



British Institute of  
International and  
Comparative Law

**Report by the British Institute of International and  
Comparative Law for Her Majesty's Court Service**

**September 2006**

# **ADVERSE POSSESSION**

# **Instructions**

Her Majesty's Court Service has asked the Institute to conduct comparative research with respect to statutes of limitation in the following common law and civil law jurisdictions; Hungary, Poland, Germany, Netherlands, Spain, Sweden, France, Australia, New Zealand, United States and Canada.

The request emanates from counsel appearing in a human rights case currently before the European Court of Human Rights, *J.A. Pye (Oxford) Ltd v United Kingdom*. The United Kingdom is appealing against the decision of 15 November 2005 to the effect that a failure to provide compensation for loss of title to land acquired on expiry of a statutory period of limitation violates Article 1 of Protocol 1 of the Human Rights Convention (Application 44302/02)

The Institute has been asked to provide:

- The original text and a translation into English of the legal provisions relating to the length of the limitation of action or prescription period for the acquisition of title to land by adverse possession.
- A summary of the most important case law, if any, based on these provisions.

In particular, the following questions are to be considered:

- Do limitation or prescription periods differ depending upon whether adverse possession is in 'good faith'?
- Is compensation available for those who lose title to land at the end of a limitation or prescription period? If so, under which conditions?

## **Overview of comparative national laws**

The aims of this comparative legal research have been to determine:

- whether other civil and common law jurisdictions recognize the acquisition of title to land by adverse possession
- the role of lack of 'good faith'
- whether compensation for extinction of title will be awarded by the state.

The following is a summary of the findings that have emerged from the research into the nominated jurisdictions.

- 1. The acquisition of land under the doctrine of adverse possession is recognized in all the civil and common law jurisdictions examined.**
- 2. The period after which the 'real' owner may no longer bring an action to repossess his land varies widely among jurisdictions from 5 years in the United States to 60 years in the case of claims by the crown; the most typical period being 20-30 years. Where legislatures have amended the limitation period, it has usually been on the ground that the earlier period was 'too long', while recognizing that any period is necessarily arbitrary.**
- 3. Proof of good faith on the part of the possessor of the land will significantly reduce the limitation period in some jurisdictions (France and Spain); in other jurisdictions evidence of good faith is not a relevant consideration (Hungary, Germany and Massachusetts/US).**
- 4. Where there has been good faith, prescriptive title may be acquired after twenty years in, for example, Poland and after ten years in, for example, Sweden. Where good faith cannot be demonstrated, the limitation period will be extended to thirty years or twenty years respectively in these jurisdictions (see also Netherlands).**
- 5. A significant difference in the application of adverse possession arises where states have adopted a system of land registration. Where land is registered, some states have abolished the capacity to acquire land by prescription (Canada) while retaining the right in respect of unregistered land. This difference reflects the policy that the uncertainty of ascertaining ownership is eliminated by a system of registration so that the rationale for the doctrine of adverse possession is thereby weakened.**
- 6. Most states do, however, maintain the doctrine of adverse possession in respect of registered land (United Kingdom, Australia, United States and New Zealand) and courts continue to recognize the public policy value of extinguishing title to registered property after a certain period.**
- 7. No instance was found in which compensation is available to the original owner for extinguishment of title on adverse possession, with the single exception of Sweden. Here, compensation may be paid if the rightful owner was forcefully deprived of his property and the action is brought within the 10 year limitation period.**

## **Value of comparative research**

It has been observed that the legal position in common law jurisdictions with regard to adverse possession varies according to whether the land is registered or unregistered. In its majority judgment in *Pye (Oxford) Ltd v UK*, the European Court of Human Rights warned that comparative legal materials should be viewed with 'some caution' as it was unclear whether the 'same system of compulsory registration of land' applied in all jurisdictions (Para 66). Indeed, the ECHR observed that where a system of land registration has been established, the doctrine of adverse possession had either been abolished or substantially restricted. Only a few instances have been found in which adverse possession has been abolished in respect of registered land. Paradoxically, many States have reduced the limitation period, making it easier to gain title to registered land by prescription.

While the Court's cautionary note is warranted, the comparative value of this research is significant in that it supports the general observation that, where a State has adopted a system of land registration, the rationale underlying restrictions on actions for recovery of land loses its vitality and relevance. The ECHR was willing to concede that the law of adverse possession in respect of registered land could serve a public purpose; the vital question being whether that public purpose was proportionate to, or a fair balance with, the legislative interference with title.

## **Civil Law Jurisdictions**

### **France**

#### *Adverse possession*

French law permits the acquisition of title to land by prescription over a 30 year period if there is:

*'...continuous and uninterrupted, peaceful, public and unequivocal possession, and in the capacity of an owner'* Article 2229C Civ.

The notion of possession is satisfied if two elements are present, the claimant bearing the onus of proof, of:

- objective physical possession such as an owner would have; and the
- subjective intent to exercise the material mastery on his own behalf, rather than on behalf of another.

#### *Effect of good faith upon the period of prescriptive title*

Where the person has come into possession of a 'just title' in good faith, good faith being presumed, the period for prescriptive title will be reduced by 10

years to 20, or by 20 years to 10, depending upon whether the true owner lives in the territory of the Court of Appeal within which the land is situated, Article 2265.

However, if a seller of land acquired it in bad faith, a good faith purchaser will need to demonstrate prescriptive title over the full 30 year period.

The effect of prescriptive title is retroactive in the sense that the possessor is considered to be the owner from the first day of possession and all acts from that day will be valid.

### *Compensation*

No compensation is payable to the original owner under French law.

## **Spain**

### *Acquisitive Possession*

The Spanish Civil Code recognizes the capacity to acquire ownership by 'acquisitive prescription' over everything that can be possessed. Under Article 1941:

*Possession must be exercised under claim of ownership, and must be public, peaceful and uninterrupted.*

Not only must the claimant intend to possess as the owner or holder as of right but also the facts must demonstrate that possession is held as the putative owner.

### *Good faith and the limitation period*

The limitation period for acquisitive prescription varies depending upon whether the:

- adverse possession is in 'good faith' and with 'just title'
- property is a moveable or immovable

### *Ordinary acquisitive possession*

Where the possession is in good faith and the claimant has a 'just title' the acquisitive possession is described as 'ordinary'. While good faith will be presumed, it is necessary for the possessor to prove just title.

- in the case of immovables, inscription under the *Land Register Act* will be sufficient; ownership can be prescribed by ordinary acquisitive

possession of ten years for persons who are present and twenty years for absentees (i.e. residing in a foreign country).

- in respect of movables, possession in good faith ranks as title; Movables may be acquired after three years uninterrupted possession in good faith and after six years without any need to show good faith.

### *Extraordinary acquisitive possession*

Extraordinary acquisitive possession may be achieved by proof of possession and does not require either good faith or just title. For both movables and immovables, the necessary period is 30 years.

### *Autonomous Communities*

As civil law is not unified in Spain, different rules may pertain in the Autonomous Communities. Catalonia has for example introduced Articles 531-24 and 531-27 which makes no distinction between ordinary and extraordinary possession, permitting acquisitive possession under a claim of right that is public, peaceful and uninterrupted. Neither proof of title nor good faith are required. Title may be acquired by adverse possession of three years for movables and twenty years for immovables.

### *Compensation*

No compensation is available for someone who loses their title to property after expiry of a limitation period, though it remains possible for persons who are incapacitated to sue their legal representatives for negligence.

## **The Netherlands**

### *Adverse possession*

The Dutch Civil Code recognizes the right to acquire title to land by adverse possession through the doctrines of acquisitive and extinctive prescription as follows:

- Acquisitive prescription under article 3:105(1) provides that the adverse possessor of land acquires title when the right of action to terminate the adverse possession expires.
- Extinctive prescription terminates the right of action of the rightful owner after a nominated period.

### *Role of good faith*

If a person has held uninterrupted possession and has acted in good faith, he may acquire ownership after 10 years (Article 3:99(1)). Where good faith is

proven to be absent, an uninterrupted possession may give the possessor title after twenty years. (Article 3:105(1)).

Good faith is presumed and its absence must be proven.

### *Compensation*

No right of compensation is granted to the person whose title has been extinguished under these rules.

There are no cases that have developed the jurisprudence on these rules by the Dutch courts.

## **Sweden**

### *Adverse possession*

Swedish law recognizes ownership by 'adverse possession' of land under Chapter 16 of the *Real Property Code* once a person other than the rightful owner has been registered as an owner in the land register or 'lagfart'.

A limitation period of 20 years applies, after which the possessor of property is held to have a better right to the land than the original owner. Time runs from the moment someone other than the rightful owner has received lagfart. Proof of good faith is not required.

### *Good faith*

Where the possessor bought the property or received it as a gift or through barter, and did not know and could not have been expected to know of the real owner's prior right, the limitation period is reduced to 10 years. By contrast with adverse possession after 20 years, application of the 10 year rule requires a demonstration of good faith.

### *Compensation*

Swedish law does not recognize a right to compensation for loss of immovable property under the law of adverse possession. (Rights in negligence or tort law remain available, though unlikely, unless action is brought within the relevant statutory limitation period). An exception to the lack of compensation arises under Chapter 18 where title may not be acquired in good faith if the real owner was forced to give up their property. An owner may be entitled to compensation from the government for loss of title if the claim is made within 10 years of the entry of title into the land register.

## **Hungary**

### *Adverse possession*

Hungarian law recognises the right to acquire property by adverse possession as follows:

“A person who has continuously had possession of real property for fifteen years, or any other thing for ten years as his own, shall acquire ownership through adverse possession.” Section 121(1) of Act IV of 1959 of the Civil Code.

The prerequisites of adverse possession are:

- the passing of ten or fifteen years
- possession of the property as one’s own, and
- continuous possession.

### *Good faith*

Good faith is not required in order that someone can acquire the ownership of a thing through adverse possession and the period of adverse possession does not depend on whether or not the adverse possessor acted in good faith.

### *Compensation*

The owner who has lost his ownership because of adverse possession is not entitled to claim either compensation or indemnification from the new owner under Hungarian law.

## **Poland**

### *Adverse possession*

The Polish Civil Code permits the acquisition of ownership by adverse possession in Articles 172 – 176, as a legal instrument which corrects the differences between the legal status and the actual state of affairs. In order to acquire ownership by way of adverse possession two conditions must be met; uninterrupted possession as an autonomous possessor (i.e. the possessor must act “as the owner”); and a defined period of time must lapse.

### *Limitation periods*

Limitation periods for adverse possession of real property are:



- 20 years, when possessor is in good faith;
- 30 years, when possessor is in bad faith.

However, if the owner of the land against whom the period of adverse possession is running is a minor, the period of possession cannot give rise to ownership of the land until two years after the original owner has become an adult.

### *Good faith*

The good faith of the possessor is not a condition for acquiring ownership; it only affects the length of the limitation period (see above). The Polish Civil Code does not define the term “good faith”; instead it is treated as a blanket clause.

### *Compensation*

Polish law does not provide for any form of compensation for someone who loses their proprietary title by way of adverse possession after the expiry of the limitation period.

## **Germany**

### *Adverse possession*

German land law provides for two different methods of acquiring property by way of adverse possession.

#### 1. Acquisition by possession by person registered

*A person, who has been registered in the land register as the owner of a piece of land without having obtained ownership, acquires ownership thereof, if he has been registered as such for thirty years and during that time he has been in proprietary possession of the land. Under § 900 BGB (German Civil Code),*

Possession does not have to be in good faith, and the reason or motivation for the possession is irrelevant.

#### 2. Acquisition by proprietary possession and cancellation proceedings.

*The owner of a piece of land may, if for thirty years the land has been in the proprietary possession of another, be excluded from his rights by means of public summons. [...] If the owner has been registered in the land register, the public summons is permissible only if he is dead or has disappeared and no registration in the land register which requires the owner's consent has been made within thirty years. § 927 BGB,*

The acquisition of property under § 927 does not apply to a person who is inaccurately registered in the land register. Rather, it facilitates acquisition of property by a person who is not registered in the register, but who has held proprietary possession of the land for thirty years.

### *Good faith*

Neither method of adverse possession requires proof of good faith on the part of the possessor. Adverse possession is even possible where the possessor is in bad faith, e.g. when he knowingly takes over bequeathed land that did not belong to the deceased. Good faith being irrelevant, the only decisive point is the entry situation in the land register. This principle can be compared to the situation with regard to moveable property, where acquisition by adverse possession is only possible if the possessor is and was in good faith in relation to his right of possession, see § 937 (2) BGB.

### *Compensation*

Under German law, the acquisition of property by adverse possession does not trigger any right to compensation for the person who loses title to land. Moreover, the notion of unjust enrichment will also not provide any basis for a claim. Similarly, tort law principles do not help the former owner, because the act of property acquisition was itself lawful and inconformity with the code.

## **Common Law Jurisdictions**

### **Australia**

Rights in relation to land are, as a matter of constitutional law, determined by the laws of the respective States and Territories of Australia. While the laws of the Australian Capital Territory and the Northern Territory do not recognize any loss of title to land by adverse possession, each of the States will recognize a proprietary interest held under adverse possession, depending upon whether the land is registered.

- Where the land is not registered, an action by the real owner to recover it may be brought only within limitation periods of either 12 years (NSW, Queensland, Western Australia and Tasmania) or 15 years (Victoria and South Australia). Once the statutory period has expired, the title of the person dispossessed will be extinguished and their cause of action lost.
- In respect of registered land, the registered owner holds the land subject to any rights of an adverse possessor. In those jurisdictions

where the period of possession has extinguished the title of the registered proprietor, the adverse possessor may apply for registration of title.

The legal position of the adverse possessor is less favorable where the Crown has an interest. The right of the Crown to land cannot be affected by adverse possession in Qld., WA and Victoria. A limitation period of 30 years applies to adverse possession in NSW and Tasmania.

### *Good faith*

Good faith is not a necessary or sufficient condition for the acquisition of title by adverse possession.

### *Compensation*

There are no rights to compensation for the original owner who loses title under adverse possession.

## **New Zealand**

New Zealand law recognizes the rights of an adverse possessor depending upon whether the land is registered or unregistered.

- Title to unregistered land can be extinguished after 12 years of adverse possession *Limitation Act* 1950; the period is extended to 60 years where the action to recover land is brought by the Crown; while the *Limitation Act* does not apply to Maori customary land, a 12 year limitation period applies if an action to recover such land is brought against the Crown; certain categories of land, including land held for public works, cannot be affected by adverse possession.
- Where the land is registered, the adverse possessor can apply for a certificate of title after 20 years under the *Land Transfer Amendment Act* 1963; a certificate will be granted unless another person establishes a better title. The Act does not apply to Crown land, Maori land, local authority land, land held in trust for public purposes and land possessed by virtue of an erroneous boundary marker or change of watercourse.

### *Good faith*

Evidence of good faith is not a legislative requirement under the laws of New Zealand.

### *Compensation*

No provision is made for loss of title under adverse possession.

## **Canada**

Rights in relation to land in Canada are regulated by the laws of the states and provinces and will vary depending upon whether the land is registered or unregistered.

Under the law of Ontario, for example, while adverse possession is recognized after 10 years in respect of unregistered land, adverse possession does not apply to registered land ( *Land Titles Act*, RSO 1990). Where an action to recover land is brought by the Crown, by contrast, a 60 year limitation period applies.

No time limitation applies in respect of waste or vacant land of the Crown. Similarly, time will not run in respect of any road allowance or public highway if the freehold is vested in the Crown or public body.

### *Good faith*

Evidence of good faith or lack of it will not affect the right to title to land under adverse possession

### *Compensation*

There is no provision for compensation for loss of title under adverse possession

## **United States**

### *Adverse possession*

Rights in relation to land in the United States are subject to the laws of individual states. All states within the federation recognize title acquired by adverse possession after limitation periods ranging from 5-40 years. In addition to varying time limitations, there are differences among states as to the role of good faith as a necessary condition for adverse possession and as to certain categories of land type and use.

Under Alaskan law, for example, a good faith but mistaken belief that land lies within the boundary of land owned by an adverse claimant will, after 10 years, be 'conclusively presumed to give title', except as against the state of Alaska or the United States. By contrast, under the laws of Massachusetts, adverse possession will not be recognized in respect of registered land. In respect of unregistered land, adverse possession for 20 years will extinguish any right to recover possession and proof of good faith is not a requirement. Under the laws of Connecticut, the time limit for recovery of land by the owner is 15 years of uninterrupted possession, after which the possessor has the right to claim an absolute title.

### *Good faith*

While it has not been possible to consider the laws of all states within the United States, most of the jurisdictions examined do not require an element of good faith in cases of actual and uninterrupted possession. Even in those jurisdictions where adverse possession must not have arisen by fraud, there is a presumption of good faith and the burden of proof lies with a claimant who asserts a lack of *bona fides*.

Where the legislation does not require an element of good faith, it remains open to the courts to take evidence of fraud or lack of *bona fides* into account when considering whether adverse possession has been established, (as in *Waggoner v Benton Beach Corporation*, 3 April 1998 Conn.)

### *Compensation*

No state law provides for compensation for loss of title by virtue of adverse possession.

## **CIVIL LAW JURISDICTIONS**

### **France**

#### **Articles of the French Civil Code**

##### **Article 712**

La propriété s'acquiert aussi par accession ou incorporation, et par prescription.

##### **Article 2228**

La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exerçons par nous-mêmes, ou par un autre qui la tient ou qui l'exerce en notre nom.

##### **Article 2229**

Pour pouvoir prescrire, il faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire.

