

Acquisitive Prescription in View of the Property Clause

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DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

EJ Marais, 05 August 2011, Stellenbosch

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SUMMARY

Acquisitive prescription (“prescription”), an original method of acquisition of ownership, is regulated by two prescription acts. Prescription is mostly regarded as an unproblematic area of South African property law, since its requirements are reasonably clear and legally certain. However, the unproblematic nature of this legal rule was recently brought into question by the English *Pye* case. This case concerned an owner in England who lost valuable land through adverse possession. After the domestic courts confirmed that the owner had lost ownership through adverse possession, the Fourth Chamber of the European Court of Human Rights in Strasbourg found that this legal institution constituted an uncompensated expropriation, which is in conflict with Article 1 of Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms 1950. This judgment may have repercussions for the constitutionality of prescription in South African law, despite the fact that the Grand Chamber – on appeal – found that adverse possession actually constitutes a mere (constitutional) deprivation of property. Therefore, it was necessary to investigate whether prescription is in line with section 25 of the Constitution.

To answer this question, the dissertation investigates the historical roots of prescription in Roman and Roman-Dutch law, together with its modern requirements in South African law. The focus then shifts to how prescription operates in certain foreign systems, namely England, the Netherlands, France and Germany. This comparative perspective illustrates that the requirements for prescription are stricter in jurisdictions with a positive registration system. Furthermore, the civil law countries require possessors to possess property with the more strenuous *animus domini*, as opposed to English law that merely requires possession *animo possidendi*. The justifications for prescription are subsequently analysed in terms of the Lockean labour theory, Radin’s personality theory and law and economics theory. These theories indicate that sufficient moral and economic reasons exist for retaining prescription in countries with a negative registration system. These conclusions are finally used to determine whether prescription is in line with the property clause. The *FNB* methodology indicates that prescription constitutes a non-arbitrary deprivation of property. If one adheres to the *FNB* methodology it is equally unlikely that prescription could amount to an uncompensated expropriation or even to constructive expropriation. I conclude that prescription is in line with the South African property clause, which is analogous to the decision of the Grand Chamber in *Pye*.

OPSOMMING

Verkrygende verjaring (“verjaring”), ‘n oorspronklike wyse van verkryging van eiendomsreg, word gereguleer deur twee verjaringswette. Verjaring word grotendeels beskou as ‘n onproblematiese aspek van die Suid-Afrikaanse sakereg, aangesien die vereistes daarvan taamlik duidelik en regseker is. Nietemin is die onproblematiese aard van hierdie regsinstelling onlangs deur die Engelse *Pye*-saak in twyfel getrek. Hierdie saak handel oor ‘n eienaar wat waardevolle grond in Engeland deur *adverse possession* verloor het. Nadat die plaaslike howe die verlies van eiendomsreg deur *adverse possession* bevestig het, het die Vierde Kamer van die Europese Hof van Menseregte in Straatsburg bevind dat hierdie regsreël neerkom op ‘n ongekompenseerde onteiening, wat inbreuk maak op Artikel 1 van die Eerste Protokol tot die Europese Verdrag van die Reg van die Mens 1950. Hierdie uitspraak kan implikasies inhou vir die grondwetlikheid van verjaring in die Suid-Afrikaanse reg, ten spyte van die Groot Kamer se bevinding – op appèl – dat *adverse possession* eintlik neerkom op ‘n grondwetlik geldige ontneming van eiendom. Derhalwe was dit nodig om te bepaal of verjaring bestaanbaar is met artikel 25 van die Suid-Afrikaanse Grondwet.

Vir hierdie doel word die geskiedkundige wortels van verjaring in die Romeinse en Romeins-Hollandse reg, tesame met die moderne vereistes daarvan in die Suid-Afrikaanse reg, ondersoek. Daar word ook gekyk na hoe hierdie regsreël in buitelandse regstelsels, naamlik Engeland, Nederland, Frankryk en Duitsland, funksioneer. Hierdie regsvergelykende studie toon dat verjaring strenger vereistes het in regstelsels met ‘n positiewe registrasiesstelsel. Verder vereis die siviëlregtelike lande dat ‘n besitter die grond *animo domini* moet besit, wat strenger is as die Engelsregtelike *animus possidendi*-vereiste. Die regverdigingsgronde van verjaring word vervolgens geëvalueer ingevolge die Lockeaanse arbeidsteorie, Radin se persoonlikheidsteorie en *law and economics*-teorie. Hierdie teorieë illustreer dat daar genoegsame morele en ekonomiese regverdigings vir die bestaan van verjaring is in lande met ‘n negatiewe registrasiesstelsel. Hierdie bevindings word ten slotte gebruik om te bepaal of verjaring bestaanbaar is met die eiendomsklousule. Die *FNB*-metodologie toon dat verjaring neerkom op ‘n geldige, nie-arbitrêre ontneming volgens artikel 25(1). Indien ‘n mens die *FNB*-metodologie volg is dit eweneens onwaarskynlik dat verjaring op ‘n ongekompenseerde onteiening – of selfs op konstruktiewe onteiening – neerkom. Gevolglik strook verjaring wel met die Suid-Afrikaanse eiendomsklousule, welke uitkoms soortgelyk is aan dié van die Groot Kamer in die *Pye*-saak.

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CHAPTER 1: INTRODUCTION

1.1 Outline of the research problem and hypothesis

1.1.1 Outline of the research problem

Acquisitive prescription (“prescription”) is an area of South African property law that is generally regarded as both unproblematic and legally certain. The two prescription acts regulate this field of law, namely the Prescription Act 18 of 1943 (“1943 Act”) and the Prescription Act 68 of 1969 (“1969 Act”). Although these acts do not codify the law of prescription,¹ they provide that a person acquires ownership in property if such person possessed it openly, continuously and “as if owner” for an uninterrupted period of 30 years.² It follows that prescription is an original method of acquisition of ownership, since the co-operation of the legal predecessor is not required to acquire ownership in this manner.³ In other words, a possessor acquires ownership *ex lege* the moment she satisfies all the requirements for prescription.

Other jurisdictions, such as Dutch, French and pre-2003⁴ English law, also seem to regard prescription or adverse possession as an unproblematic area of the law.⁵ However, the seemingly uncomplicated nature of this legal institution was recently brought into question when the constitutionality of adverse possession – the common law equivalent of prescription – was challenged before the European Court of Human Rights in Strasbourg. *Pye*, a company registered in England, lost title to 25 hectares of land to the *Grahams* through the effects of adverse possession. After exhausting its remedies at local level, where the House of Lords confirmed the loss of title through adverse possession,⁶ *Pye* took its case to the European Court of Human Rights. *Pye* claimed that adverse possession violated its right to peaceful enjoyment of possessions guaranteed in Article 1 of Protocol No 1 (“Article 1”) to the European Convention on Human Rights and Fundamental Freedoms 1950 (“the Convention”). The Fourth Chamber of the European Court of Human Rights upheld *Pye*’s

¹ *Pienaar v Rabie* 1983 (3) SA 126 (A) 135; *Bisschop v Stafford* 1974 (3) SA 1 (A) 7.

² Section 1 of the Prescription Act 68 of 1969. These requirements are similar to those set out in section 2(1)-(2) of the Prescription Act 18 of 1943, as indicated in sections 2.3.1-2.3.2 of chapter two below.

³ I extrapolate this from section 1 of the Prescription Act 68 of 1969 and section 2(1) of the Prescription Act 18 of 1943. See further section 2.3.1 of chapter two below.

⁴ The Land Registration Act, which fundamentally altered English adverse possession law, came into operation on 13 October 2003 and is prospective in nature: See *Ofulue v Bossert* [2009] UKHL 16 and *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

⁵ See generally sections 3.2, 3.3 and 3.4 for English, Dutch and French law respectively in chapter three below.

⁶ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

claim and found that adverse possession constituted an uncompensated deprivation – or expropriation in the South African context – of property, which upset the “fair balance” required by the Convention.⁷ This decision led to an outcry from property law scholars in member states of the European Union, since they feared that this decision also invalidated their rules pertaining to prescription.⁸ The United Kingdom government, unsatisfied with the judgment of the Fourth Chamber, appealed to the Grand Chamber of the European Court of Human Rights.⁹ The Grand Chamber reversed the decision of the Fourth Chamber and decided that adverse possession amounts to a regulation of property, as opposed to expropriation. This finding led the Grand Chamber to conclude that sufficient reasons do exist for having a mechanism such as adverse possession in a modern legal system and, consequently, it held that adverse possession strikes a “fair balance” between the interests of the individual and the public interest. Accordingly, the Grand Chamber found that adverse possession is in line with Article 1 of the First Protocol to the Convention.

In light of these decisions by the European Court of Human Rights, especially the judgment of the Fourth Chamber, it is clear that the constitutionality of prescription may also be challenged in the constitutional setting of South Africa. In this regard the Constitutional Court will have to determine whether prescription is in line with section 25, the property clause of the Constitution of the Republic of South Africa 1996 (“the Constitution”). The possibility that prescription could be in conflict with section 25 is likely to have serious repercussions for the rules of property law pertaining to original acquisition of ownership. Therefore, it is necessary to investigate two questions in this dissertation, namely (i) whether sufficient justification exists for prescription today and (ii) whether this legal institution complies with the property clause.

To answer these questions, it is essential to – firstly – investigate the history of prescription and its requirements in modern South African law. Chapter two addresses this issue, since it focuses on the reception and requirements of prescription in South African law. This chapter

⁷ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV).

⁸ See, for instance, Caterina R “Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279; Sagaert V “Prescription in French and Belgian Property Law after the *Pye* Judgment” (2007) 15 *European Review of Private Law* 265-272; Radley-Gardner O “*Pye (Oxford) Ltd v. United Kingdom: The View from England*” (2007) 15 *European Review of Private Law* 289-308; Milo JM “On the Constitutional Proportionality of Property Law in the Netherlands” (2007) 15 *European Review of Private Law* 255- 263.

⁹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC).

considers the requirements of the forerunners of prescription in Roman and Roman-Dutch law, together with how the prescription acts and case law regulate prescription in South Africa today.

The emphasis of chapter three falls on foreign law in order to ascertain how prescription or adverse possession operates in other jurisdictions. For this purpose Dutch, French, German and especially English law are investigated. This chapter specifically examines the requirements for prescription in French and German law, since these two jurisdictions represent the two main civil law traditions in Europe. Although South Africa has a mixed legal system, South African property law – which includes prescription law – is much closer to the civil law tradition than to the English common law tradition. Furthermore, Germany (like South Africa) is a jurisdiction with a supreme constitution that also contains a justiciable property clause. For this reason German law is ideal for comparative purposes.

Dutch law also forms part of the civil law tradition and has a mixed civil law system, since it contains elements of both the French and German legal traditions. Dutch law also shares the Roman-Dutch legal heritage with South Africa, which makes a comparative analysis useful in this context. A further reason for studying these civil law jurisdictions is because they, contrary to South African law, distinguish between *bona* and *mala fide* possessors for purposes of prescription. This is interesting, since South African prescription law attaches no significance to this distinction and simply requires both good and bad faith possessors to possess property for 30 years before such possessor can acquire ownership.

Chapter three pays special attention to the English law of adverse possession because the *Pye* case concerned the constitutionality of adverse possession in light of Article 1. It is necessary to scrutinise this legal institution both before and after the enactment of the Land Registration Act 2002 (“LRA” or “2002 Act”), since the LRA amended the rules pertaining to adverse possession by making it more difficult for title holders (or owners) of registered land to lose title through adverse possession.¹⁰ Nonetheless, the *Pye* case was lodged before this Act came into operation, which also necessitates an inquiry as to how adverse possession operated before the 2002 Act came into effect. Furthermore, even though English law does not have a written constitution, the Human Rights Act 1998 has the effect that the Convention now

¹⁰ See section 3.2.4 of chapter three below.

applies to English law. Accordingly, English land law must be in line with Article 1 of the First Protocol to the Convention, which is a position similar to South African law where all law must comply with the Constitution. Finally, the requirements of adverse possession also influenced the requirements for prescription in South African law to a certain extent, which further justifies a comparative analysis in this regard.

This dissertation does not investigate the requirements for adverse possession or prescription in United States (“US”), Australian or Irish law. It does not examine how prescription operates in other African countries either. This is because US and Australian law both belong to the common law tradition, which makes a discussion in this context unnecessary in light of chapter three’s discussion of English adverse possession law. Irish law is not scrutinised because it contains elements of feudal law and has a unique property clause, which would complicate a comparative analysis. The reason for not considering other African countries is because these systems are mostly either common-law based or founded on French civil law principles. Since chapter three covers both, it is unnecessary to examine how prescription functions in other African countries.

The justifications for prescription are set out in chapter four. This chapter investigates the rationale for prescription in Roman-Dutch, South African, Dutch and French law. Attention is then directed at English law for two reasons. Firstly, the fact that the *Pye* case originated in England makes it imperative to focus on the grounds advanced in favour of adverse possession. Secondly, the English Law Commission recently concluded that adverse possession of registered land is no longer justified if the register provides conclusive proof of ownership. This led to the enactment of the LRA, which now prevents loss of title of registered land through the mere passage of time. The analysis of the justifications for adverse possession in English law is followed by a discussion of three liberal property theories to determine whether the “abolishment” of traditional adverse possession by the Law Commission was justified and whether prescription still fulfils a useful purpose in other legal systems today. These theories are the Lockean labour theory, the personality theory – as developed by Radin – and utilitarianism and law and economics theory. I specifically consider these three theories because they are analogous to the traditional justifications provided for prescription or adverse possession. Taken together, they predict that prescription plays an important role in negative registration systems by clearing titles and promoting legal certainty, although certain economic and moral factors may even justify maintaining

prescription in a positive registration system. Finally, this chapter considers whether the distinction between *bona* and *mala fide* possessors for purposes of prescription performs any useful role and whether this differentiation is truly necessary.

Chapter five focuses on the constitutionality of prescription. For this purpose, the chapter employs the methodology set out by Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (“FNB”)¹¹ to conduct the section 25 analysis of prescription. Firstly, this chapter investigates whether prescription amounts to arbitrary deprivation of property in terms of section 25(1). I predict that prescription amounts to a non-arbitrary deprivation of property, which is in line with section 25(1). For purposes of this argument, chapter five considers the moral and economic justifications in favour of prescription discussed in chapter four, together with the judgment of the Grand Chamber of the European Court of Human Rights in *Pye*. The question of whether prescription constitutes expropriation in terms of section 25(2) (or even constructive expropriation) is also examined. The possibility that prescription amounts to either expropriation or constructive expropriation is ruled out through an analysis of expropriation law in terms of the *FNB* methodology. Accordingly, this chapter concludes that the law of prescription is constitutionally compliant.

1.1.2 Hypothesis

My hypothesis is that prescription, which affects the loss of ownership on the side of an owner, could amount to an arbitrary deprivation under section 25(1) of the Constitution if there is insufficient reason for it. It may perhaps even constitute an uncompensated expropriation in terms of section 25(2), a possibility that is similar to the finding of the Fourth Chamber of the European Court of Human Rights in the *Pye* case. Should prescription be in conflict with the property clause, it will entail major repercussions for prescription as well as the rules of property law pertaining to original acquisition of ownership, such as *specificatio*, *accessio* and *commixtio et confusio*. Accordingly, it is imperative to investigate how this legal institution operates in both South African law and other jurisdictions, as well as the reasons for having such a rule in a modern legal system.

¹¹ 2002 (4) SA 768 (CC).

Chapter two indicates that the requirements for prescription in South African law are difficult to satisfy, since a possessor must possess the property of another continuously with the *animus domini*¹² for an uninterrupted period of 30 years.¹³ Chapter three illustrates that the requirements for prescription in Dutch and French law are similar to those in South African law, since both these civil law systems also require a possessor to possess property *animus domini* for a certain period of time.¹⁴ German law also requires a possessor to possess property with the intention of an owner before she can acquire it through *Ersitzung*,¹⁵ although it has more strenuous requirements due to the positive nature of the German registration system. To the contrary, English law merely requires possessors to possess land *animus possidendi*¹⁶ for purposes of acquiring it through adverse possession, a requirement that is more easily satisfied than possession *animus domini*.¹⁷ This is an interesting difference between prescription and adverse possession, especially if one considers the fact that the Grand Chamber of the European Court of Human Rights found the “less strenuous” adverse possession to be in line with Article 1 of the First Protocol. Nevertheless, the enactment of the LRA makes it much harder to acquire title to registered land, since English law – like German law – now also employs a positive registration system.

The English Law Commission reasoned that the traditional justifications for adverse possession do not hold water when a register provides conclusive proof of ownership, since registration – and no longer possession – is then indicative of ownership. These developments may seem to hinder prescription from surviving a constitutional challenge under section 25 of the Constitution. However, chapter four argues that the Law Commission failed to take certain moral and economic factors into account when it decided to amend adverse possession law pertaining to registered land. For this purpose the chapter considers the traditional justifications that Roman-Dutch, South African, Dutch and French law provide for prescription. The justifications for adverse possession in English law and the objections raised against them by the Law Commission are also investigated. Against this background, the chapter establishes that the Lockean labour theory, Radin’s personality theory, and utilitarianism and law and economics theory provide powerful justifications for the existence of prescription in a legal system. This is due to the fact that prescription fulfils an important

¹² The intention of an owner: See section 2.3.2.1.1 of chapter two below.

¹³ See generally section 2.3 of chapter two below for a more detailed discussion in this regard.

¹⁴ See section 3.3.2 for Dutch law and section 3.4.2 for French law in chapter three below.

¹⁵ *Ersitzung* is the equivalent of acquisitive prescription in South African law.

¹⁶ The intention to possess.

¹⁷ See section 3.2.2.3.2.3 of chapter three below.

corrective function and helps to reallocate resources to higher-valuing possessors in countries with a negative registration system, although certain moral justifications for this legal institution can possibly even justify its presence in jurisdictions with a positive registration system. Nonetheless, this chapter only attempts to justify prescription in the context of a negative registration system.

These moral and economic arguments in favour of prescription are then used in chapter five, which focuses on the constitutionality of prescription. The main question in this chapter is whether prescription constitutes non-arbitrary deprivation of property, as required by section 25(1). For this purpose, I employ Ackermann's J methodology for adjudicating section 25 disputes, as laid down in *FNB*. In this sense, sufficient reasons must exist for the deprivation in question brought about by prescription to be in line with section 25(1).¹⁸ In other words, there must be a sufficient *nexus* between prescription and the fact that it results in the loss of ownership on the side of an owner in order for the deprivation to be non-arbitrary. Chapter five predicts that such a *nexus* indeed exists between the effects of prescription (loss of ownership) and the reasons for such deprivation, namely the moral and economic considerations identified in chapter four. It follows that prescription amounts to non-arbitrary deprivation, which is in line with the property clause. Finally, I conclude that prescription cannot constitute expropriation or even constructive expropriation if one strictly adheres to the *FNB* methodology. Consequently, this dissertation establishes that prescription complies with section 25 of the Constitution.

1.2 Overview of chapters

There are four substantive chapters in this dissertation, while the current one forms the introduction and chapter six the conclusion. Chapter two discusses how South African law received prescription as well as the requirements of this legal institution today. It provides a brief historical overview of the Roman and Roman-Dutch roots of prescription, together with how prescription operated in these two systems. Following this brief historical perspective, the chapter analyses the requirements for prescription in South African law. For this purpose, the requirements for prescription according to the 1943 and 1969 acts are scrutinised, since it is possible to encounter cases involving long periods of suspension where a possessor may

¹⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

still have to satisfy the requirements under the 1943 Act.¹⁹ Chapter two relies on case law and the academic work of property scholars to examine the requirements for prescription. This chapter shows that the requirements under the two prescription acts are remarkably similar, since both acts require a person to possess property openly, continuously and as if owner (*animo domini*) for an uninterrupted period of 30 years in order to acquire ownership.²⁰

Chapter three considers prescription or adverse possession in English, Dutch, French and German law. This chapter initially investigates English law and scrutinises the requirements for adverse possession both before and after the enactment of the LRA for two reasons. Firstly, this Act prevents the extinguishment of title through mere adverse possession. Secondly, the Fourth and Grand Chambers of the European Court of Human Rights decided the *Pye* case under the “old” rules of adverse possession, which makes it important to ascertain how adverse possession worked at this time for purposes of a comparative and constitutional analysis. Special attention is paid to the intention a person must have to possess land for purposes of adverse possession. Adverse possession law merely requires a person to possess property with the *animus possidendi* (intention to possess), which makes it “easier” to succeed with an adverse possession claim when compared to prescription under the civil law systems, which requires the intention of an owner (*animus domini*).²¹ The requisite intention in adverse possession law is the same both before and after the LRA came into effect, since this Act merely puts protective mechanisms in place for owners of registered title. Accordingly, this Act does not affect the substantive requirements for adverse possession in English law.

Chapter three also examines the facts of the *Pye* case – as well as the reasoning of each of the three local courts – to provide a background for the discussion of the decisions by the Fourth and Grand Chambers of the European Court of Human Rights in chapter five. As mentioned before, the 2002 Act prevents owners of registered land from losing ownership through the effects of adverse possession.²² This makes it much harder to acquire title in registered land

¹⁹ Although the Prescription Act 68 of 1969 came into operation on 1 December 1970, it is not retrospective in nature. This means that prescription periods running up until 30 November 1970 still have to comply with the requirements as set out by the Prescription Act 18 of 1943. It follows that the remainder of the prescription period after 30 November 1970 then only has to comply with the requirements of the Prescription Act 68 of 1969. See further the discussion in section 2.3.1 of chapter two below.

²⁰ See sections 2.3.1-2.3.2 of chapter two below.

²¹ See the discussion in section 3.2.2.3.2.3 of chapter three below.

²² See section 96(1) of the Land Registration Act 2002, which disapplies section 15 of the Limitation Act 1980. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.21.

through adverse possession today. The reasons for this alteration by the English Law Commission are discussed in chapter four.

The requirements for prescription in Dutch and French law demonstrate remarkable similarities to those in South African law. The main difference lies in the fact that these two Western European systems differentiate between good and bad faith possessors, since these jurisdictions require *mala fide* possessors to possess property for longer periods than their *bona fide* counterparts before they can acquire ownership.²³ Both these systems also require a possessor to possess property with the *animus domini* to acquire ownership through prescription, just as in South African law.²⁴

German law has a strict prescription regime, since a person can only acquire ownership in land through *Ersitzung* if she possessed the property continuously for 30 years while also (erroneously) being registered as the owner in the *Grundbuch* (register).²⁵ This indeed narrows down the possibility to acquire ownership in land through prescription, since it is highly unlikely that a person would be wrongly registered as owner in the *Grundbuch* for a period of 30 years. The reason for this strict approach is because the German Civil Code (“*Bürgerliches Gesetzbuch*”) guarantees the correctness of the *Grundbuch*, which causes German law to have a positive registration system.²⁶ In this sense English law is now similar to German law, since the LRA also deems the English register to provide conclusive proof of ownership.²⁷ This illustrates why the requirements for prescription or adverse possession are stricter in jurisdictions with a positive registration system than those with a negative registration system. Chapter four focuses on the significance of this phenomenon, together with the question whether there is merit in distinguishing between good and bad faith possessors for purposes of prescription.

Chapter four examines the justifications behind prescription. In this context the point of departure is the justifications Roman-Dutch, South African, Dutch and French law provide

²³ For Dutch law, see sections 3.3.2.2.2-3.3.2.2.3 of chapter three below. For the position of French prescription law, see section 3.4.2.2 of chapter three below.

²⁴ For Dutch law, see section 3.3.2.2.1 of chapter three below. For the position of French prescription law, see section 3.4.2.1 of chapter three below.

²⁵ See section 3.5 of chapter three below.

²⁶ BGB § 891 I. See also Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 891 RdNr 2, 5.

²⁷ Section 58(1) of the Land Registration Act 2002.

for this legal institution. This chapter omits German law, since it is clear from chapter three that prescription no longer fulfils a meaningful purpose in this jurisdiction. From the discussion of the four systems mentioned earlier, it becomes clear that they regard prescription as a mechanism that affords *de iure* status to long-existing *de facto* situations, especially in the context of a negative registration system. Another justification advanced in favour of prescription is that it encourages owners to use their property or, stated negatively, punishes owners for not looking after their property. This justification carries more weight in Roman-Dutch and South African law than in Dutch and French law, where it is regarded as merely ancillary to the promotion of legal certainty argument.²⁸

Following the discussion of the justifications for prescription in these four systems, the chapter shifts its focus to the reasons why the English Law Commission decided to limit the effects of adverse possession in relation to registered land. The Commission relied on an article by Dockray,²⁹ who criticises the traditional justifications as observed in the four legal systems mentioned in the previous paragraph. The Commission accepted the objections of Dockray and concluded that it is no longer justified to allow adverse possession in respect of registered land when the register provides conclusive proof of title. Nonetheless, this chapter argues that the Commission failed to make an informed decision, as it did not take into account certain key moral and economic considerations. To fill this gap, chapter four considers three liberal property theories, namely the Lockean labour theory, Radin's personality theory, and utilitarianism and law and economics theory. One of the reasons I concentrate on these three theories specifically is because they overlap with the traditional justifications that South African law provides for prescription. In terms of the labour theory, the chapter argues that persons who actively use and invest labour into the neglected property of others obtain a labour theory claim to such property if one regards the owner's neglect of such property as constituting *quasi*-abandonment.³⁰ Furthermore, the labour theory is subject to certain internal qualifications that justify granting ownership to a possessor through prescription under specific circumstances.³¹

²⁸ See the discussion in section 4.2 of chapter four below.

²⁹ Dockray M "Why do we Need Adverse Possession?" 1985 *Conveyancer* 272-284.

³⁰ I rely on Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 in this regard. See further the discussion in section 4.4.2 of chapter four below.

³¹ See section 4.4.2 of chapter four below.

According to the personality theory, Radin regards some forms of property – which she classifies as personal property – as being constitutive to one’s personhood. In this context, a person who possesses an owner’s (neglected) property will be entitled to stronger protection concerning possession of the property if it is closely related to the personhood of the possessor.³² This position is analogous to German constitutional law, where it is more difficult for the state to regulate the limits of property rights located closer to a person’s autonomy – such as a home – than those that are not so related, such as commercial property. Furthermore, Radin’s theory is similar to what Singer refers to as the “reliance interest” of parties.³³ According to this theory, possessors and third parties begin to rely on factual situations that owners “allow” to persist for long periods of time. In this sense the absence of the owner allows the possessor to become “attached” to the property, which induces third parties (and possessors) to believe that the possessor is the true owner of the property and not the owner. Another moral theory that is analogous to Radin’s personality theory, and that provides a powerful justification for prescription, is Alexander’s social-obligation norm.³⁴ This theory entails that owners have an inherent obligation to help others in the community to foster their capabilities to attain human flourishing. Consequently, an owner that neglects her land through “allowing” a possessor to stay on it for a long time will be obliged to “give” that land to the squatter if it became essential for such squatter to lead a well-lived life. Since prescription involves the acquisition of ownership in land by possessors, chapter four argues that the social-obligation norm underlies this legal institution.

The third theory used to justify prescription is utilitarianism and law and economics theory. Chapter four discusses these trends together, as both of them aim to maximise the general welfare or utility, albeit in different contexts. Utilitarianism attempts to maximise overall happiness while law and economics theory aims to structure the law in such a way as to optimise economic efficiency. I argue that prescription is justified from a utilitarian perspective, since it maximises happiness if prescription awards ownership to a person who actively uses property for a sufficient length of time in the absence of a neglecting owner. In this context utility is increased by having a legal rule (prescription), in terms of rule-

³² See section 4.4.3 of chapter four below.

³³ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751. See further the discussion in section 4.4.3 of chapter four below.

³⁴ Developed by Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820. This theory is addressed in section 4.4.3 of chapter four below.

utilitarianism, which awards ownership to the hardworking labourer instead of the neglectful owner after a certain period of time.

Since law and economics theory aims to maximise economic efficiency, it attempts to lower transactions costs in circumstances where high transaction costs prevent voluntary exchange between parties. Consequently, one can justify prescription if it can be shown that this legal institution helps to shift resources to higher-valuing users or possessors in situations where the market cannot realise this function due to high transaction costs. The costs in relation to four categories are taken into account for purposes of law and economics theory, namely (i) owners, (ii) possessors, (iii) third parties and (iv) litigation. With regard to owners, the economic analysis of prescription demonstrates that the “pain” – in the form of “demoralization costs”³⁵ – an owner suffers when ownership is lost to a possessor through prescription is less in a regime with a longer prescription period. This is because owners become detached from property the longer they are out of possession, a position that is analogous to Radin’s personality theory. It follows that the shorter the period, the higher the demoralisation costs, since an owner is then likely to still regard the land as personal property. Monitoring costs are also reduced by lengthening the prescription period, since the owner won’t have to incur costs to locate possessors who are not readily detectable. The decrease in monitoring costs also lowers uncertainty costs, since ownership is more secure if the law requires a possessor to remain in possession for a longer time before she can acquire ownership through prescription.

As to the possessor, the potential demoralisation costs she suffers increase with the length of the prescription period, since the possessor will come to rely – through her “reliance interest” – on the fact that the owner “allowed” such possessor to remain on the property. This position is again similar to Radin’s predictions under the personality theory. In this context prescription maximises economic efficiency through awarding ownership to the possessor and taking it away from the owner, who in any event makes no economic use thereof. Furthermore, prescription in a negative registration system also lowers costs pertaining to the ascertainment of ownership, since third parties can disregard possible errors in the register

³⁵ This concept was developed by Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258 1214. The connection of using demoralisation costs in the context of prescription was made by Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727-728. See further the discussion in section 4.4.4 of chapter four below.

that predate the prescription period, which also reduces search costs. In addition, it will be safer to merely inspect the property to see who possesses it (thereby incurring inspection costs) than to rely on (faulty) information of the register in a negative registration system. Another economic justification includes the fact that prescription reduces litigation costs, since it avoids protracted litigation concerning ownership.

Finally, chapter four analyses the distinction between *bona* and *mala fide* prescription. The chapter especially relies on Fennell³⁶ to illustrate that it serves no useful purpose to distinguish between these types of possessors, since the “so-called” distinction is flawed because of fallacious moral reasoning. These judgments include the presumption that bad faith possessors – who possess property knowing that they do not own it – are morally reprehensible and that the law should therefore make it more difficult for them to acquire ownership through prescription. Fennell indicates that the apparently simple distinction between good and bad faith is not as clear-cut as it *prima facie* seems and emphasises that persons are able to choose how to inform themselves of a particular situation. This fact, according to Fennell, makes knowledge an unstable criterion to determine whether good faith or bad faith is present.³⁷ Fennell further argues that by disentangling the way law and morality is conflated in the word “thief”, we are able to discover why bad faith should actually be a requirement for acquiring land through prescription.

