十五條所定變為以行使地上權之意思而占有，即不具備取得時效之前提要件。若共有人或共同共有人於占有之共有或共同共有土地，對於使其占有之他共有人或共同共有人表示變為以在他人之土地上行使地上權之意思而占有，自得本於民法第七百七十二條準用第七百六十九條、第七百七十條，主張依時效而取得地上權，請求登記為地上權人。內政部七十七年八月十七日台內地字第六二一四六四號函發布時效取得地上權登記審查要點第三點第五款規定，共有人不得就共

based on the joint relationship. Where a superficies is created by all joint owners over the jointly owned land in favor of one or more of the joint owners, the act constitutes a disposition of the jointly owned property, and the owners of superficies have thus acquired a usufruct in consequence of such act of disposition. Since superficies is a type of right over things, it is of course acquirable by prescription. However, the primary element for acquisition of superficies by acquisitive prescription is possession of the land of others with the intent to exercise superficies thereon. In the absence of such intent as supported by the nature of the facts from which the possession originated, the acquisitive prescription shall not begin to count unless there occurs an event because of which the possession becomes one with such intent. Thus, the possession of the land is based *ab initio* on the possessor's status as a co-owner, the exercise of the right which a joint owner may enjoy by virtue of the joint relationship, or an intent of taking an unauthorized possession, rather than based on the intent to exercise superficies, nor is it a possession

有土地申請時效取得地上權登記，與上開意旨不符，有違憲法保障人民財產權之本旨，應不予適用。

that becomes subsequently one with the intent to exercise superficies as prescribed in Article 945 of the Civil Code. In other words, the possession lacks the elements required for acquisition by prescription. Conversely, If the co-owner or joint owner who possesses the land under co-ownership or joint ownership expresses to the other co-owners or joint owners who put the land in his possession the intent to make it subsequently a possession for the purpose of exercising superficies, he is certainly entitled to claim acquisition of the superficies by prescription under Articles 769 and 770 of the Civil Code, which are made applicable *mutatis mutandis* by Article 772 thereof, and to apply to have himself registered as an owner of superficies. The Guidelines for Review on the Registration of Superficies Acquired by Prescription issued by the Ministry of Interior per letter Tai-Nei-Ti No. 62146 dated August 17, 1988, which prescribe in Section 3, Subsection 5, that a co-owner may not apply for the registration of superficies by reason of acquisitive prescription over land under ownership in common, are inconsistent with the essence of

our opinion given above and also contrary to the purpose of the Constitution in protecting the property right of the people. Thus, this provision must be held inoperative.

Justice Chi-Nan Chen filed concurring opinion.

Justice Vincent Sze filed dissenting opinion, in which Justice Chung-Mo Cheng joined.

Justice Ho-Hsiung Wang filed dissenting opinion, in which Justice Tong-Schung Tai joined.

本號解釋陳大法官計男提出協同意見書；施大法官文森、城大法官仲模共同提出不同意見書；王大法官和雄、戴大法官東雄共同提出不同意見書。