### **Article 2236**

Ceux qui possèdent pour autrui ne prescrivent jamais par quelque laps de temps que ce soit.

Ainsi, le fermier, le dépositaire, l'usufruitier, et tous autres qui détiennent précairement la chose du propriétaire ne peuvent la prescrire.

### **Article 2262**

Toutes les actions, tant réelles que personnelles, sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi.

### **Article 2265**

Celui qui acquiert de bonne foi et par juste titre un immeuble en prescrit la propriété par dix ans si le véritable propriétaire habite dans le ressort de la cour d'appel dans l'étendue de laquelle l'immeuble est situé ; et par vingt ans, s'il est domicilié hors dudit ressort.

### **Article 2268**

La bonne foi est toujours présumée, et c'est à celui qui allègue la mauvaise foi à la prouver.

## **English official translation <sup>1</sup>**

### **Article 712**

Ownership is also acquired by accession or incorporation, and by prescription.

### **Article 2228**

Possession is the detention or enjoyment of a thing or of a right which we hold or exercise by ourselves, or by another who holds and exercises it in our name.

### **Article 2229**

In order to be allowed to prescribe, one must have a continuous and uninterrupted, peaceful, public and unequivocal possession, and in the capacity of an owner.

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<sup>1</sup> [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)

### **Article 2236**

Those who possess for another never acquire ownership by prescription, whatever the time elapsed may be.

Thus a farm tenant, a depositary, a usufructuary, and all those who precariously hold the thing of an owner, may not prescribe it.

### **Article 2262**

All claims, *in rem* as well as *in personam*, are prescribed by thirty years, without the person who alleges that prescription being obliged to adduce a title, or a plea resulting from bad faith being allowed to be set up against him.

### **Article 2265**

A person who acquires an immovable in good faith and under a just title prescribes ownership of it by ten years, where the true owner lives on the territory of the court of appeal within whose limits the immovable is situated; and by twenty years, where he is domiciled outside of the said territory.

### **Article 2268**

Good faith is always presumed, and it is on the person who alleges bad faith to prove it.

## **Ownership by Adverse Possession** **French Law**

**Author: Faria Medjouba**

### **Introduction**

"Property is the most absolute right in relation to a thing which the law allows to an individual."<sup>2</sup>

Article 544 of the French Civil Code (French acronym C.civ) provides that "*Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations*".

Article 546 further provides that "*Ownership of a thing, either movable or immovable, gives a right to everything it produces and to what is accessorially united to it, either naturally or artificially.*" It incorporates (Article 551) all that is attached to the land and (Article 552) all that is above and below the soil.

"In English law, one cannot speak of an absolute title, except in relation to registered land and certain rights such as patents and copyrights. In French law, the owner has an absolute title, one facet of which is that prescription

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<sup>2</sup> Bell, Boiron, Wittaker, *Principles of French Law*, OUP, 1998, p283.

does not merely extinguish adverse titles but confers a positive title on the person prescribing. French law has no doctrine of estates and ownership attaches, not to estates in the land of various durations, but to the land itself [...] There can be no distinction between legal and equitable estate. Either a person is the owner or he is not; he cannot be the owner for management purpose without also being owner for purposes of enjoyment. In this sense, the unity of ownership is a fundamental principle of French law."<sup>3</sup>

France has a system of registration of transactions but this procedure does not affect their validity, merely their effectiveness against third parties.<sup>4</sup> French law effects transfer of title automatically by the operation of contract. There are three elements in the French registered land transactions.<sup>5</sup> In the first place, there is the agreement of the parties which suffices to transfer the property under Article 1138 of the Civil Code<sup>6</sup>. This agreement need not be in writing. Even when it is in writing, it need not follow any particular form and can be a simple private written document (*acte sous seing privé*), as opposed to a notarial act. Because validity does not depend on registration, the relevant date for all issues concerning the validity of the contract is that on which it has made, not the date of the registration. Thus, where a contract agreement was made on 20 March, but the notarial act and registration was not made until 4 April, the *Cour de Cassation* decided that the first date was the relevant one as a starting point.<sup>7</sup>

The second element is the notarial act (*acte authentique*), by which a notary records in an official note what the parties have agreed. The notary effectively ensures that the requirements for the validity of the transaction have been followed. Certain transactions, e.g. charges on land created by agreement must be made by way of notarial act in order to be valid. Even where an agreement does not require to be in the form of a notarial act to be valid, such as a sale of land, it will have to be recorded by a notary who will verify the signatures and the identity of the parties concerned. In the third place, the transaction will be registered in the appropriate local registry of charges.

Ownership can be acquired in a number of ways. One common method of classifying these draws a distinction between cases where the title is simply derived from another person, e.g. transfer or inheritance, and cases where it is an original title, as when a person appropriates property that has no owner or ousts its existing owner. Therefore, in French law, "a person becomes the original owner of a property as a result of his own actions and without reference to the actions of the others."<sup>8</sup> Although unusual in modern law,

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<sup>3</sup> Lawson, Anton, Brown, *Amos and Walton's Introduction to French Law*, 3<sup>rd</sup> Edition, 1967, p99.

<sup>4</sup> In this respect, it should be noted that registration of a parcel of land at the cadastre is irrelevant; it is a simple formality that has no consequences with regards to the right of property. Aix-en-Provence, 31 October 1996, Juris-Data n°048178

<sup>5</sup> Bell, Boiron, Wittaker, *Principles of French Law*, OUP, 1998, p290.

<sup>6</sup> "An obligation of delivering a thing is complete by the sole consent of the contracting parties."

<sup>7</sup> Civ. Ire 18 June 1962, D 1962.608.

<sup>8</sup> Bell, Boiron, Wittaker, *Principles of French Law*, OUP, 1998, p285.



French law demonstrates the importance of physical control in the notion of ownership.

In general terms, ownership may be acquired in two ways: it may be acquired from a previous owner by purchase for consideration or by way of gift or inheritance.

Ownership may also be acquired by adverse possession<sup>9</sup>. In this respect, Article 712 C.Civ provides that "*Ownership is also acquired by accession or incorporation, and by prescription.*"

Adverse possession is a cornerstone of French law: it enables a person to acquire a legal title that he did not have previously<sup>10</sup>.

Title by adverse possession is based on Article 2262 C.civ which provides a general prescriptive rule of thirty years, applicable to land as well as to other properties and rights. The use of land by a person as though he was its owner over a period of thirty years peacefully, publicly and in a non-equivocal manner will satisfy the requirements of the Article.<sup>11</sup>

It must be noted that where a person comes into possession in good faith, then the prescription period is reduced (*prescription abrégée*), from 10 to 20 years.

## **Conditions of ownership by adverse possession**

### **Summary**

#### **• The notion of possession: a key concept**

- Article 2229 C.civ provides that "*In order to be allowed to prescribe, one must have a continuous and uninterrupted, peaceful, public and unequivocal possession, and in the capacity of an owner.*"
- The notion of possession includes two distinct elements:
  - o The *corpus*, that is the factual exercise of the rights derived from the ownership; which means that the possessor should have material control and use of an insubstantial item of property.
  - o The *animus domini*, that is the intention to exercise the material mastery on his own behalf, and not on behalf of another person.

#### **• Prescription period**

- General principle: Thirty years, even if the possessor acted in bad faith. Article 2262 C.civ declares that: "*All claims, in rem as well as in*

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<sup>9</sup> *Prescription acquisitive* or *usucapion*.

<sup>10</sup> F. Terré, P. Simler, *Droit Civil, Les Biens*, 6<sup>e</sup> Edition 2002, Dalloz, p338

<sup>11</sup> H. Dyson, *French Property and Inheritance Law, Principles and Practice*, OUP, 2003.

*personam, are prescribed by thirty years, without the person who alleges that prescription being obliged to adduce a title, or a plea resulting from bad faith being allowed to set up against him."*

In this respect, it must be noted that if the action of the original owner to recover property cannot be prescribed, he will not be able to do so if the defendant can prove that he became the owner by adverse possession.<sup>12</sup>

In other words, the original owner cannot be deprived of his right of access to the courts, but his property right can be extinguished in favour of a person who had established lawful adverse possession.

- Reduced prescription period: From ten to twenty years. In this respect, Article 2265 provides that "*A person who acquires an immovable in good faith and under a just title prescribes ownership of it by ten years, where the true owner lives on the territory of the Court of Appeal within whose limits the immovable is situated; and by twenty years, where he is domiciled outside the said territory.*"
  - o Ten years where the true owner lives on the territory of the Court of Appeal within whose limits the immovable is situated.
  - o If the true owner does not live within the district of the Court of Appeal, then the period is extended by twice the number of years in which he has lived outside the area, e.g. maximum twenty years.

Two conditions have to be fulfilled: the possessor must have acted in good faith and he must prove the existence of a just title.

- o Good faith is always presumed and it is on the person who alleges bad faith to prove it (Article 2268 Civil code). The possessor acts in good faith when he genuinely believed that he had acquired the ownership from the true owner.
- o A just title can be defined as a juridical act which purpose is to convey ownership but which did not actually convey it. Generally, the inefficiency of the title derives from the fact that the author of the act was not the true owner.

### **• Effect of ownership by adverse possession**

Ownership by adverse possession has a retroactive effect: the possessor is considered to be the owner from the first day of the possession; and in the same way, the original owner loses all his rights from the day where the possession began.

For public policy matters, the possessor has to claim his ownership; the judge cannot do it on his behalf.

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<sup>12</sup> Civ. 1re, 7 October 1964, JCP 1964. II. 13944. " Si l'action en revendication intentée par le propriétaire dépossédé de son immeuble est imprescriptible, elle ne peut triompher contre un défendeur qui justifie être devenu lui-même propriétaire de l'immeuble revendiqué, par une possession contraire réunissant toutes les conditions exigées par la prescription acquisitive."

## The notion of possession - a key concept

With regards to adverse possession, the "new" owner needs not only to let time elapse passively; he needs to take some positive steps to mark out his ownership.

In this respect, the notion of possession is a key concept; even if often regarded as a factual situation, it has important implications in French law. In effect, "it is not enough that the original owner has lost interest in the thing: there must be some reason why the new owner is the person whose title the law should recognize."<sup>13</sup>

Accordingly, Article 2229 C.civ declares that "*In order to be allowed to prescribe, one must have a continuous and uninterrupted, peaceful, public and unequivocal possession, and in the capacity of an owner.*"

The French *Cour de Cassation* had many times the opportunity to acknowledge that ownership by adverse possession shall fulfil the conditions provided by Article 2229.<sup>14</sup>

Possession can be defined as exercising over a physical object such control as the owner would have.<sup>15</sup> However, "mere material control and use is not by itself sufficient to constitute possession in the eye of the law, there must, in addition, be a mental element."<sup>16</sup>

Subsequently, possession involves two distinct elements:

- The *corpus* or objective element, that is the factual exercise of the rights derived from the ownership (such as *usus*, *fructus* and *abusus*). In other words, it means that the possessor shall have material control and use of an insubstantial item of property and "have enjoyment over it as if one were lawfully entitled to exercise it".<sup>17</sup>
- The *animus domini*, or subjective element; that is "the intention to exercise the material mastery on his own behalf, and not on behalf or by licence of another person"<sup>18</sup>

In this respect, possession has to be distinguished from the notion of "precarious detention" (*détention précaire*). Article 2236 provides that "*those who possess for another never acquire ownership by prescription, whatever the time elapsed may be. Thus a farm tenant, a depositary, a usufructuary, and all those who precariously hold the thing of an owner, may not prescribe it.*"

Therefore, adverse possession supposes a real possession and encompasses both the *corpus* and the *animus domini*. A simple tenant or farmer will never become the owner by adverse possession because his title excludes any possibility of ownership.<sup>19</sup>

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<sup>13</sup> Bell, Boiron, Wittaker, *Principles of French Law*, op cit, p 284.

<sup>14</sup> See for example: Civ. 3<sup>e</sup>, 15 June 1976, Bull. civ III n°262.

<sup>15</sup> W. Cairns, R. McKeon, *Introduction to French Law*, 1<sup>st</sup> Edition, 1995.

<sup>16</sup> Lawson, Anton, Brown, *Amos and Walton's Introduction to French Law*, 3<sup>rd</sup> Edition, 1967, p100

<sup>17</sup> Cairns, McKeon, *Introduction to French Law*, op cit,

<sup>18</sup> Cairns, McKeon, *Introduction to French Law*, op cit

<sup>19</sup> See for example, Civ. 29 Oct 1899, DP 1900, 1, 253.

Also, adverse possession cannot be based on "acts of pure tolerance". Such acts have to be regarded as the acknowledgment of the owner's rights. For example, if an owner allows his neighbour to walk through his property in order to have access to a well or a fountain, the neighbour will never be able to claim the ownership of this passageway. On the contrary, by granting his permission, the owner formally expressed his right.<sup>20</sup>

Possession must be public; the effect of the possession must be noticeable if the original owner is going to have a chance to react and claim the property. Thus possession must not be clandestine. The *Cour de Cassation* held that possession is clandestine if the material acts of possession are hidden from people who would have interest in knowing them.<sup>21</sup> However, if possession is known by the claimant, then it will be considered as public.<sup>22</sup>

Possession must be peaceful. It can never begin by a violent act. Accordingly, the prescription period only begins to run from the date on which forcible occupation ceased.

Possession must be unequivocal. Case law shows that possession is equivocal when the acts of the possessor do not show his intention to behave like the real owner<sup>23</sup>; when he cannot prove the *animus domini*.

Possession must be continuous. Therefore, if the possessor cannot prove that he had the material control of the thing - the *corpus* -, on a regular basis, or at least with the same regularity than a real owner would have, then possession is regarded as discontinuous.<sup>24</sup>

It should be noted that there is a presumption of absence of irregularity.<sup>25</sup> Therefore, the burden of proof falls on the claimant.<sup>26</sup>

## **Prescription period**

### **• General principle: full prescription of thirty years**

The normal time limit with regards to adverse possession is thirty years, as provided by

Although this Article provides a general prescriptive rule of thirty years, it is applicable to land as well as properties.

Thus, a person can acquire a title by prescription even if he obtained possession in bad faith, e.g. by squatting on land knowing that he has no right to be there. French jurisdictions held that with regards to prescription of

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<sup>20</sup> F. Terré, P. Simler, *Droit Civil, Les Biens*, Dalloz, 6<sup>e</sup> Edition 2002

<sup>21</sup> Civ.3e, 15 February 1968, D. 1968.453.

<sup>22</sup> Civ.1re, 7 July 1965, Bull.civ. I, n°459.

<sup>23</sup> Civ.1re, 13 June 1963, Bull. Civ. III, n° 317.

<sup>24</sup> F. Chabas, H. Mazeaud, *Leçons de droit civil, Tome II, Volume 2, Les biens*, Monthchrestien, 8th Edition, 1994, p209

<sup>25</sup> Civ. 1ere 13 Nov.1970, JCP 1972, II, 17077.

<sup>26</sup> Poitiers, 19 November 2002, Juris-Data n°197861.

thirty years, bad faith does not constitute an irregularity and is therefore irrelevant with regards to prescriptive acquisition.<sup>27</sup>

Such a situation can be considered as extreme and French law is reluctant to recognize it. However, it can also be considered as being in accordance with the social interest: the law should not protect the owner who sat on his right for such a long period of time.

Under Article 2262, the general prescription of thirty years applies in this case, so the original owner has plenty of time to bring an action to repossess the property.

In this respect, it must be noted that if the action of the original owner to recover property cannot be prescribed, he will not be able to do so if the defendant can prove that he became the owner by adverse possession.<sup>28</sup> In other words, the original owner cannot be deprived of his right of access to the courts, but his property right can be extinguished in favour of a person who had established lawful adverse possession.

Also, it should be noted that if the vendor of land acquired it in bad faith, then even a good faith purchaser will have to rely on the full prescription of thirty years.<sup>29</sup>

Consequently, the possessor who acted in bad faith and even the usurper can become the legal owner after 30 years. However, if the possession started with acts of violence, the prescription starts only the day where the violence stopped (Article 2233 (2) C.civ).

- Reduced prescription period: from ten to twenty years

Article 2265 provides that *"A person who acquires an immovable in good faith and under a just title prescribes ownership of it by ten years, where the true owner lives on the territory of the Court of Appeal within whose limits the immovable is situated; and by twenty years, where he is domiciled outside the said territory."*

Under Article 2265, the shorter period is ten years. However, when the original owner has moved from the district of the Court of Appeal in which the property is situated, then the period is extended by twice the number of years in which he has lived outside the area. Thus, the maximum period for a possessor in good faith is twenty years.

The wording of Article 2265 clearly shows that two elements are necessary for reduced prescription: the existence of a "just title", and good faith.

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<sup>27</sup> See for example: Pau, 8 April 2002, Juris-Data n° 173536

<sup>28</sup> Civ. 1re, 7 October 1964, JCP 1964. II. 13944. " Si l'action en revendication intentée par le propriétaire dépossédé de son immeuble est imprescriptible, elle ne peut triompher contre un défendeur qui justifie être devenu lui-même propriétaire de l'immeuble revendiqué, par une possession contraire réunissant toutes les conditions exigées par la prescription acquisitive. "

<sup>29</sup> Civ. 3e, 29 February 1968, Bull. Civ. III n°83.

First of all, the possessor must act in good faith. The possessor acts in good faith when he genuinely believed that he had acquired the ownership from the true owner.<sup>30</sup>

Article 2268 facilitates the acquisition of title by reduced prescription by providing that good faith is always presumed: "*Good faith is always presumed, and it is on the person who alleges bad faith to prove it.*"

Secondly, the possessor in good faith must have acquired ownership under a "just title".