Peñalver and Katyal³⁸ agree with Fennell that this distinction is based on erroneous moral judgments. They emphasise the role these “acquisitive [property] outlaws” play in developing property law. In this sense the authors agree with Radin that property is important to persons to help gain individual identity, which justifies the acquisition of ownership through bad faith prescription if the possessor had real need of the property. Another reason for allowing bad faith prescription is because it generates information as to the inefficient distribution of property rights in society. In this sense these authors (Fennell, Peñalver and Katyal) agree with the economic arguments that prescription should be allowed if it helps to relocate resources to higher-valuing users.

³⁶ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096.

³⁷ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1050.

³⁸ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186.

Chapter five focuses on the constitutionality of prescription in terms of section 25 of the South African Constitution. For purposes of the section 25 analysis, this chapter relies on the methodology set out by Ackermann J in *FNB* when dealing with the interpretation and application of section 25 disputes. The first substantive question in this context is whether prescription complies with section 25(1), which allows for deprivation of property. I establish that the two South African prescription acts constitute law of general application, which is the first requirement of section 25(1). As to the question of arbitrariness, the chapter argues that prescription amounts to non-arbitrary deprivation of property, since it satisfies both the procedural and substantive non-arbitrariness legs of the arbitrariness test. The moral and economic justifications identified in chapter four are central to this conclusion, especially the fact that prescription fulfils a corrective function and lowers transaction costs in jurisdictions with a negative registration system. This result finds further support in the judgment of the Grand Chamber in the *Pye* case, where it was found that adverse possession in English law constitutes a regulation – or deprivation in South African law – of property, which is in line with the third rule of Article 1. The fact that the Grand Chamber found adverse possession – with its “easy” *animus possidendi* requirement – to comply with Article 1 provides further support for the constitutionality of prescription, since it has the more strenuous *animus domini* element.

In the wake of the arguments pertaining to section 25(1), the next question is whether prescription amounts to uncompensated expropriation in terms of section 25(2), along with whether it constitutes constructive expropriation. The fact that prescription could amount to uncompensated expropriation is a real possibility, which is analogous to the judgment of the Fourth Chamber in *Pye*. Nonetheless, I argue that prescription cannot amount to expropriation, since the two prescription acts do not empower the state to expropriate property rights.³⁹ Furthermore, these acts also do not provide for the payment of compensation, which further indicates that prescription does not amount to expropriation. In addition, the courts in South African law have no common law authority to order expropriation, since this power must be expressly or tacitly granted in empowering legislation. The fact that the prescription acts in no way empower a court to order expropriation is another indication that it cannot amount to expropriation.

³⁹ The question of whether prescription amounts to expropriation is addressed in section 5.3.2.6 of chapter five below.

Finally, chapter five argues that prescription does not amount to constructive expropriation either.⁴⁰ This reasoning is based on the argument that the doctrine of constructive expropriation, which treats excessive deprivation as *de facto* expropriation that requires compensation, does not form part of South African law.⁴¹ This doctrine is recognised in Swiss law, where the constitution provides for this form of expropriation. It is also applied in US law (where it is known as regulatory takings), although its application in that context is not free from difficulty. German law does not recognise this doctrine and this is likely to be the position in South African law as well. According to German constitutional law, an excessive deprivation will be unconstitutional for being in conflict with the Basic Law. In this context an “unconstitutional” deprivation cannot be saved by treating it as constructive expropriation. Furthermore, if one strictly adheres to the methodology set out in *FNB*, it is clear that “unconstitutional” deprivations will be struck down as arbitrary deprivation under section 25(1) before one can reach the question as to whether it constitutes constructive expropriation under section 25(2). Accordingly, I conclude that prescription does not amount to constructive expropriation. Therefore, this chapter concludes that prescription is in line with section 25 of the Constitution.

In the final chapter, I conclude that prescription is in line with the property clause, since it fulfils an important corrective function in jurisdictions with a negative registration system. Chapter six reaches this conclusion by using the arguments made in chapter three (the comparative law chapter) concerning prescription in other jurisdictions, together with assessing the justifications provided by the three liberal property theories investigated in chapter four. This chapter incorporates the conclusions drawn from chapters three and four in the *FNB* methodology to ascertain whether prescription amounts to a non-arbitrary deprivation, which constitutional analysis confirms that prescription is in line with section 25.

1.3 Qualifications

This dissertation only focuses on prescription in the context of ownership of land and does not investigate the role of prescription pertaining to either movables or servitudes, since the justifications – and to a lesser degree also the requirements – differ from those concerning ownership of immovable property. For these reasons I do not specifically investigate

⁴⁰ This question is addressed in section 5.3.2.6 of chapter five below.

⁴¹ Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2.

prescription in the context of boundary disputes either. Accordingly, prescription in these situations falls outside the scope of this dissertation. In this regard I take cognisance of the fact that the Draft Common Frame of Reference (“DCFR”) contains a chapter pertaining to the prescription of movables, even though it does not allow for the acquisition of land through prescription.⁴² It is worth emphasising that the requirements for acquiring movables through prescription under the DCFR are remarkably similar to those in the German law of *Ersitzung*.

Even though chapter two includes and discusses South African cases pertaining to the acquisition or loss of servitudes through prescription, this is only done for purposes of clarifying the requirements for prescription under the two prescription acts in relation to land. This approach is in no way intended to facilitate a discussion as to the acquisition of servitudes through prescription in South African law.

It is not my intention to analyse the extinction of debts or obligations through extinctive prescription, since the focus of this dissertation only falls on the acquisition of immovables through acquisitive prescription. This is because both the requirements and the effects of extinctive prescription differ from those of acquisitive prescription, since extinctive prescription fulfils a more important role in the context of the law of obligations than in property law. Accordingly, since the justifications for extinctive prescription also differ from those of acquisitive prescription, they fall outside the scope of my dissertation.

Finally, I do not provide an in-depth historical discussion of prescription in the second chapter. The purpose of the historical analysis is merely to illustrate that prescription has its roots in Roman and Roman-Dutch law and not to provide a detailed account of the requirements of prescription during these two eras. An in-depth study to this effect falls outside the scope of this dissertation.

⁴² Von Bar C *et al* (eds) *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (2009) Chapter 8.

CHAPTER 2: ACQUISITIVE PRESCRIPTION: RECEPTION AND REQUIREMENTS

2.1 Introduction

Acquisitive prescription (“prescription”) is one of the oldest existing legal institutions, already recognised by the earliest legal code adopted by the Romans.¹ This chapter shows how prescription developed throughout the Roman law period, as well as how it changed under the rule of the emperor Justinian. Following this analysis of the ancient sources, the chapter investigates the position of prescription under Roman-Dutch law. Against this historical background the focus then shifts to modern South African prescription law. Specific emphasis is placed on the content of the requirements set out by the two prescription acts,² with special consideration for the requirements of *possessio civilis*, adverse user and “as if owner”. Regard is also had to the similarities between these two acts.

2.2 Historical background

2.2.1 Introduction

South African private law, which was greatly influenced by Roman-Dutch law, has its roots in Roman law. Accordingly, a brief overview is presented of the origins of prescription, as well as how it developed until the time Roman-Dutch law emerged in the provinces of Holland. This helps to contextualise the discussion of the modern South African law of prescription. This section starts by focusing on the position under the old Roman law,³ followed by the late republican and classical periods of law,⁴ the post-classical period⁵ and then the period during the rule of Justinian.⁶ Afterwards, the acquisition of servitudes through prescription in Roman law is briefly investigated, ending off with how prescription developed under Roman-Dutch law.

¹ The Twelve Tables.

² Prescription Act 18 of 1943 and Prescription Act 68 of 1969.

³ This is the period between the adoption of the Twelve Tables (around 450 BC) until the pre-classical period (around 250 BC).

⁴ From 250 BC until the classical period, between 27 BC and 250 AD.

⁵ From 250 AD until around 500 AD.

⁶ From around 520 AD until 540 AD: See Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 10 for this division.

2.2.2 Acquisitive prescription under Roman law

The earliest known form of prescription is found in the Twelve Tables,⁷ which most scholars agree was adopted by the Romans around 450 BC.⁸ This legal rule later became known as *usucapio*.⁹ During this early stage, the Romans did not distinguish between acquisitive and extinctive prescription, hence the unqualified use of the term “prescription” in the first sentence of this paragraph.¹⁰ According to *Tabula* 6.3, it was possible to acquire both movable and immovable objects through prescription.¹¹ The requirements for prescription (and later *usucapio*) were numerous and complicated, but for the purposes of this discussion they may be summarised as follows, according to *Tabula* 6.3:

- i) continuous possession or use of another’s property;
- ii) for a certain period of time (two years for immovables and one year for movables).¹²

These periods applied throughout the republican and classical periods and, regarding movables, even up until the time of Justinian.¹³ If a person satisfied these requirements, he became the owner of the property.¹⁴ In other words, he acquired *dominium* or ownership. However, this method of acquiring *dominium* was qualified.¹⁵ According to *Tabula* 3.7,¹⁶ prescription could not run in the favour of *peregrini* (or foreigners). Stolen things (*rei*

⁷ *Leges Duodecim Tabularum*.

⁸ According to Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 82, *Tabula* 6.3 states: “*Usus auctoritas fundi biennium esto, ceterarum rerum omnium annuus est usus.*” There is a debate over the exact meaning of this stipulation, but that is not discussed here. According to Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 81, (acquisitive) prescription probably existed even before the adoption of the Twelve Tables.

⁹ The word *usucapio* is of such ancient heritage that no one is certain since when it has been used to refer to prescription: See Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 81.

¹⁰ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 13.

¹¹ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 14; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 130; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 30.

¹² *Gai Inst* 2.42; Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 200; Johnston D *Roman Law in Context* (1999) 57; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 14; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 130 132; De Wet JC *Opuscula Miscellanea* (1979) 80; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 242; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 82; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 30; Wessels JW *History of the Roman-Dutch Law* (1908) 635.

¹³ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 82.

¹⁴ *Gai Inst* 2.41.

¹⁵ The qualifications are found in *Tabulae* 3.7 and 8.17.

¹⁶ “*Adversus hostem aeterna auctoritas (esto).*” Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 130 translates this provision as follows: “As against an alien the warranty shall last eternally.” See also Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 248; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 83; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 30-31; Wessels JW *History of the Roman-Dutch Law* (1908) 635.

furtivae) were also excluded from the effects of prescription, which was enhanced by the *lex Atinia* (enacted around the beginning of 200 BC).¹⁷ This was the case even if a *bona fide*¹⁸ third party obtained possession of stolen property.¹⁹ Not until the stolen object was returned to the hands of the owner did it once more become susceptible to prescription.²⁰ It was not necessary that the owner be physically reunited with the stolen thing; all that was required was that the owner needed to know the whereabouts of the property, and thus be able to reclaim it with his *rei vindicatio*.²¹ If these requirements were satisfied, it once more became possible to acquire the property through *usucapio*.²² This exception only applied to movables, as it is impossible to steal immovable property.²³

The justifications for *usucapio* during this time were much the same as the traditional ones advanced in favour of prescription in most modern-day jurisdictions, namely

- i) to legalise the position of a possessor who may not have complied with the formal requirements for transfer of *dominium* (ie transfer by way of *traditio* of a *res Mancipi* instead of through *mancipatio*); and
- ii) to afford *de iure* status to a *de facto* situation.²⁴

During the late republican and classical law periods,²⁵ prescription finally became known as *usucapio*.²⁶ It was important that the possessor exercised legal possession (*possessio civilis*) over the property, as opposed to mere custody (*detentio*), which was not sufficient for

¹⁷ This is found in *Tabula* 8.17, which was extended by the *lex Atinia*: “Quod subruptum erit, eius rei aeterna auctoritas esto.” Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 131 translates this provision as follows: “With regard to that which has been obtained from another (by stealth), the warranty shall last eternally.” See also *Gai Inst* 2.45; Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 203; Johnston D *Roman Law in Context* (1999) 57; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 248; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 82; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 30.

¹⁸ Good faith.

¹⁹ *Gai Inst* 2.49; Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 203; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 15.

²⁰ Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 131; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 83.

²¹ Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 248.

²² Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 248.

²³ *Gai Inst* 2.51; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 83.

²⁴ *Gai Inst* 2.41, 2.44; Grotius *Inleidinge* 2.7.4; Johnston D *Roman Law in Context* (1999) 57; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 309-310; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 16-17. The traditional justifications behind prescription are discussed in greater detail in section 4.2 of chapter four below.

²⁵ 250 BC until 250 AD.

²⁶ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 17; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 131.

usucapio.²⁷ At this time legal possession already comprised the two elements known today in South African law, namely the *corpus* (physical) and *animus* (mental) elements.²⁸ *Corpus* referred to the physical possession of the property, while the *animus* required the possessor to possess the property with the *animus domini*, or with the intention of an owner.²⁹ The main difference between *usucapio* and prescription under the Twelve Tables is the fact that *usucapio* required the possessor to possess the thing *bona fide*³⁰ and *iustus titulus*.³¹ These new requirements notably restricted the possibility to acquire *dominium* through *usucapio*.³² Initially *bona fides* and *iustus titulus* did not exist independently from each other, but overlapped to some extent.³³ Accordingly, it was feasible to hold property *bona fide* without complying with the *iustus titulus* requirement, though it was impossible to satisfy the latter requirement if you were not also in good faith.³⁴

Bona fides required the possessor to be in good faith at the moment of *traditio*.³⁵ Since the Romans did not define *bona fides*, it is difficult to ascertain the exact meaning of this phrase. The majority of authors state that the possessor must have honestly believed – at the moment of *traditio* – that he indeed became owner of the property concerned.³⁶ In this instance *bona fides* differs from the *animus domini*, which only requires the possessor to hold the thing with the intention of an owner. Other sources mention that *bona fides* may be described as the belief that the holder had a right to hold the property as his own.³⁷ Whatever the precise definition, *bona fides* was presumed in favour of the possessor because the law placed the

²⁷ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 200.

²⁸ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 116-117.

²⁹ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 117. Van Oven describes *animus domini* as “de wil om te zaak als eigenaar onder zich te hebben.” (“[T]he will to hold the thing as owner.”) Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 157 also translate *animus domini* as the “intention of being owner”.

³⁰ *Gai Inst* 2.43.

³¹ Just or valid title: See Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Johnston D *Roman Law in Context* (1999) 57; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 131; De Wet JC *Opuscula Miscellanea* (1979) 80; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 84; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 30.

³² Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 84.

³³ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 84.

³⁴ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 84.

³⁵ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 24; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 132; De Wet JC *Opuscula Miscellanea* (1979) 80; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 244.

³⁶ *Gai Inst* 2.43; Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 84-85. A debate exists over whether this principle also applied to contracts of sale, and whether the buyer had to be *bona fide* at the moment of *consensus* or *traditio*, or both. This interesting topic will, however, not be investigated in this dissertation.

³⁷ Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 243- 244.

burden of proof on the party averring the contrary.³⁸ It was impossible for a *mala fide* possessor to acquire *dominium* over property by way of *usucapio*.³⁹

Bona fides was only required when the possessor acquired possession of the property; subsequent *mala fides* did not serve to interrupt *usucapio*.⁴⁰ This strict approach was certainly enhanced by adding the *iustus titulus* requirement. Although the Romans never defined the latter concept, it may be understood to mean “good reason”,⁴¹ or “some fact which is ordinarily a basis of acquisition.”⁴² In my opinion, *iustus titulus* may simply be understood as acquisition under a “just” or “legal” title. According to Van Oven, *iustus titulus* means that the possessor had to acquire possession over the property in accordance with a legally recognised ground before *usucapio* could start running in his favour.⁴³ Although there was no *numerus clausus* of *iusti tituli* during this time, there were some well established *iusti tituli possessionis* that could give rise to *usucapio*.⁴⁴ There was no presumption in favour of *iusti tituli*, and as such it had to be proved by the party that claimed *usucapio*.⁴⁵

For a person to acquire property through *usucapio*, it also had to be *res habiles*, or property capable of begin usucaped.⁴⁶ As seen above, already under the Twelve Tables some forms of property – like stolen property – were excluded from the effects of *usucapio*. These exceptions largely remained in force during the late republican and classical law eras. The *lex Iulia de vi* (from the time of Augustus, between 27 BC and 14 AD) and *lex Plautia* (enacted between 73 BC and 68 BC) equated things taken by force (*vi*) to stolen things and during the

³⁸ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 202; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 132; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 245.

³⁹ *Gai Inst* 2.49.

⁴⁰ C 7.31.1.3: “Mala fides superveniens non nocet.” (“Supervening *mala fides* does not break [or interrupt] prescription.”) See also Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 202; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 84.

⁴¹ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 85.

⁴² Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 246.

⁴³ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 85. See also De Wet JC *Opuscula Miscellanea* (1979) 80.

⁴⁴ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 85. See also Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 131. These authors list them as follows: *pro emptore* (D 41.4), *pro donato* (D 41.6), *pro dote* (D 41.9), *pro legato* (D 41.8), *pro derelicto* (D 41.7), *pro suo* (D 41.10), *pro soluto* (D 41.3 46) and *pro hedere* (D 41.5). The content of these *iusti tituli possessionis* are not important for purposes of this dissertation and will, therefore, not be investigated. For a comprehensive discussion on this topic, see Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 85-87 and Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 247.

⁴⁵ Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 246.

⁴⁶ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 26.

Imperial period, property of the fisc or the Emperor was added to this category.⁴⁷ Sacred things – such as temples – and free men could not be acquired through *usucapio* either.⁴⁸ The initial prescription periods of one year for movables and two years for immovables were retained for purposes of *usucapio*.⁴⁹

Usurpatio – or interruption of *usucapio* – could take place in two instances: Either by natural interruption, when the possessor merely lost possession of the property for whatever reason, or by civil interruption, which occurred when a legal claim was made to recover the property.⁵⁰ Civil interruption was only introduced during the classical period, as this concept was unknown under the earlier Roman law.⁵¹ It seems that any formal claim under Republican law, even short of litigation, amounted to civil interruption.⁵² Under classical law, civil interruption only took place the moment judgment was given against the possessor.⁵³ There existed two exceptions under classical law pertaining to the loss of possession. In the first instance, an heir could continue the *usucapio* started by his predecessor in title if such predecessor received the property under *iustus titulus* and was *bona fide* when he took possession of the property.⁵⁴ This was known as *successio in usucapionem* and *mala fides* on the side of the heir did not interrupt the running of *usucapio*.⁵⁵ However, if the predecessor in title did not comply with either the *iustus titulus* or *bona fide* requirements, interruption took place regardless of the *fides* of the heir.⁵⁶ The second exception was *accessio possessionis*, or

⁴⁷ Gai *Inst* 2.45; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 131; Buckland WW A *Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 249; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 83.

⁴⁸ Gai *Inst* 2.48.

⁴⁹ Gai *Inst* 2.42.

⁵⁰ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 27; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 132; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 90.

⁵¹ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 90.

⁵² Buckland WW A *Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 243.

⁵³ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Buckland WW A *Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 243.

⁵⁴ Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 132; Buckland WW A *Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 242; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89.

⁵⁵ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 132; Buckland WW A *Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 242; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89.

⁵⁶ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89.

what is better known as *coniunctio temporum*. This exception only applied in late classical law and was recognised concerning successors in title to contracts of sale.⁵⁷

Usucapio – with its short prescription periods – became impractical in the post-classical period⁵⁸ due to socio-political and economic developments, which contributed to the disappearance of this legal institution from practice regarding immovables.⁵⁹ In the provinces, this resulted in the introduction of a new form of prescription for immovables around 200 AD, namely *praescriptio longi temporis*.⁶⁰ The prescription period was 10 years if the possessor and owner were domiciled in the same municipality (*inter praesentes*) and if not, 20 years (*inter absentes*).⁶¹ Movables could still be acquired through *usucapio*, but a period of three years now applied.⁶² Regarding these new forms of prescription, most of the rules under *usucapio*, such as *bona fides* and *iustus titulus*, were still in force.⁶³ Another institution developed later on, either under Constantine or his sons, which initially had a 40-year period.⁶⁴ This period was later reduced to 30 years and from 449 AD this institution became imbedded in the law of the day.⁶⁵

The Eastern Roman Empire no longer recognised *usucapio* as a method of prescription during this time.⁶⁶ Under the rule of the emperor Constantine, *praescriptio longi temporis* was a well-established form of prescription, and this institution required *iustus titulus* and

⁵⁷ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 28; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 132.

⁵⁸ 250 AD until 500 AD.

⁵⁹ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 32; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 31.

⁶⁰ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 87-88.

⁶¹ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; De Wet JC *Opuscula Miscellanea* (1979) 80; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 250; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 88; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 31; Wessels JW *History of the Roman-Dutch Law* (1908) 635.

⁶² De Wet JC *Opuscula Miscellanea* (1979) 80; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 31.

⁶³ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204; De Wet JC *Opuscula Miscellanea* (1979) 80; Wessels JW *History of the Roman-Dutch Law* (1908) 635.

⁶⁴ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 32-33; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 251.

⁶⁵ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 32-33; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 251.

⁶⁶ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 33-34.

probably also *bona fides*.⁶⁷ At this stage the distinction between *iustus titulus* and *bona fides* became clearer.⁶⁸ The periods of 10 years *inter praesentes* and 20 years *inter absentes* also applied, and both movables and immovables could be acquired through *praescriptio longi temporis*.⁶⁹ Between 326 and 333 AD, Constantine introduced another form of prescription with a period of 40 years, which is mentioned above.⁷⁰ This form of prescription merely required possession.⁷¹ Although the old requirements of *iustus titulus* and *bona fides* were dropped, this vacuum was filled by considerably lengthening the prescription period. It seems that this form of prescription became the forerunner of *praescriptio longissimi temporis*, which was later introduced under Justinian.⁷² If a possessor satisfied the requirements of *praescriptio longi temporis*, he could also acquire *dominium* under this method of Constantinian prescription.⁷³ However, it seems that *praescriptio longi temporis* no longer played any role after Constantine's reign.⁷⁴ The forerunner of *praescriptio longissimi temporis*, with its 40-year prescription period, was reduced to 30 years, and *iustus titulus* was in all probability still not required.⁷⁵ Even at this time there was very little differentiation between acquisitive and extinctive prescription.⁷⁶

When the emperor Justinian came to power in 527 AD, his great ambition was to revive the glory of the Roman Empire of old. In order to achieve this goal, he realised that his new Empire would have to be governed by an up-to-date legal system. He therefore commissioned the best legal scholars of the day to produce a legal code that later became known as the *Corpus Iuris Civilis*.⁷⁷ This code was a compilation of the works of the five most authoritative Roman law jurists, namely Gaius, Ulpian, Modestinus, Paulus and Papinian, and

⁶⁷ Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 88.

⁶⁸ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 87.

⁶⁹ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 34; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 250.

⁷⁰ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 34; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133.

⁷¹ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 251; Wessels JW *History of the Roman-Dutch Law* (1908) 636.

⁷² Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204.

⁷³ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 34.

⁷⁴ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 35; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133.

⁷⁵ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 35; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133.

⁷⁶ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 35.

⁷⁷ Justinian's code – consisting of the Digest, Institutes, Codex and Novellae – did not have an official name; the name "*Corpus Iuris Civilis*" was coined by Gothofredus in 1583; See Thomas PhJ, Van der Merwe CG & Stoop BC *Historiese Grondslae van die Suid-Afrikaanse Privaatreg* (2000) 49.

formed the precursor for today's civil codes in most civil law countries. These efforts of Justinian had profound effects on the development of the law of prescription, which consisted of a reintroduction of a varied form of *usucapio* for movables, the reinstatement of *praescriptio longi temporis* and the creation of a new type of prescription, namely *praescriptio longissimi temporis*.⁷⁸

Justinian attempted to create a uniform prescription law.⁷⁹ Concerning immovable property, he fused the old institutions of *usucapio* (with its short periods) with *praescriptio longi temporis* (with its longer period), and thus required a longer period of possession before the possessor could acquire *dominium*.⁸⁰ *Usucapio* now only applied to movables, for which possession of three years was required, together with the requirements of *bona fides* and *iustus titulus* from the classical period.⁸¹ As to immovables, the new fused form of *praescriptio longi temporis* required a possessor to possess the property for 10 years *inter praesentes*, or 20 years *inter absentes*, together with *bona fides* and *iustus titulus*.⁸² Under Justinian, the distinction between *iustus titulus* and *bona fides* finally crystallised.⁸³ Justinian also made it clear that *usucapio* and *praescriptio longi temporis* were forms of acquisitive prescription, which he distinguished from extinctive prescription.⁸⁴ *Iustus titulus* now applied to both *usucapio* and *praescriptio longi temporis*.⁸⁵ Although *usucapio* and *praescriptio longi*

⁷⁸ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 36.

⁷⁹ Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133.

⁸⁰ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 36; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 251; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 140; Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 31.

⁸¹ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 200 204; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; De Wet JC *Opuscula Miscellanea* (1979) 80; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 251; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89; Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 31.

⁸² Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 200, 204; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 36-37; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; De Wet JC *Opuscula Miscellanea* (1979) 80; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 250; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 140-141; Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 31. *Inter praesentes* and *absentes* in this instance no longer referred to the municipality of domicile of the owner and possessor, but to whether these parties were now domiciled within the same province or not: See Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 250.

⁸³ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 87.

⁸⁴ Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 88.

⁸⁵ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 37; Wessels JW *History of the Roman-Dutch Law* (1908) 636.

temporis were part of Justinian's acquisitive prescription law, their effects differed. As such, *usucapio* was a derivative method of acquisition of ownership, while *praescriptio longi temporis* was an original method of acquisition of ownership.⁸⁶ Pertaining to the position of *accessio possessionis*, Justinian revised the law by ensuring that this doctrine applied to all types of successors in title, be it under either *praescriptio longi temporis* or *usucapio*.⁸⁷ This was a significant departure from the position under the classical law, as discussed above.

Even under Justinian, some forms of property were still regarded as *res inhabiles*, which could not be acquired through prescription.⁸⁸ The old *res habiles* requirement was even extended in that prescription could not run against the state.⁸⁹ It seems that this was the first time in history that the acquisition of state property through acquisitive prescription was prohibited.

Justinian also introduced a new type of prescription, namely *praescriptio longissimi temporis*. It required a period of 30 years and in some cases 40 years.⁹⁰ Through this form of prescription all manner of rights could be acquired, which included movable or immovable property, and even mere rights of action (like servitudes).⁹¹ *Iustus titulus* was no longer required, although it seems that *bona fides* was initially still considered a requirement.⁹² In this instance, *bona fides* was also presumed in favour of the possessor, but could be disproved.⁹³ *Bona fides* was still only required at the moment of acquisition of possession;

⁸⁶ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 37.

⁸⁷ Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 242-243, 250; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89.

⁸⁸ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 37; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 250.

⁸⁹ C 7.38: "Contra principem non currit praescriptio." ("Against the principate [or state], prescription does not run.") See also Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 37.

⁹⁰ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 39; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; De Wet JC *Opuscula Miscellanea* (1979) 80; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89; Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 32.

⁹¹ Wessels JW *History of the Roman-Dutch Law* (1908) 636.

⁹² Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 204; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 39; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133; De Wet JC *Opuscula Miscellanea* (1979) 80; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 251; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 141; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89; Wessels JW *History of the Roman-Dutch Law* (1908) 636-637.

⁹³ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89; Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 32.

subsequent *mala fides* did not prevent the running of *praescriptio longissimi temporis*.⁹⁴ Later sources omit *bona fides* as a requirement, with the effect that even *rei furtivae* could then be acquired through this legal institution.⁹⁵ However, the harsh effects of this development were tempered by the fact that the *nec vi* (without violence) requirement was introduced as one of the requirements of *praescriptio longissimi temporis*, which required that the possessor must have acquired possession peaceably and not through violence.⁹⁶ In this context it is worth emphasising that Canon law reintroduced *bona fides*. Indeed, not only did the acquisition of possession need to be *bona fide* under Canon law, the possessor had to be *bona fide* throughout the whole prescription period.⁹⁷

Justinian also formalised the postponement and interruption of prescription law. Postponement had the effect that the completion of the prescription period was postponed due to a certain factor. A famous example in this regard is the fact that from the earliest times, prescription did not run against those who were incapable of managing their own affairs, like minors.⁹⁸ Interruption occurred when a certain event took place that ended the running of prescription, which resulted that the prescription period had to begin running *de novo*. Under *praescriptio longi temporis*, interruption occurred at the moment of *litis contestatio*.⁹⁹ However, this was not the case under *usucapio*. Here the possessor could become owner of the property even after *litis contestatio*.¹⁰⁰ Cases were decided *tempore litis contestatio*, which meant that the possessor could be ordered to give the property back to the original owner, even after he (the possessor) became owner of it through prescription.¹⁰¹

⁹⁴ Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 32.

⁹⁵ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 39; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 133.

⁹⁶ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 39.

⁹⁷ Grotius *Inleidinge* 2.7.3; Kaser M *Roman Private Law* (trans by Dannenbring R, 3rd ed 1980) 132; De Wet JC *Opuscula Miscellanea* (1979) 80; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 32; Wessels JW *History of the Roman-Dutch Law* (1908) 642.

⁹⁸ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 90.

⁹⁹ Borkowski A & Du Plessis P *Textbook on Roman Law* (3rd ed 2005) 201; Buckland WW *A Text-Book of Roman Law from Augustus to Justinian* (3rd rev ed Stein P, 1963) 250; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 90.

¹⁰⁰ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 40.

¹⁰¹ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 90.

It seems as though it was possible to acquire servitudes through prescription under the old Roman law, although this was largely prohibited by the *lex Scribonia* from around 50 BC.¹⁰² Nonetheless, this *lex* did not abolish the acquisition of the urban servitudes of *altius tollendi*, *officiendi luminibus vicini* and *stillicidii non avertendi* (building higher, obscuring light and diverting rain water) through prescription.¹⁰³ Van Oven mentions that during the classical era, servitudes were viewed as *rei incorporales*, which could not be legally possessed and that could thus not be acquired through prescription.¹⁰⁴ However, it seems that it was possible to acquire the servitude of *aquaeductus* through long-term use (*diuturnus usus*), which use also had to be *nec vi*, *nec clam* and *nec precario*.¹⁰⁵ Under the reign of Justinian, the rules relating to the *lex Scribonia* and the ban on acquisition of servitudes through prescription were abolished and henceforth, *rei incorporales* (like servitudes) could be acquired through *praescriptio longi temporis*.¹⁰⁶ Yet, prescription as relating to servitudes needs to be distinguished from that relating to corporeal property. As seen above, the latter required both *bona fides* and *iustus titulus*. For servitudes the requirements were merely:

- i) possession or use for the duration of the prescription period (*quasi possessio* regarding *res incorporales*);
- ii) exercise of the servitude as of right; and
- iii) exercise of the right *vis-à-vis* the owner of the property *nec vi* (without violence), *nec clam* (openly) and *nec precario* (as of right and not by the owner's leave and license).¹⁰⁷

2.2.3 Acquisitive prescription under Roman-Dutch law

¹⁰² Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 40; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 148; Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 33.

¹⁰³ Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 33.

¹⁰⁴ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 148. See also Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 40-41.

¹⁰⁵ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 41; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 151-152.

¹⁰⁶ C 7.33.12.4: "Eodem observando et si non soli sint, sed incorporales, quae in iure consistunt, veluti usufructus et ceterae servitutes." Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 34 translates this provision as follows: "The same rules as to usucapion in 10 or 20 years must be observed even if the property is not land, but is incorporeal and consists of rights, like usufruct and the other servitudes." See also Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 89, 151.