A just title can be defined as a juridical act which purpose is to convey ownership. Thus, sale and gift have to be regarded as a just title. Normally, such an act should be sufficient by itself to actually transfer the ownership. Subsequently, a just title is a title of a nature to convey ownership, but which did not actually convey it. However, and in spite of this lack of its normal effect, it enables a possessor in good faith to become the owner by reduced prescription. Why this favour? Because the possessor did not steal the thing; this thing has been transmitted to him, even if irregularly, and without any form of usurpation.<sup>31</sup>

In this respect, two situations have to be distinguished: the situation where the possessor acquired ownership from the real owner, and the one where the possessor acquired it by a non-owner.

In the former situation, the inefficiency of the title derives from the fact that the author of the act is not the true owner. Subsequently, the author, as a non-owner, could not have transferred a right that he did not have in the first place: *nemo plus juri ad alium transferre potest quam ipse habet*. That is the normal field of reduced prescription, that is, where the possessor genuinely believed he had dealt with the true owner.

In the latter situation, reduced prescription can normally not be invoked. However, there are two situations where the possessor can acquire the owner by reduced prescription: where the title, even if produced by the real owner, was declared null; and, where the title was not officially published.

A distinction must be drawn between the notion of just title and the one of putative title. Putative title can be defined as the situation where the title only exists in the belief of the possessor. In this case, the *Cour de Cassation* held that the just title must have a real and true existence,<sup>32</sup> otherwise, the condition of good faith would have been self-sufficient and there would have been no need for the condition of just title.

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<sup>30</sup> Civ.3<sup>e</sup>, 18 January 1972, Bull. civ. III, p28.

<sup>31</sup> F. Chabas, H. Mazeaud, *Lecons de droit civil, Tome II, Volume 2, Les biens*, Monthchrestien, 8th Edition, 1994, p254

<sup>32</sup> Civ. 1st, 6 November 1963, Bull. Civ. 1, n°483

### **Effects of ownership by adverse possession.**

Ownership by adverse possession has a retroactive effect: the possessor is considered to be the owner from the first day of the possession. Every action on the land is retroactively validated. In the same way, the original owner lost all his rights from the day where possession began. No compensation shall be claimed.

The purpose of this rule is to protect the third parties who dealt with the possessor.

However, for public policy<sup>33</sup> matters, the possessor has to claim his ownership; it cannot be automatically granted. The legislator did not want to oblige the possessor to become the owner, especially if he believes that the acquisition was dishonest or immoral.<sup>34</sup> Therefore, if the possessor does not claim it, the judge cannot do it on his behalf.

On the other hand, the possessor can also renounce to his ownership. Renunciation has a retroactive effect as well: if the possessor renounces to his property right by adverse possession, the true owner remains the owner from the beginning of the possession. Possession is considered as having never existed.

It does not need to be accepted by the owner as it is an unilateral act.

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<sup>33</sup> *Ordre public.*

<sup>34</sup> F. Chabas, H. Mazeaud, *Lecons de droit civil, Tome II, Volume 2, Les biens*, Monthchrestien, 8th Edition, 1994, p 262.

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## **Website Resources**

- [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)
- [www.courdecassation.fr](http://www.courdecassation.fr)

# **Spain**

## **ACQUISITION by adverse possession ("prescripción Adquisitiva" or "Usucapión") in Spain**

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### General Introduction

1. The Spanish Civil Code regulates acquisition by adverse possession together with prescription. Following the French Civil Code, the Spanish Civil Code (hereafter CC) distinguishes between:
  - (a) "acquisitive prescription", which is considered as a means of acquiring ownership or any other real right which can be possessed (for instance an usufruct, but not a mortgage) and



- (b) “**extinctive prescription**”, as a means of extinguishing all sorts of rights and actions (cf. Art. 1930 CC).<sup>1</sup>
2. The grounds for “acquisitive prescription” (*prescripción adquisitiva*, known also as *usucapión*) are explained according to a subjective theory and to an objective one. According to the subjective theory, acquisition by adverse possession presupposes a lack of activity of the owner not making use of his or her right. This lack of activity or omission amounts to an abandonment or neglect of his rights or to lack of diligence, whereas the person possessing adversely deserves protection for his or her diligence. According to the objective theory, “acquisitive prescription” or adverse possession aims at protecting interests of the society as a whole. The society’s interest in the certainty of legal situations is put at risk when stale claims are brought. Moreover, a situation lasting for a long period creates an appearance and certain expectations and it would be unjust to disappoint those who trust on them.
  3. In the case of “acquisitive prescription”, the Spanish Civil Code distinguishes between “ordinary” and “extraordinary” acquisitive prescription. The former requires more conditions but shorter periods of possession; conversely, extraordinary prescription requires fewer conditions but longer possessory periods (see *infra* at II).
  4. Both types of acquisitive prescription, however, must meet common requirements. Pursuant to Art. 1941 CC “Possession must be exercised under claim of ownership, and must be public, peaceful and uninterrupted”. In more detail, this means that:

**(a) Possession under claim of ownership**

5. Possessing under claim of ownership or as holder of the right that is to be acquired by adverse possession is, according to case-law, an essential condition for the acquisition by adverse possession.<sup>2</sup> This type of possession does not depend on mere intention of the possessor, since it must be externally manifested with acts according to which the possessor behaves as a true and actual owner of the thing or holder of the right on the thing which is

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<sup>1</sup> For a very basic bibliography see: Luis Díez-PICAZO/ Antonio GULLÓN BALLESTEROS, *Sistema de Derecho Civil*, Vol. III. *Derecho de cosas y Derecho inmobiliario registral*, 6ª ed., Madrid, Tecnos, 1997; Candido PAZ-ARES RODRIGUEZ / Luis Díez-PICAZO PONCE DE LEÓN / Rodrigo BERCOVITZ / Pablo SALVADOR CODERCH (Dir.), *Comentario del Código civil*, T. II, Madrid, Ministerio de Justicia, 1991; Manuel ALBALADEJO GARCÍA, *Comentarios al Código Civil y Compilaciones Forales* (Dirigido por Manuel ALBALADEJO y Silvia DÍAZ ALABART), T. XXV, vol 1., Madrid, Edersa, 1993 and Rodrigo BERCOVITZ RODRIGUEZ-CANO (Coordinador), *Comentarios al Código Civil*, Pamplona, Aranzadi, 2001. Still a valuable work after so many years, Antonio Manuel MORALES MORENO, *Posesión y usucapión*, Madrid, Centro Superior de Investigaciones Científicas, 1972.

<sup>2</sup> Among many others see the Decisions of the Supreme Court (hereafter SSTS –for several decisions- and STS –when quoting one only) 16.11.1999 [RJ 1999\8612], 17.11.1997 [RJ 1997\7897], 22.7.1997 [RJ 1997\5805] and 28 .6.1993 [RJ 1993\4791].

adversely possessed.<sup>3</sup> For this reason, persons who are possessing on the grounds of tolerance of the owner or who have an obligational right only cannot acquire by adverse possession even if they desire to finish such a possession and start possessing as a true owners or holders of the right (*animus domini*).<sup>4</sup> Thus the co-owner does not possess as sole owner against the other co-owners (STS 18.1.2000 [RJ 2000\109], nor does the co-heir possess as sole heir against the other heirs (STS 24.7.1998 [RJ 1998\6446]. The same is true, against the owner, in the case of the lessee (STS 24.1.1992 [RJ 1992\206] or in the case of a possessor who is a fiduciary holder only (STS 16.11.1999 [RJ 1999\8612]).

6. Whether possession is under claim of ownership or as holder of a real right or not is a question of fact that must be determined according to the external conduct of the possessor (SSTS 6.11.2005 [RJ 2005\7634] and 24.1.1992 [RJ 1992\206])<sup>5</sup> and the person who claims that he or she is possessing this way must furnish prove of it (SSTS 6.11.2005 [RJ 2005\7634], 24.1.1992 [RJ 1992\206] and 24.3.1983 [RJ 1983\1613]).

#### **(b) Possession must be public**

7. This condition is a logical consequence of the fact that possession is under claim of ownership or as holder of a real right. The owner of a thing or holder of a right makes use of it publicly, with no fear of being impaired by others for the fact that he is exercising his rights. This is an essential condition since, if clandestine possession were accepted, persons interested in preventing acquisition by adverse possession from taking place could have no knowledge of facts detrimental to them (SSTS 29.11.1968 [RJ 1968\5705] and 21.10.1964 [1964\4488]. According to legal doctrine, publicity does not refer to possession only, but also to the “concept” in which possession is held, i.e. that it is a possession under claim of ownership or as holder of a certain real right.<sup>6</sup>

#### **(c) Possession must be peaceful**

8. This is a requirement that has a material or physical character, i.e. “peaceful” is understood as opposed to violent possession, not to possession under dispute, as is possession, for instance, when somebody has brought a claim contesting it.<sup>7</sup> Being “peaceful” means that possession is not kept by force, even if it was taken by force. In this latter case, however, possession qualifying for

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<sup>3</sup> Among many other, see SSTS 29.4.2005 [RJ 2005\3648], 10.2.1997 [RJ 1997\938], 7.2.1997 [RJ 1997\685], 25.5.1995 [RJ 1995\4127] and 30.12.1994 [RJ 1994\10592].

<sup>4</sup> In this sense SSTS 16.11.1999 [RJ 1999\8612] and 9.6.1984 [RJ 1984\3251].

<sup>5</sup> See also ALBALADEJO, fn. 1, p. 260.

<sup>6</sup> Cf. MORALES MORENO, fn 1, p. 165 et seq. and ALBALADEJO, fn.1, p. 264.

<sup>7</sup> See SSTS 11.6.1994 [RJ 1994\6384], 21.10.1988 [RJ 1988\7597]. However, also against this position SSTS 8.5.1982 [RJ 1982\2559] and 20.4.1976 [RJ 1976\1920].

acquisition will not start until violence ceases. However, if the act of dispossession amounts to a crime, possession taken by force cannot not serve as grounds for adverse possession, even when violence has ceased, "...unless the criminal action on the crime or misdemeanour involved, or its penalty, as well as the action in damages arising from the crime or misdemeanour, have prescribed"(cf. Art. 1956 CC)..

**(d) Possession must be uninterrupted**

9. In order to acquire by adverse possession, possession may not be interrupted either "naturally" or "civilly" (art. 1943 CC). Possession is interrupted naturally when, for any cause, it ceases for more than one year (Art. 1944 CC). Civil interruption is caused by a judicial citation of the possessor, even if it is by order of a court without jurisdiction (Art. 1945 CC). However, a judicial citation will be considered not made and will cease to produce interruption if it is null for lack of legal formalities, if the plaintiff dismisses the claim or fails to continue it within the time allowed or if the claim against the possessor is dismissed (Art. 1946 CC). Civil interruption can also take place, under certain conditions, by an act of conciliation (cf. Art. 1947 CC) and by any express or tacit acknowledgment of the owner's right made by the possessor (cf. Art. 1948 CC).

Do limitation periods differ depending upon whether adverse possession is 'in good faith' or not?

10. Yes, the Spanish Civil Code draws a distinction between "ordinary" and "extraordinary" acquisitive prescription and between movables and immovables.

**(a) Ordinary and extraordinary acquisitive prescription**

11. This distinction stems from Roman law. Ordinary acquisitive prescription takes place when adverse possession is in "good faith" and the possessor has a "just title". Extraordinary acquisitive prescription is based upon possession only and does not require either good faith or just title.
12. Pursuant to Art. 1950 CC, "[G]ood faith on the part of the possessor consists in the belief that the person from whom he received the thing was the owner thereof and could transfer its ownership". By contrast to what happens in the area of contract law (cf. Arts. 1269 et seq. CC), "good faith" is not related to conduct, but to knowledge (cf. Arts. 433 and 1950 CC); therefore it has nothing to do with fraud or deceit, but it is simply related to knowing or to not knowing whether the person transferring the thing had an appropriate ownership or not (SSTS 27.9. 1996 [RJ 1996\6645], 23.1.1989 [RJ 1989\115] and 16.3.1981 [RJ 1981\915]. "Good faith" is a condition that is independent of the other condition of just title and must last for all the time established by the law as a condition for acquisition by ordinary

adverse possession to take place (cf. Art. 1940 CC). Although “good faith” is a question of fact, it is subject to legal assessment and this legal assessment can be reviewed in cassation (SSTS 22.10.1991 [RJ 1991\7234] and 5.7.1990 [RJ 1990\5776]).

13. Pursuant to Art. 1952 CC, “[A] just title shall be one that is legally sufficient to transfer the ownership or real right the prescription of which is in question”. “Just title” is thus the title that, had it not been for the circumstance preventing the transfer of ownership (or the corresponding real right), would have been sufficient to transfer ownership and would have done so (SSTS 25.2.1991 [RJ 1991\1594], 7.2.1985 [RJ 1985\538] and 30.3.1943 [RJ 1943\410]). When this title is a contract, the meaning of “title” coincides with Art. 609 CC when it provides that “Ownership and other real rights over things are acquired and transferred ... by delivery, as a consequence of certain contracts”. Here delivery (*traditio*) is the *modus* and contract the title (*titulus*). Hence, just titles would be contracts of sale, settlement, *datio in solutum*, or any other contracts suitable for transferring ownership or other legal right; outside the realm of contract law, just titles are, for instance, bequest and succession (STS 22.2.2000 [RJ 2000\808]). Just title must refer to the whole thing acquired by adverse possession and, accordingly, there will be no acquisition as regards those parts or respects of the thing not covered by the title (SSTS 17.11.1997 [RJ 1997\7897], 13.7.1995 [RJ 1995\5963] and 8.5.1993 [RJ 1993\3467]).
14. By contrast to good faith, which is presumed (cf. Art. 434 CC), just title is never presumed and must be fully proven (cf. Art. 1954 CC). However, in the case of adverse possession of immovables, “inscription shall be just title” (cf. Art. 35 *Ley hipotecaria* [Land Register Act, LH]). In this case, inscription performs the function of the title. When adverse possession refers to movables, possession of a movable in good faith ranks as title (cf. Art. 464 CC) and for this reason in these cases Art. 1955 I CC does not require title as an additional condition when it provides that “[T]he ownership of movables is prescribed by the uninterrupted possession of three years in good faith”<sup>8</sup>.
15. A further condition that must be met by the title, pursuant to Art. 1953 CC, is that “[T]he title for the prescription purposes must be true and valid”. Accordingly, titles that are null or void for lack of any of its essential requirements, such as lack of the essential requirements of form when this is needed (form *ad solemnitatem*), are not suitable for acquisition of ownership or other real right by adverse possession. However, case-law considers that voidable titles, such as contracts that can be annulled, rescinded, revoked or resolved, are suitable for this purpose (SSTS 10.2.2006 [RJ 2006\1700], 5.3.1991 [RJ 1991\1718] and 26.1.1988 [RJ 1988\146]). Inscription in the land or property register of a

voidable title performs the same function (SSTS 3.10.1974 [RJ 1974\3649] and 4.10.1969 [RJ 1969\4478]).

**(b) Acquisitive prescription of movables and of immovables**

16. The most important difference between acquisitive prescription of movables and immovables is that in the case of movables the period of adverse possession is much shorter.
17. Pursuant to Art. 1955 I and II CC “[T]he ownership of **movables** is prescribed by the uninterrupted possession of **three years in good faith**” and “[T]he ownership of **movables** is also prescribed by the uninterrupted **possession of six years**, without need of meeting any other condition”.
18. As regards immovables, pursuant to Art. 1957 CC “[O]wnership and other real rights on **immovables** are prescribed by possession of **ten years**, as to persons present, and **twenty years** as to absentees, **in good faith and with just title**”. Art. 1959 CC adds “[O]wnership and other real rights over immovables are also prescribed by uninterrupted possession for **thirty years, without necessity of title or good faith, and without distinction among persons present and absentees**, saving the exception provided for in Article 539”.<sup>9</sup>
19. As can be seen, in the case of immovables the limitation periods are longer: in the case of ordinary adverse possession, 10 years as to persons present and 20 years as to absentees. In the case of extraordinary adverse possession, the period is always of 30 years, with no further distinctions. Art. 1958 I CC defines what “absentee” means in this context: “[F]or the purposes of prescription, a person residing in a foreign country or overseas shall be considered absentee” and in 1958 II and III CC it establishes several rules regarding how this time of absence must be calculated.

Is compensation available for someone who loses his title to land at the end of a limitation period? If so, under which conditions?

20. No, as a rule there is no compensation available for someone who loses his title to land at the end of a limitation period. By a way of exception, in a general provision referring both to extinctive and to acquisitive prescription Art. 1932 CC provides that “[R]ights and actions are extinguished by prescription to the detriment of all kinds of persons, even legal ones, in the terms provided by the law” and adds that “[P]ersons incapacitated to administer their property shall have a right of action against their legal representatives if the negligence of the latter was the cause of prescription”. This liability of the legal representatives of person incapacitated to administer their property results from the fact that the Spanish Civil Code breaks with the Roman rule *contram non*

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<sup>9</sup> Art. 539 CC provides that “[C]ontinuous non-apparent servitudes and discontinuous servitudes, whether apparent or non-apparent, can only be acquired by virtue of title”.

*valentem non agere prescriptio*, which, albeit with many exceptions, was enshrined in *Las Partidas* (P 3.29.18 and P. 6.19.9) Therefore, prescription can take place against all sorts of persons, both legal and natural, even if natural persons are minor or incapacitated (SSTS 13.3.1996 [RJ 1996\2177], 12.6.1956 [RJ 1956\2482] and 28.11.1932 [RJ 1932-1933\1317]). These persons, however, are entitled to bring a claim against their legal representatives if the loss of the action or right is the result of a negligent action or omission of the latter.