¹⁰⁷ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 41; Krause LE "The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law" (1923) 40 *South African Law Journal* 26-41 32-34.

Lee describes the difficulty of studying Roman-Dutch prescription law:

“In the Netherlands the whole subject of prescription was involved in the greatest uncertainty, according as local practice approached to or receded from the Roman Law. The situation was further complicated by the presence of two new terms of prescription, a shorter period of a year and a day ... and a longer period of a third of a century ...”¹⁰⁸

Despite the distinction Justinian drew between acquisitive and extinctive prescription, it seems that Roman-Dutch lawyers did not clearly distinguish between these concepts, which once more resulted in confusion.¹⁰⁹ Nonetheless, it is clear that prescription during this time required neither *bona fides* nor *iustus titulus*.¹¹⁰ According to some authors, the only requirements were uninterrupted possession for 30 years (or a third of a century)¹¹¹ that needed to commence *nec vi, nec clam* and *nec precario*.¹¹² Although this is an oversimplification, as will be seen, these requirements formed the crux of prescription during this period. Interestingly, it appears that Roman-Dutch prescription law adopted the same requirements for acquisition of incorporeal property (ie servitudes) under Roman law, namely possession *nec vi, nec clam* and *nec precario*.

Usucapio, with its periods of three, 10 and 20 years, was no longer in force under Roman-Dutch law.¹¹³ Nonetheless, most rules incidental to *usucapio* – according to Voet – also applied to prescription in Roman-Dutch law.¹¹⁴ This included the rules, *inter alia*, relating to who could acquire property through prescription,¹¹⁵ what kind of property could be acquired¹¹⁶ as well as the rules pertaining to stolen and pledged property.¹¹⁷ In the Netherlands the usual period for prescription was 30 years, but the province of Holland

¹⁰⁸ Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 141 (footnotes omitted). In this regard, see also Grotius *Inleidinge* 2.7.5 – 2.7.7.

¹⁰⁹ Wessels JW *History of the Roman-Dutch Law* (1908) 634.

¹¹⁰ Voet 44.3.9; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 142. Unfortunately, Grotius’s discussion on long prescription in *Inleidinge* is silent on this matter. This could be construed as implying that *bona fides* and *iustus titulus* were no longer required.

¹¹¹ A third of a century, according to Voet 44.3.8 and Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 141.

¹¹² Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 142; Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 32. The position regarding acquisitive prescription under Roman-Dutch law is not crystal clear, however, and the presence of local enactments regulating prescription makes it difficult to ascertain how prescription operated during this time in the Netherlands: See De Wet JC *Opuscula Miscellanea* (1979) 81.

¹¹³ Voet 44.3.7.

¹¹⁴ Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 32-33.

¹¹⁵ Voet 41.3.2.

¹¹⁶ Voet 41.3.11.

¹¹⁷ Voet 41.3.14.

adopted a period of 30 years for movables and a third of a century for immovables.¹¹⁸ The province of Zeeland took over the prescription rules relating to *inter praesentes* and *absentes*, although it extended the periods by requiring 20 years *inter praesentes* and 30 years *inter absentes*.¹¹⁹ In this sense, *iustus titulus* and *bona fides* were also not required.¹²⁰ As to the precise periods of prescription, one is struck by the variety of different rules that prevailed in the different Dutch towns.¹²¹ It is clear that the law of Holland recognised many prescription institutions, each with its own requirements.¹²² Some of these existed long before Roman law was introduced in Holland.¹²³ Others came from Germanic law, such as the year and a day rule, while the influence of Canon law, as well as the reception of Roman law, also had profound effects on the development of prescription law during this time.¹²⁴

The Germanic year and a day rule already existed before the 12th century and was also known as *rechte gewere* or *Verschweigung*.¹²⁵ The word “*gewere*” refers to actual control over an object and *rechte gewere* is *gewere* that was protected by law.¹²⁶ A person could qualify for *rechte gewere* if he acquired control (*gewere*) over the object by way of a legally (*rechte*) recognised method.¹²⁷ The prescription period only began to run after such a person obtained *gewere* by way of a legally recognised method, like a public announcement or delivery in accordance with the law of that place.¹²⁸ *Rechte gewere* was obtained when a person had *gewere* over property for a year and a day, without interference from the owner.¹²⁹ Although the possessor did not acquire ownership over the property concerned, he could plead this new

¹¹⁸ Grotius *Inleidinge* 2.7.8; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 141-142; Wessels JW *History of the Roman-Dutch Law* (1908) 638. There is a debate over whether the period of a third of a century only applied to immovable property and whether it also applied to movables. For purposes of this dissertation it can be assumed that – in the province of Holland – a period of 30 years applied to movables and a third of a century for immovables: See Wessels JW *History of the Roman-Dutch Law* (1908) 640-641.

¹¹⁹ Grotius *Inleidinge* 2.7.8; Voet 44.3.9; Wessels JW *History of the Roman-Dutch Law* (1908) 638.

¹²⁰ Voet 44.3.9.

¹²¹ Wessels JW *History of the Roman-Dutch Law* (1908) 638.

¹²² Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 51.

¹²³ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 51.

¹²⁴ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 51.

¹²⁵ Hijmans IH *De Verjaringsinstituten* (1892) 8-9; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 52. See also Grotius *Inleidinge* 2.7.7.

¹²⁶ Hijmans IH *De Verjaringsinstituten* (1892) 8-9; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 52.

¹²⁷ Hijmans IH *De Verjaringsinstituten* (1892) 9-10; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 52.

¹²⁸ Grotius *Inleidinge* 2.7.7; Voet 44.3.8. To the contrary is Van Apeldoorn LJ *Inleidinge tot de Hollandsche Rechts-geleerdheid Beschreven bij Hugo de Groot* (4th ed 1939) 130, where he states that a public announcement was not a requirement in every Dutch town. This is yet another illustration of how prescription law differed from province to province and town to town, which further complicates the study of this field of law.

¹²⁹ Grotius *Inleidinge* 2.7.7; Hijmans IH *De Verjaringsinstituten* (1892) 9-10; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 52.

right to defeat the owner's *rei vindicatio*.¹³⁰ In other words, the possessor obtained an unassailable right over the property in this manner.¹³¹ In my opinion, prescription of a year and a day constitutes a *sui generis* form of prescription, since it has characteristics common to both acquisitive and extinctive prescription.¹³² This is because through *rechte gewere* the possessor obtained an unassailable right to the property after possessing it for a year and a day and by satisfying all the requirements of this legal institution.¹³³ Thus, the owner lost his *rei vindicatio* to reclaim possession (an element of "extinctive" prescription), while the possessor acquired an unassailable right to the property through *rechte gewere* (an element of "acquisitive" prescription).¹³⁴ Voet thinks that this form of prescription applied in the provinces of Holland and Utrecht, and that the possessor must have obtained possession of the property by way of a just cause (*iustus titulus*), together with peaceful (*nec vi*) possession and good faith (*bona fides*).¹³⁵ However, this form of prescription largely fell into disuse by the end of the seventeenth century.¹³⁶ Despite this, the year and a day rule survived in a very unique form, not regarding the acquisition of ownership, but pertaining to encroachments.¹³⁷ Grotius examines this phenomenon under his discussion of the acquisition of servitudes:

"Maer een ghetimmert dat jaer ende dag onbeklaegt heeft ghestaen is daer mede genoeg verjaert, behoudens den beschadigde redelicke vergoedinge."¹³⁸

This unique form of prescription only applied to buildings or structures that encroached onto the land of another and entailed that the encroaching owner could become owner of that part

¹³⁰ Van Apeldoorn LJ *Inleidinge tot de Hollandsche Rechts-geleerdheid Beschreven bij Hugo de Groot* (4th ed 1939) 127.

¹³¹ Grotius *Inleidinge* 2.7.7; Van Apeldoorn LJ *Inleidinge tot de Hollandsche Rechts-geleerdheid Beschreven bij Hugo de Groot* (4th ed 1939) 127-133.

¹³² Hijmans IH *De Verjaringsinstituten* (1892) 11 is of the opinion that *rechte gewere* cannot be classified as being either acquisitive or extinctive prescription, while Van Apeldoorn LJ *Inleidinge tot de Hollandsche Rechts-geleerdheid Beschreven bij Hugo de Groot* (4th ed 1939) 130-131 mentions that the effect of this institution is both extinctive and acquisitive at the same time. Nonetheless, the precise categorisation of this interesting notion falls outside the scope of this dissertation and will, therefore, not be discussed here.

¹³³ Hijmans IH *De Verjaringsinstituten* (1892) 9-10; Van Apeldoorn LJ *Inleidinge tot de Hollandsche Rechts-geleerdheid Beschreven bij Hugo de Groot* (4th ed 1939) 131.

¹³⁴ Hijmans IH *De Verjaringsinstituten* (1892) 9-10; Van Apeldoorn LJ *Inleidinge tot de Hollandsche Rechts-geleerdheid Beschreven bij Hugo de Groot* (4th ed 1939) 131.

¹³⁵ Voet 44.3.8.

¹³⁶ Voet 44.3.8; Hijmans IH *De Verjaringsinstituten* (1892) 11-12; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 53; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 141; Wessels JW *History of the Roman-Dutch Law* (1908) 638. Voet discusses this form of prescription under the heading "Prescription in Holland and Utrecht of a year and a day on quite possession with just cause no longer in force": See Voet 44.3.8.

¹³⁷ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 53.

¹³⁸ Grotius *Inleidinge* 2.36.5. ("An encroachment that has stood for a year and a day without protestation [by the owner] is through this method regarded as prescribed, subject to reasonable compensation to the owner.") Voet 8.4.6 also examines this form of prescription under his discussion of the acquisition of praedial servitudes through prescription.

of the neighbour's property, but in such a case the "encroacher" had a duty to reasonably compensate the loss of the other owner.¹³⁹ However, according to Van Apeldoorn, the *Hoge Raad* (the Supreme Court of the Netherlands) rejected this rule in January 1720. The Court reasoned that it only applied in certain Dutch towns and that Grotius erroneously regarded it as law of general application (*ius generale*), which – according to the Court – was not the case.¹⁴⁰ Van Bijkershoek discusses the impact of this decision as follows:

"Doctrina Grotii ex statutis quarundam urbium originem traxit, ut notat Groenew. ad Grot, quibus abuti non convenit ad statuendum jus generale, quod tamen Grotio perquam familiare est."¹⁴¹

Voet also refers to this form of prescription and states that it only applied in cases concerning encroachment by buildings or structures.¹⁴² He describes the rule in cases where a neighbour builds something into a communal wall, which then constitutes an encroachment:

"An exception would be when *local custom* directs that no one is forced to demolish if he has had the work there for more than a year and a day, though it was done quite wrongfully and to the damaging of the neighbour; but that he is released by paying out the damages."¹⁴³ (Emphasis added.)

Accordingly, it has to be determined whether this type of prescription forms part of modern South African prescription law. One of the few cases dealing specifically with this issue is *Rand Waterraad v Bothma en 'n Ander* ("Rand Waterraad")¹⁴⁴ where the Court, after an extensive analysis of the old sources, found that the year and a day rule was not a rule of general application under Roman-Dutch law and was, therefore, not received into South African law.¹⁴⁵ The Court refers to much the same Roman-Dutch sources discussed above. Support for this argument is even found in writings by contemporary South African authors

¹³⁹ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 54.

¹⁴⁰ Van Apeldoorn LJ *Inleidinge tot de Hollandsche Rechts-geleerdheid Beschreven bij Hugo de Groot* (4th ed 1939) 205, who relies on Van Bijkershoek *Obs Tum II* 1695.

¹⁴¹ Van Bijkershoek *Obs Tum II* 1695. ("The doctrine of Grotius originates from the statutes of certain cities, as Groenewegen notes on Grotius, from which one cannot deduce that it constituted law of general application, because perhaps only Grotius was familiar with it.")

¹⁴² Voet 8.4.6.

¹⁴³ Voet 8.2.17. Voet refers to it as "local custom", which is yet another indication that this rule was not of general application. See also Cilliers JB & Van der Merwe CG "The 'Year and a Day Rule' in South African Law: Do our Courts have a Discretion to Order Damages Instead of Removal in the Case of Structural Encroachments on Neighbouring Land?" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 587-595 589.

¹⁴⁴ 1997 (3) SA 120 (O). For a general source on this case, see Temmers Z *Building Encroachments and Compulsory Transfer of Ownership* (LLD Thesis Stellenbosch University 2010).

¹⁴⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130. There are other cases where the year and a day rule was discussed, but in none of them did the Court actually decide whether it applied in South African law or not. For instance, see *Naude v Bredenkamp* 1956 (2) SA 448 (O) 451 and *Cape Town Municipality v Fletcher and Carthwrights Ltd* 1936 OPD 347 352.

before the *Rand Waterraad* case was decided.¹⁴⁶ In the light of this decision, as well as the discussion of the developments surrounding this rule above, one can safely conclude that it was not of universal application in Roman-Dutch law and could, therefore, never have formed part of South African prescription law. There can be no doubt that Hattingh J in *Rand Waterraad* was correct to arrive at this conclusion. The correctness of this case is put beyond doubt by the decision of the *Hoge Raad* on 19 and 20 January 1720, where it found the rule not to be of general application in the Netherlands.¹⁴⁷

Vetustas, or immemorial use, also applied in Roman-Dutch law, but was only relevant regarding the acquisition of servitudes through prescription.¹⁴⁸ As in modern South African law, there was not always a clear distinction in this context. Despite the presence of these many forms of prescription under Roman-Dutch law, for present purposes it is only necessary to focus on the type of prescription that was received into South African law, namely prescription of 30 years. The problem, again, with studying this form of prescription is the fact that many of the towns and cities in the Netherlands during this time had their own adaptations of this institution.¹⁴⁹ Accordingly, one must be careful not to regard all rules used by some towns concerning prescription as being of universal application.¹⁵⁰

Henceforth, I simply refer to prescription of a third of a century as “prescription”. It is not known when precisely this institution originated.¹⁵¹ Be that as it may, by the seventeenth century prescription was regarded as binding law in Holland.¹⁵² The law required a person to possess property before he could acquire ownership in this manner.¹⁵³ Grotius states that one must distinguish between *bezit* (possession) and *bezitrecht* (right of possession). According to him, *bezitrecht* is that which flows forth from *bezit*.¹⁵⁴ He describes *bezit* as “the immediate holding of a thing with the intention of holding it for ourselves and not for others.”¹⁵⁵ From

¹⁴⁶ Cilliers JB & Van der Merwe CG “The ‘Year and a Day Rule’ in South African Law: Do our Courts have a Discretion to Order Damages Instead of Removal in the Case of Structural Encroachments on Neighbouring Land?” (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 587-595 588-589, 591.

¹⁴⁷ Van Bijkershoek *Obs Tum II* 1695.

¹⁴⁸ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 56.

¹⁴⁹ Wessels JW *History of the Roman-Dutch Law* (1908) 638.

¹⁵⁰ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 56-57.

¹⁵¹ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 57.

¹⁵² Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 58.

¹⁵³ Grotius *Inleidinge* 2.7.1; Voet 44.3.9.

¹⁵⁴ Grotius *Inleidinge* 2.2.1.

¹⁵⁵ Grotius *Inleidinge* 2.2.2: “Bezit is dadelyke behouding van een zaak, met wille om die te behouden voor ons en niet voor een ander.” (Possession is the immediate holding of a thing with the intention of holding it for ourselves and not for others.)

this quotation it is clear that possession consisted of two elements, namely a *corpus* (physical) element and an *animus* (intention) element. Although Grotius does not further describe these two concepts, he states that lessees, borrowers and persons to whom things are entrusted cannot be said to possess property.¹⁵⁶ This qualification made it impossible for such persons to acquire property through prescription, as they did not have the necessary possession. It was possible to possess property through an agent, for instance when a lessor possessed leased property through a lessee.¹⁵⁷ Voet requires that the possession must be peaceful and continuous and that the possessor must hold the property with the intention of keeping it for himself without acknowledging the rights of the true owner.¹⁵⁸ In this instance the *animus* and *corpus* elements of possession are again distinguishable. Interestingly, the *animus* required of the possessor at this time did not oblige such possessor to hold the property with the belief that he was the owner of it (*animus domini*).¹⁵⁹ It was merely required that the possessor possesses the property *animo sibi habendi*, which literally translates as the intention of keeping the thing for yourself.¹⁶⁰ Consequently, all that was necessary was that the possessor possessed the property with the intention of holding it for himself without acknowledging the rights of the true owner.

At this time the period for prescription was a third of a century and it applied to both movables and immovables, as well as actions and servitudes.¹⁶¹ A servitude had to be exercised *nec precario*.¹⁶² As mentioned, *iustus titulus* and *bona fides* no longer formed part of prescription at this stage.¹⁶³ The requirements for prescription may be summarised as follows:

- i) possession of the property with the intention of keeping it for oneself (*animus rem sibi habendi*);

¹⁵⁶ Grotius *Inleidinge* 2.2.3.

¹⁵⁷ Grotius *Inleidinge* 2.2.4.

¹⁵⁸ Voet 44.3.9.

¹⁵⁹ This anomaly is pointed out in Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 62.

¹⁶⁰ Voet 44.3.9. The original Latin text of Voet refers to the "*animo sibi habendi*", which Gane translates as "the intention of keeping [the property] for himself". Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 157-158 also translate "*animus sibi habendi*" as the "intention of holding something for oneself".

¹⁶¹ Grotius *Inleidinge* 2.7.8, 2.36.4; Voet 44.3.8. Some sources state that a third of a century only applied to immovables, while 30 years applied to movables: See Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 141-142. For purposes of this discussion, it is assumed that the period of a third of a century applied to both movables and immovables during this time.

¹⁶² Grotius *Inleidinge* 2.36.4.

¹⁶³ Voet 44.3.9.

- ii) possession (for corporeal things) or *quasi*-possession (for incorporeal things, like servitudes) needed to be continuous and peaceful (*nec vi*);
- iii) possession without any disturbance by the owner throughout the prescription period; and
- iv) the possessor must in no way have acknowledged the rights of the owner.¹⁶⁴

The principle of *coniunctio temporum*, as seen during the time of Justinian, also applied in Roman-Dutch law.¹⁶⁵ The acquisition of servitudes under Roman-Dutch law largely conforms to what was required under Roman law. According to Grotius, to acquire a servitude through prescription, a person needed to make use of a servitude for a third of a century and such use must have been *nec precario*, or without the owner's consent.¹⁶⁶ Voet also mentions that servitudes can be acquired through prescription over a period of a third of a century.¹⁶⁷ *Nec vi* (without violence) and *nec clam* (openly) also formed part of the requirements to acquire servitudes at this time.¹⁶⁸ As to *bona fides* and *iustus titulus*, the common view is that they were not required concerning servitudes either.¹⁶⁹ As to prescription against the state, prescription could run against alienable state property, but not with regard to inalienable state property, such as property for the public benefit.¹⁷⁰

The position surrounding suspension under Roman-Dutch law is unclear. It seems that prescription did not run against minors or people incapable of administering their own affairs.¹⁷¹ In other words, prescription did not run against those who were incapable of performing juridical acts.¹⁷² Consequently, it is clear that the rule of *contra non valentem non currere praescriptionem* did apply in Roman-Dutch law, although the precise ambit of the

¹⁶⁴ Voet 44.3.9. See also Grotius *Inleidinge* 2.36.4 and Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 142.

¹⁶⁵ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 63; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 143.

¹⁶⁶ Grotius *Inleidinge* 2.36.4.

¹⁶⁷ Voet 8.4.6.

¹⁶⁸ Voet 8.4.4; Grotius *Inleidinge* 2.36.4 – 2.36.6.

¹⁶⁹ Grotius *Inleidinge* 2.36.4; Voet 8.4.4. Although Voet requires *bona fides* for acquiring servitudes through prescription, this view was not common among the other Roman-Dutch legal authors. Grotius, for instance, does not put *bona fides* as a requirement for prescription.

¹⁷⁰ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 70; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 143.

¹⁷¹ Grotius *Inleidinge* 2.7.8; Voet 44.3.11; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 70; Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 143.

¹⁷² For examples in this regard, see Voet 44.3.11 and Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 143.

rule was uncertain.¹⁷³ Interruption fulfilled much the same role as under Roman law, with the division between natural and civil interruption still forming part of Roman-Dutch law.¹⁷⁴

2.3 South African prescription law since 1943

2.3.1 Introduction

Acquisitive prescription (*verkrygende verjaring* in Afrikaans) is one of the original methods of acquisition of ownership in South African law,¹⁷⁵ which was received when the Dutch East India Company brought Roman-Dutch law to the Cape in 1652. Property obtained through this method of acquisition is acquired free from any previous encumbrance, such as limited real rights and mortgages.¹⁷⁶ Furthermore, original acquisition of ownership entails that a person acquires ownership without the assistance or permission of the previous owner.

South African prescription law was formalised for the first time by the Prescription Act 18 of 1943 (“1943 Act”),¹⁷⁷ later followed by the Prescription Act 68 of 1969 (“1969 Act”).¹⁷⁸ Although the 1969 Act repealed the earlier 1943 Act, it did not do so with retrospective effect.¹⁷⁹ Accordingly, all prescription periods running up until 30 November 1970 (the 1969 Act came into operation on 1 December 1970) have to comply with the requirements as set out by the 1943 Act, with the remainder of the period having to comply with the requirements of the 1969 Act. This means that the two acts ran in tandem until 30 November 2000. After this date, most periods will only have to comply with the requirements set out by the 1969

¹⁷³ Scholtens JE “*Praescriptio – Jus Possidendi and Rei Vindicatio*” (1972) 89 *South African Law Journal* 383-395 386-387.

¹⁷⁴ Lee RW *An Introduction to Roman-Dutch Law* (5th ed 1953) 142.

¹⁷⁵ Section 2(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969. See also Sonnekus JC “*Die Rei Vindicatio en Verjaring – Of Nie*” 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 576-590 576; Sonnekus JC “*Sub Hasta-veilings en die Onderskeid tussen Afgeleide en Oorspronklike Wysies van Regsverkryging*” 2008 *Tydskrif vir die Suid-Afrikaanse Reg* 696-727 699; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 309; Marx FE “*Eiendomsverkryging deur Verjaring en Beperkte Saaklike Regte*” (1994) 15 *Obiter* 161-171 167, 170-171; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 268

¹⁷⁶ Sonnekus JC “*Sub Hasta-veilings en die Onderskeid tussen Afgeleide en Oorspronklike Wysies van Regsverkryging*” 2008 *Tydskrif vir die Suid-Afrikaanse Reg* 696-727 699; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 309; Marx FE “*Eiendomsverkryging deur Verjaring en Beperkte Saaklike Regte*” (1994) 15 *Obiter* 161-171 170-171. There exists a debate over whether acquisitive prescription truly extinguishes existing limited real rights and mortgages regarding prescribed properties. For purposes of this dissertation it is assumed that property acquired through acquisitive prescription is received free from previous limited real rights and/or mortgages registered over that property.

¹⁷⁷ This Act came into operation on the 19th of April 1943, with the Afrikaans text signed by the Officer Administering the Government.

¹⁷⁸ This Act came into operation on the 1st of December 1970, with the English text signed by the State President. For a background discussion to this Act, see De Wet JC *Opuscula Miscellanea* (1979) 77-144.

¹⁷⁹ Section 5 of the Prescription Act 68 of 1969.

Act. However, this does not imply that all prescription cases brought to court after 30 November 2000 only have to comply with this Act, as situations involving extreme cases of postponement can still be encountered.¹⁸⁰ In such a scenario, a part of the prescription period may still have to comply with the requirements of the 1943 Act. For this reason, both acts are discussed in this chapter, with particular focus on the similarities between them. Another reason for this approach is the fact that most of the case law decided under the 1943 Act still applies to contemporary prescription law. A brief introduction to the two prescription acts regarding prescription ensues, followed by a discussion of their requirements.

According to section 2(1) of the 1943 Act, acquisitive prescription (“prescription”) is the acquisition of ownership through the possession of another person’s movable or immovable property,¹⁸¹ or the use of a servitude¹⁸² in respect of immovable property, continuously for 30 years *nec vi, nec clam, nec precario*.¹⁸³ As seen from the historical analysis, these words have – through the development of case law – come to be understood as meaning without force (*nec vi*), openly (*nec clam*) and without the owner’s consent (*nec precario*).¹⁸⁴ Prescription does not only run against natural persons, but also against public corporations, municipal councils and the state.¹⁸⁵ The possessor or user *ipso iure*¹⁸⁶ becomes the owner of the property or servitude concerned once the 30-year prescription period expires.¹⁸⁷ Since the possessor acquires full ownership, the South African law of prescription is truly “acquisitive” in nature. Should the owner aver absence of negligence on his side, this will be of no avail to him, as negligence on the part of the owner is not a requirement for prescription in South African law.¹⁸⁸

¹⁸⁰ See the discussion of postponement in section 2.3.4 below.

¹⁸¹ In this sense property also includes incorporeal property, such as shares. See, for instance, the cases of *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) and *Albert and Others v Ragaven* 1966 (2) SA 454 (D), which dealt with the prescription of shares in immovable property.

¹⁸² As mentioned in chapter one, this dissertation does not purport to discuss the acquisition and extinction of servitudes through prescription. The aim is to only focus on the requirements for the acquisition of servitudes through prescription to the extent that they overlap with and help clarify the requirements for acquiring real rights through prescription. The Court in *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468 found that the requirements for the acquisition of property and servitudes through prescription are basically the same.

¹⁸³ Section 2(1) of the Prescription Act 18 of 1943.

¹⁸⁴ These requirements are discussed in sections 2.3.2.2-2.3.2.4 below.

¹⁸⁵ Hall CG *Maasdorp’s Institutes of South African Law Volume II – The Law of Property* (10th ed 1976) 80. Regarding prescription against the state, see the discussion in section 2.3.6 below.

¹⁸⁶ Through operation of law.

¹⁸⁷ Section 2(2) of the Prescription Act 18 of 1943.

¹⁸⁸ *Pienaar v Rabie* 1983 (3) SA 126 (A) 138 139. For a more complete discussion in this regard, see section 4.2 of chapter four below.

Although not explicitly mentioned in the 1943 Act, the adverse user¹⁸⁹ requirement has come to be accepted – through case law – as a supplementary requirement for prescription.¹⁹⁰ In this sense it is not possible for a person to acquire prescriptive title to property already owned.¹⁹¹ Regarding the doctrine of notice, the Supreme Court of Appeal found that it does not apply to rights acquired through prescription, since prescription is one of the original methods of acquisition of ownership.¹⁹²

The 1943 Act did not codify South African prescription law, a fact clearly illustrated by a strong body of case law.¹⁹³ This position is confirmed by the fact that the 1943 Act provides that it only repeals common law rules that are inconsistent with it.¹⁹⁴ Common law rules that are consistent with the Act thus remain in force. Although the 1969 Act is silent on this issue, the courts have held that the position remains the same.¹⁹⁵

According to section 1 of the 1969 Prescription Act, a person acquires ownership over property that has been

“possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.”

Regarding acquisitive prescription specifically, the similarities between the two prescription acts are indeed remarkable.¹⁹⁶ The 1969 Act also states that servitudes can be acquired through prescription if the person making use of the servitude has done so openly and as

¹⁸⁹ Also referred to as adverse possession. This must not be confused with what is referred to in English law as adverse possession, which is what South African law knows as acquisitive prescription. For a discussion of adverse possession in English law, see section 3.2.2.3 of chapter three below.

¹⁹⁰ *Malan v Nabygelegen Estates* 1946 AD 562 574. See further section 2.3.2.4 below.

¹⁹¹ *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) para 39; *Ex Parte Puppli* 1975 (3) SA 461 (D) 463.

¹⁹² See *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 13 and *Ex Parte Puppli* 1975 (3) SA 461 (D) 464, where it was found that the acquisition of real rights through prescription does not depend on registration in the deeds office. See also Marx FE “Eiendomsverkryging deur Verjaring en Beperkte Saaklike Regte” (1994) 15 *Obiter* 161-171 162.

¹⁹³ See *Pienaar v Rabie* 1983 (3) SA 126 (A) 135; *Bisschop v Stafford* 1974 (3) SA 1 (A) 7; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467; *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 47 and *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 604, where this position is confirmed. In its preamble, the Act mentions that it aims only to amend and consolidate the laws relating to prescription, thus not resulting in a codification of prescription law.

¹⁹⁴ Section 15(1) of the Prescription Act 18 of 1943. See also *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467.

¹⁹⁵ I extrapolate this from the cases mentioned in footnote 193 above. See also Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 309.

¹⁹⁶ This fact was acknowledged by the Supreme Court of Appeal in *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 8.

though he were entitled to do so.¹⁹⁷ The greatest difference, it would seem, is the omission of the *nec vi* and *nec precario* requirements from the 1969 Act.¹⁹⁸ Unlike the 1943 Act, the 1969 Act specifically regulates *coniunctio temporum*. Despite this, it was already held in *Stephenson v Lamsley*¹⁹⁹ that *coniunctio temporum* was possible under the 1943 Act, since this was not regarded as one of the cases where the legislator intended to depart from the common law.²⁰⁰ That decision was followed ever since.²⁰¹ This phenomenon, also known as *successio in possessionem* or *accessio possessionis*, came to us from Roman-Dutch law and entails that possession – for the purposes of prescription – need not have been held by one person only.²⁰² It allows the aggregation of periods of possession by successors in title in order to meet the 30-year requirement.²⁰³ A derivative link must exist between the predecessor and successor in title, and the circumstances of either succession or contract are applicable.²⁰⁴ Furthermore, each possessor in the chain of legal predecessors and successors should have had the correct mental attitude regarding the possession of the property.²⁰⁵ If one of the legal predecessors or successors did not satisfy all the requirements for prescription, the running of prescription would be interrupted.²⁰⁶ Furthermore, the two prescription acts specifically state that courts may not *mero motu* take notice of prescription; it must be pleaded by the parties.²⁰⁷

In addition, the 1969 Act specifically regulates interruption and postponement of prescription,²⁰⁸ while the 1943 Act is silent on this issue. Under the 1943 Act, resort had to be had to the common law concerning these issues. If one sets out the requirements for prescription under the two prescription acts, the following similarities are discernable:

¹⁹⁷ Section 6 of the Prescription Act 68 of 1969.

¹⁹⁸ These requirements are discussed in sections 2.3.2.2 and 2.3.2.4 respectively below.

¹⁹⁹ 1948 (4) SA 794 (W) 796-797.

²⁰⁰ *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 574; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 172; *Stephenson v Lamsley* 1948 (4) SA 794 (W) 796-797.

²⁰¹ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 172.

²⁰² Voet 44.3.9; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 172; *Stephenson v Lamsley* 1948 (4) SA 794 (W) 796.

²⁰³ Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 149.

²⁰⁴ Van der Merwe CG (with Pope A) "Property" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 405-665 514; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 178; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 312; De Wet JC *Opuscula Miscellanea* (1979) 90.