#### SHORT REFERENCE TO THE NEW CATALAN CIVIL CODE

21. As is well known, Civil Law is not unified in Spain and there are several Autonomous Communities (Aragon, Balearic Islands, Catalonia, Galicia, Navarra and Basque Country) that have a more or less fragmentary regulation on civil law.
22. Catalonia had traditionally had a different regulation of adverse possession which had its origin in Visigothic law (*Usatge Omnes cause*). Enshrined in Art. 324 of the Catalan Compilation, the prior Catalan regulation did not distinguish between ordinary and extraordinary adverse possession, and established that possession that met the requirements that made it suitable for acquisition (i.e. public, peaceful and uninterrupted possession) and that was kept for 30 years was sufficient, with no further requirements.
23. In 2002 the Catalan legislature passed the “Llei 29/2002, de 30 de desembre. *Primera llei del Codi civil de Catalunya*” (The First Act of the Catalan Civil Code), which established the structure of the new Catalan Civil Code and passed its First Book. In 2006, the “Llei 5/2006, de 10 de maig, *del llibre cinquè del Codi civil de Catalunya, relatiu als drets reals*” (Act on the 5<sup>th</sup> Book of the Catalan Civil Code, referring to real rights) has incorporated the Book 5 (on property) into the Catalan Civil Code. This new Act, which has entered into force on the 1<sup>st</sup> of July 2006, has honoured the Catalan legal tradition by not distinguishing between ordinary and extraordinary adverse possession, but has substantially reduced the 30 year period. Thus, now pursuant to Art. 531-24 .1 CCC “[I]n order to acquire by adverse possession, possession must be under claim of holder of the right, public, peaceful and uninterrupted and does not require either title or good faith.” Additionally, Art. 531-27.1 CCC provides that “[T]he time periods required for acquisition by adverse possession are of three years for movables and twenty years for immovables”.

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# The Netherlands

## Acquisition of title of land in case of adverse possession

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### 1. Text and English translation of statutory provisions

The statutory provisions on prescription regarding situations of adverse possession and the acquisition of title can be found in Book 3 of the Dutch Civil Code (*Burgerlijk Wetboek, BW*) of 1992. This Book deals with general issues regarding patrimonial law (*vermogensrecht*). The most relevant provisions are the articles 3:99, 3:105 and 3:306. (All articles mentioned in this report are from the *Burgerlijk Wetboek*).

#### *Artikel 3:99:*

Rechten op roerende zaken die niet registergoederen zijn, en rechten aan toonder of order worden door een bezitter te goeder trouw verkregen door een onafgebroken bezit van drie jaren, andere goederen door een onafgebroken bezit van tien jaren.

#### *Article 3:99:*

Rights in moveable things which are not registered property and rights under documents payable to bearer and order are acquired by a possessor in good faith by uninterrupted possession for three years; other property is acquired by uninterrupted possession for ten years.<sup>1</sup>

#### *Artikel 3:105:*

1. Hij die een goed bezit op het tijdstip waarop de verjaring van de rechtsvordering strekkende tot beëindiging van het bezit wordt voltooid, verkrijgt dat goed, ook al was zijn bezit niet te goeder trouw.

2. Heeft iemand vóór dat tijdstip het bezit onvrijwillig verloren, maar het na dat tijdstip, mits binnen het jaar na het bezitsverlies of uit hoofde van een binnen dat jaar ingestelde rechtsvordering, terugverkregen, dan wordt hij als de bezitter op het in het vorig lid aangegeven tijdstip aangemerkt.

#### *Article 3:105:*

1. A person who possesses property at the time of the completion of the prescription of the right of action to terminate possession, acquires the property even if his possession was not in good faith.

2. Provided that a person who has involuntarily lost possession before the completion of the prescription of the right of action to terminate possession, has recovered it within the year following the loss of possession or by virtue of

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<sup>1</sup> New Netherlands civil code: patrimonial law (property, obligations, and special contracts), translated by P.P.C. Haanappel and Ejan Mackaay under the auspices of the Ministry of Justice of the Netherlands (Deventer-Boston: Kluwer Law and Taxation Publishers, 1990), p. 56.

an action instituted within that year, he is deemed to be the possessor at the time indicated in the preceding paragraph.<sup>2</sup>

*Artikel 3:306:*

Indien de wet niet anders bepaalt, verjaart een rechtsvordering door verloop van twintig jaren.

*Article 3:306:*

Unless otherwise provided for by law, rights of action are prescribed by twenty years.<sup>3</sup>

## **2. Comments**

Someone who is not the owner of the land can acquire ownership if he has been the possessor (*bezitter*) of it for a certain period of time (article 3:99). In principle, the possession has to be in good faith (*goede trouw*) but also if this was not the case the possessor can acquire ownership (*eigendom*).<sup>4</sup>

If the possessor acted in good faith he acquires ownership after he has uninterruptedly possessed the land for a period of 10 years. This follows from article 3:99(1).

If the possessor did *not* possess the land in good faith he acquires ownership after he has uninterruptedly possessed the land for a period of 20 years. This follows from article 3:105(1) (acquisitive prescription) in conjunction with article 3:306 (extinctive prescription).

To understand this latter combination of statutory provisions, it is important to point out that the Dutch Civil Code, following the French Civil Code, provides for two kinds of prescription: acquisitive prescription (*verkrijgende verjaring*) and extinctive prescription (*be vrijdende verjaring*). Acquisitive prescription regards the situation of adverse possession in which the possessor acquires ownership by way of prescription. Extinctive prescription regards the extinction of rights and actions.<sup>5</sup>

Article 3:105(1) (acquisitive prescription) provides that the adverse possessor of land becomes owner of the land when the right of action to terminate the adverse possession expires (art. 3:306). The latter article provides for a prescription period of 20 years.

It follows from article 3:314(1) that the 20 year period starts to run at the beginning of the day following the one on which the immediate termination of that situation can be claimed.

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<sup>2</sup> New Netherlands civil code: patrimonial law (property, obligations, and special contracts), translated by P.P.C. Haanappel and Ejan Mackaay under the auspices of the Ministry of Justice of the Netherlands (Deventer-Boston: Kluwer Law and Taxation Publishers, 1990), p. 58.

<sup>3</sup> New Netherlands civil code: patrimonial law (property, obligations, and special contracts), translated by P.P.C. Haanappel and Ejan Mackaay under the auspices of the Ministry of Justice of the Netherlands (Deventer-Boston: Kluwer Law and Taxation Publishers, 1990), p. 141.

<sup>4</sup> Asser-Mijnssen-Van Dam, Goederenrecht (Deventer: Kluwer, 2001), nr 423.

<sup>5</sup> Asser-Mijnssen-Van Dam, Goederenrecht (Deventer: Kluwer, 2001), nr 431.



The legislator of the new Civil Code has issued these rules in order to prevent the possible legal limbo under the old Civil Code (in force until 31 December 1991) in that the owner of the land was not entitled to terminate the adverse possession anymore (after his right of action has expired) and the possessor was not able to acquire ownership. It was preferred to adjust the legal situation to the factual one after expiration of the prescription period.<sup>6</sup>

Another difference between the old and the new Civil Code is that until 1991 the general prescription period was 30 years (art. 2004 oud Burgerlijk Wetboek, old Civil Code). The reduction to – in case of adverse possession of land – 20 years has not given rise to extensive discussions. It was considered that 30 years was ‘too long’ and that each rule on the prescription period is somewhat arbitrary.<sup>7</sup> However, at the time of the entering into force of the new Dutch Civil Code there have been discussions on the reasonableness of the 20 year period for extinctive prescription in case of, *inter alia*, acquiring the ownership of stolen objects of art.<sup>8</sup>

According to article 3:107(1) possession (*bezit*) means that someone detains the property for himself.<sup>9</sup> Whether someone detains property and whether he does so for himself or for another is determined according to common opinion, taking into account statutory provisions and the facts as they appear (art. 3:108). A person is presumed to detain property for himself (art. 3:109). A person takes possession of property by acquiring actual control of it (art. 3:113(1)). A possessor of property loses possession when it is evident that he abandons the property or when another acquires possession of it (art. 3:117(1)).<sup>10</sup>

A possessor who believes himself to be the title-holder and is reasonably justified in that belief, is a possessor in good faith. Once a possessor is in good faith, he is considered to remain so. Good faith is presumed; absence of good faith must be proven (art. 3:118).<sup>11</sup>

There is no relevant case law as to the statutory rules which have been set out in this section and which are of particular relevance for the questions to be answered.

### 3. Do limitation periods differ depending upon whether adverse possession is ‘in good faith’ or not?

It follows from section 2 that limitation periods differ depending upon whether adverse possession of the land is ‘in good faith’ or not. In case of the

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<sup>6</sup> C.J. van Zeben and J.W. du Pon (ed.), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 3: Vermogensrecht in het algemeen* (Deventer: Kluwer, 1981), p. 416; Asser-Mijnssen-Van Dam, *Goederenrecht* (Deventer: Kluwer, 2001), nr 423 and 431.

<sup>7</sup> C.J. van Zeben and J.W. du Pon (ed.), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 3: Vermogensrecht in het algemeen* (Deventer: Kluwer, 1981), p. 917.

<sup>8</sup> See *inter alia* C.C. van Dam, *Nederlands Juristenblad* 67 (1992) 29, 932-934.

<sup>9</sup> *Hoge Raad* 3 May 1996, *Nederlandse Jurisprudentie* 1996, 501 (*Huizing/NSAW*) and *Hoge Raad* <sup>8</sup> September 2000, *Nederlandse Jurisprudentie* 2000, 629 (*Pietersz/Groenenberg*).

<sup>10</sup> Asser-Mijnssen-Van Dam, *Goederenrecht* (Deventer: Kluwer, 2001), nr 428.

<sup>11</sup> Asser-Mijnssen-Van Dam, *Goederenrecht* (Deventer: Kluwer, 2001), nr 129, 429 and 430.

possessor's good faith the limitation period is 10 years. It is 20 years if the possessor was not in good faith.

#### **4. Compensation for someone who loses his title to land by prescription?**

If the owner of land loses his title by way of prescription, the rules on limitation do not provide for a right to compensation. It is generally acknowledged that an enrichment as the consequence of acquiring ownership as a consequence of the expiring of a limitation period is not unjustified. It does not give ground for a compensation action by the person losing title.<sup>12</sup> However, in the legal literature it has been argued that an exception should be made in case a debtor has unlawfully prevented the creditor to use his right of action before this right expired.<sup>13</sup>

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<sup>12</sup> W.H.M. Reehuis and E.E. Slob (ed.), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek*, *Boek 6: Algemeen gedeelte van het verbintenissenrecht* (Deventer: Kluwer, 1990), p. 830 and 833.

<sup>13</sup> C.J.H. Brunner, *RM Themis* 2001, p. 243.

Sweden

# **Brief presentation of transfer of title regarding real property in situations of adverse possession etc. in Swedish law**

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## **General Remarks**

Rules of limitation regarding acquisition of title to real property are laid down in the Real Property Code from 1970.<sup>1</sup> Ownership of real property by means of “adverse possession” is dealt with in chapter 16 of the code. As a general characteristic it can be said that issues of ownership of property dealt with under the rules in the Real Property Code, in cases of competing claims, are often connected with the issue of entry into the land register. In Swedish legal terminology it is said that a key factor is which party first received “lagfart”, which is the expression used for the entry into the land register. This also holds for adverse possession and similar issues.

## **Hävd**

The closest equivalent of the common law notion of adverse possession would be the Swedish institute of “hävd”. “Hävd” takes sight at the situation where someone has acted like the owner of a piece of real property for a longer period of time but without a valid title. The most common translation of “hävd” in legal writing is “prescription”. In some situations “hävd” can result in title for the possessor. There are two different possibilities under the Real Property Code to become owner of real property through “adverse possession”. The difference between the two lies in whether the new owner was in good faith or not. The issue of good faith affects the limitation period.

## **The 20 Year Limitation Period**

In ch. 16, sect 1, it is stated the when someone has received an entry into the land register regarding a piece of real property she will have a better right to the property after she has possessed the property for 20 years under the

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<sup>1</sup> Official Swedish name: Jordabalk 1970:994. Future references are to the Real Property Code.

claim of being an owner. A “better right” means that the possessor cannot be forced by the real owner (or rather: the previous owner) to give the property back.<sup>2</sup>

## **The 10 Year Limitation Period**

In the second paragraph of the section, it is stated that the limitation period is sometimes 10 instead of 20 years. The shorter *10 years* limitation period applies when the possessor has bought the property (or received the property as a gift or in a barter transaction) and she did not know and should not have known about the real owner’s right.

### **Differences between the 20 Year Rule and the 10 Year Rule**

There are several additional requirements in the second paragraph, compared to “the 20 year rule”. Most importantly, there is the additional requirement of good faith. After 20 years has gone since the possessor received an entry into the land register bad faith is, so to say, healed. But if someone wants to claim a better right to the property than the real owner after “just” 10 years, good faith is required.

Also the rule in the second paragraph requires that the possessor bought the property, or received the property under a barter contract or as a gift. No such requirements apply under the main 20 years rule. Under the 20 year rule the possessor will thus have a better right even if there was no contractual basis for the claim at all in the first place.

### **The Starting Point of the Limitation Period**

The limitation period starts to run as soon as someone other than the rightful owner has received a “lagfart”, that is, has been registered as an owner in the land register. (See ch. 16, sect. 1, para. 3.) This means that if B simply takes possession of a land unit owned by A, and becomes registered in the land register at time *t*, the limitation period will start to run at *t* no matter what happens later on with the land unit. If C buys the property from B 19 years after *t*, C will have a better right to the property than A after another year has passed.

### **Compensation for the Real ( Previous ) Owner**

There are no rules regarding compensation in cases where someone becomes owner of a piece of real property under the rules of “hävd”. In some situations the real owner could, in principle, have a right to compensation in tort law in these situations. In reality such claims will fail on the rules of limitation when the possessor receives a better right to the property.

### **Other types of Good Faith Acquisition**

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<sup>2</sup> I will use the term “better right” which is the expression used in the Real Property Code.

The rules regarding “hävd” should be seen against other rules regarding good faith acquisition of title in chapter 18 of the Real Property Code. The most interesting comparison is with the 10 year “hävd” rule in chapter 16, which also requires good faith. I will not comment in detail on the different rules in chapter 18 but will simply make a generalized comparison with the rules in chapter 16.

Under chapter 18, section 1, a good faith buyer (or, as the case may be, someone who received the property as a gift or under a barter contract) will have a better right to the property than the real owner if she was in good faith, under the condition that the seller (or the giver, or the other party to the barter contract) was registered as an owner in the land register. The rule applies in any situation where the real owner “lost” the property in a wrongful manner. There are important exceptions to this rule in ch. 18, sect 3. There is thus no possibility to good faith acquisition of title if the real owner had been forced to give up her property.

In cases of good faith acquisition of title in chapter 16 there is a possibility for the real owner to receive compensation from the government. (Ch. 16, sect. 4.)

The difference between the 10 year “hävd” rule and the good faith rules in chapter 16 lies primarily in the fact that the rules in chapter 16 will not apply under the circumstances mentioned in sect 3. Example: B forces A to give B her property, under the threat of violence. C, in good faith, buys the property from B. Since this is an exception mentioned in chapter 18, sect 3, C will only be able to claim a better right to the property than A under the 10 year “hävd” rule, which requires that 10 years has passed since B or C received entry into the land register. After these 10 years has passed, A will not be able to claim compensation from the government for the loss of title. (Furthermore, she will probably be unable to claim compensation in tort from B since the period of limitation will have expired.)

### **“Urminnes hävd”**

When the Real Property Code was introduced, a previously existing possibility of “urminnes hävd” was abolished. “Urminnes hävd” could be translated into something like “ancient possession” and was an institute that applied to situations where someone had possessed a piece of real property “since ancient times”, as an owner. In theory the possessor would under such circumstances be able to receive title to the property. When the question of “urminnes hävd” came up as a case for the courts it sometimes became an issue of such proportions that it bordered on constitutional law. One important case dealt with the right to title for the Swedish sami minority; a case of enormous proportions.<sup>3</sup>

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<sup>3</sup> The issues were dealt with by the Swedish Supreme Court in what is generally considered the largest Swedish court case in history, the so-called “Skattefjällsmålet”. This case dealt with the issue of whether the Swedish sami minority could have acquired ownership of large areas of land in Northern Sweden. See NJA 1981 p. 1.

**Case Law**

There is no case law from the Supreme Court regarding the rules on “hävd” in chapter 16 in the Real Property Code.

**Statutory Law**

The rules of the Real Property Code with a translation into English will be attached as a separate document.

# Hungary

## Adverse possession

Section 121(1) of Act IV of 1959 of the Civil Code of the Republic of Hungary, which regulates adverse possession, reads as follows:

“A person who has continuously had possession of real property for fifteen years, or any other thing for ten years as his own, shall acquire ownership through adverse possession.”

The prerequisites of adverse possession are as follows: 1) the passing of ten or fifteen years, 2) possession of the property as one’s own and 3) continuous possession.

Good faith is not required in order that someone can acquire the ownership of a thing through adverse possession. Therefore, the period of adverse possession does not depend on whether or not the adverse possessor acted in good faith.

The owner who has lost his ownership because of adverse possession is not entitled to claim either compensation or indemnification from the new owner under Hungarian law.