²⁰⁵ *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd* 1993 (4) SA 138 (C) 140. See also Carey Miller DL & Pope A *Land Title in South Africa* (2000) 178; Van der Merwe CG *Sakereg* (2nd ed 1989) 282.

²⁰⁶ For a discussion on the difficulties of proving *coniunctio temporum*, see Robertson S "The Difficulty of Proving the Essentials of Acquisitive Prescription" (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 158-161 161.

²⁰⁷ Section 14 of the Prescription Act 18 of 1943 and section 17 of the Prescription Act 68 of 1969.

²⁰⁸ Sections 2-4 of the Prescription Act 68 of 1969.

- i) possession (or use, in the case of acquiring limited real rights);
- ii) openness (*nec clam*);
- iii) possession as if owner (this clearly corresponds to the *animus domini* element of *possessio civilis*, together with a mixture of the earlier *nec precario* and adverse user requirements);²⁰⁹ and
- iv) continuous possession for 30 years.²¹⁰

2.3.2 The requirements for acquisitive prescription in modern South African law

2.3.2.1 Possession

The type of possession required for prescription is not defined in the 1943 Act.²¹¹ The 1969 Act is slightly clearer in this regard, stipulating that the possessor needs to possess “openly and as if he were the owner”.²¹² The answer regarding possession, therefore, has to be found in the common law. In this context the South African courts have consistently held that the required form of possession is that mentioned by Voet, namely *possessio civilis* or civil possession.²¹³ The courts have also held that the successive prescription acts in no way alter this position, as this was not a case where the common law is inconsistent with the acts.²¹⁴

²⁰⁹ The *animus domini* requirement is discussed in section 2.3.2.1.1 below. The “as if owner”, *nec precario* and adverse user requirements are discussed together in section 2.3.2.4 below, where it is shown that these requirements all inherently form part of the *animus domini* element of *possessio civilis*.

²¹⁰ See Carey Miller DL & Pope A *Land Title in South Africa* (2000) 160, where a similar breakdown is followed.

²¹¹ See *Welgemoed v Coetzer and Others* 1946 TPD 701 710, where it was held that the 1943 Act did not alter the common law position regarding the type of possession required for prescription.

²¹² Section 1 of the Prescription Act 68 of 1969. The “as if owner” requirement clearly corresponds to the *animus domini* element of *possessio civilis*.

²¹³ Also known as full juristic possession: See Voet 41.2.1, 41.2.3. This is confirmed in case law: See *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) paras 8-9; *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 8; *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 28; *Pienaar v Rabie* 1983 (3) SA 126 (A) 134; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *Barker NO v Chadwick and Others* 1974 (1) SA 461 (D) 465; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 281; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 677; *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 48; *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299; *Welgemoed v Coetzer and Others* 1946 TPD 701 712. See further Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 311; Van der Merwe CG *Sakereg* (2nd ed 1989) 275; Hall CG *Maasdorp's Institutes of South African Law Volume II – The Law of Property* (10th ed 1976) 77.

²¹⁴ *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 9; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 574-575; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 281; *Welgemoed v Coetzer and Others* 1946 TPD 701 710-711.

Therefore, the position regarding the type of possession required for prescription before and after 1970 is the same.²¹⁵

Possessio civilis consists of two elements, namely the *animus domini* (mental) and *corpus* (physical) elements.²¹⁶ Both the mental state and the physical act of detention must coincide for possession to qualify as *possessio civilis*.²¹⁷

2.3.2.1.1 *The animus domini requirement*

The *animus domini* element²¹⁸ entails that a possessor needs to possess the property with the intention of an owner, or, in the words of the 1969 Act, “as if [he were] owner.”²¹⁹ The courts have made it clear that anything less than *animus domini*, ie the limited *possessio naturalis*²²⁰ of a lessee or usufructuary, *detentio*,²²¹ *commodatarium*²²² or exercising a servitude over a servient tenement, is ineffective and does not satisfy this requirement, since all of these fall short of the intention of possessing the property as owner.²²³ However, this does not entail

²¹⁵ *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 9; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 574-575; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 281. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 280.

²¹⁶ Carey Miller DL & Pope A *Land Title in South Africa* (2000) 160-161.

²¹⁷ Voet 41.2.10; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 281; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Welgemoed v Coetzer and Others* 1946 TPD 701 712. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 162.

²¹⁸ Also referred to as the *animus sibi habendi* or the intention of possession for oneself: Voet 44.3.9; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 701; *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299; *Welgemoed v Coetzer and Others* 1946 TPD 701 712-713. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 162 footnote 254. Some of the older cases refer to the *animus domini* as the “as of right” requirement, see for instance *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 476.

²¹⁹ Section 1 of the Prescription Act 68 of 1969. See further Voet 44.3.9; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 701; *Hayes v Harding Town Board and another* 1958 (2) SA 297 (N) 299; *Welgemoed v Coetzer and Others* 1946 TPD 701 712-713. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 162 and Van der Merwe CG *Sakereg* (2nd ed 1989) 275. In *Bisschop v Stafford* 1974 (3) SA 1 (A) 5, Jansen JA describes *animus domini* as the intention to act adversely to the owner's rights. Regarding the similarities between *animus domini* and the adverse user requirement, see the discussion in section 2.3.2.4 below.

²²⁰ “Mere or natural possession”, according to Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 256-257.

²²¹ “Detention of a thing”, according to Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 177.

²²² “One to whom something is entrusted”, according to Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 165.

²²³ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 30; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 702; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 281; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299; *Welgemoed v Coetzer and Others* 1946 TPD

that the possessor needs to possess with the belief that he *is* the owner; all that is required is that the possessor intends to keep the property *as if* he is the owner.²²⁴ Therefore, the necessary *animus* is present in scenarios where the possessor mistakenly believes that he is the owner (*bona fide*) and even in situations where he knows (*mala fide*) that he is not the owner.²²⁵ In this sense it has been decided that even in cases where the plaintiff, or his predecessors in title, realise that they are in fact not owners of the property, this will not negate the “adverse user” of the property.²²⁶ This is because the Roman law requirements of *bona fides*²²⁷ and *iustus titulus*²²⁸ no longer form part of South African prescription law.²²⁹ Therefore, it is possible for *mala fides* to co-exist with the necessary *animus domini*.²³⁰ Strictly speaking, it is even possible for a thief to possess (movable) property with the *animus domini*, although it is unlikely that he will succeed in practice with a case based on prescription, as the thief might be unable to satisfy the openness requirement.²³¹

If the possessor recognises the rights of the owner, for instance by asking him whether he (the possessor) may lease or buy the property, possession will immediately cease to be *animus domini*.²³² This will be the case even if such an acknowledgment is not followed by any

701 712-713. This position is in line with Roman-Dutch law as described by Grotius *Inleidinge* 2.2.3: See section 2.2.3 above.

²²⁴ *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) para 36; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 577; *Bisschop v Stafford* 1974 (3) SA 1 (A) 9 7, 10; *Pienaar v Rabie* 1983 (3) SA 126 (A) 137; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680. See also Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 265 and Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 162.

²²⁵ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 160-161.

²²⁶ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 701; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680. In this sense I agree with the *Campbell* decision by equating “adverse user” to *possessio civilis*, and thus to the *animus domini*: See the discussion in this regard in section 2.3.2.4 below.

²²⁷ Good faith.

²²⁸ Just title.

²²⁹ Voet 44.3.3–44.3.9

²³⁰ Voet 41.2.3; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 577; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Welgemoed v Coetzer and Others* 1946 TPD 701 711. See also Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 268 and Van der Merwe CG *Sakereg* (2nd ed 1989) 275. As to the desirability of this position, see Van der Walt AJ *Property in the Margins* (2009) 173-174. Section 4.5 of chapter four below specifically focuses the anomaly of the *mala fide* possessor.

²³¹ *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 577; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474. See also Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 405-665 512; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 165; Van der Merwe CG *Sakereg* (2nd ed 1989) 275. For examples of scenarios involving *animus domini*, see *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 475.

²³² Voet 44.3.9; *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 9; *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 945; *Wood v Baynesfield*

permission (*precarium*), expressed or implied, from the side of the owner.²³³ Uncertainty exists surrounding the question of which acts by the possessor amount to an acknowledgment of the owner's rights in the property.²³⁴ According to an *obiter dictum* by Broome JP in *Payn v Estate Rennie and Another*,²³⁵ the mere mental recognition or acknowledgment by the claimant does not suffice to terminate the *animus domini*.²³⁶ According to the judge, it only operates as a bar if the state of mind is accompanied by some overt act.²³⁷ This approach is founded on sound principles, as it is impossible to determine the mental attitude or intention with which a person possesses property if there is no outward manifestation of such intention.²³⁸ Thus, the courts look at all the surrounding circumstances and evidence to determine whether a possessor is holding property *animo domini*.²³⁹ In this regard Miller J – in *Campbell v Pietermaritzburg City Council*²⁴⁰ – said that “it is safer, by far, to rely on the

Board of Administration 1975 (2) SA 692 (N) 698; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467, 477; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680; *Pratt v Lourens* 1954 (4) SA 281 (N) 282; *Malan v Nabygelegen Estates* 1946 AD 562. In this regard, see Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 162, where the authors state that “an acknowledgment of the owner's right and a willingness to give up possession if the owner should enforce his or her right before the period of prescription has been completed, should not *per se* be inconsistent with the *animus domini* requirement.” It is doubtful whether this statement is correct, as it is clear from the main text, as well as from the authorities quoted, that an acknowledgment of the owner's rights will negate the *animus domini*. Nevertheless, this area of South African law is not free from uncertainty or difficulty.

²³³ *Pratt v Lourens* 1954 (4) SA 281 (N) 282. For a more detailed discussion regarding *precarium*, see section 2.3.2.4 below.

²³⁴ See *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 37, where the Court preferred to leave this question open. De Wet JC *Opuscula Miscellanea* (1979) 93-94 is of the opinion that a mere informal (“*verbygaande*”) acknowledgment of the owner's rights should not suffice in terminating the running of prescription. However, he qualifies this by stating that if the informal acknowledgment should be followed by a factual situation where the possessor no longer possess “as owner”, such as a lessee, then the running of prescription will be terminated. To much the same effect is Van der Merwe CG *Sakereg* (2nd ed 1989) 281 and Van der Merwe CG “Original Acquisition of Ownership” in Zimmermann R & Visser D (eds) *Southern Cross – Civil Law and Common Law in South Africa* (1996) 701-717 713, where he mentions that a mere acknowledgment of the owner's rights will not succeed to terminate the running of prescription. According to him at 281, this will only happen if the acknowledgment is followed by a “*duidelik waarneembare berusting*” or a clearly discernable acceptance of the owner's rights. Henckert HG “*Die Animus Domini-vereiste by Verjaring*” (1986) 5 *Responsa Meridiana* 138-142 is also of this view.

²³⁵ 1960 (4) SA 261 (N).

²³⁶ *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N) 262-263.

²³⁷ *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N) 262-263.

²³⁸ Here I am of the same mind as Van der Merwe CG *Sakereg* (2nd ed 1989) 281, who argues that the mere acknowledgment of the owner's rights, which does not constitute clear outward acknowledgment, will not negate the *animus domini*. See also Henckert HG “*Die Animus Domini-vereiste by Verjaring*” (1986) 5 *Responsa Meridiana* 138-142 139.

²³⁹ *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 9.

²⁴⁰ 1966 (2) SA 674 (N).

external manifestations of [the possessor's] state of mind than on his own clumsy attempts at verbal reconstruction of his state of mind many years ago.”²⁴¹

Unfortunately, the Appellate Division of the Supreme Court²⁴² – as it then was – unnecessarily complicated matters with its decision in *Minister of Landbou v Sonnendecker*.²⁴³ In an *obiter dictum* by Rumpff CJ, the Court mentioned the possibility that a possessor could possess property “as if owner”, even though he knew it belonged to another person and was willing to return possession to the owner, should such owner arrive and claim the property.²⁴⁴ This part of the decision attracted criticism, and rightly so.²⁴⁵ According to Marx, the *animus domini* requirement is not satisfied if one holds property with the intention of *becoming* owner.²⁴⁶ As seen above, it is possible to hold property with the necessary *animus domini*²⁴⁷ even if a person realises that he is not owner. Yet, the *animus domini* will probably be terminated should a possessor be willing to hand over the property once the owner arrives at the scene. In this regard the willingness of the possessor to hand over the property must be clearly discernable from his conduct.²⁴⁸ Nonetheless, Rumpff CJ preferred not to answer this question, since it was not relevant to the case and thus the matter remains open.²⁴⁹ As mentioned, the possessor's mental attitude must be deduced from physical manifestations, as it is impossible to look into the mind of another. Thus, the possessor's state of mind depends on the circumstances.²⁵⁰ As to the question whether the *animus domini* will

²⁴¹ *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 679. See also *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 701 and *Smith and Others v Martin's Executor Dative* (1899) 16 SC 148 148-151.

²⁴² Since 1996 known as the Supreme Court of Appeal: See section 166(b) of the Constitution.

²⁴³ 1979 (2) SA 944 (A).

²⁴⁴ *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 947.

²⁴⁵ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 162-163 contend that this *obiter dictum* by Rumpff CJ is correct. However, Van der Merwe CG *Sakereg* (2nd ed 1989) 281 and Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 237 differ, since they think that this state of affairs is unacceptable. Of the same view is Carey Miller DL & Pope A *Land Title in South Africa* (2000) 174. I agree with Van der Merwe, Marx, Carey Miller and Pope, should it be possible to clearly discern the possessor's state of mind from his conduct.

²⁴⁶ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 237. See also Van der Merwe CG “Original Acquisition of Ownership” in Zimmermann R & Visser D (eds) *Southern Cross – Civil Law and Common Law in South Africa* (1996) 701-717 715.

²⁴⁷ Here I equate “as if owner” with the *animus domini* requirement. This topic is further discussed in section 2.3.2.4 below.

²⁴⁸ As stated by Miller J in *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 679: “[I]t is safer, by far, to rely on the external manifestations of [the possessor's] state of mind than on his own clumsy attempts at verbal reconstruction of his state of mind many years ago.”

²⁴⁹ *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 947.

²⁵⁰ For an interesting instance in this regard, see the discussion of *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) in the next paragraph.

be terminated through recognition *vis-à-vis* the owner or *vis-à-vis* his representative, South African law is unclear.²⁵¹

An interesting argument regarding the *animus domini* arose in *Sapphire Dawn Trading 42 BK v De Klerk and Others*,²⁵² where the third respondent claimed to have acquired certain property through prescription. The plaintiff objected and stated that the third respondent acknowledged the rights of the owner. The third respondent replied that he only recognised the owner's rights *after* the 30-year period had already expired, since he was unaware of the fact that he had already acquired the property through prescription. The Court rejected this argument:

“Die probleem hiermee is egter dat die derde respondent se optrede ná verloop van die termyn onteenseglik dui op die gesindheid waarmee hy tot dan toe sy besit op daardie stadium uitgeoefen het. Sy optrede strook bloot eenvoudig net met ‘n erkenning van die oorledene [the owner] se eiendomsreg op die eiendom en dit alleen is fataal vir sy aanspraak op verkrygende verjaring.”²⁵³

2.3.2.1.2 *The corpus requirement*

One has to carefully scrutinise whether the possessor's actions satisfy the *corpus* requirement,²⁵⁴ which actions must be judged objectively with specific regard to the circumstances.²⁵⁵ An example of conduct that is *prima facie* construed as the necessary *corpus* is when the possessor makes permanent improvements to the claimed property, such as by building on land or fencing it.²⁵⁶ Then again, it has been decided that the paying of rates concerning certain immovable property serves merely as an indication of the possessor's mental attitude toward the property and does not in itself amount to a physical holding or

²⁵¹ *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N) 263.

²⁵² (693/2008) [2009] ZAFSHC 11 (12 February 2009).

²⁵³ *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 9. (“The problem with this is that the third respondent's actions, after the expiration of the prescription period, undeniably illustrate the mental attitude with which he possessed the property up until that stage. His actions simply boil down to an acknowledgment of the ownership of the deceased [owner] over the property and that alone is fatal for his allegation of acquisitive prescription.”)

²⁵⁴ The physical requirement.

²⁵⁵ Carey Miller DL & Pope A *Land Title in South Africa* (2000) 161.

²⁵⁶ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 31; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 170. See also Hall CG *Maasdorp's Institutes of South African Law Volume II – The Law of Property* (10th ed 1976) 78. See further *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C), where the Court held that the building of a stoep that protrudes onto a public road is sufficient to amount to adverse user, which also constitutes the necessary *animus domini* and *corpus*. For a discussion concerning the similarities between adverse user and *animus domini*, see section 2.3.2.4 below.

detention of the property.²⁵⁷ In some cases, grazing on its own may constitute the necessary *corpus*, but one will have to look at the specific land as well as the degree of grazing to establish this.²⁵⁸ Consequently, regard must be had to the context to determine whether the plaintiff's actions necessarily constitute *corpus*.

It is not required that every part or area of the property be occupied or used to constitute *corpus*, as this is sometimes simply impractical.²⁵⁹ The test is “whether there was such use of a part or parts of the ground as amounts, for practical purposes, to possession of the whole.”²⁶⁰ In this regard much depends on the nature of the property and the type of use or possession to which it is put.²⁶¹ In other words, the possessor must use the property to a certain degree to meet the required physical possession. Total and exclusive physical possession is, therefore, not required. In *Joles Eiendom (Pty) Ltd v Kruger and Another*,²⁶² the Court held that the mere fact that the owner and/or his employees had occasional access to the property concerned did not, in itself, detract from the possessor's effective control of it, nor did it serve to interrupt prescription.²⁶³ Clearly, there is not a *numerus clausus* of forms of physical possession that may constitute the necessary *corpus*.

Corbett J made the following remark concerning the question of satisfying the *corpus* requirement through an agent:

²⁵⁷ *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299; *Minister van Lande v Swart en Andere* 1957 (3) SA 508 (C) 511. See also Carey Miller DL & Pope A *Land Title in South Africa* (2000) 172.

²⁵⁸ See, for instance, *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C). See also *Minister van Lande v Swart en Andere* 1957 (3) SA 508 (C) 511, where the Court held that mere grazing was not enough to constitute *corpus*. According to Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 163, the acts of the possessor must be in accordance with his *animus domini* before he will succeed in a claim based on prescription. If only the necessary intention is present, without sufficient *corpus* from which to deduce the intention, the possessor will not be able to succeed with his claim. However, the possessor may still be able to acquire something less than ownership, such as a grazing servitude, depending on the circumstances and the form of physical possession.

²⁵⁹ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 170; *Minister of Forestry v Michaux* 1957 (2) SA 32 (N) 39; *Welgemoed v Coetzer and Others* 1946 TPD 701 720; *Smith and Others v Martin's Executor Dative* (1899) 16 SC 148-151. See also Carey Miller DL & Pope A *Land Title in South Africa* (2000) 162; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 311.

²⁶⁰ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468. See also *Welgemoed v Coetzer and Others* 1946 TPD 701 720.

²⁶¹ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468; *Mocke v Beaufort West Municipality* 1939 CPD 135 142; *Boshoff and Another v Reinhold and Co* 1920 AD 29 33.

²⁶² 2007 (5) SA 222 (C). The part of this decision that dealt with the question of prescription was confirmed by the Supreme Court of Appeal in *Kruger v Joles Eiendomme (Pty) Ltd and Another* 2009 (3) SA 5 (SCA) para 13.

²⁶³ *Joles Eiendom (Pty) Ltd v Kruger and another* 2007 (5) SA 222 (C) para 29.

“Where a person erects or acquires a building which wholly or partially encroaches upon the land of another, then, in my opinion, he legally possesses the land taken up by the encroachment irrespective of whether he occupies the building himself or whether he lets it to someone else. The soundness of this proposition is clearly demonstrated by the case where the encroachment is not a stoep, as in the present instance, but a room forming part of the building. Could it ever be said that the owner of the building did not exercise legal possession of the land upon which the room was built merely because the building as a whole was let to the tenant?”²⁶⁴

This argument illustrates that it is possible to satisfy the *corpus* requirement by possessing property through another, ie through an agent, such as when a landlord exercises possession through his tenant.²⁶⁵ In such a case one has to comply with the requirements laid down by the law of agency, which may be summarised as follows:

- i) the agent’s intention must be to acquire possession not for himself but on behalf of the possessor (principal);
- ii) the possessor (principal) must have the intention of acquiring possession over the property concerned; and
- iii) a juridical relation must exist between the possessor (principal) and the agent, ie there must be an order or a commission that precedes the acquisition.²⁶⁶

Prescription only commences in favour of the principal from the moment he becomes aware that the agent has indeed taken control of the property.²⁶⁷ If the agent should acknowledge the rights of the owner, the *animus domini* will also be terminated.²⁶⁸ However, in such a case one has to determine whether the agent acted within the scope of his authority.²⁶⁹

The onus rests on the person that claims prescription to prove uninterrupted possession, as well as the other requirements.²⁷⁰ Although the courts will carefully scrutinise the evidence

²⁶⁴ *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 282.

²⁶⁵ *Grotius Inleidinge* 2.2.4; *Voet* 41.2.12; *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd* 1993 (4) SA 138 (C) 140-142; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 282; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 171.

²⁶⁶ *Welgemoed v Coetzer and Others* 1946 TPD 701 714.

²⁶⁷ *Welgemoed v Coetzer and Others* 1946 TPD 701 714. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 163.

²⁶⁸ *Pratt v Lourens* 1954 (4) SA 281 (N) 282. In this case the Court referred to the termination of the adverse possession. This case is included in this discussion for practical purposes, since I argue that there are few material differences between the concepts of adverse user and *possessio civilis*. This topic is discussed in section 2.3.2.4 below.

²⁶⁹ For an example of this sort, see *Pratt v Lourens* 1954 (4) SA 281 (N).

²⁷⁰ *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 575; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 698; *Bisschop v Stafford* 1974 (3) SA 1 (A) 6 9; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 469; *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O) 503; *City of Cape Town v Abelson’s Estate* 1947 (3) SA 315 (C) 326; *Welgemoed v Coetzer and Others* 1946 TPD 701 720; *Smith and Others v Martin’s Executor Dative* (1899) 16 SC 148 148-151.

before depriving a person of property due to the effects of prescription, the burden of proof is still that of a civil case, namely on a balance of probabilities.²⁷¹

It is, of course, also possible to satisfy the *corpus* requirement by possessing the property as co-possessor. Yet, what should happen if one possessor doesn't meet all the requirements for prescription, while the other possessor does? The answer is that the failure of one co-possessor to successfully assert ownership of property through prescription does not in itself result in the failure of a claim for prescription by the other co-possessor.²⁷²

In pleadings it must be averred that the claimant's possession was *possessio civilis*, as mere assertion of possession will not be sufficient to find a case for prescription.²⁷³ This is because the term "possession", used without qualification, has a wide connotation, which can mean anything from *possessio civilis* to mere *detentio*, and – therefore – it must be qualified.²⁷⁴ In cases concerning co-owners, it is also possible for one co-owner to acquire the joint property through prescription.²⁷⁵ Under these circumstances the claimant has to prove that he appropriated the whole property and enjoyed the exclusive use of it adversely to the other co-owner(s) before he can satisfy the *corpus* requirement.²⁷⁶

It is worth emphasising that in some cases the argument was put forward that prescription could be presumed on the basis of *vetustas*.²⁷⁷ *Vetustas* can be understood as a presumption based on immemorial use.²⁷⁸ The difference between prescription and *vetustas* is as follows: when prescription is proved, it creates a legal situation, as opposed to *vetustas*, which only raises a rebuttable presumption.²⁷⁹ *Vetustas* merely creates a rebuttable presumption in favour

²⁷¹ *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O) 503; *Minister of Forestry v Michaux* 1957 (2) SA 32 (N) 39; *Welgemoed v Coetzer and Others* 1946 TPD 701 720.

²⁷² *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) para 72; *Barker NO v Chadwick and Others* 1974 (1) SA 461 (D) 465.

²⁷³ *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 48.

²⁷⁴ Jansen J in *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 48.

²⁷⁵ *Albert and Others v Ragaven* 1966 (2) SA 454 (D); *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N).

²⁷⁶ *Albert and Others v Ragaven* 1966 (2) SA 454 (D) 455; *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N) 262.

²⁷⁷ *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd* 1993 (4) SA 138 (C); *Bisschop v Stafford* 1974 (3) SA 1 (A); *De Beer v Van der Merwe* 1923 AD 378.

²⁷⁸ Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 305.

²⁷⁹ *De Beer v Van der Merwe* 1923 AD 378 383.

of the existence of public rights.²⁸⁰ As this is the difference, it has been held that it is not possible to support a claim for prescription on the basis of *vetustas*.²⁸¹

The possession of the property must be uninterrupted for the full 30-year period. This does not mean that absolute continuity of occupation is required, as long as there is no substantial interruption during the prescription period.²⁸² It will be sufficient if the right is exercised from time to time as occasion requires and with reasonable continuity.²⁸³ The requirement of continuity must relate not only to the possessor's *animus domini* and his *corpus*, but also to the other elements required for prescription, for example the *nec vi, nec clam* and *nec precario* requirements of the 1943 Act.²⁸⁴ To constitute a cause of action, it is important that the plaintiff's cause of action must exist at the time the proceedings begin, or, in other words, the 30 years must already have elapsed when summons was issued or served.²⁸⁵ If the possessor satisfies all the requirements for prescription, he becomes owner of the property the moment the 30-year period expires.²⁸⁶ In the case of immovable property, the rights in the land pass to the possessor even without registration, after which he may demand that the land be registered in his name.²⁸⁷

2.3.2.2 Nec vi

The *nec vi* requirement obliges the possessor to possess the property without force, or "peaceably".²⁸⁸ This requirement does, however, not entail that the acquisition of possession needs to be without force; it only requires that the continued possession of the property must

²⁸⁰ *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd* 1993 (4) SA 138 (C) 143. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 547.

²⁸¹ *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd* 1993 (4) SA 138 (C) 143-144; *Bisschop v Stafford* 1974 (3) SA 1 (A) 4; *De Beer v Van der Merwe* 1923 AD 378 383-384.

²⁸² *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468; *Minister of Forestry v Michaux* 1957 (2) SA 32 (N) 39; *Welgemoed v Coetzer and Others* 1946 TPD 701 720. See also Carey Miller DL & Pope A *Land Title in South Africa* (2000) 176.

²⁸³ *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 170; *Minister of Forestry v Michaux* 1957 (2) SA 32 (N) 39; *Welgemoed v Coetzer and Others* 1946 TPD 701 720

²⁸⁴ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 169.

²⁸⁵ *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 169.

²⁸⁶ Section 2(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969.

²⁸⁷ See *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O). See also Sonnekus JC "Die *Rei Vindicatio* en Verjaring – Of Nie" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 576-590 578; Sonnekus JC "Sub *Hasta*-veilings en die Onderskeid tussen Afgeleide en Oorspronklike Wyses van Regsverkryging" 2008 *Tydskrif vir die Suid-Afrikaanse Reg* 696-727 698.

²⁸⁸ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468.

be without force.²⁸⁹ The 1969 Act omits *nec vi*, which may seem to imply that property retained by force can now also be acquired through prescription. However, many authors²⁹⁰ state that the omission of the *nec vi* requirement is of little practical relevance, since forceful possession of property is unlikely to be consistent with the *animus domini* requirement.²⁹¹ Furthermore, the fact that the possessor has to possess the property continuously for 30 years also eliminates the possibility of acquiring ownership through forceful possession, as it is highly unlikely that someone will be able to forcefully maintain possession over property for the entire 30-year period.²⁹²

As regards illegal possession, one needs to distinguish between two scenarios, namely (i) where the possessor's possession is illegal simply because it is without the owner's consent (ie unlawful possession), and (ii) where it is illegal irrespective of such consent due to statutory restrictions (ie in contravention of the law).²⁹³ If property is held without the consent of the owner, such possession is *nec precario*.²⁹⁴ The act of possession is then merely unlawful, since there is no entitlement to possession.²⁹⁵ Concerning the second instance, if the law forbids even the owner to use the property in the way used by the possessor, then a case for prescription cannot succeed.²⁹⁶ Yet, if the possessor exercises rights of a wider scope than those forbidden by law, then he is able to acquire those rights through prescription. There may also be cases in which the possession relied on, though attended by illegal acts, can be regarded as separable from the illegality for purposes of prescription.²⁹⁷ Thus, an owner must

²⁸⁹ Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 312; Van der Merwe CG *Sakereg* (2nd ed 1989) 275.

²⁹⁰ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 165; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 168; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 312-313; Van der Merwe CG *Sakereg* (2nd ed 1989) 275-276.

²⁹¹ Carey Miller DL & Pope A *Land Title in South Africa* (2000) 168; Van der Merwe CG *Sakereg* (2nd ed 1989) 275.

²⁹² Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 165; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313; Van der Merwe CG *Sakereg* (2nd ed 1989) 275-276; De Wet JC *Opuscula Miscellanea* (1979) 87.

²⁹³ *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 604-605.

²⁹⁴ *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 681.

²⁹⁵ *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 681. See also Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 181.

²⁹⁶ *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 605. For a good example, see *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A), where legislation effectively took away control of the ground from the owner and vested it in the mining authorities. The claimant was not able to possess the property adversely *vis-à-vis* the owner due to the illegality of his possession and, thus, his claim for prescription failed. See also Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 181.

²⁹⁷ *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 605. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 166.

have the right to prevent the possessor from possessing the property.²⁹⁸ It follows that if an owner is unable to prevent the possessor from occupying the property, then prescription cannot run in favour of such possessor.²⁹⁹

2.3.2.3 Nec clam

The *nec clam* requirement entails that possession be “open”³⁰⁰ and was retained as one of the requirements for prescription in the 1969 Act.³⁰¹ Carey Miller and Pope describe the rationale behind this requirement as follows:

“There are two reasons why possession must be open rather than secret or clandestine. First, in that prescription is justified by the impression created by outward appearances, in the world at large, it stands to reason that the exercise of rights must be patent: without this the element of publicity could not be satisfied. Secondly, from the owner’s point of view, the security of ownership entitles an owner to leave his or her property and it would be unfair to expect him or her to take steps to recover possession maintained secretly by another.”³⁰²

Occupation is open even without actual knowledge on the part of the owner, as long as the possession is open for all to see who want to see, including the owner.³⁰³ Stated differently, the possession must be open *vis-à-vis* the general public, as well as *vis-à-vis* the owner.³⁰⁴ The possession must be so open that an owner, exercising reasonable care, would have observed it.³⁰⁵ To determine openness is a matter of considering the evidence before the Court. As with the *nec vi* requirement, *nec clam* does not require that possession of property must have been

²⁹⁸ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 26; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 577; *Barker NO v Chadwick and Others* 1974 (1) SA 461 (D) 466; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 479; *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 606.

²⁹⁹ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 26.

³⁰⁰ *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *Ex Parte Puppli* 1975 (3) SA 461 (D) 463.

³⁰¹ De Wet JC *Opuscula Miscellanea* (1979) 86-87.

³⁰² Carey Miller DL & Pope A *Land Title in South Africa* (2000) 164, quoted with approval in *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) para 59.

³⁰³ *Bisschop v Stafford* 1974 (3) SA 1 (A) 7; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 170; *Minister of Forestry v Michaux* 1957 (2) SA 32 (N) 39; *Welgemoed v Coetzer and Others* 1946 TPD 701 720.

³⁰⁴ *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *Welgemoed v Coetzer and Others* 1946 TPD 701 723; *De Beer v Van der Merwe* 1923 AD 378; *Smith and Others v Martin’s Executor Dative* (1899) 16 SC 148 148-151. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 165. Van der Merwe CG *Sakereg* (2nd ed 1989) 277 and Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille’s Principles of South African Law* (9th ed 2007) 405-665 512 differ from this approach and states that the possession need only be open *vis-à-vis* the public. There is merit in this argument, as it is clear that actual knowledge of the possessor’s actions on the part of the owner is not required for purposes of prescription.

³⁰⁵ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Ex Parte Puppli* 1975 (3) SA 461 (D) 463; *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *Welgemoed v Coetzer and Others* 1946 TPD 701 721; *Smith and Others v Martin’s Executor Dative* (1899) 16 SC 148 148-151.

obtained openly; only the continued possession needs to be open.³⁰⁶ Van der Merwe questions whether the *nec clam* requirement is in fact not inherently part of the required form of possession (*possessio civilis*) and, therefore, redundant.³⁰⁷ This is indeed the case in Dutch and French law, where openness is regarded as an inherent element of possession.³⁰⁸

2.3.2.4 *Nec precario, adverse user and “as if owner”*

There has been quite a significant development surrounding the *nec precario* requirement in South African prescription law. Therefore, a brief discussion of the historical development concerning the ambit of this requirement is necessary to obtain clarity. Until 1923 the South African courts have interpreted the *nec precario* widely, in such a way that it “included” the concept of adverse user.³⁰⁹ In *De Beer v Van der Merwe*,³¹⁰ the Appellate Division of the Supreme Court held as follows in the context of prescription: “[T]he right must have been *non precario* or as it is alleged in our modern pleadings, the right must have been exercised adversely and as of right.”³¹¹ The Court elaborated on the previous by finding that “[w]hen the owner of the dominant tenement is also lessee of the servient tenement, the former has not, by diverting the water on to the latter tenement, done so adversely and as of right, but *precario*”.³¹² By equating a lease contract to a *precarium*, it follows that adverse user was once regarded by the Appellate Division of the Supreme Court as “forming part” of the *nec precario* requirement.³¹³ I argue that this wide interpretation of *nec precario* is legally unsound, since a *precarium* is not an overarching concept that includes contracts such as a lease.³¹⁴ I return to this issue in the next few paragraphs. Nonetheless, this wide interpretation was abandoned in *Malan v Nabygelegen Estates*,³¹⁵ where the same Appellate Division of the

³⁰⁶ Carey Miller DL & Pope A *Land Title in South Africa* (2000) 164; Van der Merwe CG *Sakereg* (2nd ed 1989) 277.

³⁰⁷ Van der Merwe CG *Sakereg* (2nd ed 1989) 277. See also Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 180. To the contrary are Carey Miller DL & Pope A *Land Title in South Africa* (2000) 166 and De Wet JC *Opuscula Miscellanea* (1979) 86-87.

³⁰⁸ See section 3.3.2.2.1 for Dutch law and section 3.4.2.1 for French law in chapter three below.

³⁰⁹ *De Beer v Van der Merwe* 1923 AD 378 384. This chapter argues that adverse user was wrongly incorporated into South African prescription law, as it merely constitutes part of the *possessio civilis* requirement. Hence me placing “included” in inverted commas. This issue is discussed in the next few paragraphs.

³¹⁰ 1923 AD 378.

³¹¹ *De Beer v Van der Merwe* 1923 AD 378 384.

³¹² *De Beer v Van der Merwe* 1923 AD 378 384.

³¹³ Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 183 supports this view. Adverse user is discussed in the next few paragraphs.

³¹⁴ Reinsma M “‘Adverse User’ of ‘Adverse Possession’” (1969) 32 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 293-298 295. Van der Merwe CG *Sakereg* (2nd ed 1989) 278 opines that the wide interpretation of *nec precario* renders this requirement unusable (“*onbruikbaar*”).

³¹⁵ 1946 AD 562.

Supreme Court opted for the narrow interpretation of *nec precario*, an approach followed in subsequent cases.³¹⁶ In this decision, Watermeyer CJ described *nec precario* as follows:

“[A] *precarium* is the legal relationship which exists between parties when one party has the use or occupation of property belonging to the other on sufferance, by the leave and licence of the other. Its essential characteristic is that the permission to use or occupy is revocable at the will of the person granting it.”³¹⁷

This *obiter dictum* establishes that a *precarium* is a bilateral legal relationship,³¹⁸ where the grantor agrees (consents) that the grantee may exercise possession over the property concerned, which consent is revocable at the will of the grantor. While the grantee enjoys the *precarium* from the grantor, he has the *ius possidendi* to control the property, and through this he (continuously) acknowledges the ownership of the grantor.³¹⁹ Thus, a *precarium* is something of which the use is granted at the request of the grantee for as long as the grantor is willing to allow him to have it.³²⁰ *Nec precario*, therefore, postulates the absence of such a grant or request.³²¹ *Nec precario* may also be understood as meaning “not by virtue of a precarious consent”, “not by virtue of a revocable permission” or “not on sufferance”.³²² The onus rests on the person claiming prescription to prove that neither he nor his predecessors in title held the property *precario*, or (in other words) that they held it *nec precario* throughout the prescription period.³²³

Concerning the nature of a *precarium*, as seen above, a person holds something precariously when he holds it on sufferance or by virtue of permission that is revocable at the will of the grantor.³²⁴ A *precarium* may be of two kinds, namely:

³¹⁶ See for instance *Bisschop v Stafford* 1974 (3) SA 1 (A) 8 and *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697, where this departure is confirmed.

³¹⁷ *Malan v Nabyegelegen Estates* 1946 AD 562 573.

³¹⁸ *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) 327; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 681.

³¹⁹ Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313.

³²⁰ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 278.

³²¹ *Bisschop v Stafford* 1974 (3) SA 1 (A) 8.

³²² *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O) 503; *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 48; *Malan v Nabyegelegen Estates* 1946 AD 562 574.

³²³ *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 8; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 470. Robertson S “The Difficulty of Proving the Essentials of Acquisitive Prescription” (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 158-161 underlines the difficulty of proving the absence of a *precarium*.

³²⁴ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 470; *Malan v Nabyegelegen Estates* 1946 AD 562 573.

- i) in the nature of the concession of a servitude; or
- ii) it may be a *precarium* proper, described by the authorities as *tot wederzeggens toe*.³²⁵

If a *precarium* is present, the possessor's claim for prescription will fail.³²⁶ For possession to be *precario*, it is essential that some sort of permission should have been given to the possessor by the owner, as mere acquiescence by the owner will not suffice.³²⁷ The permission (*precarium*) may be granted either expressly or tacitly.³²⁸

*City of Cape Town v Abelson's Estate*³²⁹ dealt with the question whether a *precarium* given to one person would automatically attach to the possession of his successors in title. According to this case, the mere fact that a person occupied property by virtue of a *precarium* does not in itself mean that his predecessors in title also hold the property precariously.³³⁰ The nature and scope of the precarious right depends on the intention of the parties when the *precarium* was granted, which has to be decided on the evidence.³³¹ As mentioned above, a *precarium* may be granted either expressly or tacitly.³³² Normally, a personal concession terminates at the grantee's death, and his legal successors only occupy *precario* if there was a tacit re-grant of the concession to them.³³³ Such tacit re-grant, being a bilateral relationship, only arises if both parties had knowledge of the situation; the position would then be that the grantor tacitly intended and the occupier tacitly recognised that continuous occupation would be *precario*.³³⁴ Interestingly enough, the Court in *Abelson* held in an *obiter dictum* that it may be possible to presume the tacit extension of *precarium* – in the circumstances of certain

³²⁵ “Tot wederzeggens toe” may be understood as “until I revoke or until I say differently”: See *City of Cape Town v Abelson's Estate* 1947 (3) SA 315 (C) 326; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 499.

³²⁶ *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 6.

³²⁷ *Malan v Nabygelegen Estates* 1946 AD 562 576-577; *Pratt v Lourens* 1954 (4) SA 281 (N) 282. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 278.

³²⁸ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 470; *Malan v Nabygelegen Estates* 1946 AD 562 573.

³²⁹ 1947 (3) SA 315 (C).

³³⁰ *City of Cape Town v Abelson's Estate* 1947 (3) SA 315 (C) 326.

³³¹ Voet 8.4.18; *City of Cape Town v Abelson's Estate* 1947 (3) SA 315 (C) 326.

³³² Voet 43.26.1; *Bisschop v Stafford* 1974 (3) SA 1 (A) 8; *City of Cape Town v Abelson's Estate* 1947 (3) SA 315 (C) 327. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 278.

³³³ *City of Cape Town v Abelson's Estate* 1947 (3) SA 315 (C) 327.

³³⁴ *City of Cape Town v Abelson's Estate* 1947 (3) SA 315 (C) 327-328; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 681. For an extensive discussion of the *nec precario* requirement, see *City of Cape Town v Abelson's Estate* 1947 (3) SA 315 (C).

types of *precario* – when there is an absence of evidence for the party averring prescription.³³⁵

It must be emphasised that a contract, such as one allowing someone to lease property or to exercise a servitude, does not constitute revocable permission granted by one person to another.³³⁶ For instance, if a possessor exercises rights in property in terms of a contract, he exercises those rights “as of right” and not by virtue of “consent” in the sense of revocable permission (*precarium*).³³⁷ The reason why prescription does not run in favour of the possessor in this context is because the possessor – due to the presence of the contract – does not possess the property *animo domini*. Such possession merely amounts to the limited *possessio naturalis*,³³⁸ which falls short of the intention of possessing as owner.³³⁹ This is why the wide approach adopted in *De Beer v Van der Merwe*,³⁴⁰ where the Court held that rights performed in terms of a contract are exercised precariously, is legally unsound. However, the fact that possession originated in contract does not necessarily preclude the acquisition of property through prescription.³⁴¹ For instance, if the possessor exercises rights pertaining to the property that falls outside those granted by the contract – such as drawing water from a fountain in the context of a lease contract not permitting such drawing of water – it is possible to acquire such right as a servitude through prescription.³⁴² If the possessor had no right to take water from a fountain on the property in terms of the lease contract, such

³³⁵ *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) 328-329: “It may be that, in the circumstances of certain types of *precario*, the absence of evidence by the person, who claims a prescriptive title as to the terms under which he occupies, the tacit extension of the *precarium* to cover his occupation may be presumed.”

³³⁶ *Malan v Nabygelegen Estates* 1946 AD 562 576-577; *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O) 504.

³³⁷ *Malan v Nabygelegen Estates* 1946 AD 562 576-577; *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O) 504.

³³⁸ “Mere or natural possession”, according to Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 256-257.

³³⁹ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 30; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 702; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 281; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299; *Welgemoed v Coetzer and Others* 1946 TPD 701 712-713. See also Reinsma M “‘Adverse User’ of ‘Adverse Possession’” (1969) 32 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 293-298 295. This was also the position in Roman-Dutch law as described by Grotius *Inleidinge* 2.2.3: See section 2.2.3 above.

³⁴⁰ 1923 AD 378.

³⁴¹ *Malan v Nabygelegen Estates* 1946 AD 562 574; *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O) 504.

³⁴² *Malan v Nabygelegen Estates* 1946 AD 562 574; *Du Toit and Others v Furstenberg and Others* 1957 (1) SA 501 (O) 504. The example of drawing water from a fountain is based on the facts of *Malan v Nabygelegen Estates* 1946 AD 562.

an act will – in the absence of a grant or *precario* to that effect – be performed *nec precario*.³⁴³

The *nec precario* requirement has, like the *nec vi* requirement, also been omitted from the 1969 Act. Even so, the fact that the type of possession required for prescription is *possessio civilis* probably makes this requirement superfluous, since holding property precariously is clearly inconsistent with the *animus domini*.³⁴⁴ This position is strengthened by the fact that the 1969 Act merely requires the possessor to possess the property openly and “as if he were the owner”, the latter requirement clearly being similar to the *animus domini* element of *possessio civilis*.³⁴⁵ Furthermore, the Court in *Campbell v Pietermaritzburg City Council*³⁴⁶ held that “[if] the court is satisfied that possession was *nec precario* ... it will also have been *civilis possessio* [and thus *animus domini*].”³⁴⁷

Although adverse user does not appear as a requirement in either the 1943 or 1969 Act, it has been viewed as constituting a supplementary requirement for prescription since the decision of *Pratt v Lourens*³⁴⁸ in 1954.³⁴⁹ One observes this position from the authoritative decision of *Malan v Nabygelegen Estates*,³⁵⁰ where the Appellate Division of the Supreme Court held as follows:

“In order to avoid misunderstanding, it should be pointed out here that mere occupation of property ‘*nec vi, nec clam, nec precario*’ for a period of thirty years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation

³⁴³ *Malan v Nabygelegen Estates* 1946 AD 562 577.

³⁴⁴ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 166; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 169; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 276-277; Van der Merwe CG *Sakereg* (2nd ed 1989) 278. To the same effect is *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680.

³⁴⁵ Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 180-181; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 162; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 164-165, 169-170; Robertson S “The Difficulty of Proving the Essentials of Acquisitive Prescription” (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 158-161 158; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 311; Van der Merwe CG *Sakereg* (2nd ed 1989) 280; Henckert HG “Die *Animus Domini*-vereiste by Verjaring” (1986) 5 *Responsa Meridiana* 138-142 138. This point is discussed in greater detail in the next few paragraphs.

³⁴⁶ 1966 (2) SA 674 (N).

³⁴⁷ *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680. See also *Bisschop v Stafford* 1974 (3) SA 1 (A) 8-9, where the Court held that the requirements of *nec precario*, adverse user and *possessio civilis* are synonymous.

³⁴⁸ 1954 (4) SA 281 (N).

³⁴⁹ *Pratt v Lourens* 1954 (4) SA 281 (N) 282. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 279.

³⁵⁰ 1946 AD 562.

by virtue of some contract or legal relationship such as lease or usufruct which recognises the ownership of another.”³⁵¹

This position has subsequently been followed in many cases regarding prescription.³⁵² As seen from the above quotation, the essence of “adverse user” is that the possessor must use or possess the property without recognising the rights of the owner.³⁵³ Accordingly, one can regard adverse user as meaning “the use and enjoyment of a thing without molestation by, and in conflict with the rights of, the owner thereof”.³⁵⁴ Therefore, the possessor must possess the property adversely *vis-à-vis* the owner, as possessing the property adversely toward a non-owner does not suffice.³⁵⁵ In this light, Sonnekus and Neels describe adverse user as a *strydige daad*.³⁵⁶ Recognition occurs when the possessor has a legal relationship with the owner, such as a lease, where the possessor implicitly acknowledges the ownership of the owner. In this context the Appellate Division of the Supreme Court in *Swanepoel v Crown Mines Ltd*³⁵⁷ confirmed that adverse user precludes lessees and usufructuaries from acquiring property through prescription.³⁵⁸ According to the Court, it is inconceivable that the Act could have intended that these persons should become owner after possessing the property continuously for 30 years.³⁵⁹ Although this conclusion is legally sound, it is doubtful whether the additional requirement of adverse user is at all necessary to achieve this purpose in South African law. This is because lessees, usufructuaries, detentors and persons who exercise servitudes are in any event precluded from acquiring ownership through prescription, since they – by having mere *possessio naturalis* – lack the requisite *animus domini*.³⁶⁰

³⁵¹ *Malan v Nabygelegen Estates* 1946 AD 562 574. This approach was followed in *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 47 and *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 604.

³⁵² See for instance *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Barker NO v Chadwick and Others* 1974 (1) SA 461 (D) 465; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467; *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299; *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 604; *City of Cape Town v Abelsohn’s Estate* 1947 (3) SA 315 (C) 326; *Malan v Nabygelegen Estates* 1946 AD 562 574.

³⁵³ This is also a feature of the *animus domini* requirement: See the discussion in section 2.3.2.1.1 above.

³⁵⁴ *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N) 262. See similarly *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 480.

³⁵⁵ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 702-703; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 477; *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299.

³⁵⁶ Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313. (“An act that is in conflict with the rights of the owner.”)

³⁵⁷ 1954 (4) SA 596 (A).

³⁵⁸ *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 604.

³⁵⁹ *Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (A) 604.

³⁶⁰ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 30; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 702; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) 281; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474; *Hayes v Harding Town Board and Another* 1958 (2) SA 297 (N) 299; *Welgemoed v Coetzer and Others* 1946 TPD

Consequently, a debate exists over whether adverse user indeed constitutes an independent requirement for prescription or whether it simply forms part of *possessio civilis*.³⁶¹ It is mostly accepted – before and after 1954 – that adverse user is not an additional requirement, but merely an element of *possessio civilis*.³⁶² This view finds support in *Campbell v Pietermaritzburg City Council*,³⁶³ where the Court held adverse user and *possessio civilis* to be synonymous.³⁶⁴ Scholtens is of the opinion that to add adverse user to the “as if owner” requirement as an additional requirement only leads to confusion.³⁶⁵ In any event, it is doubtful whether the concept of adverse user should ever have entered South African prescription law, as it contains elements of the English law rule of adverse possession, which greatly differs from acquisitive prescription.³⁶⁶ Be that as it may, this issue is largely made redundant by the “as if owner” requirement of the 1969 Act.³⁶⁷ Nonetheless, Van der Merwe is of the opinion that adverse user can still be a useful factor to determine whether a person had the requisite *animus domini*, even though it does not constitute an independent requirement.³⁶⁸

701 712-713. This position is in line with Roman-Dutch law as described by Grotius *Inleidinge* 2.2.3: See section 2.2.3 above.

³⁶¹ Van der Walt AJ *Property in the Margins* (2009) 172 footnote 7; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 193, 275; Van der Merwe CG *Sakereg* (2nd ed 1989) 279-280; De Wet JC *Opuscula Miscellanea* (1979) 85 and cases cited. See also Carey Miller DL & Pope A *Land Title in South Africa* (2000) 165-166, where adverse user is regarded as correlative to the *animus domini* requirement.

³⁶² *Bisschop v Stafford* 1974 (3) SA 1 (A) 8-9; *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 48 (per Jansen J); *Malan v Nabygelegen Estates* 1946 AD 562 574. See also Carey Miller DL & Pope A *Land Title in South Africa* (2000) 165-166; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313-314; Van der Merwe CG *Sakereg* (2nd ed 1989) 279-280; Henckert HG “Die *Animus Domini*-vereiste by Verjaring” (1986) 5 *Responsa Meridiana* 138-142 138; Scholtens JE “*Praescriptio – Jus Possidendi and Rei Vindicatio*” (1972) 89 *South African Law Journal* 383-395 384; Reinsma M “‘Adverse User’ of ‘Adverse Possession’” (1969) 32 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 293-298 295. To the same effect is Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 193, 197, 273-275.

³⁶³ 1966 (2) SA 674 (N).

³⁶⁴ *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680. See also *Wicks and Others v Place NO* 1967 (1) SA 561 (E) 567. The Court held in *Bisschop v Stafford* 1974 (3) SA 1 (A) 8-9 that *nec precario*, adverse user and *possessio civilis* are synonymous.

³⁶⁵ Scholtens JE “*Praescriptio – Jus Possidendi and Rei Vindicatio*” (1972) 89 *South African Law Journal* 383-395 384. De Wet JC *Opuscula Miscellanea* (1979) 86 and Reinsma M “‘Adverse User’ of ‘Adverse Possession’” (1969) 32 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 293-298 298 are to the same effect. Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 314 think that adverse user is embodied in the “as if owner” requirement.

³⁶⁶ Of the same opinion are Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 275; De Wet JC *Opuscula Miscellanea* (1979) 86 and Reinsma M “‘Adverse User’ of ‘Adverse Possession’” (1969) 32 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 293-298 294-295. Adverse possession in English law is discussed in section 3.2.2.3 of chapter three below.

³⁶⁷ I address this issue in the next few paragraphs.

³⁶⁸ Van der Merwe CG *Sakereg* (2nd ed 1989) 280. Carey Miller DL & Pope A *Land Title in South Africa* (2000) 165 and Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 275 are of the same mind.

The “as if owner” requirement was introduced for the first time by the 1969 Act, on suggestion from De Wet, the so-called “father” of this Act.³⁶⁹ This requirement bears a striking resemblance to the *animus domini* element and, thus, to *possessio civilis*. Indeed, the “as if owner” requirement does not in any way differ from *possessio civilis*,³⁷⁰ a view confirmed in case law.³⁷¹ The post-30 November 2000 prescription cases illustrate an interesting trend in this context. These cases tend to discuss the 1969 Act requirements for prescription with reference to the terminology introduced under the previous Act.³⁷² In most of these cases, the courts still discuss and use the *nec precario* and adverse user requirements to determine whether the possessor complied with the “as if owner” requirement.³⁷³ This approach is in line with the view that some of the “older” requirements, such as adverse user, can still play a useful role to establish whether a person holds property *animo domini*.³⁷⁴

As indicated above, the *nec precario* requirement is rendered superfluous by requiring a person to possess property *possessio civilis* for purposes of prescription.³⁷⁵ As to adverse user, it has been shown that also this requirement is made redundant by the *possessio civilis*

³⁶⁹ See section 1 of the Prescription Act 68 of 1969 and De Wet JC *Opuscula Miscellanea* (1979) 85-86. With regard to the acquisition of servitudes, section 6 of the Prescription Act 68 of 1969 requires the user to exercise his use “openly and as though he were entitled to do so.” Clearly, there is no material difference between the requirements for the acquisition of property or servitudes through acquisitive prescription.

³⁷⁰ Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 180-181; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 162; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 164-165, 169-170; Robertson S “The Difficulty of Proving the Essentials of Acquisitive Prescription” (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 158-161 158; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 311; Van der Merwe CG *Sakereg* (2nd ed 1989) 280; Henckert HG “Die *Animus Domini*-vereiste by Verjaring” (1986) 5 *Responso Meridiana* 138-142 138.

³⁷¹ *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 8; *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) paras 7, 9; *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 28; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 574-575.

³⁷² Prescription Act 18 of 1943. See especially *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009); *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA); *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C); *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C); *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC).

³⁷³ See the cases referred to in the previous footnote.

³⁷⁴ Van der Merwe CG *Sakereg* (2nd ed 1989) 280; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 165-166; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 275.

³⁷⁵ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 166; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 169; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 276-277; Van der Merwe CG *Sakereg* (2nd ed 1989) 278-279. To the same effect is *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680. Van der Merwe CG *Sakereg* (2nd ed 1989) 278-279 is of the opinion that the *nec precario* requirement is redundant, since it can be seen as simply forming part of the *animus domini* and “as if owner” requirements.

requirement.³⁷⁶ In this context it is illuminating to quote the following passage from *Campbell v Pietermaritzburg City Council*:³⁷⁷

“[I]f the Court is sati[s]fied that there was *possessio civilis* ... it is superfluous to inquire further whether there was adverse user and that if, on the other hand, the Court is satisfied that possession was *nec precario* and adverse to the owner's rights, it will also have been *civilis possessio*.”³⁷⁸

Since the “as if owner” requirement is the same as *possessio civilis*, it can be safely deduced that the “as if owner” requirement encapsulates both the *nec precario* and adverse user requirements.

2.3.3 Interruption of acquisitive prescription

Concerning interruption it is necessary to distinguish once more between the law as it stood prior to and after 30 November 1970. The 1943 Act does not specifically regulate interruption, which means that one must rely on the common law in this regard. Interruption of prescription ensues when a specific event occurs that terminates the running of the prescription, causing the 30-year period to start running *de novo*.³⁷⁹ A distinction is drawn between two types of interruption, namely (i) natural interruption and (ii) civil interruption.³⁸⁰ Natural interruption entails that the possessor loses possession of the property either by giving it up voluntarily or by having it taken from him forcibly, namely by the owner, another person or by *vis maior*.³⁸¹ Mere protest by the owner is not enough; the possessor's possession must be terminated.³⁸²

³⁷⁶ *Bisschop v Stafford* 1974 (3) SA 1 (A) 8-9; *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) 48 (per Jansen J); *Malan v Nabygelegen Estates* 1946 AD 562 574. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 167; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 165-166; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 313-314; Van der Merwe CG *Sakereg* (2nd ed 1989) 279-280; Henckert HG “Die *Animus Domini*-vereiste by Verjaring” (1986) 5 *Responsa Meridiana* 138-142 138; Scholtens JE “*Praescriptio – Jus Possidendi and Rei Vindicatio*” (1972) 89 *South African Law Journal* 383-395 384; Reinsma M “‘Adverse User’ of ‘Adverse Possession’” (1969) 32 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 293-298 295. To the same effect is Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 193, 197, 273-275.

³⁷⁷ 1966 (2) SA 674 (N).

³⁷⁸ *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 680. See also *Bisschop v Stafford* 1974 (3) SA 1 (A) 8-9 and *Wicks and Others v Place NO* 1967 (1) SA 561 (E) 567.

³⁷⁹ Voet 41.3.17; Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 405-665 514.

³⁸⁰ Voet 41.3.17.

³⁸¹ Such as war or flooding; See Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 405-665 514-515; Van der Merwe CG *Sakereg* (2nd ed 1989) 282-283.

³⁸² Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 405-665 515; Van der Merwe CG *Sakereg* (2nd ed 1989) 283.

Civil interruption occurs by the serving of a process (warrant, notice of motion, interdict) in which the owner's claim to ownership is clearly stated to the possessor.³⁸³ Thus, a mere claim for rent or compensation because of unlawful occupation does not suffice. The prescription period is also interrupted if the possessor acknowledges the rights of the owner.³⁸⁴ This is in line with the adverse user requirement, which requires the possessor to possess the property in conflict with the rights of the owner of the property.³⁸⁵ In *Joles Eiendom (Pty) Ltd v Kruger and Another*,³⁸⁶ the Court found that if the owner and/or his employees had occasional access to the property, this did not interrupt prescription.³⁸⁷

The 1969 Act, as opposed to its 1943 counterpart, expressly regulates interruption.³⁸⁸ According to the 1969 Act, the running of prescription is judicially (civilly) interrupted by the service of a process³⁸⁹ on the possessor, whereby the owner claims ownership of the property.³⁹⁰ However, any interruption in terms of section 4(1) shall lapse – and the running of prescription be deemed to not have been interrupted – if the person claiming ownership does not successfully prosecute the claim under the process in question to final judgment, or if he does prosecute the claim but abandons the judgment or if the judgment is set aside.³⁹¹ Should prescription be interrupted,³⁹² a new period of prescription shall commence to run – if at all – only on the day on which final judgment is given.³⁹³ In accordance with the advice of De Wet,³⁹⁴ the legislator included an exception to the normal working of interruption by providing that the running of prescription shall not be interrupted by involuntary loss of

³⁸³ Section 4(1)-(4) of the Prescription Act 68 of 1969. See also Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 314.

³⁸⁴ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 37. For a discussion regarding which acts by the possessor amounts to an acknowledgment, see the discussion under the *animus domini* element in section 2.3.2.1.1 above.

³⁸⁵ *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 697; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 480; *Payn v Estate Rennie and Another* 1960 (4) SA 261 (N) 262. The adverse user requirement is discussed in section 2.3.2.4 above.

³⁸⁶ 2007 (5) SA 222 (C).

³⁸⁷ *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C) para 29.

³⁸⁸ Section 4 of the Prescription Act 68 of 1969.

³⁸⁹ According to section 4(4), this includes a petition, notice of motion, rule *nisi* and any document whereby legal proceedings are commenced. See for instance *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) para 40, where the Court confirmed that the running of prescription is interrupted by the service of a notice of motion for evicting the possessor.

³⁹⁰ Section 4(1) of the Prescription Act 68 of 1969.

³⁹¹ Section 4(2) of the Prescription Act 68 of 1969.

³⁹² As contemplated in section 4(1) of the Prescription Act 68 of 1969.

³⁹³ Section 4(3) of the Prescription Act 68 of 1969.

³⁹⁴ De Wet JC *Opuscula Miscellanea* (1979) 88-89.

possession,³⁹⁵ should possession be regained at any time through legal proceedings instituted within six months after the loss for the purpose of regaining possession, or if possession is regained in any other lawful way within one year of the loss of possession.³⁹⁶ This approach is similar to the position in Dutch prescription law.³⁹⁷ As with the 1943 Act, voluntary loss of possession also interrupts prescription under the 1969 Act.

2.3.4 Postponement of acquisitive prescription³⁹⁸

As with interruption, the 1943 Act does not provide for the postponement of prescription either. Accordingly, one must again rely on the common law in this context.³⁹⁹ Postponement is based on the principle of *contra non valentem agere non currit praescriptio*,⁴⁰⁰ which entails that prescription does not run against persons without the capacity to act. According to the common law, this group includes:

- i) minors;
- ii) insane persons;
- iii) persons under curatorship;
- iv) persons who were absent due to service to the state or by reason of war;
- v) married women subject to their husbands' marital power;
- vi) *fideicommissarii* pending the fulfilment of the condition of the *fideicommissum*, where the fideicommissary property was alienated by a *fiduciarius* who did not have the power to do so; and
- vii) generally those who were prevented from enforcing their rights.⁴⁰¹

As soon as the impending situation or event falls away, the running of prescription continues for the remainder of the 30-year period.⁴⁰² For instance, if a person possessed immovable

³⁹⁵ Such as war or flooding.

³⁹⁶ Section 2 of the Prescription Act 68 of 1969.

³⁹⁷ See sections 3.3.2.3.1-3.3.2.3.2 of chapter three below.

³⁹⁸ Also known as suspension or delay.

³⁹⁹ This position was confirmed in *Estate Dambuza v Estate Mcikwa* 1946 NPD 94 98.

⁴⁰⁰ "Prescription does not run against a party who cannot take action.": See Hiemstra VG & Gonin HL *Trilingual Legal Dictionary* (3rd ed 2006) 169. See also *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 479.

⁴⁰¹ Voet 44.3.9; *Estate Dambuza v Estate Mcikwa* 1946 NPD 94 98. See also Van der Merwe CG (with Pope A) "Property" in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 405-665 515; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 171; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 316.

property for 20 years and the owner then suddenly became insane, prescription would not run against him. In other words, the running of prescription is postponed until he regains the capacity to act. Only then will the running of prescription continue for the remainder of the 30-year period.