## **Rights and Obligations of the Owner and Adverse Possession under Hungarian Law**

### **1. Rights and Obligations of the Owner**

#### **1.1. Provisions of the Hungarian Civil Code<sup>1</sup> pertaining to the rights and obligation of the owner<sup>2</sup>**

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<sup>1</sup> Act IV of 1959 on the Civil Code of the Republic of Hungary (hereinafter referred to as Ptk.).

<sup>2</sup> Source of the translation of Ptk. and other legal regulations mentioned below: Hatályos Magyar Jogszabályok – Geltende Ungarische Rechtsnormen – Hungarian Rules of Law in Force which is a database issued by Complex kiadó containing many Hungarian legal regulations translated into English and German.

**(i) PART THREE**

**(ii) OWNERSHIP**

Title I

GENERAL RULES OF OWNERSHIP

**(iii) Chapter VIII**

Sections 88-90

[repealed]

Section 91

[repealed]

*Sections 92-93*

[repealed]

**(iv) Chapter IX**

**(v) Objects of Ownership**

Section 94

- (1) There may be ownership of all things which are capable of appropriation.
- (2) Unless otherwise provided by law, the provisions pertaining to ownership shall duly apply to money and securities as well as to natural resources that can be utilized in the same way as things.

Section 95

- (1) Ownership extends to everything that is permanently joined with a thing in such a way that disjunction would cause the thing or its disjoined part to be destroyed or would significantly reduce its value or usefulness (components).
- (2) In the case of doubt, ownership shall also extend to parts that are not components but are usually necessary or beneficial for the proper use or maintenance of a thing (accessories).

Section 96

The ownership of land shall not extend to the 'treasures of the earth', nor does it extend to natural resources.



### Section 97

- (1) Ownership of a building shall be due to the owner of the land.
- (2) Ownership of a building shall be due to the builder if so prescribed by law or by a written agreement concluded with the owner of the land.
- (3) The owner of the land shall have right of preemption in respect of the building, while the owner of the building shall have right of preemption in respect of the land.

## **Chapter X**

### **Content and Protection of Ownership**

#### ***(b) Right of Possession***

### Section 98

An owner has the right of possession and is entitled to protect the possession.

#### **Right of Use and Collection of Proceeds**

### Section 99

An owner is entitled to use and to collect the proceeds from a thing; he bears the liabilities attaching to the thing as well as the damage for which no one can be obliged to make compensation.

### Section 100

An owner is obliged, while using a thing, to refrain from any conduct that would needlessly disturb others, especially his neighbours, or that would jeopardize the exercise of their rights.

### Section 101

- (1) An owner may not deprive the neighbouring building from its necessary ground-support without providing another appropriate means of securing it.
- (2) An owner may keep the fruits fallen from branches reaching over his land if they are not gathered by the owner of the tree; he is not entitled to cut branches bending over or roots spreading over his land, unless they prevent him from the proper use of his land, and the owner of the tree does not remove them in spite of being requested to do so.

### Section 102

- 1) An owner shall permit entrance to his property for indemnification if it is necessary for doing works of public interest, harnessing animals, gathering fruit from branches reaching over his land, removing branches or roots, or for other important reasons.
- (2) An owner may use the neighbouring land for indemnification if it is necessary for the construction, demolition, reconstruction or maintenance of a building located on his land.

#### Section 103

- (1) If two parcels of land are separated by a fence (hedge) or field boundary, the affected neighbours shall be entitled to use it jointly.
- (2) Costs of maintenance shall be borne by neighbours in proportion to their statutory obligation to erect a fence. If it is not prescribed by legal regulation, costs shall be borne in proportion to the length of the land to be enclosed.

#### Section 104

- (1) A tree or bush standing on the boundary of two plots of land and the fruit thereof may be claimed by the affected neighbours in equal proportions. Maintenance costs are borne by the affected neighbours in the same proportions.
- (2) If a tree or bush standing on the boundary of two plots of land impedes the proper use of one of the plots of land, the affected owner shall be entitled to demand its removal, the costs of which shall be shared jointly by the owners.

#### Section 105

A stray animal may be withheld by the user of the land until compensation is provided by its owner for any damage that has been caused.

#### Section 106

A legal regulation or an agreement of the parties may depart from the provisions of this Act that pertain to neighbourhood right.

#### Section 107

- (1) In the event of danger (emergency) constituting a direct threat to the life, safety or property of another person that cannot be prevented in any other way, an owner shall tolerate his thing to be used, utilized or damaged to the extent necessary for abolishing the emergency situation. This obligation shall be binding on an owner in the case of an emergency endangering another person's property only if the imminent damage is estimated to substantially exceed the damage likely to be caused to the owner as a consequence of the intervention.
- (2) Owners shall be entitled to demand indemnification from persons in an emergency and compensation from persons who caused unjustifiably great damage in the course of eliminating the emergency.
- (3) If a danger that threatens the lives or properties of several persons is prevented by sacrificing some endangered articles, the damage originating therefrom shall be borne jointly by the affected persons in proportion to their risked interests, if such sacrifice was necessary; this provision shall also apply to the sharing of costs necessary for preventing the danger.

#### Section 108

- (1) The owner of a real property is obliged to tolerate agencies authorized by specific other legislation to use the real property for a period of time, obtain servient tenement or restrain ownership rights in other ways to the extent that is necessary for the performance of their professional tasks. In such cases, the owner of the real property shall be entitled to indemnification according to the extent of the hindrance (restraint).

(2) If the servitude or another restraint terminates or considerably impedes the proper use of the real property, the owner may request that the real property be purchased or expropriated.

(3) Provisions pertaining to production, construction, health care, water management and other issues concerning the exercise of ownership rights are prescribed in specific other legislations.

#### Section 109

(1) If an owner had a house built beyond the boundary line of his land in good faith, the neighbour shall be entitled to demand the builder either

a) pay indemnification for damage for the use of the part of land occupied and for the depreciation in value caused therewith,

b) purchase the part of the land occupied if the land is divisible, or

c) purchase the entire parcel of land.

(2) A neighbour may demand that the builder purchase his entire land if

a) the construction has rendered the remaining part of the land unusable,

b) the exercise of a right or profession related to the land has become impossible or considerably more expensive due to the construction.

#### Section 110

(1) If the builder has acted in bad faith or the neighbour has protested against the construction at a time when restoration of the original state would not have caused unreasonable damage to the builder, the neighbour shall, in addition to the options prescribed in Paragraph (1) of Section 109, be entitled to demand the builder either

a) transfer ownership of his land and the building in return for proper compensation of actual gains, or

b) demolish the building.

(2) A neighbour may demand the demolition of a building if it is not against the requirements of reasonable management. The costs of demolition and of the restoration of the original state shall be borne by the builder; however, he shall have possession of the material recovered.

#### Section 111

(1) A court decision may resolve the consequences of construction in a manner that differs from the neighbour's choice; however, such a decision may not prescribe a solution that is protested by both parties.

(2) [repealed]

### **Right of Disposition**

#### Section 112

(1) An owner has the right to surrender the possession, use or collection of proceeds of a thing to another person, to use it as security or encumber it in another way, and, furthermore, to transfer or abandon ownership.

(2) The ownership of real property may not be abandoned.

### Section 113

If ownership of a building may be claimed by the owner of the land, the ownership of the building may only be transferred or encumbered together with the ownership of the land.

### Section 114

- (1) If a legal regulation or court decision excludes or restricts the right of disposition, any disposition contrary to this prohibition or restriction shall be null and void.
- (2) The right to alienate or encumber property may be restricted or excluded by contract only in the event of the transfer of ownership and only for the purpose of securing the right of the transferor or another person in respect of the thing. With regard to real property, the right secured by the prohibition shall also be indicated in the real estate register.
- (3) Any disposition contrary to a prohibition of alienation or encumbrance stipulated by contract shall be null and void provided that
  - a) the prohibition has been entered in the real estate register,
  - b) the person claiming a right for disposition has otherwise acted in bad faith, or
  - c) the disposition did not include any consideration.

## **Protection of Ownership Rights**

### Section 115

- (1) Ownership claims shall not lapse.
- (2) Pursuant to the regulations on the protection of possession, an owner may arbitrarily restrain or prevent any and all illegal intrusion or influence that impedes, restricts, or obliterates the exercise of his ownership rights.
- (3) An owner may demand the termination of illegal intrusions or influences and, if things have been removed from his possession, to have them returned.

### Section 116

- (1) The owner of a real property, if he has acquired ownership title from an owner other than the holder of record, may request to have his ownership indicated in the real estate register.
- (2) If other legal regulations do not make exceptions, the real estate register shall be deemed authentic certification of the existence of ownership and other entitlements.
- (3) The detailed provisions on real estate registration are prescribed in specific other legislation.

## **1.2. Commentaries on the above mentioned provisions**

Under Hungarian law the right of ownership includes the right of possession, the right of use and right of disposition. In accordance with the right of possession, the owner is entitled to have the thing in his power; and to protect his possession. The right of use means the use and the collection of proceeds

from property<sup>3</sup>. The owner must exercise the right of use concerning his property properly; however, this right can only be restricted by law. The right of disposition includes the right to surrender the possession, use or collection of proceeds of property to another person, to use it as security or encumber it in another way; and, furthermore, to transfer or abandon ownership<sup>4, 5</sup>.

As far as the obligations on the owner are concerned, he must bear the liabilities of his property<sup>6</sup>, which have three aspects. On the one hand, this includes the costs and expenditure which are necessary to maintain, protect or reconstruct, etc. the property. The liabilities also include restrictions on the elements of the right of ownership, for example, the duty of tolerance (e.g. the owner has to tolerate people passing across his land), or the duty to refrain from conduct (e.g. from making a loud noise). Rights *in re aliena*, neighbourhood rights and restraints on alienation and encumbrance also fall within this category. Thirdly, liabilities also cover public dues (e.g. taxes). The owner must also bear the costs of any damage to the property if no one can be obliged to provide compensation (i.e. assumption of the risk). In the event of danger constituting a direct threat to the life, safety or property of another person that cannot be prevented in any other way, an owner shall tolerate his property to be used, utilized or damaged to the extent necessary to put an end to the emergency situation<sup>7, 8</sup>.

Neighbourhood rights<sup>9</sup>, encroachment<sup>10</sup> and restraints on alienation and encumbrance<sup>11</sup> are deemed the restrictions on the right of ownership in private law.<sup>12</sup>

As for the restrictions on the right of ownership in public law, there are four categories. The first category covers the restrictions relating to the acquisition of ownership. There are three subcategories:

- 1) Property the possession of which cannot be taken (e.g. *res communes omnium usus*).
- 2) Property owned exclusively by the state<sup>13</sup> and primary assets of self-governments<sup>14</sup> or other important property such as the property of the Churches and arable land<sup>15</sup>.

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<sup>3</sup> See Section 99 of Ptk.

<sup>4</sup> See Section 112(1) of Ptk.

<sup>5</sup> Lenkovics Barnabás: *Dologi jog*, Budapest, Eötvös József Könyvkiadó, 2001, p. 87-92.

<sup>6</sup> See Section 99 of Ptk.

<sup>7</sup> See Section 107(1) of Ptk.

<sup>8</sup> Lenkovics Barnabás: *op. cit.* p. 93-95.

<sup>9</sup> Sections 102-106 of Ptk.

<sup>10</sup> Sections 109-111 of Ptk.

<sup>11</sup> Section 114 of Ptk.

<sup>12</sup> Lenkovics Barnabás: *op. cit.* p. 99-111.

<sup>13</sup> Under Section 172 of Ptk. “[u]nless otherwise provided by law, the following shall remain under exclusive state ownership:

- a) the 'treasures of the earth',
- b) underground waters, the natural basins of underground waters, rivers and natural lakes, and the beds thereof,

3) Conditional acquisition of ownership, which means, for example, that “[t]he provisions pertaining to domestic private persons shall apply to the EU national wishing to settle in Hungary to independently engage in agricultural production, and who has been legitimately residing in Hungary for at least three consecutive years and is pursuing agricultural activities”.<sup>16</sup>

The second category provides for restrictions relating to the possession of property. The following items fall within this category: firearms, explosives or art treasures.

The third category includes restrictions relating to the right of use and collection of proceeds. It is often the case that possession of property falling within this category is also restricted. Here are some examples: obligation of registration, obligation of use (concerning e.g. arable land) or restriction of use (e.g. temporary restriction of use of heavy goods vehicles), etc.

Restrictions on the right of disposition fall within the fourth category. The restraint on alienation and encumbrance is one of the restrictions on the right of disposition; however, it belongs to the category of restrictions in private law. As for the restrictions in public law, the obligation of alienation, the registration of alienation or the conditional alienation of a product, etc, can be mentioned.<sup>17</sup>

Expropriation can also be regarded as a restriction on the right of ownership. Under Section 173(1) of Ptk. “[r]eal property may be expropriated in special cases and in the public interest, for the reasons and in the manner prescribed by law. Full, unconditional, and prompt indemnification shall be made for expropriated real property.” Section 173(2) of Ptk. stipulates that “[t]he specific

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- c) abandoned riverbeds and newly evolved islands of rivers,
  - d) national public roads, railroads, international commercial airports, and the airspace over the territory of the country,
  - e) frequencies to be used for telecommunications purposes,
  - f) the full range of authentication codes used for communication networks, for the provision of communication services, and for cooperation between communication networks and services.
  - g) [repealed]”

14 Under Section 79(1) of Act LXV of 1990 on Local Self-Governments “[p]rimary assets shall comprise that property of the self-government that is used directly by the self-government to meet its compulsory duties and responsibilities or to enforce public rights and powers.”

15 Under Section 5(1) of Act LV on Arable Land “[a] domestic private person may acquire ownership of arable land only up to the limit of 300 hectares in terms of size or 6000 Aranykorona (Gold Crowns) (hereinafter referred to as 'AK') in terms of quality rating.”

<sup>16</sup> Section 7(2) of Act LV on Arable Land.

<sup>17</sup> Lenkovics Barnabás: op. cit. p. 111-116.

provisions on expropriation shall be prescribed in a separate law.” This is the Law Decree No. 24 of 1976 on Expropriation.<sup>18</sup>

## **2. Adverse Possession**

2.1. Provisions of the Hungarian Civil Code pertaining to the adverse possession

### **Adverse Possession**

#### Section 121

(1) A person who has continuously had possession of a real property for fifteen years, or any other thing for ten years as his own, shall acquire ownership through adverse possession.

(2) A person who has taken possession of a thing by committing a crime or in another violent or treacherous way shall not acquire ownership through adverse possession.

(3) [repealed]

(4) Ownership of real property shall not be acquired through adverse possession, if the conditions of adverse possession exist only for a section of the land and that parcel of land is indivisible.

(5) An adverse possessor, in the event of failure to have his ownership registered in the real estate register, shall not be entitled to claim acquisition of ownership against a person who has acquired a right on the real property for payment of a consideration, as relying upon the real estate register.

#### Section 122

A new possessor shall be entitled to add to the period of his own adverse possession the time that qualified as time of adverse possession during the possession of his predecessor.

#### Section 123

If an owner is not in the position to exercise his ownership rights for a reason that can be justified, adverse possession shall not take place for one year from the termination of the impediment, even if the time of adverse possession has elapsed or there is less than one year left.

#### Section 124

(1) Adverse possession is interrupted, if

- a) the owner summons the possessor in writing to surrender the thing or files a lawsuit thereto,
- b) the owner has the disposal of the thing (Section 112),

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<sup>18</sup> Lenkovics Barnabás: op. cit. p. 116-122.

c) the possessor loses the property against his will and does not acquire it again within one year or does not file for court action within one year to have the thing returned by its new possessor.

(2) If adverse possession is interrupted, the time of adverse possession that has elapsed up to that date may not be taken into consideration, and the period of adverse possession begins again following the termination of the reason for interruption.

## 2.2. Commentaries on the above mentioned provisions

Adverse possession is one of the methods of acquisition of ownership. The prerequisites of adverse possession are as follows: 1) the passing of ten or fifteen years, 2) possession as one's own and 3) continuous possession. As for the first requirement, the possessor has to be in possession of real property for fifteen years, or of any other property for ten years, so as to acquire ownership through adverse possession. In accordance with the ministerial reasoning of Ptk., the second requirement relates not only to the person who thinks that the property belongs to him, but also to the person who knows that it belongs to somebody else, however he considers his possession definitive. Therefore, good faith is not a condition of acquiring the ownership of property through adverse possession.<sup>19</sup> According to the Supreme Court of the Republic of Hungary<sup>20</sup>, it is very important to note that if a person does have legal title to possess property, he is unable to acquire its ownership through adverse possession. As far as the third prerequisite is concerned, the possession is continuous if the possession is not interrupted by the facts and circumstances specified in Section 124(1) of Ptk. The fact that the possessor, for example, hires out the property for a certain period of time does not influence the continuity of the possession of the possessor. Everybody who has legal capacity (i.e. natural and legal persons, including the State as well) can acquire ownership through adverse possession.<sup>21</sup>

In the case of joint ownership, it is possible that a co-owner may acquire the ownership the property of another co-owner; however, the court has to pay increased attention to whether the prerequisites of adverse possession are to be established.<sup>22</sup>

Under Section 121(4) of Ptk. “[o]wnership of real property shall not be acquired through adverse possession, if the conditions of adverse possession exist only for a section of the land and that parcel of land is indivisible”. Therefore, the parcel of land may be acquired through adverse possession only if the provisions pertaining to building affairs allow it. The adverse

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<sup>19</sup> A Polgári Törvénykönyv magyarázata [authors: Benedek Károly et al.; editor: Gellért György] Budapest, KJK, 1992, p. 295-297.