The 1969 Act altered the common law position by specifically regulating the issue of postponement.⁴⁰³ In this regard the 1969 Act refers to two specific groups of people, the first being those against whom prescription is running⁴⁰⁴ and the second being those in favour of whom prescription is running.⁴⁰⁵ The former group includes persons who are minors, insane, under curatorship or are prevented by *vis maior*⁴⁰⁶ from interrupting the running of prescription.⁴⁰⁷ The second group includes persons who are outside the Republic of South Africa, married to the person against whom prescription is running or are members of the governing body of a juristic person against whom prescription is running.⁴⁰⁸ The 1969 Act provides for a unique chain of events, should a person fall into one of the mentioned groups. Should the prescription period have been completed, but for the impediment mentioned above, before or on, or within three years after the day on which the relevant impediment has fallen away, the prescription period shall not be completed before the expiration of three years after the postponing impediment has fallen away.⁴⁰⁹ An example will clarify this situation: In the case of prescription running against a minor, if the prescription period would have been completed before or on the day the minor came of age, the prescription period shall have to run for an additional three years after the minor come of age before it is completed. Furthermore, should the prescription period have been completed within three years following the termination of the impediment (the day the minor comes of age), the completion will also be postponed for three years from the date the impediment fell away.⁴¹⁰ In this sense the 1969 Act provides that the period of prescription in relation to fideicommissary property shall not be completed against a *fideicommissarius* before the

⁴⁰² Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 316; Van der Merwe CG *Sakereg* (2nd ed 1989) 285-286.

⁴⁰³ Section 3 of the Prescription Act 68 of 1969. See De Wet JC *Opuscula Miscellanea* (1979) 91-92 for a general discussion in this regard.

⁴⁰⁴ Section 3(1)(a) of the Prescription Act 68 of 1969.

⁴⁰⁵ Section 3(1)(b) of the Prescription Act 68 of 1969.

⁴⁰⁶ Superior force.

⁴⁰⁷ Section 3(1)(a) of the Prescription Act 68 of 1969.

⁴⁰⁸ Section 3(1)(b) of the Prescription Act 68 of 1969.

⁴⁰⁹ Section 3(1)(c) of the Prescription Act 68 of 1969.

⁴¹⁰ See Carey Miller DL & Pope A *Land Title in South Africa* (2000) 185-191 for a more complete discussion in this regard.

expiration of a period of three years after the day on which the right of the *fideicommissarius* to the property has vested in him.⁴¹¹

2.3.5 Rationale for acquisitive prescription

Chapter four discusses the rationale for prescription, since it specifically focuses on this aspect.

2.3.6 Prescription against the state

During the discussion of Roman-Dutch law, it was seen that under certain circumstances it was possible to acquire alienable state property through prescription.⁴¹² Since the commencement of the 1943 Act, as well as the 1969 Act, this matter has been regulated by statute. The 1943 Act explicitly states that it binds the state and that prescription shall not run against the state unless the property in question is capable of being alienated by the state and of being owned by a private person.⁴¹³ The 1969 Act is to the same effect, explicitly stating that it binds the state and that its provisions shall not affect the provision of any law that prohibits the acquisition of land or any right in land by prescription.⁴¹⁴ At first glance these sections might seem to be in conflict, but a better interpretation is probably that the 1969 Act binds the state in so far as the state has not enacted legislation that prohibits the acquisition of property through prescription.⁴¹⁵ For instance, the State Land Disposal Act 48 of 1961 prohibits the acquisition of state land through prescription since it came into operation in 1971.⁴¹⁶ However, persons are still able to acquire state property through prescription that does not fall under the definition of “immovable property”, such as movable state property, for instance.

2.4 Conclusion

⁴¹¹ Section 3(2) of the Prescription Act 68 of 1969.

⁴¹² See Voet 41.3.12. Prescription under Roman-Dutch law is discussed in section 2.2.3 above.

⁴¹³ Section 13(1) and (3) of the Prescription Act 18 of 1943.

⁴¹⁴ Sections 18-19 of the Prescription Act 68 of 1969.

⁴¹⁵ See the argument in favour of this approach in Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 173.

⁴¹⁶ Section 3 of Act 48 of 1961.

It is clear that prescription is of ancient heritage and came to South African law through its Roman-Dutch legal heritage. Through the ages it has undergone many changes and developments, which in South African law culminated in the enactment of the two prescription acts. Despite uncertainty concerning some of the requirements for prescription, this legal institution is mostly regarded as legally certain and unproblematic in modern-day South African law. Much of the confusion pertaining to the requirements for prescription can be overcome if one views the *nec precario* and adverse user requirements as forming part of the *animus domini* element of *possessio civilis*. Such a conclusion is strengthened by the 1969 Act, which merely requires a possessor to possess property openly and “as if owner”.

Although prescription may appear to be a harsh rule, it still serves the legitimate purpose of promoting legal certainty by affording *de iure* status to long-existing *de facto* situations. Although not entirely free of uncertainty and potential problems, as mentioned, it was seen that the requirements under the two acts are indeed similar and mainly unproblematic. The biggest difficulty seems to be in the reconciliation of the fact that both *bona* and *mala fide* possessors can profit from prescription. In the next chapter, the focus shifts to modern English, Dutch, French and German law to show how prescription operates in those legal systems. Specific attention is paid to the similarities of the requirements for prescription in the civil law systems mentioned, together with how English law regulates prescription or adverse possession today. Chapter three also emphasises how these systems solve the problem of the *mala fide* possessor.

CHAPTER 3: ACQUISITIVE PRESCRIPTION IN FOREIGN JURISDICTIONS

3.1 Introduction

The purpose of this chapter is to compare the South African law of acquisitive prescription (“prescription”) – discussed in chapter two – with the legal institutions that fulfil the same purpose in English, Dutch, French and German law. English and Dutch law are thoroughly investigated, with special reference to the *Pye* case¹ in the discussion of English adverse possession law.² The reason for specifically focusing on English law is because the constitutionality of English adverse possession law was recently challenged under Article 1 of Protocol No 1 (“Article 1”) to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (“the Convention”) in *JA Pye (Oxford) Ltd v United Kingdom*.³ This necessitates an investigation as to how adverse possession operated at the time it was challenged under Article 1. The chapter also scrutinises Dutch prescription law, as it shares the Roman-Dutch legal heritage with South Africa and demonstrates notable similarities with South African prescription law. However, Dutch prescription law attaches different consequences to good and bad faith prescription by having different prescription periods in this regard. This phenomenon deserves attention, since South African prescription law sets a period of 30 years for both *bona* and *mala fide* possessors.

The analysis of English adverse possession law reveals that adverse possession requires a different type of intention to obtain ownership than its civil-law counterparts. In this sense adverse possession requires mere *animus possidendi* (intention to possess),⁴ while prescription in the civil law jurisdictions under discussion requires the more strenuous *animus domini* (intention of an owner).⁵ As a result, it is “easier” to have possession for purposes of adverse possession than in the context of prescription. Consequently, a possessor is more likely to acquire title through adverse possession than to succeed with a case based on prescription in the civil-law sense. The *Pye* case illustrates this fact, where the adverse possessors succeeded in acquiring title despite their willingness to rent the land from the owner. Such willingness would have negated the *animus domini*, as was illustrated during the

¹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676; *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

² See section 3.2.3 below.

³ (2006) 43 EHRR 3 (IV). The decision by the Grand Chamber is reported as *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC).

⁴ See section 3.2.2.3.2.3 below.

⁵ See section 3.3.2.2.1 for Dutch law, section 3.4.2.1 for French law and section 3.5 for German law below.

discussion of South African prescription law.⁶ Nonetheless, English adverse possession law underwent fundamental alterations with the enactment of the Land Registration Act 2002 (“LRA” or “2002 Act”), which now prevents the extinguishment of title in registered land through mere adverse possession.⁷ Accordingly, the LRA now offers better protection to owners of registered land than at the time of *Pye*. However, the LRA does not affect the substantive requirements of adverse possession, as it merely creates procedural safeguards that prevent owners of registered land from losing title through adverse possession.

German and English law (after the enactment of the LRA) have strict requirements in the context of prescription and adverse possession. Since both these systems currently have a positive registration system, guaranteeing the correctness of the register,⁸ people now look to the register instead of possession to ascertain ownership. Consequently, the traditional justifications for prescription and adverse possession – such as that it affords *de iure* status to long-existing *de facto* situations – no longer carry weight in these systems. Chapter four expands this line of reasoning and investigates the justifications for prescription and adverse possession.

Dutch and French prescription law, with their negative registration systems, do not have the same protective mechanisms as found in German and post-LRA English law. However, this chapter indicates that the prescription regimes of these systems do protect the interests of owners indirectly by requiring possession to be *animo domini*, coupled with longer prescription periods for *mala fide* possessors.

3.2 English law

3.2.1 Introduction

English land law, unlike most civil law systems, does not have a rule similar to prescription relating to land. The nearest concept is adverse possession, which is wholly a creature of statute and not an original method of acquisition of ownership.⁹ This is because adverse

⁶ See section 2.3.2.1.1 of chapter two above. For the position in Dutch, French and German law, see sections 3.3.2.2.1, 3.4.2.1 and 3.5 respectively below.

⁷ The amendments by the Land Registration Act 2002 are discussed in section 3.2.4 below.

⁸ See section 3.2.4 for English law and section 3.5 for German law below.

⁹ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 20 per Mummery LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.3; Smith RJ *Property Law* (6th ed 2009) 79.

possession – as opposed to prescription – only extinguishes the owner’s title in land and not the interests of third parties pertaining to that title.¹⁰

Although English law recognises prescriptive acquisition for purposes of the acquisition of easements (or servitudes), this is not the same as adverse possession.¹¹ Nourse LJ neatly summed up the difference between these two legal institutions in one of the most authoritative decisions¹² on adverse possession in English law:

“The essential difference between prescription and [adverse possession] is that in the former case title can be acquired only by possession as of right [possession *nec vi, nec clam, nec precario*]. That is the antithesis of what is required for [adverse possession], which perhaps can be described as possession as of wrong. It can readily be understood that with prescription the intention of the true owner may be of decisive importance, it being impossible to presume a grant by someone whose intention is shown to have been against it. But with [adverse possession] it is the intention of the squatter which is decisive. He must intend to possess the land to the exclusion of all the world, including the true owner, while the intention of the latter is, with one exception, entirely beside the point.”¹³

It is worth emphasising at this point that the law of adverse possession recently underwent fundamental changes with the enactment of the LRA. The recommendations from the English Law Commission resulted in its enactment, as the Commission established that the traditional justifications for adverse possession – such as that it promotes legal certainty – were no longer valid in cases that involve registered land when the register provides conclusive proof of title.¹⁴

The *Pye* case,¹⁵ decided before the LRA came into operation, is a classic illustration of the reasons why the Law Commission advised the legislature to amend the rules of adverse

¹⁰ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.3; Smith RJ *Property Law* (6th ed 2009) 79.

¹¹ This dissertation does not discuss the acquisition of easements (servitudes) by prescriptive acquisition in English law. What is interesting, though, is that the period required for prescriptive acquisition of easements is set at 20 years, while the much more odious adverse possession (before the Land Registration Act 2002) required only 12 years.

¹² The authoritative position established in *Buckinghamshire County Council v Moran* [1990] Ch 623, together with *Powell v McFarlane* (1979) 38 P & CR 452, was confirmed by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 432 per Lord Browne-Wilkinson.

¹³ *Buckinghamshire County Council v Moran* [1990] Ch 623 644.

¹⁴ See especially the two reports by the English Law Commission, namely *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) and *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998). I discuss these reasons more fully in section 4.3 of chapter four below, which chapter specifically focuses on the justifications behind prescription and adverse possession.

¹⁵ Although there were five decisions in total, the first three decided in the United Kingdom and last two decided by the European Court of Human Rights, this case is referred to in the singular form (for instance “*Pye* case” as opposed to “*Pye* cases”). The decisions are as follows: *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676; *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419;

possession pertaining to registered land. In essence, the LRA makes it much more difficult to obtain an estate in land (or ownership, to put it simply) than it traditionally was under the law preceding its enactment. However, it does not go so far as to abolish adverse possession in its entirety, since the amendments did not alter the substantive requirements that a person has to satisfy in order to succeed with a case based on adverse possession. The 2002 Act merely provides additional requirements (or safeguards) that the possessor, or squatter, now has to satisfy. However, the LRA does not amend pre-2003¹⁶ adverse possession law regarding unregistered land in any sense.

This section discusses adverse possession law by firstly referring to the law in force immediately prior to the commencement of the 2002 Act. To achieve this end, the section examines case law and developments that occurred prior to the enactment of the LRA. Secondly, I evaluate the first three *Pye* decisions¹⁷ with specific emphasis on the reasons given by each court as to the *animus possidendi* requirement, together with how they differed in this respect. The discussion of the decisions by the Fourth¹⁸ and Grand Chambers¹⁹ of the European Court of Human Rights appears in chapter five, as these decisions focus on the constitutionality of adverse possession under Article 1 of the Convention.²⁰ The reason for only discussing the two *Pye* decisions of the European Court of Human Rights in chapter five is that they do not affect the substantive law requirements for adverse possession – as laid down by the House of Lords in *JA Pye (Oxford) Ltd v Graham*²¹ – in any way. Thirdly, the section analyses the alterations introduced by the LRA and illustrates how cases similar to *Pye* are unlikely to occur in future. The aim of this discussion is not to provide a doctrinal analysis of English land law, but rather to illustrate how adverse possession operates in that system today for purposes of a comparative analysis.

JA Pye (Oxford) Ltd v United Kingdom (2006) 43 EHRR 3 (IV); *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC). The United Kingdom decisions are discussed in section 3.2.3 below, while the decisions by the European Court of Human Rights form part of the discussion in section 5.3.2.4.2 of chapter five below.

¹⁶ The Land Registration Act 2002, which fundamentally altered English adverse possession law, only came into operation on 13 October 2003 and is prospective in nature: See *Ofulue v Bossert* [2009] UKHL 16 and *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

¹⁷ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676; *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

¹⁸ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV).

¹⁹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC).

²⁰ The decisions by the Fourth and Grand Chambers of the European Court of Human Rights are discussed in section 5.3.2.4.2 of chapter five below. Chapter five specifically focuses on the constitutionality of prescription or adverse possession.

²¹ [2003] 1 AC 419.

3.2.2 Adverse possession prior to the Land Registration Act 2002²²

3.2.2.1 *Introduction and relevant statutory provisions*

Before embarking on this discussion, it is worth emphasising that a person who holds an estate in fee simple in registered or unregistered land (which one may equate, more or less, to ownership in the civil-law sense) is simply referred to as “the owner” in this chapter.²³ Adverse possession – which forms part of the law of limitation of actions – is a creature of statute, since it never existed as a common law rule.²⁴ The Limitation Act 1980 (“LA” or “1980 Act”), which was the primary source on limitation law before the LRA came into force, lays down three limitation periods. Of these three, only the 12-year period for the recovery of land²⁵ is relevant for the present discussion.²⁶ Section 15(1) of the LA²⁷ provides as follows:

“No action shall be brought by any person [the owner] to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The essence of this provision is that an owner of land will be unable to reclaim possession thereof after a period of 12 years has expired from the day that the owner, or the person through whom she claims, obtained the right to reclaim possession of that land. Section 38(1) of the 1980 Act – the interpretation section – defines “action” as including “any proceedings in a court of law, including an ecclesiastical court ...” The courts have held that an originating summons amounts to an “action”, although it does not seem to extend to an application to the Land Registry.²⁸

²² This act only came into operation on 13 October 2003.

²³ Although one cannot regard the common law estate in fee simple as being the same as civilian ownership on a theoretical level, one can regard the two as similar on a practical level. Interestingly, some authors argue that after the commencement of the Land Registration Act 2002 (which obliges all land in the United Kingdom to be registered), a “new conceptualism of *ownership* or *dominium*” has emerged in English land law: See Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.20.

²⁴ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 20 per Mummery LJ.

²⁵ Land in this sense includes any legal or equitable interest in land: See section 38(1) of the Limitation Act 1980.

²⁶ The Land Registration Act 2002 reduced the limitation period for registered land to 10 years, but the 12-year period is still applicable to unregistered land. This dissertation does not investigate the longer periods of limitation in so-called “special cases”, which require a 30-year limitation period for crown lands and corporations sole (60 years under Schedule 6, paragraph 13 of the Land Registration Act 2002): See Schedule 1, paragraph 10 of the Limitation Act 1980.

²⁷ This Act has been in force since 1 May 1981.

²⁸ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 699.

Part 1 of Schedule 1 to the LA contains the provisions used to determine the date of accrual of the right of action to recover land.²⁹ It is headed “Accrual of Rights of Action to Recover Land” and provides as follows:

“1 Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.”³⁰

It is plain that the right of action (to reclaim possession) accrues to the owner on the date on which she discontinues possession or has been dispossessed of it. Under the 1980 Act, persons that claim title through adverse possession must prove either (i) discontinuance by the owner followed by possession, or (ii) dispossession of that owner.³¹ Therefore, it is necessary to distinguish between these two concepts.

The accrual of the action for recovering possession is further qualified in Part 1 of Schedule 1 to the LA. This qualification is headed “Right of action not to accrue or continue unless there is adverse possession” and provides as follows:

“8(1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as ‘adverse possession’); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.”

“8(2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.”³²

It follows that the right of action will not accrue before the land is in the possession of a person in whose favour the limitation period can run, which possession is known as adverse possession. Limitation – or adverse possession – in cases regarding unregistered land extinguishes the title of the owner the moment the limitation period expires.³³ However, the expiration of the limitation period does not extinguish the title of the owner of registered land,

²⁹ Section 15(6) of the Limitation Act 1980.

³⁰ Schedule 1, paragraph 1 of the Limitation Act 1980.

³¹ *Buckinghamshire County Council v Moran* [1990] Ch 623 635 per Slade LJ; *Treloar v Nute* [1976] 1 WLR 1295 1300.

³² Schedule 1, paragraph 8 of the Limitation Act 1980.

³³ Section 17 of the Limitation Act 1980.

since the law then deems the registered owner to hold the land in trust for the squatter.³⁴ The adverse possessor may then apply to be registered as the owner of that land.³⁵ As mentioned above, the LRA fundamentally altered this position of adverse possession pertaining to registered land.³⁶

It is clear from these provisions that limitation (or adverse possession) only commences when:

- i) the owner has been dispossessed, or has discontinued her possession; and
- ii) the squatter has taken adverse possession of the land.³⁷

Although it may seem simple to distinguish between these requirements on a theoretical level, for practical purposes they tend to overlap to a certain extent. The crucial question in this regard is whether the possessor was in adverse possession for the entire duration of the limitation period. Just as in South African law, negligence or ignorance on the part of the owner is irrelevant for purposes of adverse possession.³⁸ Accordingly, it is immaterial – unless there is concealed fraud – whether an owner is ignorant of the dispossession.³⁹

3.2.2.2 *Distinguishing between discontinuance and dispossession*

Although the 1980 Act differentiates between these two concepts, parties in the majority of cases agree to decide a case based on adverse possession in terms of “dispossession”.⁴⁰ Nevertheless, it remains necessary to discuss both concepts.

The courts have held that the words “possess” and “dispossess” – or expressions such as “discontinuance” – must be afforded their ordinary legal meaning in terms of the LA.⁴¹ Fry J described the difference between dispossession and discontinuance as follows:

³⁴ Section 75(1) of the Land Registration Act 1925.

³⁵ Section 75(2) of the Land Registration Act 1925. See also *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 8 per Clarke LJ.

³⁶ These alterations are discussed in section 3.2.4 below.

³⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 431 per Lord Brown-Wilkinson; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 687, 689; *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ and per Nourse LJ at 644; *Powell v McFarlane* (1979) 38 P & CR 452 481. See also Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-015.

³⁸ *Powell v McFarlane* (1979) 38 P & CR 452 480; *Rains v Buxton* (1880) 14 Ch D 537 540-541. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.35.

³⁹ *Powell v McFarlane* (1979) 38 P & CR 452 480.

⁴⁰ See, for instance, *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 432 per Lord Browne-Wilkinson; *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 468.

“[T]he difference between dispossession and the discontinuance of possession might be expressed in this way – the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed into possession by other persons.”⁴²

Since the law no longer requires a squatter to physically remove or “oust” the owner from possession, dispossession now occurs when the squatter obtains possession of the land.⁴³ The courts describe dispossession as the “taking of possession in such sense from another without the other’s licence or consent”.⁴⁴ A squatter can only dispossess an owner for purposes of adverse possession if she performs sufficient physical acts on the land and has the requisite *animus possidendi*.⁴⁵ Therefore, to dispossess the owner, the squatter must satisfy the two elements of possession, namely factual possession (*factum possessionis*) coupled with the intention to possess (*animus possidendi*).⁴⁶

Discontinuance, on the other hand, occurs when the owner goes out of possession or abandons it and the squatter then takes up possession.⁴⁷ Due to this fine distinction, some sources state that the intention of the owner may be important in this regard.⁴⁸ This approach is incorrect, since the mere intention of the owner cannot prevent a person from having adverse possession.⁴⁹ According to the courts, an owner can prevent a discontinuance of possession by

⁴¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434 per Lord Browne-Wilkinson; *Wretham v Ross* [2005] EWHC 1259 Ch para 16; *Buckinghamshire County Council v Moran* [1990] Ch 623 637 per Slade LJ.

⁴² *Rains v Buxton* (1880) 14 Ch D 537 539-540, quoted with approval in *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ and referred to by Nourse LJ at 644.

⁴³ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434-435 per Lord Browne-Wilkinson and per Lord Hope of Craighead at 445; *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 32 per Mummery LJ; *Wretham v Ross* [2005] EWHC 1259 Ch para 16. For an example in this regard, see *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 paras 44-46, where Clarke LJ held that by breaking the padlock to a flat and replacing it with his own, the squatter dispossessed the owner of his possession over the flat. The word “ouster” – which is derived from pre-1833 adverse possession law and “has overtones of confrontational, knowing removal of the true owner from possession” – no longer applies in English law: See *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434-435 per Lord Browne-Wilkinson. See also Smith RJ *Property Law* (6th ed 2009) 70-71 and Dockray M “Adverse Possession and Intention Part F” 1982 *Conveyancer* 256-264.

⁴⁴ *Powell v McFarlane* (1979) 38 P & CR 452 469, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433 per Lord Browne-Wilkinson and in *Wretham v Ross* [2005] EWHC 1259 Ch para 16. In this instance “dispossession” is similar to adverse possession, which also has to be without licence or consent from the owner: See section 3.2.2.3.2 below.

⁴⁵ *Buckinghamshire County Council v Moran* [1990] Ch 623 644 per Nourse LJ.

⁴⁶ Possession, with its two elements of factual possession and the intention to possess, is discussed in section 3.2.2.3.2 below.

⁴⁷ See generally *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 694; *Buckinghamshire County Council v Moran* [1990] Ch 623 644 per Nourse LJ; *Powell v McFarlane* (1979) 38 P & CR 452 468. See also Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-015.

⁴⁸ *Buckinghamshire County Council v Moran* [1990] Ch 623 644 per Nourse LJ.

⁴⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 435 per Lord Browne-Wilkinson; *Buckinghamshire County Council v Moran* [1990] Ch 623 645 per Nourse LJ.

the slightest acts of ownership – even by none at all – if such owner intends to use the land for a specific purpose in the future.⁵⁰ Although this position is correct, it merely indicates that a squatter must dispossess the owner before she can obtain adverse possession.⁵¹

The factual possession and *animus possidendi* required for dispossession are similar to what is required for discontinuance, since there is “no practical distinction between what is necessary to exclude all the world in a case where the true owner has retained possession and in one where he has discontinued it.”⁵² Against this background, it seems that the distinction between discontinuance and dispossession has indeed become more of a theoretical than practical reality. Therefore, it is questionable whether a material distinction exists between dispossession and discontinuance of possession for purposes of adverse possession.⁵³ It seems that the deciding factor should rather be whether the squatter has dispossessed the owner through obtaining possession – without her consent – of the land for the duration of the limitation period.⁵⁴ It follows that the taking or continuation of possession by the squatter with the owner’s consent does not constitute dispossession or (adverse) possession.⁵⁵

In cases pertaining to dispossession, the limitation period commences on the date that the squatter dispossesses the owner.⁵⁶ As to discontinuance, the period commences on the date that the possessor obtains possession.⁵⁷ This again highlights the fact that the distinction between these two concepts is immaterial.

3.2.2.3 *Adverse possession*

⁵⁰ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 19 per Clarke LJ; *Buckinghamshire County Council v Moran* [1990] Ch 623 644 per Nourse LJ; *Powell v McFarlane* (1979) 38 P & CR 452 468, 472. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.40.

⁵¹ *Buckinghamshire County Council v Moran* [1990] Ch 623 644 per Nourse LJ.

⁵² *Buckinghamshire County Council v Moran* [1990] Ch 623 644-645 per Nourse LJ.

⁵³ *Buckinghamshire County Council v Moran* [1990] Ch 623 645 per Nourse LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.36; Smith RJ *Property Law* (6th ed 2009) 71; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-016; Jourdan S *Adverse Possession* (2003) paras 5-18–5-20.

⁵⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 435 per Lord Browne-Wilkinson; *Wretham v Ross* [2005] EWHC 1259 Ch para 16; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 39 per Parker LJ.

⁵⁵ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434-435 per Lord Browne-Wilkinson; *Wretham v Ross* [2005] EWHC 1259 Ch para 16.

⁵⁶ Schedule 1, paragraph 1 of the Limitation Act 1980.

⁵⁷ Schedule 1, paragraphs 1 and 8(1) of the Limitation Act 1980.

3.2.2.3.1 *The meaning of “adverse” in adverse possession*⁵⁸

It is important to clarify the meaning of the word “adverse” and its place in adverse possession law before discussing the substantive requirements of this legal institution. This is by no means a simple feat, since the concepts of “adverse” possession, factual possession and *animus possidendi* sometimes tend to overlap to a certain extent, which makes it difficult to distinguish them clearly. Therefore, the discussion necessitates a brief historical overview of the “adverse” concept, introduced through the notion of “non-adverse possession”, which formed part of English limitation law prior to 1833.⁵⁹

In essence, adverse possession before 1833 denoted “an ouster and use of the land by the squatter of a kind which was clearly inconsistent with the paper title.”⁶⁰ Such inconsistent use was known as “adverse possession”.⁶¹ It is unnecessary, however, to discuss the content and ambit of that type of adverse possession here,⁶² since the Real Property Limitation Act abolished the doctrine of non-adverse possession in 1833.⁶³ It has since been incorrect to use these old notions – namely “adverse possession” or “ouster from possession” – in judicial decisions.⁶⁴ Nonetheless, “adverse possession” again made its appearance in the 1939 and 1980 Limitation Acts. Despite this reoccurrence, references to adverse possession in these acts do not reintroduce the old notions of adverse possession from before 1833.⁶⁵

The 1980 Act defines adverse possession as being present where “land is in the possession of some person in whose favour the period of limitation can run.”⁶⁶ The courts decided that adverse possession in this context does not relate to the nature of the possession, but rather to

⁵⁸ For an extensive analysis of the concept “adverse” in adverse possession, see Jourdan S *Adverse Possession* (2003) paras 6-01–6-35.

⁵⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433 per Lord Browne-Wilkinson. See also Dockray M “Adverse Possession and Intention Part I” 1982 *Conveyancer* 256-264 260.

⁶⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433 per Lord Browne-Wilkinson. See also Dockray M “Adverse Possession and Intention Part I” 1982 *Conveyancer* 256-264 260.

⁶¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433 per Lord Browne-Wilkinson. See also Dockray M “Adverse Possession and Intention Part I” 1982 *Conveyancer* 256-264 260.

⁶² See *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433-434 per Lord Browne-Wilkinson for a detailed discussion. See generally Dockray M “Adverse Possession and Intention Part I” 1982 *Conveyancer* 256-264.

⁶³ Later followed by the Real Property Limitation Act 1874.

⁶⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433-434 per Lord Browne-Wilkinson. See generally *Paradise Beach Co Ltd v Price-Robinson* [1968] AC 1072; *Culley v Taylerson* (1840) 11 A & E 1008; *Nepean v Doe* (1837) 2 M & W 894. See also Dockray M “Adverse Possession and Intention Part I” 1982 *Conveyancer* 256-264 260.

⁶⁵ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434 per Lord Browne-Wilkinson. See also Dockray M “Adverse Possession and Intention Part I” 1982 *Conveyancer* 256-264 260.

⁶⁶ Schedule 1, paragraph 8(1) of the Limitation Act 1980.

the capacity of the squatter.⁶⁷ Accordingly, references to adverse possession under the 1980 Act do not reintroduce the old notions of pre-1833 limitation law.⁶⁸ According to Lord Browne-Wilkinson, the question surrounding adverse possession today should rather be whether the squatter has “dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.”⁶⁹ This section proceeds to illustrate the content of “adverse” possession against this background.

Prima facie the word “adverse” seems to indicate that it requires possession to be hostile or aggressive. It was seen above that this is not the case, since the use of the term adverse possession is now merely meant to indicate that the possession is adverse to the interests of the owner.⁷⁰ Possession cannot be adverse if it is enjoyed under a lawful title from the owner, since it is – both semantically and legally – impossible to be in adverse possession with an owner’s consent.⁷¹ If a person occupies or uses land by licence of the owner and that licence has not been properly determined, such person cannot be in adverse possession.⁷² Consequently, adverse possession requires the squatter to show that her possession was “not pursuant to a licence, a tenancy, or some other grant, whether express or implied, from the owner.”⁷³ This position is similar to that in South African prescription law, where the presence of such a grant or licence also prevents the running of prescription.⁷⁴ If a squatter occupies land with permission from the owner, it is clear that the squatter – and not the owner – then enjoys possession, although such possession cannot be adverse as long as the licence is

⁶⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434 per Lord Browne-Wilkinson, subsequently followed in *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 31 per Mummery LJ and *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 paras 39, 71 per Parker LJ.

⁶⁸ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434 per Lord Browne-Wilkinson. See also Dockray M “Adverse Possession and Intention Part I” 1982 *Conveyancer* 256-264 260.

⁶⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434 per Lord Browne-Wilkinson. See also Dockray M “Adverse Possession and Intention Part I” (1982) *Conveyancer* 256-264 260.

⁷⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 445 per Lord Hope of Craighead. See also *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 30 per Mummery LJ; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 40 per Parker LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 18 per Clarke LJ.

⁷¹ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 33 per Mummery LJ; *Wretham v Ross* [2005] EWHC 1259 Ch para 41; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693; *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 469. See also Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-016

⁷² *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693; *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 469.

⁷³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 694. See generally *Hayward v Chaloner* [1968] 1 QB 107.

⁷⁴ See sections 2.3.2.1.1 and 2.3.2.4 of chapter two above.

in force.⁷⁵ However, if the squatter remains in occupation after the expiration of the licence, such possession can then become adverse.⁷⁶ Although authors disagree on this point, it appears that the necessary intention to possess will be absent if the squatter believes that possession is still held with permission from the owner, even though it was terminated.⁷⁷ Yet, it is plain that one must be able to discern such a belief from the possessor's conduct. Jourdan, in his authoritative book on adverse possession, describes adverse possession as "wrongful" possession.⁷⁸

3.2.2.3.2 *Elements of adverse possession: Factual possession and intention to possess*

3.2.2.3.2.1 Introduction

Since the 1980 Act defines neither "possession" nor "dispossession", one has to use English common law to ascertain the meaning of these terms.⁷⁹ The squatter obtains possession (and such possession is "adverse") only if she satisfies both elements of possession, namely:

- i) sufficient physical control (*factum possessionis*); coupled with
- ii) the intention to possess the land (*animus possidendi*).⁸⁰

⁷⁵ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 694-695.

⁷⁶ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 695.

⁷⁷ *Clowes Developments (UK) Ltd v Walters* [2006] 1 P & CR 1 13-16. See also Smith RJ *Property Law* (6th ed 2009) 74. To the contrary is *Wretham v Ross* [2005] EWHC 1259 Ch para 40 and Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.48.

⁷⁸ Jourdan S *Adverse Possession* (2003) para 6-06. See also *Buckinghamshire County Council v Moran* [1990] Ch 623 644 per Nourse LJ.

⁷⁹ This is similar to the position under the Prescription Act 18 of 1943 and Prescription Act 68 of 1969 in South African law, which also do not define "possession". For a discussion in this regard, see sections 2.3.1-2.3.2 of chapter two above.

⁸⁰ *Ofulue v Bossert* [2009] UKHL 16 para 67 per Lord Neuberger of Abbotsbury; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 432-433, 435 per Lord Browne-Wilkinson and per Lord Hope of Craighead at 445-446; *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 29 per Mummery LJ; *Wretham v Ross* [2005] EWHC 1259 Ch paras 16-17; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 paras 37-38 per Parker LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 12 per Clarke LJ; *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 469. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.43; Smith RJ *Property Law* (6th ed 2009) 72. United States ("US") adverse possession law seems also to require mere *animus possidendi*, although some authors refer to this intention as the "intent to maintain dominion": See Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2423-2432. The requirement of an intention to possess (*animus possidendi*) is lower than what is required by most civil-law based jurisdictions, namely South African (discussed in section 2.3.2.1.1 in chapter two above), Dutch (discussed in section 3.3.2.2.1 below), French (discussed in section 3.4.2.1 below) and German (discussed in section 3.5 below) law, all of which require the possessor to have the intention of an owner (*animus domini*). Even Italian and Belgian law require a person to possess property with the *animus domini* before such person can qualify as a possessor: See Caterina R "Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*" (2007) 15 *European Review of Private Law* 273-279 273 and Sagaert V "De Verkrijgende Verjaring van Onroerende Goederen Herbezocht.

Neither the occupation of land itself, nor the mere intention to possess without physical detention, will suffice.⁸¹ These requirements (occupation and intention) are complementary and must coincide for the entire limitation period before a person can be in possession.⁸² A person who claims to have “dispossessed” an owner must likewise fulfil both these requirements.⁸³ Consequently, if a squatter dispossesses the owner by taking possession of the land without the owner’s consent, such dispossession constitutes adverse possession for purposes of the 1980 Act.⁸⁴ This confirms that factual possession of land coupled with the necessary *animus possidendi* by the squatter (to exclude everyone else) constitutes adverse possession.⁸⁵ This state of affairs, namely adverse possession, must exist for the whole duration of the limitation period.⁸⁶ Should possession cease to be adverse, it will revert to the owner and the limitation period will only commence *de novo* once the squatter regains adverse possession.⁸⁷

Possession is normally single and exclusive, the exception being in cases concerning joint possessors,⁸⁸ since only one person can be in possession of land at any given time.⁸⁹ The owner therefore ceases to enjoy possession the moment the squatter obtains it.⁹⁰ A squatter dispossesses an owner if the owner was in possession of the land at one stage, but the squatter’s subsequent occupation then constitutes possession.⁹¹ The question whether the squatter possessed the land (*factum possessionis*) with the requisite intention (*animus*

Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1587. I am indebted to Prof Sagaert for bringing his article under my attention.

⁸¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 446 per Lord Hope of Craighead; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 40 per Parker LJ.

⁸² *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 469. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.43.

⁸³ *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 469.

⁸⁴ *Powell v McFarlane* (1979) 38 P & CR 452 469, although this case dealt with the Limitation Act 1939.

⁸⁵ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434 per Lord Browne-Wilkinson, followed in *Roberts v Swangrove Estates Ltd* [2008] Ch 439 paras 32, 88 per Mummery LJ.

⁸⁶ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 33 per Mummery LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 29 per Clarke LJ. See also Smith RJ *Property Law* (6th ed 2009) 77.

⁸⁷ Schedule 1, paragraph 8(2) of the Limitation Act 1980. See further *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 33 per Mummery LJ.

⁸⁸ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 435 per Lord Browne-Wilkinson and per Lord Hope of Craighead at 445; *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 33 per Mummery LJ. In the *Roberts* case, Mummery LJ stated that joint tenants count as one person. See further *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 40 per Parker LJ.

⁸⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 445 per Lord Hope of Craighead; *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 33 per Mummery LJ.

⁹⁰ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 695.

⁹¹ Schedule 1, paragraph 1 of the Limitation Act 1980. See also *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 435 per Lord Browne-Wilkinson; *Treloar v Nute* [1976] 1 WLR 1295 1300.

possidendi) depends on whether the owner has discontinued possession or was dispossessed by the squatter.⁹² In both instances, the crucial question is whether the squatter was in *possession* of the land.

The law deems the owner – in the absence of evidence indicating otherwise – as being in possession of the land.⁹³ It follows that the law requires clear evidence that the squatter had both factual possession and held it *animo possidendi* before the courts will recognise such squatter as being in adverse possession.⁹⁴

3.2.2.3.2.2 Factual possession (*factum possessionis*)⁹⁵

Slade J, as he then was, defined factual possession as follows:

“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession ... Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.”⁹⁶

It has also been described as “[a] sufficient degree of physical custody and control.”⁹⁷ This description of *factum possessionis* largely corresponds with what is required to constitute *corpus* in South African law.⁹⁸ A squatter does not have to have complete physical control over every piece of the occupied land to satisfy the *factum possessionis* requirement, since this is simply impractical.⁹⁹ Consequently, *factum possessionis* must be determined with reference

⁹² See generally *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 431 per Lord Browne-Wilkinson.

⁹³ *Powell v McFarlane* (1979) 38 P & CR 452 470; *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 33 per Mummery LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 13 per Clarke LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.40.

⁹⁴ *Powell v McFarlane* (1979) 38 P & CR 452 470-472. See also *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 36 per Clarke LJ, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 448 per Lord Hutton and approved by Lord Hope of Craighead at 446. See generally *Wretham v Ross* [2005] EWHC 1259 Ch paras 15, 20.

⁹⁵ For an extensive analysis of factual possession, see Jourdan S *Adverse Possession* (2003) paras 8-01–8-25.

⁹⁶ *Powell v McFarlane* (1979) 38 P & CR 452 470-471, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 436 per Lord Browne-Wilkinson. See also *Wretham v Ross* [2005] EWHC 1259 Ch para 18; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 14 per Clarke LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 689; *Buckinghamshire County Council v Moran* [1990] Ch 623 641 per Slade LJ.

⁹⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 435 per Lord Browne-Wilkinson.

⁹⁸ See section 2.3.2.1.2 of chapter two above.

⁹⁹ *Powell v McFarlane* (1979) 38 P & CR 452 471. See also *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 78 per Mummery LJ. See further Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.52.

to an objective standard, which is related to the nature and situation of the land involved.¹⁰⁰ Consequently, acts of possession exercised on parts of the land can constitute possession of the whole, although this depends on the type of land and the degree of use.¹⁰¹ A helpful test to determine factual possession is whether “the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.”¹⁰²

The question of *factum possessionis* is related to the *animus possidendi*, since one deduces this intention from physical acts of the squatter.¹⁰³ A person does not obtain possession until she has exclusive enjoyment of the land.¹⁰⁴ The question of what amounts to such exclusive enjoyment depends on the nature of the property as well as the manner in which land of that nature is commonly used or enjoyed.¹⁰⁵ For instance, fishing could – in the way it has done – constitute factual possession.¹⁰⁶ A lack of fencing by the squatter is indicative that she did not have factual possession, although this fact (by itself) is not conclusive.¹⁰⁷ Furthermore, factual possession must also be peaceable and open.¹⁰⁸

3.2.2.3.2.3 Intention to possess (*animus possidendi*)¹⁰⁹

A squatter must have the intention to possess – together with the *factum possessionis* – before she can obtain possession over land. *Powell v McFarlane*¹¹⁰ provides the definition for *animus possidendi*:

¹⁰⁰ *Powell v McFarlane* (1979) 38 P & CR 452 471.

¹⁰¹ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 78 per Mummery LJ; *Powell v McFarlane* (1979) 38 P & CR 452 471. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.52.

¹⁰² *Powell v McFarlane* (1979) 38 P & CR 452 471, quoted with approval in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 689. See also *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 78 per Mummery LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 15 per Clarke LJ.

¹⁰³ See especially *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 36 per Clarke LJ, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 448 per Lord Hutton and approved by Lord Hope of Craighead at 446. See also generally *Wretham v Ross* [2005] EWHC 1259 Ch paras 15, 20.

¹⁰⁴ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 paras 33, 75 per Mummery LJ.

¹⁰⁵ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 paras 33, 75 per Mummery LJ.

¹⁰⁶ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 75 per Mummery LJ.

¹⁰⁷ *Wretham v Ross* [2005] EWHC 1259 Ch para 47.

¹⁰⁸ *Browne v Perry* [1991] 1 WLR 1297 1302 per Lord Templeman. See also *Wretham v Ross* [2005] EWHC 1259 Ch para 16; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 86 per Parker LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 18 per Clarke LJ. This corresponds with the South African prescription requirements that possession must be open and *nec vi* (without violence), see section 2.3.2.2 of chapter two above.

¹⁰⁹ For an extensive discussion regarding the *animus possidendi* requirement, see Jourdan S *Adverse Possession* (2003) paras 9-01–9-99.

¹¹⁰ (1979) 38 P & CR 452.

“[T]he *animus possidendi* involves the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the process of the law will allow.”¹¹¹

It is not the *nature* of the squatter’s physical control alone, but also the *intention* with which these physical acts are performed that determines whether such squatter has possession.¹¹² However, one can only deduce a person’s mental attitude from her physical acts.¹¹³ It follows that *factum possessionis* offers the best evidence to establish whether the *animus possidendi* is present.¹¹⁴ It is helpful to restate that the law deems an owner – or another person with the right to possession of the land – to have possession as the point of departure, unless and until someone presents evidence to the contrary.¹¹⁵

The *animus possidendi* entails an intention to *possess* the land and not an intention to *appropriate, own* or even to *become owner* of it.¹¹⁶ The necessary intention is “the intent to exercise exclusive control over the thing for oneself”.¹¹⁷ However, it is not required that the squatter must intend to exclude the owner in all future circumstances.¹¹⁸ This position greatly differs from South African prescription law, which requires the *animus domini* (intention of an owner) to satisfy the *possessio civilis* requirement for acquisitive prescription.¹¹⁹ Interestingly, even a squatter who mistakenly believes that she is the owner of the disputed land is able to

¹¹¹ *Powell v McFarlane* (1979) 38 P & CR 452 471-472, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 437 per Lord Browne-Wilkinson and per Lord Hutton at 488. See also *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 79 per Mummery LJ; *Wretham v Ross* [2005] EWHC 1259 Ch paras 19, 25; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 43 per Parker LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 689; *Buckinghamshire County Council v Moran* [1990] Ch 623 641 per Slade LJ.

¹¹² *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 436 per Lord Browne-Wilkinson.

¹¹³ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 446 per Lord Hope of Craighead; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 40 per Parker LJ.

¹¹⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 446 per Lord Hope of Craighead; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 40 per Parker LJ. See also *Wretham v Ross* [2005] EWHC 1259 Ch para 20.

¹¹⁵ *Powell v McFarlane* (1979) 38 P & CR 452 472; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 19 per Clarke LJ.

¹¹⁶ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 436-437 per Lord Browne-Wilkinson; *Wretham v Ross* [2005] EWHC 1259 Ch para 19; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 44 per Parker LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 16 per Clarke LJ and per Judge LJ at para 60; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 689-690; *Buckinghamshire County Council v Moran* [1990] Ch 623 643 per Slade LJ and per Nourse LJ at 646. Butler-Sloss agreed with both Slade LJ and Nourse at 647. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.53; Jourdan S *Adverse Possession* (2003) para 9-07.

¹¹⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 446 per Lord Hope of Craighead, quoted with approval in *Wretham v Ross* [2005] EWHC 1259 Ch para 20.

¹¹⁸ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 27 per Clarke LJ, expressly disapproving on this point of *Buckinghamshire County Council v Moran* [1990] Ch 623, which is to the contrary.

¹¹⁹ See section 2.3.2.1.1 of chapter two above.

hold it *animo possidendi*.¹²⁰ Although such a belief will also not terminate the requisite intention for prescription in South African law, which must be *animo domini*, it is worth emphasising that English law merely requires an *intention to possess*.¹²¹ Nonetheless, even a person who knows that the land belongs to another can obtain it through adverse possession, since the *fides* of the squatter is irrelevant for purposes of establishing the *animus possidendi*.¹²² The *fides* of the possessor is also irrelevant in the context of *animus domini* in South African prescription law, which has only one prescription period for both good and bad faith possessors.¹²³

According to case law, equivocal acts by the squatter are unlikely to satisfy the *animus possidendi* requirement.¹²⁴ Therefore, the courts will not treat a squatter as possessing *animo possidendi* if her acts are open to more than one interpretation.¹²⁵ It must be unequivocal from the squatter's acts that she intended to exclude the owner as far as possible.¹²⁶ Unfortunately, few acts exist that are *prima facie* able to demonstrate the *animus possidendi*. Acts of this nature include enclosures, as – according to Cockburn CJ – “[e]nclosure is the strongest possible evidence of adverse possession.”¹²⁷ To the same effect is Russell LJ, who stated that “[o]rdinarily, of course, enclosure is the most cogent evidence of adverse possession and of dispossession of the paper owner.”¹²⁸ However, not even enclosure (on its own) will always be conclusive.¹²⁹

¹²⁰ *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 87 per Mummery LJ. See also generally *Hughes v Cork* [1994] EGCS 25.

¹²¹ See section 2.3.2.1.1 of chapter two above for the position in South African law.

¹²² *Roberts v Swangrove Estates Ltd* [2008] Ch 439 para 87 per Mummery LJ.

¹²³ See section 2.3.2.1.1 of chapter two above.

¹²⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 447 per Lord Hutton; *Wretham v Ross* [2005] EWHC 1259 Ch para 21; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 41 per Parker LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 20 per Clarke LJ; *Buckinghamshire County Council v Moran* [1990] Ch 623 642 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 472; *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633 642 per Sachs LJ.

¹²⁵ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 447 per Lord Hutton; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 41 per Parker LJ; *Powell v McFarlane* (1979) 38 P & CR 452 472; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 paras 19-20 per Clarke LJ.

¹²⁶ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 20 per Clarke LJ; *Powell v McFarlane* (1979) 38 P & CR 452 471-472 per Slade J. See also Smith RJ *Property Law* (6th ed 2009) 73.

¹²⁷ *Seddon v Smith* (1877) 36 LT 168 169, quoted with approval in both *Buckinghamshire County Council v Moran* [1990] Ch 623 641 per Slade LJ and in *Powell v McFarlane* (1979) 38 P & CR 452 478. See also *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 paras 23-25 per Clarke LJ; *Marshall v Taylor* [1895] 1 Ch 641 645 per Lord Halsbury.

¹²⁸ *George Wimpey & Co Ltd v Sohn* [1967] Ch 487 511, quoted with approval in *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 25 per Clarke LJ and in *Buckinghamshire County Council v Moran* [1990] Ch 623 641 per Slade LJ. See also Smith RJ *Property Law* (6th ed 2009) 71.

¹²⁹ *Seddon v Smith* (1877) 36 LT 168 169 per Cockburn CJ. See also generally *Littledale v Liverpool College* [1900] 1 Ch 19; *George Wimpey & Co Ltd v Sohn* [1967] Ch 487. See further Harpum C, Bridge S & Dixon M

To plough up and cultivate agricultural land is also likely to satisfy the *animus possidendi* requirement.¹³⁰ To place a new lock and chain on the gate, for example, also unequivocally points to the possessor's intention to possess the land.¹³¹ A similar example is a possessor that breaks the lock of a flat, replaces it with her own and then lives in the flat.¹³² To put up a notice on the land that warns intruders to keep out – together with actual enforcement of such a notice – is another act that can establish *animus possidendi*.¹³³

It is worth repeating that the squatter's acts must only be open to one interpretation, namely that she has – through her conduct – made it clear that she intends to exclude the owner as far as possible.¹³⁴ The squatter must also make her intentions sufficiently clear or open so that an owner, who exercises reasonable care, would have discovered such a squatter.¹³⁵ This corresponds to the *nec clam* (openness) requirement for prescription in South African law.¹³⁶

The reason why the possessor must only exclude the owner as far as “reasonably practicable” is because – until such possessor obtains ownership through adverse possession – she is not able to use legal means to exclude the owner.¹³⁷ Therefore, it will be sufficient if the possessor intends to keep the owner out until the owner evicts her.¹³⁸

A court is unlikely to find – in the absence of sufficient evidence – that the squatter intended to assert a right to the possession of the land.¹³⁹ This again emphasises the fact that *factum possessionis* and *animus possidendi* are closely entwined and that it is indeed “difficult to find

Megarry and Wade: The Law of Real Property (7th ed 2008) para 35-018; Smith RJ *Property Law* (6th ed 2009) 71.

¹³⁰ *Powell v McFarlane* (1979) 38 P & CR 452 478. See also *Seddon v Smith* (1877) 36 LT 168.

¹³¹ *Buckinghamshire County Council v Moran* [1990] Ch 623 642 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 478. See also *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 25 per Clarke LJ.

¹³² *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 26 per Clarke LJ. See similarly *Wretham v Ross* [2005] EWHC 1259 Ch para 35.

¹³³ *Powell v McFarlane* (1979) 38 P & CR 452 478.

¹³⁴ *Powell v McFarlane* (1979) 38 P & CR 452 472, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 447 per Lord Hutton. See also *Wretham v Ross* [2005] EWHC 1259 Ch para 24; *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 73 per Parker LJ; *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 19 per Clarke LJ. See also Smith RJ *Property Law* (6th ed 2009) 73.

¹³⁵ *Wretham v Ross* [2005] EWHC 1259 Ch para 29; *Powell v McFarlane* (1979) 38 P & CR 452 480.

¹³⁶ See section 2.3.2.3 of chapter two above.

¹³⁷ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 16 per Clarke LJ; *Powell v McFarlane* (1979) 38 P & CR 452 471-472. See also Smith RJ *Property Law* (6th ed 2009) 73.

¹³⁸ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 17 per Clarke LJ.

¹³⁹ *Buckinghamshire County Council v Moran* [1990] Ch 623 640 per Slade LJ.

a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention.”¹⁴⁰ The intention to possess does not require an intention to exclude the owner.¹⁴¹

Before the enactment of the 1980 Act, certain court cases seemed to establish a general doctrine for one special type of case, namely where the acts of the squatter were not inconsistent with the intentions of the owner pertaining to the future use of the land. Consequently, the law would then imply a licence – without sufficient justifying reasons – in favour of the would-be adverse possessor that “permitted” her to commit the acts of possession performed on the land.¹⁴² This doctrine, also known as the “special rule” or “implied licence theory”, only applied in one special type of case, namely where the acts of the squatter did not “substantially interfere with the plans the owners might have for the future use of undeveloped land.”¹⁴³ In such a scenario, the effect of the implied licence would be to prevent the squatter from possessing *animo possidendi*. However, paragraph 8(4) of Schedule 1 to the 1980 Act finally laid this debate to rest:

“For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter’s present or future enjoyment of the land. This provision shall not be taken as prejudicing a finding to the effect that a person’s occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case.”

This provision abolishes the assumption that a squatter’s possession was by implied licence if it fell within this special type of case. However, it does not affect situations that justify such a finding on the facts before the Court. It follows that the intention of the owner regarding the

¹⁴⁰ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 36 per Clarke LJ, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 448 per Lord Hutton and approved by Lord Hope of Craighead at 446. See also generally *Wretham v Ross* [2005] EWHC 1259 Ch paras 15, 20.

¹⁴¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 446 per Lord Hope of Craighead, quoted with approval in *Wretham v Ross* [2005] EWHC 1259 Ch paras 20, 25 and in *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 40 per Parker LJ.

¹⁴² *Buckinghamshire County Council v Moran* [1990] Ch 623 637 per Slade LJ. See also *Wallis’s Cayton Bay Holiday Camp Ltd v Shell-Mex & BP Ltd* [1975] QB 94. For a discussion on the conceptual difficulties raised by this doctrine, see especially *Powell v McFarlane* (1979) 38 P & CR 452 484 per Slade LJ. See further Smith RJ *Property Law* (6th ed 2009) 75.

¹⁴³ *Buckinghamshire County Council v Moran* [1990] Ch 623 637 per Slade LJ. As to the content of this doctrine, see generally *Treloar v Nute* [1976] 1 WLR 1295; *Wallis’s Cayton Bay Holiday Camp Ltd v Shell-Mex & BP Ltd* [1975] QB 94 and *Leigh v Jack* (1879) 5 Ex D 264. See also *Powell v McFarlane* (1979) 38 P & CR 452 484.

land today is still not wholly irrelevant.¹⁴⁴ In this sense, Slade LJ in *Buckinghamshire County Council v Moran*¹⁴⁵ said the following:

“If in any given case the land in dispute is unbuilt land and the squatter is aware that the owner, while having no present use for it, has a purpose in mind for its use in the future, the court is likely to require very clear evidence before it can be satisfied that the squatter who claims a possessory title has not only established factual possession of the land, but also the requisite intention to exclude the world at large, including the owner with the paper title, so far as is reasonably practicable and so far as the processes of the law will allow. In the absence of clear evidence of this nature, the court is likely to infer that the squatter neither had had nor had claimed any intention of asserting a right to the possession of the land.”¹⁴⁶

The two preconditions for the application of Slade LJ’s observations are that:

- i) the owner has a purpose in mind for the future use of the land, although she has no present use for the land; and
- ii) that the squatter has knowledge of this.¹⁴⁷

Yet, even if a factual situation complies with both (i) and (ii), this may merely provide support for a finding that the squatter did not intend to possess the land but only intended to occupy it until needed by the owner.¹⁴⁸ Lord Browne-Wilkinson thinks that there will be few scenarios where one can draw such an inference if the owner is excluded from the land.¹⁴⁹ As to whether the squatter’s acts must be inconsistent with the intentions of the owner today, Lord Browne-Wilkinson answered as follows:

“The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user.”¹⁵⁰

As Nourse LJ is of much the same opinion in *Buckinghamshire County Council v Moran*,¹⁵¹ one can safely conclude that the intention of the owner has mostly become irrelevant in

¹⁴⁴ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 691. See also Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-019.

¹⁴⁵ [1990] Ch 623.

¹⁴⁶ *Buckinghamshire County Council v Moran* [1990] Ch 623 639-640, quoted with approval in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 691.

¹⁴⁷ *Hounslow London Borough Council v Minchinton* (1997) 74 P & CR 221 229 per Millett LJ.

¹⁴⁸ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson.

¹⁴⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson, followed in *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 45. See further Smith RJ *Property Law* (6th ed 2009) 73-75, where it is said that “[s]imply taking possession of [the owner’s] land will not justify implying a licence.”

¹⁵⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson, quoted with approval in *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369 para 45 per Parker LJ.

¹⁵¹ [1990] Ch 623.

practice, although it may possibly still have some influence in theory.¹⁵² It follows that “there is now no reason why the words ‘possess’ and ‘dispossess’ or similar expressions should not be given their ordinary legal meaning in the context of the Act of 1980.”¹⁵³ Accordingly, one must deduce the intention to possess from the possessor’s *factum possessionis*, since the law requires unequivocal evidence before a possessor can establish the *animus possidendi* in the context of the special type of case. Thus, the question simply boils down to whether the possessor was in adverse possession.

In the recent decision of *Beaulane Properties Ltd v Palmer*,¹⁵⁴ Strauss QC attempted to reintroduce the implied licence theory from before the 1980 Act.¹⁵⁵ This approach is unattractive, not only because it is in conflict with the decision of the House of Lords in *JA Pye (Oxford) Ltd v Graham*,¹⁵⁶ but also because it affords different meanings to adverse possession in different contexts.¹⁵⁷ After the Grand Chamber of the European Court of Human Rights found adverse possession to be compatible with Article 1 of the First Protocol to the Convention in *JA Pye (Oxford) Ltd v United Kingdom*,¹⁵⁸ it is safer to simply regard *Beaulane* as being of no more than historical value.

The last controversial aspect of the *animus possidendi* concerns the scenario where the squatter may be willing or prepared to pay rent or take a tenancy – should an owner request it. This crucial issue was one of the main questions in the *Pye* decisions decided in the United Kingdom. Lord Diplock provides the answer as follows:

¹⁵² *Buckinghamshire County Council v Moran* [1990] Ch 623 645 per Nourse LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.5; Smith RJ *Property Law* (6th ed 2009) 75; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-019; Jourdan S *Adverse Possession* (2003) para 9-78. To the contrary is *Beaulane Properties Ltd v Palmer* [2006] Ch 79 140 per Strauss QC. See Dixon M “Adverse Possession and Human Rights” 2005 *Conveyancer* 345-351 for a discussion of the *Beaulane* case.

¹⁵³ *Buckinghamshire County Council v Moran* [1990] Ch 623 637 per Slade LJ. To the same effect is *Buckinghamshire County Council v Moran* [1990] Ch 623 639-640 per Slade LJ and per Nourse LJ at 646. See also *Wretham v Ross* [2005] EWHC 1259 Ch para 16.

¹⁵⁴ *Beaulane Properties Ltd v Palmer* [2006] Ch 79.

¹⁵⁵ *Beaulane Properties Ltd v Palmer* [2006] Ch 79 140. For a discussion of this case, see Radley-Gardner O “*Pye (Oxford) Ltd v. United Kingdom: The View from England*” (2007) 15 *European Review of Private Law* 289-308 292-294; Dixon M “Adverse Possession and Human Rights” 2005 *Conveyancer* 345-351; Cloherty A “Heresies and Human Rights” (2005) 64 *Cambridge Law Journal* 558-560.

¹⁵⁶ It being described as a “heresy”: See [2003] 1 AC 419 438 per Lord Browne-Wilkinson.

¹⁵⁷ Radley-Gardner O “*Pye (Oxford) Ltd v. United Kingdom: The View from England*” (2007) 15 *European Review of Private Law* 289-308 294; Dixon M “Adverse Possession and Human Rights” 2005 *Conveyancer* 345-351 350; Cloherty A “Heresies and Human Rights” (2005) 64 *Cambridge Law Journal* 558-560.

¹⁵⁸ (2008) 46 EHRR 45 (GC).

“Their lordships do not consider that an admission of this kind [willingness to pay rent or take a tenancy], which any candid squatter hoping in due course to acquire a possessory title would be almost bound to make, indicates an absence of the *animus possidendi* necessary to constitute adverse possession.”¹⁵⁹

It is now trite law that a willingness of this kind, even where the squatter regards herself as a tenant, will not negate the *animus possidendi*.¹⁶⁰ This is because the *animus possidendi* encompasses an intention to exclude everyone from the land, including the owner, but only as far as it is possible for her to do so.¹⁶¹ Consequently, although an offer by the squatter to pay rent or to take a tenancy amounts an acknowledgement of the owner’s title, such acts are not inconsistent with possessing land *animo possidendi*.¹⁶² Indeed, Neuberger J states that “[t]he mere recognition of the owner’s ability, if he chooses to exercise it, to reclaim possession is not an acknowledgement that the owner actually has possession.”¹⁶³ The position is wholly the opposite in South African law. Should the squatter acknowledge the ownership of the owner in South African prescription law in any way, such as by being prepared to pay rent if so requested, she will no longer possess *animo domini*, since the intention will then simply be to hold the land as a *detentor* and not of possessing it *as owner*.¹⁶⁴ Yet, such a willingness must be clearly discernable from the possessor’s actions before it will terminate the *animus domini* in South African law, since it is impossible to look into the mind of another.¹⁶⁵

However, should the squatter request the owner to keep out other people, such request results in an acknowledgement that the owner – rather than the squatter – is in possession, which will

¹⁵⁹ *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 24 per Lord Diplock, quoted with approval in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson and referred to with approval by Lord Hutton at 448. Also quoted with approval in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 692 and in *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 34 per Clarke LJ and by Judge LJ at para 60.

¹⁶⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson, quoted with approval in *Wretham v Ross* [2005] EWHC 1259 Ch para 42. See also *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 34 per Clarke LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 692; *Lodge v Wakefield Metropolitan City Council* [1995] 2 EGLR 124 126; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 24 per Lord Diplock. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.48.

¹⁶¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693. See also *Buckinghamshire County Council v Moran* [1990] Ch 623; *Powell v McFarlane* (1979) 38 P & CR 452.

¹⁶² *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693.

¹⁶³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693.

¹⁶⁴ Voet 44.3.9. See especially *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 9; *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 945; *Wood v Baynesfield Board of Administration* 1975 (2) SA 692 (N) 698; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467 477. See further section 2.3.2.1.1 of chapter two above.

¹⁶⁵ See section 2.3.2.1.1 of chapter two above.

negate the *animus possidendi*.¹⁶⁶ By contrast, an offer to pay rent is an offer to change the basis upon which the squatter maintains possession; she still has possession and the *animus possidendi* will be consistent with it.¹⁶⁷ Consequently, the mere preparedness of a squatter to take a licence or tenancy from the owner will not prevent such squatter from possessing *animus possidendi*.¹⁶⁸ This is because the informed squatter knows that she cannot lawfully exclude the owner.¹⁶⁹ However, it is possible for a squatter to express an offer in such a way that may be able to terminate the *animus possidendi*.¹⁷⁰ To summarise, if a squatter communicates a preparedness to lease the land from the owner, this alone does not prevent the squatter from possessing *animus possidendi*.¹⁷¹ However, this preparedness may impede the squatter's ability to prove that she possessed the land *animus possidendi*.¹⁷²

When a squatter declares that she possessed the land *animus possidendi*, the law attaches little evidentiary value to such oral evidence.¹⁷³ This is because such evidence is capable of being merely self-serving, while being difficult for an owner to refute.¹⁷⁴ Thus, one must infer the intention to possess from the squatter's (unequivocal) actions,¹⁷⁵ which is also the position in South African prescription law to determine the presence of the *animus domini*.¹⁷⁶

¹⁶⁶ *Pavledes v Ryesbridge Properties Ltd* (1989) 58 P & CR 459 481, followed in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693.

¹⁶⁷ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693.

¹⁶⁸ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 34 per Clarke LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 695; *Lodge v Wakefield Metropolitan City Council* [1995] 2 EGLR 124 126; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 24 per Lord Diplock.

¹⁶⁹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697; *Lodge v Wakefield Metropolitan City Council* [1995] 2 EGLR 124 126; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 24 per Lord Diplock. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.48.