<sup>20</sup> BH 1975. 509. Bírósági Határozatok (hereinafter referred to as BH) is a Hungarian periodical which contains the most important judicial decisions.

<sup>21</sup> A Polgári Törvénykönyv magyarázata [authors: Benedek Károly et al.; editor: Gellért György] Budapest, KJK, 1992, p. 297-298.

<sup>22</sup> PK 4. This is a Statement by the College of Judges on Civil Proceedings – Polgári Kollégiumi Állásfoglalás – of the Supreme Court (hereinafter referred to as PK).



possessor is obliged to prove that he has the permission issued by the authority of building affairs if it is required.<sup>23</sup>

In the event of adverse possession of real property, the adverse possessor acquires the ownership of real estate ex lege; i.e. the registration of the fact of adverse possession of real estate in the land register is not required to acquire ownership through adverse possession. However, if the adverse possessor does not have his ownership registered in the register, he is not entitled to claim acquisition of ownership against a person who has acquired a right in the real property for consideration, who is relying upon an entry in the real estate register<sup>24 25</sup>. Nevertheless, it is important to mention that the person who has acquired a right (of course including the right of ownership as well) in the real estate for consideration must have acted in good faith according to judicial practice<sup>26</sup>. If this person acted in bad faith, the adverse possessor may rely on the fact that he acquired ownership of the real estate through adverse possession.<sup>27</sup>

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<sup>23</sup> A Polgári Törvénykönyv magyarázata [authors: Benedek Károly et al.; editor: Gellért György] Budapest, KJK, 1992, p. 300-301.

<sup>24</sup> See Section 121(5) of Ptk.

<sup>25</sup> A Polgári Törvénykönyv magyarázata [authors: Benedek Károly et al.; editor: Gellért György] Budapest, KJK, 1992, p. 301. See also BH 1975. 510.

<sup>26</sup> BH 1970. 6318.

<sup>27</sup> A Polgári Törvénykönyv magyarázata [authors: Benedek Károly et al.; editor: Gellért György] Budapest, KJK, 1992, p. 302.

# Poland

## Overview

### *Adverse possession*

The Polish Civil Code permits the acquisition of ownership by adverse possession in Articles 172 – 176, as a legal instrument which corrects the differences between the legal status and the actual state of affairs. In order to acquire ownership by way of adverse possession two conditions must be met: (1) uninterrupted possession as an autonomous possessor (i.e. the possessor must act “as the owner”); and (2) the lapse of time.

### *Limitation periods*

Limitation periods for adverse possession of real property are:

- 20 years, when possessor is in good faith;
- 30 years, when possessor is in bad faith.

However, if the owner of the land against whom the period of adverse possession is running is a minor, the period of possession cannot give rise to ownership of the land until two years after the original owner has become an adult.

### *Good faith*

The good faith of the possessor is not a condition for acquiring ownership; it only affects the length of the limitation period (see above). The Polish Civil Code does not define the term “good faith”; instead it is treated as a blanket clause.

### *Compensation*

Polish law does not provide for any form of compensation for someone who loses their proprietary title by way of adverse possession after the expiry of the limitation period

# **Adverse possession and limitation - Enquiry into the duties of property owners under other legal systems (Poland)**

## **1. Relevant provisions of Polish Civil Code**

**Kodeks cywilny z dnia 23 kwietnia 1964 r. (Dz.U. Nr 16, poz. 93, z późn. zm.) (wyciąg):**

### **Zasiedzenie**

#### **Art. 172.**

§ 1. Posiadacz nieruchomości nie będący jej właścicielem nabywa własność, jeżeli posiada nieruchomość nieprzerwanie od lat dwudziestu jako posiadacz samoistny, chyba że uzyskał posiadanie w złej wierze (zasiedzenie).

§ 2. Po upływie lat trzydziestu posiadacz nieruchomości nabywa jej własność, choćby uzyskał posiadanie w złej wierze.

#### **Art. 173.**

Jeżeli właściciel nieruchomości, przeciwko któremu biegnie zasiedzenie, jest małoletni, zasiedzenie nie może skończyć się wcześniej niż z upływem dwóch lat od uzyskania pełnoletności przez właściciela.

#### **Art. 175.**

Do biegu zasiedzenia stosuje się odpowiednio przepisy o biegu przedawnienia roszczeń.

#### **Art. 176.**

§ 1. Jeżeli podczas biegu zasiedzenia nastąpiło przeniesienie posiadania, obecny posiadacz może doliczyć do czasu, przez który sam posiada, czas posiadania swego poprzednika. Jeżeli jednak poprzedni posiadacz uzyskał posiadanie nieruchomości w złej wierze, czas jego posiadania może być doliczony tylko wtedy, gdy łącznie z czasem posiadania obecnego posiadacza wynosi przynajmniej lat trzydzieści.

§ 2. Przepisy powyższe stosuje się odpowiednio w wypadku, gdy obecny posiadacz jest spadkobiercą poprzedniego posiadacza.

**Civil Code, dated 23 April 1964 (Dz.U. Nr 16, item 93, as amended) (excerpt):**

### **Usucaption**

#### **Article 172.**

§ 1. The possessor of real property who is not its owner shall acquire ownership if he possesses that property without interruption for twenty years as an autonomous possessor unless he has acquired possession in bad faith (usucaption).

§ 2. After the lapse of thirty years the possessor of real property shall acquire ownership of it, even if he acquired possession in bad faith.

### **Article 173.**

If the owner of real property against whom the period of usucaption runs is a minor, the period of usucaption cannot end until two years after the owner has become an adult.

### **Article 175.**

The rules on the period of limitation for a claim shall apply correspondingly to the running of usucaption.

### **Article 176.**

§ 1. If a transfer of possession takes place while the period of usucaption is running, the present possessor may add to the length of his own possession the length of the possession of his predecessor. If, however the previous possessor acquired possession of the property in bad faith, the length of his possession may be added only if, together with the length of possession of the present possessor, it amounts to at least thirty years.

§ 2. The above provisions shall apply correspondingly where the present possessor is heir to the previous possessor.

**Note:** Article 174 of the Polish Civil Code relates to usucaption of movable property. Article 175 and Article 176 relate both to usucaption of real and movable property. Articles 606 – 610 of the Polish Civil Procedure Code also relate to usucaption, but procedure exceeds the scope of this research.

## **2. Construction of usucaption in Polish legal system – basic research**

The usucaption is a legal instrument which corrects differences between the legal status and the actual state of affairs. In other words, usucaption leads to the acquisition of a certain proprietary right by a disentitled person, because of the long possession of the right by that person. Usucaption is the legal consequence of the belief that not exercising a proprietary right for a long period of time creates an unfavourable situation. The loss of the right is an expression of disapproval.

In order to acquire ownership by way of usucaption, two conditions must be met: (1) uninterrupted possession as an autonomous possessor and (2) lapse of time. The good faith of the possessor is not a condition for acquiring ownership; it only affects the length of the limitation period.

Limitation periods for the usucaption of real property are:

- 20 years, when the possessor is in good faith;
- 30 years, when the possessor is in bad faith.

However, if the owner of the property against whom the period of usucaption runs is a minor, the period cannot end until two years after the owner has become an adult.

The possessor can be treated as an autonomous possessor, if he acts “as the owner”; using the land exclusively, collecting proceeds from the land and having the right to dispose of the property (in this case the land). Possession that leads to usucaption must be *cum animo rem sibi habendi*.

The possession must be uninterrupted. However according to the Polish Civil Code the continuity of possession is presumed. A transient obstacle to possession does not interrupt the running of the period. If possession is restored, it is deemed uninterrupted (a legal fiction).

The Polish Civil Code does not define the terms “good faith” or “bad faith”. According to article 7 of the Code: “If statutory law makes legal effect dependent upon good or bad faith, good faith shall be presumed”. The burden of proof is on the person who states that the autonomous possessor has acquired possession in bad faith.

The concept of “good faith” and “bad faith” has the character of a “blanket clause”. The function of blanket clauses in civil law is to enable consideration of circumstances that cannot be judged according to a pattern, identically in every situation.

When acquisition of ownership by way of usucaption is taken into consideration, the good faith of the possessor means that he believes that he actually owns the right he is exercising, and that this belief is justifiable in the circumstances. A possessor is in bad faith if he knows that he is not entitled to the right; or does not know that he is not entitled, and this unawareness is not justifiable.

If the possessor of the property is in good faith himself, yet he has acquired possession from a predecessor who is in bad faith; the limitation period is 30 years.

The crucial moment for judging whether the possessor is in good or bad faith, is the moment of acquiring possession. Any later change in the awareness of the possessor does not affect this appraisal, the rule *mala fides superveniens non nocet* applies.

The lapse of the limitation period causes acquisition of ownership by the operation of law (*ex lege*). The autonomous possessor cannot modify this effect or renounce it.

The owner of the real property is not capable of acquiring ownership of it by way of usucaption. Usucaption cannot be used to clarify the legal status of real property when the owner is not capable of proving his legal title.

The acquisition of ownership by way of usucaption is impossible when the law excludes or limits the ability to acquire ownership of some things or some entity. An entry (concerning ownership) made in the land register for the property does not affect usucaption in any way.

The subject of usucaption must be material thing, capable of being the subject of individual possession. According to the Supreme Court (C I 292/48) public roads, streets, markets, parks, military areas, cemeteries cannot be acquired by way of usucaption.

It is possible to acquire by way of the usucaption both the ownership of the real estate and perpetual usufruct.

### **3. The most important judicial decisions of the Supreme Court concerning usucaption**

#### **I CR 302/71**

When evaluating if the conditions for acquisition of ownership of real property by way of usucaption exist, the term “good faith” means that the belief of the possessor that he actually has the right to the property which he is exercising is justifiable in the circumstances

#### **III CR 516/70**

In Polish law the rule that nobody can change the basis of his possession is not in force.

#### **III CRN 96/87**

The present possessor can add to the length of his own possession the length of the possession of his predecessor, as well as earlier possession, if the person who possessed the real property directly before the present possessor was entitled to it.

#### **I CKN 40/96**

The law allows the possibility of acquiring, by way of usucaption, the ownership of real property taken into possession in bad faith, and even by way of unlawful acquisition of autonomous possession (*apprehensio possessionis*).

#### **I CKN 430/98**

If the autonomous possessor of property is in bad faith, and during the limitation period he addresses the owner, or the person that he considers to be the owner, with an offer to acquire the ownership of the property by the way of agreement; this does not deprive his possession of the attribute of autonomy; unless it arises from different circumstances that he is resigning from separate and independent usage of the property.

#### **IV CKN 1050/2000**

The possessor of property is the person who actually uses it as the owner (autonomous possessor), and only such possession leads to usucaption. A person who uses the property in a manner corresponding to the substance of another right, is the possessor of that right (dependent possessor).

### **III CKN 1144/2000**

Usucaption flows against the owner. It is a condition of usucaption that the possessor is not the owner of the property at the same time.

### **II CKN 1492/2000**

A person who lawlessly entered into possession of another's real estate cannot be declared a possessor in good faith.

### **II CK 669/2004**

The Code does not provide for different treatment of the possessor who is registered as the owner of the property in the land register. (The code) differentiates limitation periods only on the basis of whether the possessor was in good or bad faith.

## **Germany**

### **German law**

German land law provides for two different methods of acquiring property by way of adverse possession. Under § 900 BGB (German Civil Code),

*A person, who has been registered in the land register as the owner of a piece of land without having obtained ownership, acquires ownership thereof, if he has been registered as such for thirty years and during that time he has been in proprietary possession of the land.*

According to § 927 BGB,

*The owner of a piece of land may, if for thirty years the land has been in the proprietary possession of another, be excluded from his rights by means of public summons. [...] If the owner has been registered in the land register, the public summons is permissible only if he is dead or has disappeared and no registration in the land register which requires the owner's consent has been made within thirty years.*

§ 900 BGB deals with the acquisition of property by a person who has been registered in the land register as owner of the land for 30 years (*Buchersitzung, usucapio secundum tabulas*).

If the proprietary possessor of a piece of land (*possessio*) has been registered in the German land register as owner of the piece of land (*scriptum*) for 30

years (*tempus*), the registered person automatically acquires ownership of the land.

The former proprietor loses his property right, and is not entitled to compensation. Furthermore, there are no possible claims for damages or unjust enrichment in favour of the former owner, because the acquisition of property according to § 900 BGB constitutes a lawful acquisition, provided for by the law.

The possession does not have to be in good faith, and the reason for the possession is irrelevant.

On the contrary, § 927 BGB provides for the possibility of acquisition of property by means of public summons ('cancellation proceedings'). The acquisition of property according to § 927 BGB does not concern the person who is inaccurately registered in the land register; it facilitates acquisition of property by a person who is not even registered in the register, but has had proprietary possession of the land for thirty years.

It is important to note that both methods of adverse possession do not require good faith on the part of the possessor. Adverse possession is even possible where the possessor is in bad faith, e.g. when he knowingly takes over bequeathed land that did not belong to the deceased. Good faith being irrelevant, the only decisive point is the entry situation in the land register. This principle can be compared to the situation with regard to moveable property, where acquisition by adverse possession is only possible if the possessor is and was in good faith in relation to his right of possession, see § 937 (2) BGB.

Under German law, the acquisition of property by adverse possession does not trigger any compensation for the person who loses his title to land. Unjust enrichment does not provide any claim, nor does tort law help the former owner, because the act of property acquisition was lawful and according to the statutes.

## **Acquisition of land by adverse possession** **under German law**

***Author: Dr. Wolf-Georg Ringe, M.Jur. (Oxon)***  
***27 August 2006***

### **I. Relevant provisions**

#### **BGB § 900 Buchersitzung.**

(1) <sup>1</sup> Wer als Eigentümer eines Grundstücks im Grundbuch eingetragen ist, ohne dass er das Eigentum erlangt hat, erwirbt das Eigentum, wenn die Eintragung 30 Jahre bestanden und er während dieser Zeit das Grundstück im Eigenbesitz gehabt hat. <sup>2</sup> Die dreißigjährige Frist wird in derselben Weise



berechnet wie die Frist für die Ersitzung einer beweglichen Sache.<sup>3</sup> Der Lauf der Frist ist gehemmt, solange ein Widerspruch gegen die Richtigkeit der Eintragung im Grundbuch eingetragen ist.

(2)<sup>1</sup> Diese Vorschriften finden entsprechende Anwendung, wenn für jemand ein ihm nicht zustehendes anderes Recht im Grundbuch eingetragen ist, das zum Besitz des Grundstücks berechtigt oder dessen Ausübung nach den für den Besitz geltenden Vorschriften geschützt ist.<sup>2</sup> Für den Rang des Rechts ist die Eintragung maßgebend.

### **§ 927 Aufgebotsverfahren.**

(1)<sup>1</sup> Der Eigentümer eines Grundstücks kann, wenn das Grundstück seit 30 Jahren im Eigenbesitz eines anderen ist, im Wege des Aufgebotsverfahrens mit seinem Recht ausgeschlossen werden.<sup>2</sup> Die Besitzzeit wird in gleicher Weise berechnet wie die Frist für die Ersitzung einer beweglichen Sache.<sup>3</sup> Ist der Eigentümer im Grundbuch eingetragen, so ist das Aufgebotsverfahren nur zulässig, wenn er gestorben oder verschollen ist und eine Eintragung in das Grundbuch, die der Zustimmung des Eigentümers bedurfte, seit 30 Jahren nicht erfolgt ist.

(2) Derjenige, welcher das Ausschlussurteil erwirkt hat, erlangt das Eigentum dadurch, dass er sich als Eigentümer in das Grundbuch eintragen lässt.

(3) Ist vor der Erlassung des Ausschlussurteils ein Dritter als Eigentümer oder wegen des Eigentums eines Dritten ein Widerspruch gegen die Richtigkeit des Grundbuchs eingetragen worden, so wirkt das Urteil nicht gegen den Dritten.

### **German Civil Code § 900 Acquisition by adverse possession.**

(1)<sup>1</sup> A person, who has been registered as the owner of a piece of land in the land register without having obtained ownership, acquires ownership thereof, if he has been registered as such for thirty years, and has had proprietary possession of the land for that period.<sup>2</sup> The period of thirty years is calculated in the same manner as the period for the acquisition of moveable property by usucapio.<sup>3</sup> The running of the period is suspended if an objection to the accuracy of the registration has been entered in the land register.

(2)<sup>1</sup> These provisions apply *mutatis mutandis*, if a right which involves possession of land, or the exercise of which is protected by the provisions applicable to possession, is registered in the name of a person to whom it does not belong. The status of such a right is determined at the date of its registration.

### **German Civil Code § 927 Public summons.**

(1)<sup>1</sup> The owner of a piece of land may be excluded from his rights by means of public summons, if the land has been in the proprietary possession of another for thirty years.<sup>2</sup> The period of possession is calculated in the same manner as the period for the acquisition of moveable property by usucapio.<sup>3</sup> If the owner has been registered in the land register, the public summons is

permissible only if he is dead or has disappeared, and within thirty years no registration is made in the land register which requires the owner's consent.

(2) The person who has obtained the decree for exclusion acquires ownership if he is registered in the land register as owner.

(3) If, before the issue of the decree for exclusion a third party has been registered as the owner of the land, or an objection to the accuracy of the land register has been registered on account of a third party's ownership, the decree is inoperative as against that third party.

## II. Relevant literature

W Böhringer 'Aufwertung von Bucheigentum durch Ausschlußurteil, Ersitzung und andere Rechtstatbestände in Ost und West' [2003] NotBZ 85; T Finkenauer *Eigentum und Zeitablauf – das dominum sine re im Grundstücksrecht* (Duncker & Humblodt Berlin 2000); TG Luthra 'Buchersitzung von Grundstücken durch die öffentliche Hand' [1996] NJW 364; I Saenger 'Grundstückserwerb nach dem Aufgebotsverfahren' [2001] MDR 134; J Siebels 'Die Ersitzung im Liegenschaftsrecht' [1971] RhNK 439; T Walter 'Grundstückserwerb und Verfügungsbefugnis der öffentlichen Hand durch Erbausschlagung und Ersitzung' [1996] DtZ 226.

See also the numerous commentaries on the BGB, eg Palandt *Bürgerliches Gesetzbuch* (65<sup>th</sup> edn CH Beck Munich 2006); K Rebmann and others (eds) *Münchener Kommentar zum BGB* (4<sup>th</sup> edn CH Beck Munich 2004); J v Staudinger *Bürgerliches Gesetzbuch* (14<sup>th</sup> edn 2002 ff); HP Westermann (ed) *Erman - Bürgerliches Gesetzbuch* (11<sup>th</sup> edn 2004).

## III. Substantive issues

Under German law, the acquisition of land by adverse possession is rare. The basic provisions are § 900 and § 927 of the German Civil Code (*Bürgerliches Gesetzbuch*<sup>87</sup>). § 900 BGB deals with the acquisition of property by a person who has been registered in the land register as the owner of the land for 30 years (*Buchersitzung, usucapio secundum tabulas*). On the contrary, § 927 BGB provides for the possibility of acquiring property by means of public summons ('cancellation proceedings').

### 1. Acquisition according to § 900 BGB

An acquisition of property under § 900 BGB requires the Roman Law conditions of *scriptum*, *possessio* and *tempus* to be present, however *titulus* and *bona fides* are not required. In particular, the following conditions have to be met:

a) The land must be capable of being privately owned. For example, this condition is not fulfilled by a public waterway according to article 89 of the German Constitution (*Grundgesetz*). The Constitution prevails over private

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<sup>87</sup> In the following referred to as 'BGB'.

law. Whether or not the State itself can acquire property by way of adverse possession is contested.<sup>88</sup>

b) The possessor has to be registered in the German land register as the owner of the land (*scriptum*). The registration gives rise to the presumption that he owns the land. Registration as a co- or joint owner is also possible; in this case, the possessor may acquire joint ownership of the property.<sup>89</sup>

c) The registered person has to be in possession of the land (*possessio*). More precisely, the degree of possession must be 'proprietary possession' as provided for in § 872 BGB. This means that the person needs to possess the land for himself and not for someone else. However, because he is registered in the land register, he is presumed to have proprietary possession of the land according to § 891 BGB. It is worth noting that the possession does not have to be in good faith<sup>90</sup> and the reason for the possession is irrelevant.<sup>91</sup>

d) The period of registration and possession must last for over 30 years (*tempus*). According to § 900 (1) (2) BGB, the time is calculated according to §§ 939-944 BGB. The period is suspended if, and for as long as, the property right is suspended itself or an objection to the accuracy of the registration has been entered in the land register (§ 900 (1) (3) BGB). The period starts again when the possessor loses possession of the land; however, a short and involuntary loss of possession is irrelevant (§ 940 BGB).

If these conditions are fulfilled, the registered person automatically acquires ownership of the land. Although the registration has been 'wrong' (in the sense of not representing the true legal situation) for the last thirty years, it becomes 'true' (i.e. 'correct') when these conditions are fulfilled. The former proprietor loses his proprietary rights (§§ 894, 985 BGB). Furthermore, the former owner has no possible claims for damages or unjust enrichment, because the acquisition of property provided for in § 900 BGB constitutes a lawful acquisition, provided for by the law.

## 2. Acquisition according to § 927 BGB

The acquisition of property according to § 927 BGB does not concern a person who is inaccurately registered in the land register; this provision facilitates acquisition of property by a person who is not registered as owner in the register, but has had proprietary possession of the land for thirty years. Most of the cases concern the situation where a purchaser of land is not entered into the land register by mistake. After the expiration of a certain period of time, he has the right to commence the *Aufgebotsverfahren* (public

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<sup>88</sup> See TG Luthra 'Buchersitzung von Grundstücken durch die öffentliche Hand' [1996] NJW 364; A Wacke in K Rebmann and others (eds) *Münchener Kommentar zum BGB* (4<sup>th</sup> edn CH Beck Munich 2004) § 900 para 6; KH Gursky in J v Staudinger *Bürgerliches Gesetzbuch* (14<sup>th</sup> edn 2002) § 900 para 6.

<sup>89</sup> A Wacke (n 88) § 900 para 3 with further references.

<sup>90</sup> Bundesgerichtshof, 30.6.1971, V ZR 43/69, reported in [1971] MDR 915; Bundesgerichtshof, 26.1.1994, IV ZR 19/93, reported in [1994] NJW 1152.

<sup>91</sup> A Lorenz in HP Westermann (ed) *Erman - Bürgerliches Gesetzbuch* (11<sup>th</sup> edn 2004) § 900 para 4.

summons or cancellation proceedings) in court in order to become the official owner of the land.

The requirements are:

- a) The land is capable of being privately owned (see 1.a above).
- b) As under § 900 BGB, proprietary possession is required (§ 872 BGB). Again, the possession does not have to be in good faith.<sup>92</sup> In other words, the provision also applies where the possessor is in bad faith, e.g. if he has taken over land that does belong to someone else.<sup>93</sup>
- c) The possession of the land must be uninterrupted for over 30 years, as under § 900 BGB.<sup>94</sup>
- d) The further conditions depend on whether the real owner of the land is registered in the land register or not:
  - aa) If no proprietor at all is registered in the land register, no other condition apart from the 30 year period exist. The same applies if a person who is not the owner of the land is registered in the land register.<sup>95</sup> The claimant has to prove these facts.
  - bb) If however the real owner is registered in the land register, the public summons proceedings are only admissible if the registered owner is either (1) deceased or (2) missing and believed to be dead (*'verschollen'*). Furthermore, no registration which required the consent of the proprietor must have been entered in the land register for 30 years. This last condition is a formal one, and therefore independent from the proprietor's actual consent.

The proceedings must comply with §§ 946 ff. of the German Act of Civil Procedure (*Zivilprozeßordnung*<sup>96</sup>).<sup>97</sup> Only the possessor can apply for this court order. The proprietor will be asked to submit his rights before the court (§ 981 ZPO). If the court finds for the applicant, a so-called *Ausschlußurteil* will be given. By this court order, the former proprietor will be excluded from his property. The land will become ownerless.<sup>98</sup> The applicant can then make an informal request at the land register.<sup>99</sup> Finally, when he is entered into the register as owner, he becomes proprietor of the land.

### 3. Overall assessment

As indicated above, German land law is based on very strict and formal rules. The law mostly relies on the land register principle. The state of registration at the land register should ideally always reflect the real situation. This is why an

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<sup>92</sup> I Saenger 'Grundstückserwerb nach dem Aufgebotsverfahren' [2001] MDR 134.

<sup>93</sup> See R Kanzleiter in K Rebmann and others (eds) *Münchener Kommentar zum BGB* (4<sup>th</sup> edn CH Beck Munich 2004) § 927 para 2.

<sup>94</sup> See above III.1.d.

<sup>95</sup> Bundesgerichtshof, 25.11.1977, V ZR 102/75, reported in [1978] WM 194.

<sup>96</sup> In the following referred to as 'ZPO'.

<sup>97</sup> See in more detail I Saenger 'Grundstückserwerb nach dem Aufgebotsverfahren' [2001] MDR 134, 135.

<sup>98</sup> Reichsgericht [1936] JW 1399.

<sup>99</sup> A Pfeiffer in J v Staudinger *Bürgerliches Gesetzbuch* (14<sup>th</sup> edn 2004) § 927 para 24.

acquisition of land without being registered in the land register (§ 927 BGB) is very difficult and rather exceptional. On the other hand, the possessor who actually is registered but does not own the property can more easily acquire the land (§ 900 BGB), although there are still hurdles to overcome.

It is important to note that both means of adverse possession do not require good faith on the part of the possessor. Adverse possession is possible where the possessor is in bad faith, e.g. if he knowingly takes over bequeathed land that did not belong to the deceased.<sup>100</sup> Good faith being irrelevant, the only decisive point is the entry situation in the land register. This principle can be compared to the situation with regard to moveable property, where acquisition by adverse possession is only possible if the possessor is and was in good faith in relation to his right of possession, see § 937 (2) BGB.<sup>101</sup>

The second point that is worth highlighting is that under German law, the acquisition of property by adverse possession does not trigger any compensation for the person who loses his title to the land.<sup>102</sup> Unjust enrichment does not provide any claim, nor does tort law help the former owner, because the act of property acquisition was lawful and according to the statutes.

## **Common Law Jurisdictions**

### **Australia**

#### **A. THE TITLE OF THE ADVERSE POSSESSOR**

As explained by Bradbrook *et al.*, 'Once the limitation period has expired, the adverse possessor does not 'acquire' or have transferred to her or him, the estate or title of the person whose title has been extinguished. The interest in the land remains based upon possession.'<sup>103</sup>

#### **B. UNREGISTERED LAND**

##### **Australian Capital Territory and Northern Territory**

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<sup>100</sup> See R Kanzleiter in K Rebmann and others (eds) *Münchener Kommentar zum BGB* (4<sup>th</sup> edn CH Beck Munich 2004) § 927 para 2.

<sup>101</sup> Cf C Baldus in K Rebmann and others (eds) *Münchener Kommentar zum BGB* (4<sup>th</sup> edn CH Beck Munich 2004) § 937 para 24 ff.

<sup>102</sup> KH Gursky in J v Staudinger *Bürgerliches Gesetzbuch* (14<sup>th</sup> edn 2002) § 900 para 3, 23.

<sup>103</sup> *Australian Real Property Law*, Bradbrook, MacCullum and Moore, LBC Information Services, 2<sup>nd</sup> Ed, 1997, para. 16.71.

Title to land cannot be lost by adverse possession.<sup>104</sup> There does not appear to be a limitation period with regards to adverse possession in the consolidated *Limitation Act* 1981 (NT).

## **The States**<sup>105</sup>

### **Length of limitation period**

Actions to recover land are subject to a limitation period from the moment the land comes into adverse possession.<sup>106</sup> This period is 12 years in New South Wales, Queensland, Western Australia and Tasmania and 15 years in Victoria and South Australia.<sup>107</sup>

### **Extinction of title after expiration of limitation period**

Each State's limitation statute provides that at the expiration of the statutory period, the title of the person dispossessed is extinguished in addition to their cause of action being lost.<sup>108</sup>

### **Adverse possession and the Crown**

In Queensland, Western Australia and Victoria, the limitation statutes provide that the right and title of the Crown in any land cannot be affected by the possession of land adverse to the Crown.<sup>109</sup> In New South Wales and Tasmania, the limitation statutes provide that an action by the Crown with respect to recovery of Crown land, is barred after 30 years adverse

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<sup>104</sup> *Limitation Act* 1985 (ACT), s. 5(a); *Australian Real Property Law*, Bradbrook, MacCullum and Moore, LBC Information Services, 2<sup>nd</sup> Ed, 1997, para. 16.01.

<sup>105</sup> Information taken from the State legislation websites:

New South Wales: <http://www.legislation.nsw.gov.au/>

Queensland: <http://www.legislation.qld.gov.au/OOPChome.htm>

Western Australia: <http://www.slp.wa.gov.au/index.html>

Tasmania: <http://www.thelaw.tas.gov.au/index.w3p>

Victoria: <http://www.dms.dpc.vic.gov.au/>

South Australia: <http://www.parliament.sa.gov.au/>

<sup>106</sup> *Limitation Act* 1969 (NSW), s. 38; *Limitation of Actions Act* 1974 (Qld), s. 19; *Limitation Act* 2005 (WA), s. 65; *Limitation Act* 1974 (Tas), s. 16; *Limitation of Actions Act* 1958 (Vic), s. 14.

<sup>107</sup> *Limitation Act* 1969 (NSW), s. 27(2); *Limitation of Actions Act* 1974 (Qld), s. 13(2); *Limitation Act* 2005 (WA), s. 19(1); *Limitation Act* 1974 (Tas), s. 10(2); *Limitation of Actions Act* 1958 (Vic), s. 8; *Limitation of Actions Act* 1936 (SA), s. 4.

<sup>108</sup> *Limitation Act* 1969 (NSW), s. 65; *Limitation of Actions Act* 1974 (Qld), s. 24; *Limitation Act* 2005 (WA), s. 75; *Limitation Act* 1974 (Tas), s. 21; *Limitation of Actions Act* 1958 (Vic), s. 18; *Limitation of Actions Act* 1936 (SA), s. 28.

<sup>109</sup> *Limitation of Actions Act* 1974 (Qld), s. 6(4); *Limitation Act* 2005 (WA), s. 76; *Limitation of Actions Act* 1958 (Vic), s. 7. In Victoria, there can be no title by adverse possession against Victorian Rail Track or against Councils: *Limitation of Actions Act* 1958 (Vic), ss. 7A and 7B.

possession.<sup>110</sup> In South Australia, there is no specific statutory provision relating to adverse possession against the Crown. According to Bradbrook *et al.*, it therefore appears that the *Crown Suits Act* 1769 (Imp) is the applicable law in South Australia. Pursuant to this Act, the Crown's right to bring an action is lost after 60 years possession by the adverse possessor or her or his "ancestors or predecessors".<sup>111</sup>

## C. THE TORRENS SYSTEM

### 1. Australian Capital Territory and Northern Territory

#### **Australian Capital Territory**<sup>112</sup>

S. 69 of the *Land Titles Act* 1925 provides that no title to registered land can be acquired by adverse possession and that the registered proprietor's title cannot be extinguished by adverse possession.

#### **Northern Territory**<sup>113</sup>

S. 198 of the *Land Title Act* 2000 provides that a person does not acquire any right or title under the Act by any length of adverse possession. The right of a registered owner of land to recover possession of the land is not barred by any length of adverse possession.

### 2. Victoria and Western Australia<sup>114</sup>

The Torrens statutes create an express exception to the indefeasibility of the title of the registered proprietor by providing that the registered proprietor

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<sup>110</sup> *Limitation Act* 1969 (NSW), s. 27(1); *Limitation Act* 1974 (Tas), s. 10(1). Bradbrook *et al.* state that in New South Wales, despite the provision in the limitation statute, s. 170 of the *Crown Lands Act* 1989 effectively provides that title to Crown land may not, on the basis of adverse possession, be asserted or established against the Crown. [Check whether it has been repealed on the Office of the Queensland Parliamentary Counsel's website.] In Tasmania, there are particular fact situations where no period of adverse possession will extinguish the Crown's title: see *Limitation Act* 1974 (Tas), s. 10(4) – (6).

<sup>111</sup> *Australian Real Property Law*, Bradbrook, MacCullum and Moore, LBC Information Services, 2<sup>nd</sup> Ed, 1997, para. 16.05.

<sup>112</sup> Information taken from the [ACT Legislation Register](http://www.legislation.act.gov.au), maintained by The Australian Capital Territory Parliamentary Counsel's Office: <http://www.legislation.act.gov.au>.

<sup>113</sup> Information taken from the Department of the Chief Minister's Legislation Database: <http://www.nt.gov.au/dcm/legislation/current.shtml>.

<sup>114</sup> *Australian Real Property Law*, Bradbrook, MacCullum and Moore, LBC Information Services, 2<sup>nd</sup> Ed, 1997, para. 16.83; Information taken from the Victorian Legislation and Parliamentary Documents website: <http://www.dms.dpc.vic.gov.au> and from the Government of Western Australia State Law Publisher website: <http://www.slp.wa.gov.au/index.html>.

holds the land subject to any rights subsisting under any adverse possession of the land.<sup>115</sup> Further, there is provision for the adverse possessor to apply to obtain registration of title if the possession has extinguished the registered proprietor's title.<sup>116</sup> Even without such formal registration, however, the interest of a person who by adverse possession has extinguished the title of the registered proprietor, prevails against the registered proprietor.

### **3. Tasmania**<sup>117</sup>

S. 138W of the *Land Titles Act* 1980 provides that the limitation statute applies to Torrens land in the same way as it does to general law land. However, it is specifically provided that the registered proprietor's title is not to be extinguished by the limitation legislation. Once the limitation period has expired, the registered proprietor holds on trust for the adverse possessor and the adverse possessor may apply to the Recorder for an order vesting the legal estate in her or him. In determining an application for title based on possession, the Recorder must consider all the circumstances of the claim and the conduct of the parties.<sup>118</sup>

### **4. South Australia and Queensland**

#### **South Australia**<sup>119</sup>

A person who would have extinguished the title of the true owner had the Torrens land been general law land may apply to the Registrar seeking title to the land.<sup>120</sup> The Registrar shall cause a notice of the application.<sup>121</sup> A person claiming an estate or interest in the land may lodge a caveat.<sup>122</sup> If the Registrar is satisfied that the caveator is the registered proprietor, or a person claiming through the registered proprietor, the Registrar must refuse the application of the adverse possessor.<sup>123</sup> If there are no caveats or the caveators cannot establish their claims, the Registrar may cancel the current certificate of title and issue a new one in the name of the claimant.<sup>124</sup>

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<sup>115</sup> *Transfer of Land Act* 1958 (Vic), s. 42(2)(b); *Transfer of Land Act* 1983 (WA), s. 68.

<sup>116</sup> *Transfer of Land Act* 1958 (Vic), ss. 60 - 62; *Transfer of Land Act* 1983 (WA), ss. 222-223.

<sup>117</sup> Information taken from the Tasmanian Legislation website: <http://www.thelaw.tas.gov.au/index.w3p>.

<sup>118</sup> *Land Titles Act* 1980 (Tas), s. 138V.

<sup>119</sup> *Australian Real Property Law*, Bradbrook, MacCullum and Moore, LBC Information Services, 2<sup>nd</sup> Ed, 1997, para. 16.85; Information taken from the South Australian Parliament website: <http://www.parliament.sa.gov.au/>.

<sup>120</sup> *Real Property Act* 1886 (SA), s. 80A.

<sup>121</sup> *Ibid*, s. 80E.

<sup>122</sup> *Ibid*, s. 80F(1).

<sup>123</sup> *Ibid*, s. 80F(3).

<sup>124</sup> *Ibid*, ss. 80G and 80H.



## Queensland<sup>125</sup>

S. 185(1)(d) of the *Land Title Act* 1994 provides that ‘the interest of a person who, on application, would be entitled to be registered as owner of the lot because the person is an adverse possessor’ is an exception to the indefeasibility of the registered proprietor’s title. An adverse possessor who has been in adverse possession for the statutory period may apply to the Registrar seeking title to the land.<sup>126</sup> The Registrar is required to advertise the application and inform certain persons of the application.<sup>127</sup> A persons claiming an interest may lodge a caveat.<sup>128</sup> If the Registrar is satisfied that the interest of the caveator has not been extinguished under the *Limitation of Actions Act* 1974, the Registrar may refuse to register the applicant or may, with the agreement of the caveator, register the applicant as the holder of a lesser interest.<sup>129</sup>

## 5. New South Wales<sup>130</sup>

A person who has been in adverse possession of Torrens land in circumstances in which had the limitation statute applied to Torrens land the title of the registered proprietor would have been extinguished, may apply to the Registrar-General to be registered as proprietor of the land.<sup>131</sup> Such an application may only be made with respect to a “whole parcel of land”.<sup>132</sup> No application may be made with respect to Crown land.<sup>133</sup>

# New Zealand<sup>134</sup>

## A. UNREGISTERED LAND

### Length of limitation period

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<sup>125</sup> *Australian Real Property Law*, Bradbrook, MacCullum and Moore, LBC Information Services, 2<sup>nd</sup> Ed, 1997, para. 16.85. Information taken from the Office of the Queensland Parliamentary Counsel (OQPC) website: <http://www.legislation.qld.gov.au/OQPChome.htm>.

<sup>126</sup> *Land Title Act* 1994 (QLD), s. 99.

<sup>127</sup> *Land Title Act* 1994 (QLD), s. 103.

<sup>128</sup> *Land Title Act* 1994 (QLD), s. 104.

<sup>129</sup> *Land Title Act* 1994 (QLD), s. 107.

<sup>130</sup> *Australian Real Property Law*, Bradbrook, MacCullum and Moore, LBC Information Services, 2<sup>nd</sup> Ed, 1997, para. 16.86; Information taken from the NSW legislation website, the official NSW Government site for the online publication of legislation: <http://www.legislation.nsw.gov.au/>.

<sup>131</sup> *Real Property Act* 1900 (NSW), s. 45D(1).

<sup>132</sup> *Ibid.*

<sup>133</sup> *Real Property Act* 1900 (NSW), s. 45D(3).

<sup>134</sup> Information taken from the New Zealand Government’s Public Access to Legislation Project: <http://www.legislation.govt.nz/>.

The limitation period for actions brought by any other person than the Crown to recover land is twelve years from the date on which the right accrued, adverse possession being a necessary condition for the right to be deemed to have accrued.<sup>135</sup>

### **Extinction of title after expiration of limitation period**

When the limitation period expires against a person, his or her title will be extinguished.<sup>136</sup>

### **Crown land**

The limitation period for actions brought by the Crown to recover land is sixty years from the date on which the right accrued.<sup>137</sup>

### **Maori customary land**

Nothing in the *Limitation Act* 1950 applies to Maori customary land, except that the Act applies to any action to recover Maori customary land that is brought against the Crown or any person claiming through the Crown.<sup>138</sup> No such action can be brought after twelve years from when the cause of action accrued.<sup>139</sup>

### **Public land**

The *Limitation Act* 1950 is subject to the *Land Act* 1948 and s. 51 of the *Public Works Act* 1981.<sup>140</sup> S. 172 of the *Land Act* 1948 provides that the following categories of land are not to be affected by adverse possession:

- i) land that is a road or street or held for any public work
- ii) land reserved for any purpose
- iii) land deemed to be reserved for sale or other disposition under s. 58 of the *Land Act* 1948<sup>141</sup>

S. 51 of the *Public Works Act* 1981 provides that there can be no acquisition of rights by adverse user of land held for public work.<sup>142</sup>

## **B. REGISTERED LAND**

Under the *Land Transfer Amendment Act* 1963, a person in adverse possession of *Land Transfer Act* 1952 land for a continuous period of not less

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<sup>135</sup> *Limitation Act* 1950, ss. 7(2) and 13.

<sup>136</sup> *Ibid*, s. 18.

<sup>137</sup> *Ibid*, s. 7(1).

<sup>138</sup> *Ibid*, s. 6(1) and (1A)(a).

<sup>139</sup> *Ibid*, s. 7A(1).

<sup>140</sup> *Ibid*, s. 6(2).

<sup>141</sup> *Land Act* 1948, s. 172(2).

<sup>142</sup> *Public Works Act* 1981, s. 51.

than 20 years (although, in practice, normally 30 years<sup>143</sup>) can apply for a certificate of title notwithstanding the existence of the registration of some other person as the proprietor of the land.<sup>144</sup> The application can be defeated if, after the application has been advertised and notified to all available relevant parties, some other person establishes a better title.<sup>145</sup> This Amendment does not apply to Crown land, Maori land, local authority land, land held in trust for public purposes, and land possessed by virtue of an erroneous boundary marker or change of watercourse.<sup>146</sup>

## **CANADA**

### **Alberta**

### **British Columbia**<sup>147</sup>

s. 12 of the *Limitation Act* 1996 provides that no right or title in or to land may be acquired by adverse possession, except as specifically provided by this or any other Act.<sup>148</sup>

NB See Limitations Act case law database on British Columbia Law Institute's website: <http://www.bcli.org/>

### **Manitoba**

### **New Brunswick**

### **Newfoundland and Labrador**

### **Northwest Territories**

### **Nova Scotia**

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<sup>143</sup> Where the person with the registered interest is an infant or of unsound mind at the expiration of the twenty years, the person in possession is not entitled to make an application until the person with the registered interest has ceased to be under the disability or has died (whichever event occurs first), except where the person in possession has been in possession for thirty years or more: *Land Transfer Amendment Act* 1963, s. 4.

<sup>144</sup> *Land Transfer Amendment Act* 1963, s. 3(1).

<sup>145</sup> *Land Transfer Amendment Act* 1963, ss. 8-13.

<sup>146</sup> *Land Transfer Amendment Act* 1963, s. 21.

<sup>147</sup> Legislation information taken from the British Columbia Queen's Printer website: <http://www.qp.gov.bc.ca/statreg/default.htm>.

<sup>148</sup> As recommended by the Law Reform Commission of British Columbia in its *Report on Limitations Part 2- General*, LRC 15 (1975), Chapter 4, section (c), available online at the British Columbia Law Institute: <http://www.bcli.org/>.

## **Ontaria**<sup>149</sup>

### **A. UNREGISTERED LAND**

#### **Length of limitation period**

The limitation period for actions brought by subjects to recover land is ten years from the date on which the right of action accrued, with that date being deemed to be the date of dispossession.<sup>150</sup>

#### **Extinction of title after expiration of limitation period**

When the limitation period expires against a person, his or her title will be extinguished.<sup>151</sup>

#### **Crown land**

The limitation period for actions brought by the Crown to recover land is sixty years from the date on which the right accrued.<sup>152</sup>

#### **Certain Crown and public land excepted**

No limitation period applies to any waste or vacant land of the Crown, nor to any road allowance or public highway where the freehold in any such road allowance or highway is vested in the Crown or a public body.<sup>153</sup>

### **B. REGISTERED LAND**

s. 51 of the *Land Titles Act*, R.S.O. 1990 provides that no title, right or interest in land registered under the Act can be acquired by adverse possession.<sup>154</sup>

[Research to be completed]

## **Prince Edward Island**

## **Quebec**

Civil law jurisdiction

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<sup>149</sup> Information taken from the Ontario E-Laws website:

[http://www.e-laws.gov.on.ca/home\\_E.asp?lang=en](http://www.e-laws.gov.on.ca/home_E.asp?lang=en)

<sup>150</sup> *Real Property Limitation Act*, R.S.O. 1990, ss. 4 and 5(1).

<sup>151</sup> *Real Property Limitation Act*, R.S.O. 1990, s. 15.

<sup>152</sup> *Real Property Limitation Act*, R.S.O. 1990, s. 3.

<sup>153</sup> *Real Property Limitation Act*, R.S.O. 1990, s. 16.

<sup>154</sup> *Land Titles Act*, R.S.O. 1990, s. 51.

Saskatchewan

Yukon Territory

Nunavut

# **The United States of America**

## **The Law of Adverse Possession in Common Law Jurisdictions**

### **The legal position in the United States of America**

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### **Summary overview on the legal Position of the law of “Adverse Possession” in the United States of America**

Through the years, the common law has provided a means for obtaining complete title to property as against all others, through occupancy and use now commonly known as adverse possession law. More specifically it is a body of law that deals with the position that if someone has abandoned their property, another can claim it, upon fulfillment of requirements set forth in the applicable law, with no compensation due to the original owner.

### **General Position**

The rules and laws concerning adverse possession have been organized across the United States under both federal and State practices. Thus if the

use of the land continues for a period of time, determined by the State, a claim may be made by the possessor for title.

Adverse possession for 20 years under common law in the United States of America passes title to the adverse possessor with certain stated qualifications. In most US States, however, there exist special Statutes of Limitations, actions affecting possession to title and land, that determine the acquisition of such title.

Adverse possession of real estate is a possession inconsistent with that of the owner and when accompanied by certain acts and circumstances, title will vest in the owner. Thus there are several elements needed for adverse possession to result in free and clear title.

## **A. Essential Elements of Adverse Possession**

The essential elements of adverse possession include:-

### **1. Time**

1. The length of time required for adverse possession varies from a period as short as 5 years or extending to a period 40 years, during which the possessor may enjoy the productive use of the property. Although there are general time limitations, these time limits are subject to changes under special circumstances as provided for in the applicable law of the State.

### **2. Act (Possession)**

2.1 There must be possession.

2.2 The act of adverse possession must be use disregarding the claim of others entirely, notorious and open for all to see.

2.3 The possession must be exclusive to the "possessor" and continuous.

2.4 In most jurisdictions the possession must be hostile to the actual owner of the land. This means that such possession must be retained without the owner's permission to use the property or there is no adverse possession.

2.5 The possession must be under a claim of title during the time necessary to create a bar under the Statute of limitations<sup>155</sup>.

### **3. Formalities for the acquisition of title by adverse possession**

To gain title to land through adverse possession requires strict compliance with the *Law Act* on adverse Possession of the relevant State.

While the formalities pertaining to adverse possession in general include the standard elements regarding adverse possession law in the various US State

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<sup>155</sup>David, A. Thomas, "Adverse Possession" in Thompson on Real Property, p.75

jurisdictions, there are certain differences in the various jurisdictions regarding the exclusion categories of land type, as well as different time periods for different types of property or on whether the element of good faith is a necessary condition for adverse possession.

In Alaska, for example, the statutory position is as follows:

### 3.1. Alaska

## 2. Alaska Statute (AS) 09.45.052. Adverse Possession provides that:-

a) The uninterrupted adverse notorious possession of real property under colour and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States. For the purpose of this section, land that is in the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.

b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958).

c) Notwithstanding AS [09.10.030](#) , the uninterrupted adverse **notorious** use of real property by a public utility for utility purposes **for a period of 10 years** or more vests in that utility an easement in that property for that purpose.

d) Notwithstanding AS [09.10.030](#) , the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes, including highways, streets, roads, or trails, by the public, the state, or a political subdivision of the state, for a period of 10 years or more, vests an appropriate interest in that land in the state or a political subdivision of the state. This subsection does not limit or expand the rights of a state or political subdivision under adverse possession or prescription as the law existed on July 17, 2003.

## 3. AS 09. 10. 030. Actions to Recover Real Property

a) Except as provided in (b) of this section, a person may not bring an action for the recovery of real property or for the recovery of the possession of it unless the action is commenced within 10 years. An action may not be maintained under this subsection for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action.

b) An action may be brought at any time by a person who was seized or possessed of the real property in question at some time before the commencement of the action or whose grantor or predecessor was seized or possessed of the real property in question at some time before commencement of the action, and whose ownership interest in the real property is recorded under Alaska Statute 40.17 in order to:-

(1) acquire title to that real property; or

(2) eject a person from that real property.

### **3.2 Connecticut**

In Connecticut the statutory basis for adverse possession is CGS **Sec 52- 575 which provides a general time limitation of 15 years uninterrupted possession.**

Adverse possession can create an ***absolute title to real estate*** which is akin to ***title by deed from the record owner***. In order to acquire title, evidence supporting the existence of all elements necessary for adverse possession must exist. This seems possible only through judicial proceedings, to which all persons to be bound by the decision must be made parties. The legislature has amended the law three times in 1999. The last change was effected in 2001. In 2002 legislation passes in Connecticut prohibited the use of certain land under category classes I and II which included land owned by invested water companies but this legislation is not applicable to land acquired by adverse possession acquired before 1 October 2001.

### **3.3 Massachusetts**

In Massachusetts the statutory basis for adverse possession is Mass. Gen L. c. 260 sec 21 which provides for a continuous, twenty year statute of limitations to recover possession of land. Massachusetts has a special land registration system in which a question of title can be brought to the "land Court" which investigates and evaluates the merits of the claim. Based on its findings the court can issue a new certificate of title. A further advantage of this procedure (to the owner) is that



property registered through the land court cannot be adversely possessed.

**Registered Land** falls within those certain estates that are not subject to adverse possession claims under Mass. Gen. L. c. 185, §51. A petition to register land interrupts or terminates adverse possession.

**In addition one must show:**

3.2.1 that he or she has been the exclusive possessor and actually entered the property;

3.2.2. the possession is open and notorious, *ie* possession must be seen. The possession must be appropriate to the type, size and use of the land. Enclosures, houses, cabins, payment of taxes all help establish the claim. The general idea is to give the owner reasonable notice that another person is in possession and to give an opportunity to eject that possessor;

3.2.3 Possession must be adverse to the owners claim, that is, without the owners consent. If the owner has given permission to another to be on the property they may not claim the property adversely;

3.2.4 Possession must be continuous (for 20 years). If entry was only occasional, then a person may be deemed a trespasser and not able to claim adverse possession. However, certain seasonal or intermittent uses satisfy the continuous element if the average owner of a particular piece of property would use it in that manner (for example, a winter or summer house).

Continuity may be established by adding together or "tacking" successive adverse possessors. So, for example, if X possesses the land for 15 years and then gives it to Y who possesses it for 5 years, Y may then claim title by adverse possession by tacking the two claims.

The title of adverse possessor is a new and independent *title by operation of law* and does not operate in privity with any former title<sup>156</sup>

A claimant of title to land by adverse possession has the burden of showing that the possession of land on which one is claiming was for the length of time required by law.<sup>157</sup> However, some US jurisdictions shorten the requisite time if there is "colour of title." (D. Thomas, at p151).

*Colour of Title* refers to the appearance of title saving its possessor from being regarded as a "naked trespasser" but it does not contribute to the title of adverse possessor. Although it is a form of constructive

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<sup>156</sup>Pearson v. Hasty , 137 P2d545(Okla.1934)

<sup>157</sup>Strickland v. Markos , 556 So.2d 229 (Ala.1990)

possession, it is not an element of adverse possession and implies that a valid title has not yet passed to the claimant.

#### **4. Good Faith**

Although in some US jurisdictions good faith is an essential/necessary element of adverse possession, there are 2 divergent views on whether adverse possession must be taken and maintained under a claim of right made in good faith.

According to one line of cases, showing good faith is a requirement where there has been actual possession whereas the majority view asserts that good faith is not a requirement where there has been actual possession.(Thomas, footnotes at p. 178)

Adverse possession may be acquired though possession maybe obtained through fraud. Even where the possession is constructive there cases that deny necessity of good faith in the absence of statutory obligation.

The case authority seems to favour the view that where the claimant actually occupies the land good faith on the part of the claimant is not a requirement to enable the holding to “ripen “into a title.

To the extent that good faith is a requirement it means that a person honestly believes to have acquired good title regardless of knowledge and mental capacity.

When one claims adversely it is not essential to show that one went into possession in good faith but the burden of showing fraud is on the opposing party. Even to he extent that adverse possession for some proponents must not have arisen in fraud, direct evidence of bona fides is not required and a presumption of good faith arises from adverse possession.(Thomas, at p.181)

Even so, in the US case of *Waggoner v. The Benton Beach Corporation*, 3.April 1998 Conn, it was established that among the factors that can be considered in adverse Possession, is good faith

#### **5. Compensation**

Based on the general presumption that adverse possession is not without good faith it remains unclear as to whether “compensation” is an issue.

### **Primary Reference**

**10 Thompson on Real Property, Second Thomas Edition, Lexis Publishing, 1998 (David A. Thomas ed.) & 2005 Cumulative Supplement.**