¹⁷⁰ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 34 per Clarke LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697.

¹⁷¹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.48.

¹⁷² *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 33 per Clarke LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697; *Lodge v Wakefield Metropolitan City Council* [1995] 2 EGLR 124 126; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 24 per Lord Diplock. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.48.

¹⁷³ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 21 per Clarke LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 691; *Powell v McFarlane* (1979) 38 P & CR 452 476-477.

¹⁷⁴ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 para 21 per Clarke LJ; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 691; *Powell v McFarlane* (1979) 38 P & CR 452 476-477.

¹⁷⁵ *Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912 paras 21, 46 per Clarke LJ; *Buckinghamshire County Council v Moran* [1990] Ch 623 642 per Slade LJ; *Powell v McFarlane* (1979) 38 P & CR 452 476-477; *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633 643 per Sachs LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.55.

¹⁷⁶ See section 2.3.2.1.1 of chapter two above.

3.2.2.3.3 *Postponement (suspension) and interruption of the running of limitation*

Postponement or extension of the limitation period, as opposed to interruption, occurs when some impediment suspends the completion of the limitation period in the normal 12-year period while said postponing impediment exists. One or more of the following grounds can postpone the running of limitation in English law: disability, fraud, concealment or mistake.¹⁷⁷ Interruption, by contrast, ensues when a certain event stops the running of limitation, after which it has to commence *de novo*.

Disability entails the situation where a person is a minor or lacks capacity to conduct legal proceedings.¹⁷⁸ If an owner suffers from a disability when the right of action accrues, she is allowed an alternative period of six years to reclaim the property from the time when she ceases to be under the disability or dies (whichever occurred first), irrespective of whether the limitation period has expired.¹⁷⁹ However, no possessor may bring an action for the recovery of land after the expiration of 30 years from the date on which the right of action accrued to the person who suffers from the disability or some person through whom she claims.¹⁸⁰ It follows that if a squatter takes possession of an owner's land when that owner is a mental patient, such owner then has 12 years from the date of the dispossession or six years from her recovery to reclaim possession, whichever is longer.¹⁸¹ However, as mentioned above, the owner cannot reclaim possession of land after the expiration of a period of 30 years from the date of dispossession. An owner's disability only postpones the running of limitation if it existed before or on the date when the right of action accrued.¹⁸² Postponement will not take place if the owner's disability arose after the date of accrual.¹⁸³

A further ground for postponement is fraud or deliberate concealment.¹⁸⁴ The limitation period will not begin to run where

¹⁷⁷ Sections 28 and 32 of the Limitation Act 1980.

¹⁷⁸ Section 38(2) of the Limitation Act 1980.

¹⁷⁹ Section 28(1) of the Limitation Act 1980.

¹⁸⁰ Section 28(4) of the Limitation Act 1980. See Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) paras 35-045–35-047 for a more complete discussion in this regard.

¹⁸¹ Example taken from Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-045.

¹⁸² Section 28(1) of the Limitation Act 1980.

¹⁸³ Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-046.

¹⁸⁴ Section 32(1) of the Limitation Act 1980.

- i) the action is based on the fraud of the squatter; or
- ii) any fact relevant to the owner's right of action has been deliberately concealed from her by the squatter.¹⁸⁵

Under these circumstances, the limitation period will not commence until the owner has discovered the fraud or concealment, or could have discovered it with reasonable diligence.¹⁸⁶ Similar provisions apply to an action for relief from the consequences of a mistake.¹⁸⁷ According to Harpum, Bridge and Dixon, "[t]his rule has a narrow scope, and applies only where the mistake is the gist of the action, i.e. where it is the mistake itself that gives a right to apply to the court for relief."¹⁸⁸

The LA provides as follows concerning the interruption or fresh accrual of limitation periods:

"If the person in possession of the land ... acknowledges the title of the person to whom the right of action has accrued –
(a) the right shall be treated as having accrued on and not before the date of the acknowledgment ..."¹⁸⁹

An acknowledgement of the owner's title or ownership interrupts the running of the limitation period, which causes the period to commence *de novo*. To institute a claim against the squatter for repossession also interrupts the running of limitation, but only once final judgment is given.¹⁹⁰

An owner's right to reclaim possession cannot be revived through an acknowledgement by the squatter once it has been barred under the LA.¹⁹¹ Consequently, it is necessary to obtain

¹⁸⁵ Section 32(1) of the Limitation Act 1980. See Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) paras 35-048–35-050 for a more complete discussion in this regard.

¹⁸⁶ Section 32(1) of the Limitation Act 1980.

¹⁸⁷ Section 32(1)(c) and 32(3)-(4) of the Limitation Act 1980.

¹⁸⁸ Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-050. See Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-050 for a more complete discussion in this regard.

¹⁸⁹ Section 29(2)(a) of the Limitation Act 1980.

¹⁹⁰ *BP Properties Ltd v Buckler* (1987) 55 P & CR 337 344 per Dillon LJ. See also Smith RJ *Property Law – Cases and Materials* (4th ed 2009) 90-91.

¹⁹¹ Section 29(7) of the Limitation Act 1980, read with section 15(1): See *Ofulue v Bossert* [2009] UKHL 16 para 69 per Lord Neuberger of Abbotsbury. See also Smith RJ *Property Law – Cases and Materials* (4th ed 2009) 90-91. In *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009), the Court held (in the context of South African law) that an acknowledgment of the owner's title after the 30-year prescription period has elapsed merely illustrates the mental state with which that property was possessed during the running of prescription, which will be less than the requisite *animus domini*. See

clarity as to what acts constitute an acknowledgment. Section 30(1) of the LA provides that “[t]o be effective ... an acknowledgement must be in writing and signed by the person making it.” It seems that a written offer to purchase the land from the owner or to take a tenancy from her constitutes such an acknowledgement.¹⁹² However, mere oral offers to purchase the land from the owner or to request a licence to use the land are insufficient to constitute an acknowledgment.¹⁹³ An application by the squatter for some entry in the owner’s register of title will also not be sufficient in this regard.¹⁹⁴ Although these actions do not amount to an acknowledgment, they may assist the contention that the squatter did not have the intention to possess.¹⁹⁵ Yet, the investigation as to whether there is sufficient *animus possidendi* “is quite a separate question from [whether] there is an acknowledgement such as to start time running afresh.”¹⁹⁶ In South African law, it is uncertain which acts by the squatter constitute an acknowledgment as well as whether it will be sufficient when made to the owner’s agent.¹⁹⁷

An offer to purchase an interest – even if made expressly “subject to contract” – also amounts to an acknowledgment of the owner’s title.¹⁹⁸ Furthermore, an admission of title in the defence¹⁹⁹ and an offer in a letter can both amount to acknowledgments.²⁰⁰ However, if defence was served more than 12 years before proceedings were brought, it will not be regarded as an acknowledgement, since it does not amount to a continuing acknowledgment.²⁰¹ The effect of section 15 of the LA is that one cannot rely on a formal record – such as a conveyance or entry in the register – after the expiration of 12 years of adverse possession.²⁰² Furthermore, an action that refers to the future – such as a payment of

Sapphire Dawn Trading 42 BK v De Klerk and Others (693/2008) [2009] ZAFSHC 11 (12 February 2009) para 9, together with the discussion in section 2.3.2.1.1 of chapter two above.

¹⁹² *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 696. See also generally *Edginton v Clark* [1964] 1 QB 367.

¹⁹³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 696-697. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.49.

¹⁹⁴ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.49.

¹⁹⁵ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.49.

¹⁹⁶ *Pavledes v Ryesbridge Properties Ltd* (1989) 58 P & CR 459 480. See also *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 696.

¹⁹⁷ See the discussion of the *animus domini* requirement in section 2.3.2.1.1 of chapter two above.

¹⁹⁸ *Ofulue v Bossert* [2009] UKHL 16 para 76 per Lord Neuberger of Abbotsbury, relying on *Edginton v Clark* [1964] 1 QB 367.

¹⁹⁹ This includes a statement in a pleading or statement of case or any other court document: See *Ofulue v Bossert* [2009] UKHL 16 para 79 per Lord Neuberger of Abbotsbury.

²⁰⁰ *Ofulue v Bossert* [2009] UKHL 16 para 77 per Lord Neuberger of Abbotsbury.

²⁰¹ *Ofulue v Bossert* [2009] UKHL 16 para 80 per Lord Neuberger of Abbotsbury.

²⁰² *Ofulue v Bossert* [2009] UKHL 16 para 81 per Lord Neuberger of Abbotsbury.

rent in advance – only stops time running up to the date it occurs.²⁰³ If the squatter acknowledges the owner’s title in a document headed “without prejudice”, such document does not amount to an acknowledgement of title, since it will normally be excluded from evidence.²⁰⁴

3.2.2.3.4 *Adverse possession in relation to leasehold land*

Adverse possession in the case of leasehold land has been refined in English law, which necessitates a brief discussion of this topic.²⁰⁵ There are three main categories in this context, namely adverse possession

- i) by the tenant against her landlord;
- ii) by the tenant against a third party; or
- iii) against the tenant herself.²⁰⁶

It is trite law that the tenant’s possession of the leased premises cannot be adverse as long as the lease persists, since the tenant occupies the premises with the consent of the landlord.²⁰⁷ When a tenant encroaches on land of a third party, which falls in the second category, the law regards her adverse possession as operating in favour of the landlord “in reversioner”.²⁰⁸ Therefore, the tenant – under these circumstances – acquires title on behalf of the landlord.²⁰⁹ As to the final category, a person that claims to have obtained title to freehold land subject to a lease must prove adverse possession for the requisite period against both the tenant *and* the landlord.²¹⁰

²⁰³ See Schedule 1, paragraph 5(2) of the Limitation Act 1980 and *Ofulue v Bossert* [2009] UKHL 16 para 81 per Lord Neuberger of Abbotsbury.

²⁰⁴ *Ofulue v Bossert* [2009] UKHL 16 paras 91, 101 per Lord Neuberger of Abbotsbury.

²⁰⁵ As this forms an entire subcategory to the law of adverse possession that is not relevant for purposes of this dissertation, the discussion in this regard will be brief. For a more detailed discussion, see Gray K & Gray SF *Elements of Land Law* (5th ed 2009) paras 9.1.58–9.1.71.

²⁰⁶ See generally Gray K & Gray SF *Elements of Land Law* (5th ed 2009) paras 9.1.58–9.1.71.

²⁰⁷ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.60. It is possible for a landlord to adversely possess against her own tenant: See Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.60.

²⁰⁸ *Tower Hamlets London Borough Council v Barrett* [2006] 1 P & CR 9 paras 26–30, 90 per Neuberger LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.62; Smith RJ *Property Law* (6th ed 2009) 82.

²⁰⁹ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.62.

²¹⁰ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.63.

3.2.2.3.5 *Aggregation of periods of adverse possession (coniunctio temporum)*²¹¹

Immediately consecutive periods of possession may be aggregated to establish title through adverse possession, as long as the period of adverse possession is continuous.²¹² This is also the position in South African law.²¹³ Yet, successive possessors can only aggregate their periods of possession if the periods of adverse possession were strictly continuous.²¹⁴ If a second squatter takes adverse possession of land initially abandoned by a previous adverse possessor, the second squatter cannot “add” to her own possession the period established by the first adverse possessor.²¹⁵ It speaks for itself that to aggregate successive periods of adverse possession, consecutive squatters must satisfy all the requirements for adverse possession. If this is not the case, the break in adverse possession will restore the owner’s title to its “pristine force”.²¹⁶ A first squatter may also transfer her possession to a second squatter through delivery, who will then continue the period of limitation.²¹⁷ It seems that this may even be the case in situations where the second squatter dispossesses the first squatter, although English law is not clear in this regard.²¹⁸

3.2.3 The *Pye* case: The three United Kingdom decisions

3.2.3.1 *Introduction*

Since the substantive requirements for English adverse possession law prior to the enactment of the LRA were already discussed, this section focuses on one of the most recent and controversial cases regarding adverse possession, namely the *Pye* case.²¹⁹ As this case was taken on appeal twice, with each court taking a different view on especially the *animus*

²¹¹ For an extensive discussion in this regard, see Jourdan S *Adverse Possession* (2003) paras 6-36–6-46.

²¹² *Allen v Matthews* [2007] 2 P & CR 21 para 85 per Lawrence Collins LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.4; Smith RJ *Property Law* (6th ed 2009) 77.

²¹³ See section 2.3.1 of chapter two above.

²¹⁴ *Allen v Matthews* [2007] 2 P & CR 21 para 85 per Lawrence Collins LJ. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.4; Smith RJ *Property Law* (6th ed 2009) 77-78.

²¹⁵ Schedule 1, paragraph 8(2) of the Limitation Act 1980. See further Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.4; Jourdan S *Adverse Possession* (2003) para 6-37.

²¹⁶ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.4.

²¹⁷ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.4; Jourdan S *Adverse Possession* (2003) para 6-37.

²¹⁸ Jourdan S *Adverse Possession* (2003) para 6-40.

²¹⁹ The three decisions are *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676, *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 and *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. The two further decisions decided by the European Court of Human Rights in Strasbourg are reported as *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) and *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC). These two decisions by the European Court of Human Rights are discussed in section 5.3.2.4.2 of chapter five below.

possidendi requirement, it is preferable to discuss each decision on its own. This discussion does not include the judgments by the Fourth and Grand Chambers of the European Court of Human Rights, as indicated earlier, since these decisions do not affect the substantive requirements for adverse possession in English law.²²⁰ These two judgments are dealt with in chapter five, which specifically focuses on the constitutional aspects of prescription or adverse possession.

3.2.3.2 *The facts*

Because the facts were not in dispute, one can divide the period of occupation by the Grahams into different stages. This aids the discussion as to how the different courts dealt with the question of adverse possession and specifically the *animus possidendi*.

JA Pye (Oxford) Ltd (“Pye”) was the registered owner of land (the “disputed land”) that – until 31 December 1983 – the Grahams, who owned property adjacent to the disputed land, occupied under a grazing agreement. Pye had fully enclosed the disputed land with hedges and it was only accessible, except by foot, through a gate kept padlocked by the Grahams. They also had the keys in their possession. On 30 December 1983, Pye instructed the Grahams to vacate the land, as the grazing agreement was about to expire. This was the first stage.

Pye expressly refused to renew the grazing agreement for 1984, as it did not want anyone to graze the land while it applied for planning permission. Despite this refusal, the Grahams remained in occupation and continued to use the land. In June 1984, Pye agreed to sell to them the standing crop of grass on the land, which cut was completed by 31 August 1984. This was the second stage.

Further requests from the Grahams in December 1984 and again in May 1985 to renew the grazing agreement or to take cuts of grass went unanswered. The Grahams continued to occupy and maintain the land, which they from then on farmed as a unit with their adjoining property. After these requests, the Grahams did not attempt to make contact with Pye again and intended to use the land until requested not to do so. They did this with the hope that a

²²⁰ See section 3.2.2.3 above.

further agreement would be forthcoming later. Therefore, from 1 September 1984 until 1998, the Grahams continued to use the whole of the disputed land for farming without Pye's consent. Pye performed no acts on the disputed land during that time. Indeed, nothing was done by or on behalf of Pye on the land from 1 January 1984 onwards. In 1997, Mr Graham registered cautions at the Land Registry against Pye's title on the basis that he obtained title through adverse possession. Pye sought cancellation of the cautions in the High Court by April 1998 and issued proceedings, brought in January 1999, seeking repossession of the land. This period – from September 1984 to January 1999 – constitutes the third stage.

The Grahams contested the claims under the 1980 Act, which, as seen from the discussion above, bars action to recovery of land after 12 years of adverse possession. The Grahams also relied on the Land Registration Act 1925, which provides that after the expiry of the 12-year limitation period, the registered owner is deemed to hold the land in trust for the squatter until that squatter is registered as owner at the Land Registry.

At first instance in the High Court, *JA Pye (Oxford) Ltd and Another v Graham and Another*,²²¹ Neuberger J found that the Grahams satisfied all the requirements for adverse possession and gave judgment in their favour. Nevertheless, he lamented the “injustice” caused in this instance by the application of the law (as it then stood) of adverse possession regarding registered land.²²²

In the Court of Appeal, *JA Pye (Oxford) Ltd v Graham*,²²³ Mummery LJ, with Keene and Sir Martin Nourse LJJ concurring, found that the Grahams did not have the necessary *animus possidendi* and overturned the decision of the High Court. The matter then went to the House of Lords in *JA Pye (Oxford) Ltd v Graham*,²²⁴ where Lord Browne-Wilkinson – who gave judgment on behalf of the majority – found that the Grahams did have the requisite intention to possess and, as a result, overturned the Court of Appeal's decision and so restored the High Court's judgment. However, the House of Lords also emphasised its lack of enthusiasm for arriving at this “apparent unjust result”.²²⁵ As the *animus possidendi* requirement was the

²²¹ [2000] Ch 676.

²²² See *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709-710.

²²³ [2001] Ch 804.

²²⁴ [2003] 1 AC 419.

²²⁵ See *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham of Cornhill.

main point of contention throughout the three decisions, the focus now falls on how these courts differed in their approach regarding this requirement.

3.2.3.3 *The three Pye decisions: Different approaches to animus possidendi*

3.2.3.3.1 **JA Pye (Oxford) Ltd and Another v Graham and Another**²²⁶ (*High Court decision*)

The High Court identified three central issues for purposes of its decision:

- i) Did the Grahams enjoy adverse possession of the disputed land between 1 January 1984 and 20 January 1999?
- ii) If so, when did the period of adverse possession commence?
- iii) When did the period of adverse possession end?²²⁷

Of these three questions, only the first two are relevant to the discussion. Nonetheless, this section addresses each of these questions individually.

The High Court held that a squatter who claims adverse possession must show that he satisfied each of the following requirements for the whole duration of the 12 year period, namely that:

- i) the squatter was in factual possession of the land;
- ii) that he had the intention to possess the land (*animus possidendi*); and
- iii) that his possession of the land was “adverse” in terms of the LA.²²⁸

The question regarding factual possession was whether the Grahams “ha[ve] been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.”²²⁹ Since the Grahams farmed the disputed land as a unit with their own property (Manor farm), the Court found that the Grahams did enjoy factual

²²⁶ [2000] Ch 676.

²²⁷ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 687.

²²⁸ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 689, following *Buckinghamshire County Council v Moran* [1990] Ch 623 636 per Slade LJ.

²²⁹ *Powell v McFarlane* (1979) 38 P & CR 452 471, applied in *Buckinghamshire County Council v Moran* [1990] Ch 623 641 per Slade LJ and followed in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 703.

possession of the land.²³⁰ This was because the Grahams went beyond what the old grazing agreement allowed them to do on it, together with the fact that the Grahams controlled all vehicular access and egress to and from the land by having the keys to the gates.

Before discussing the reasoning behind the *animus possidendi* requirement, I briefly address the issue of “adverse” possession. As to the “adverse” element of adverse possession, it “merely requires [the squatter] to show that his possession was not pursuant to a licence, a tenancy, or some other grant from the owner, whether express or implied.”²³¹

The Court relied on the following *dictum* by Slade J to ascertain the meaning of *animus possidendi*:

“What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title ... so far as is reasonably practicable and so far as the processes of the law will allow.”²³²

Neuberger J identified four issues that related to the content of this intention before he decided the *animus possidendi* question. The first was what precisely the squatter’s intention needs to reflect. The Court relied on the authoritative case of *Buckinghamshire County Council v Moran*²³³ to answer this question, where Slade LJ held that the required intention entails “an intention for the time being to possess the land to the exclusion of all persons, including the owner with the paper title.”²³⁴

The second question pertained to the weight attached to the intention of the owner concerning the disputed land.²³⁵ The Court referred to the abrogation of the implied licence theory,²³⁶ as well as to the disapproval of it in *Buckinghamshire County Council v Moran*.²³⁷ Although the

²³⁰ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 703-704.

²³¹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 694. This is in line with the meaning of “adverse”, as discussed in section 3.2.2.3.1 above.

²³² *Powell v McFarlane* (1979) 38 P & CR 452 471-472.

²³³ [1990] Ch 623.

²³⁴ *Buckinghamshire County Council v Moran* [1990] Ch 623 643 per Slade LJ, followed in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 690.

²³⁵ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 690.

²³⁶ Schedule 1, paragraph 8(4) of the Limitation Act 1980.

²³⁷ [1990] Ch 623 639 per Slade LJ and per Nourse LJ at 645.

Court agreed that the implied licence theory was no longer in force, it stressed the fact that this did not imply that the intention of the owner regarding the land was now irrelevant.²³⁸

The third question concerned the value of statements, as opposed to actions, by the squatter. Neuberger J accepted that declarations by the squatter as to his past and present intentions may provide evidence of the absence of the *animus possidendi*, while he emphasised the fact that such declarations were of little evidential value and that “[i]n general, intent has to be inferred from the acts themselves.”²³⁹ The deciding factor, therefore, is whether one could positively discern the *animus possidendi* from the squatter’s actions.

The fourth question considered the effect of the squatter being prepared or keen to pay rent or to take a tenancy, if the owner requested it.²⁴⁰ The Court relied on *Ocean Estates Ltd v Pinder*,²⁴¹ where the Privy Council said that it “[did] not consider that an admission of this kind ... indicates an absence of the *animus possidendi* necessary to constitute adverse possession.”²⁴² Neuberger J also cited *Lodge v Wakefield Metropolitan City Council*²⁴³ to strengthen this point, where the Court of Appeal held that even if the squatter “believed himself still to be paying rent ... such a belief ... would have no relevance.”²⁴⁴ According to Neuberger J, this approach is consistent with the legal position and he distinguished the case before him from the decision in *R v Secretary of State for the Environment, Ex parte Davies*.²⁴⁵ In that case Neill LJ decided that if the squatter declared that he was prepared to pay rent, such declaration would prevent the squatter from possessing *animus possidendi*.²⁴⁶ Neuberger J found that if that case was not distinguishable it must be incorrect, as it did not refer to the *Ocean Estates* case²⁴⁷ mentioned above, which was a Privy Council decision.²⁴⁸ In

²³⁸ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 691, following *Buckinghamshire County Council v Moran* [1990] Ch 623 639-640 per Slade LJ.

²³⁹ *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633 643 per Sachs LJ, followed in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 691-692. See also *Powell v McFarlane* (1979) 38 P & CR 452 476-477.

²⁴⁰ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 692.

²⁴¹ [1969] 2 AC 19.

²⁴² [1969] 2 AC 19 24 per Lord Diplock, quoted in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 692.

²⁴³ [1995] 2 EGLR 124.

²⁴⁴ [1995] 2 EGLR 124 126 per Balcombe LJ, with whom Pill LJ and Sir Roger Parker LJ agreed. This is followed in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 692.

²⁴⁵ (1990) 61 P & CR 487. Distinguished in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 692.

²⁴⁶ (1990) 61 P & CR 487 496 per Neill LJ.

²⁴⁷ [1969] 2 AC 19.

²⁴⁸ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693.

light of this reasoning, Neuberger J concluded that an offer to the owner by the squatter to pay rent or take a tenancy is not inconsistent with the *animus possidendi*.²⁴⁹ Furthermore, the Court held that if a squatter orally communicates this preparedness to the owner it would not – on its own – prevent time from running in the occupier’s favour.²⁵⁰ However, Neuberger J emphasised that the owner may invoke this state of affairs to assist a contention that the squatter did not possess *animus possidendi*.²⁵¹

The Court relied on seven factors when it had to determine whether the Grahams possessed the disputed land *animus possidendi*:²⁵²

- i) *Actual activities carried out by the squatter during the limitation period.* It is plain that the Grahams put the disputed land to use after the expiration of the grazing agreement, which qualified as factual possession.²⁵³
- ii) *The nature and history of the land concerned.* Although the Grahams used the disputed land in the past, they used it in a much wider sense than for mere grazing after the expiration of the grazing agreement.²⁵⁴
- iii) *The question of enclosure and access.* Although the Grahams did not enclose the land themselves, the Court held that this fact did not count against them.²⁵⁵ The main factor was that it was the Grahams, and not Pye, that controlled all vehicular access to and egress from the land.²⁵⁶
- iv) *The attitude which the squatter manifests to the land more generally.* The Grahams did not merely benefit from the land on a short-term basis, they looked after it and used it as one would have expected of an owner who occupied it.²⁵⁷
- v) *The circumstances under which the squatter allegedly began adversely possessing the land.* Neuberger J found that for the duration of the grazing and hay-cutting agreements, the Grahams could not have possessed the land *animus possidendi*, nor would their possession have been adverse.²⁵⁸ However, in January 1984 Pye

²⁴⁹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 693.

²⁵⁰ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697.

²⁵¹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697.

²⁵² For a more detailed discussion, see *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 704-710.

²⁵³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 704.

²⁵⁴ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 704-705.

²⁵⁵ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 705.

²⁵⁶ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 705.

²⁵⁷ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 705-706.

²⁵⁸ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 706.

refused to grant another grazing licence. The Court held that this express refusal, as well as the later requests by the Grahams to renew the agreement – which Pye ignored – clearly negates any argument that the Grahams would use the land under an implied licence from that moment.²⁵⁹ Neuberger J found that the Grahams had the *animus possidendi* from then onwards, especially since they intended to carry on using the land for grazing until requested not to do so.²⁶⁰ Although the hay-cutting agreement would have negated this intention, the Court decided that after the expiration of that “isolated grant to take a cut of hay” by the end of August 1984, the Grahams definitively possessed the land *animus possidendi*.²⁶¹

- vi) *The intentions of the owner of the land in so far as the squatter was aware of them.* Although the Grahams knew that Pye had no immediate use for the land and that they hoped to obtain planning permission in the future, Neuberger J held that the law does not require the Grahams to realise that their use of the land was not inconsistent with Pye’s intentions.²⁶² Accordingly, the Court held that the future intentions of Pye regarding the disputed land, as far as they were expressly or impliedly communicated to the Grahams, did not assist Pye’s case.²⁶³
- vii) *The expressed and unexpressed intentions of the squatter, as far as they are invoked to assist the squatter, are of very limited assistance.* Mr Graham said in his draft witness statement that he hoped a further grazing licence would be forthcoming in 1984 and after receiving no replies to his 1985 inquiries “gave up trying” and wanted to see if the plaintiffs contacted him.²⁶⁴ In the light of the *Ocean Estates* case²⁶⁵ discussed earlier, the Court concluded that these communications were not inconsistent with the Grahams having the intention to possess and, therefore, from 31 August 1984 they had the *animus possidendi*.²⁶⁶

The focus now briefly shifts to the question of when the period of adverse possession commenced, since it was not contested throughout the other cases. It was clear that the Grahams’ possession could not have been adverse during the duration of the grazing and hay-

²⁵⁹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709.

²⁶⁰ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 683, 706.

²⁶¹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 706, 709.

²⁶² *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 706-707.

²⁶³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 707.

²⁶⁴ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 708.

²⁶⁵ [1969] 2 AC 19.

²⁶⁶ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 708.

cutting agreements, as these licences prevented their possession from being adverse.²⁶⁷ Although it was not clear when precisely the hay-cutting agreement expired (between the end of June and 20 September 1984), the Court accepted that the correct date from which time began to run in favour of the Grahams was 1 September 1984.²⁶⁸

The High Court gave considerable attention to the question of when the period of adverse possession ended.²⁶⁹ In the light of this issue becoming moot in the Court of Appeal and House of Lords decisions, this chapter assumes – for the sake of simplicity – that time stopped running when Pye instituted proceedings for reclaiming possession on 20 January 1999.²⁷⁰

According to Neuberger J, the findings under each of the above seven points constituted clear evidence that the Grahams had the *animus possidendi*.²⁷¹ Accordingly, the Court held that the Grahams satisfied all the requirements for adverse possession and were therefore entitled to be registered as the owners of the disputed land in the Land Registry.²⁷² Despite this conclusion, Neuberger J ended his judgment by stating that this was a conclusion at which he arrived “with no enthusiasm.”²⁷³

3.2.3.3.2 JA Pye (Oxford) Ltd v Graham²⁷⁴ (*Court of Appeal decision*)

The Court of Appeal divided the issues on appeal into two categories, namely:

- i) whether the Grahams possessed the disputed land *animo possidendi*; and
- ii) the effect of the Human Rights Act 1998.

The focus of this inquiry falls only on the first category for purposes of the current discussion, as the second issue is addressed in chapter five.²⁷⁵

²⁶⁷ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 697-699.

²⁶⁸ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 698, 709.

²⁶⁹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 699-703.

²⁷⁰ If the limitation period commenced on 31 August 1984, it would already have expired by 1997. See also *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 430 per Lord Browne-Wilkinson and *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 810 per Mummery LJ.

²⁷¹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 708.

²⁷² *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 708.

²⁷³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709.

²⁷⁴ [2001] Ch 804.

²⁷⁵ See section 5.3.2.4.2 of chapter five below.

Pye did not appeal against the High Court’s findings of primary fact pertaining to the Grahams’ actual use of the disputed land. The appeal concerned the interpretation (by that court) of the facts that related to the question of *animus possidendi*.²⁷⁶ The Court of Appeal was of much the same mind as the High Court concerning the “adverse” possession requirement and stated that possession is never adverse if it is enjoyed under a lawful title or licence.²⁷⁷

The Court of Appeal relied on the same definition for *animus possidendi* as quoted above and emphasised that the law does not require a squatter to establish “an intention to own or even an intention to acquire ownership” of the land.²⁷⁸ However, after this the Court diverged from the reasoning adopted by the High Court by identifying three factors relating to the intention to possess that were especially relevant, namely:

- i) the owner’s intentions;
- ii) the statements of intention; and
- iii) oral offers of the squatter.²⁷⁹

Regarding (i), the Court of Appeal acknowledged that – for purposes of adverse possession – one has to look to the intention of the squatter, but emphasised the fact that the intentions of the owner were not irrelevant.²⁸⁰ In terms of (ii), Mummery LJ held that declarations by the squatter as to his intentions may provide “compelling evidence” that he did not possess *animus possidendi*, though he also said that such declarations are of little evidentiary value when they relate to the squatter’s apparent exclusive possession.²⁸¹ Concerning (iii), the “[e]vidence that the squatter is willing to pay rent to the paper title owner during the relevant period, or to take a tenancy from him, may be relevant to ascertainment of the squatter’s intention to possess

²⁷⁶ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 813 per Mummery LJ.

²⁷⁷ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 813 per Mummery LJ.

²⁷⁸ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 812 per Mummery LJ, following *Buckinghamshire County Council v Moran* [1990] Ch 623 643 per Slade LJ.

²⁷⁹ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 812 per Mummery LJ.

²⁸⁰ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 812 per Mummery LJ, following Slade LJ in *Buckinghamshire County Council v Moran* [1990] Ch 623 639-640. In my view, this overemphasises the importance of the owner’s intention.

²⁸¹ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 812 per Mummery LJ, following *Powell v McFarlane* (1979) 38 P & CR 452 476 and *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633 643 per Sachs LJ.

the land; but the squatter's statements to that effect do not necessarily constitute admission by him that he lacked the requisite intention to possess ...”²⁸²

The Court of Appeal attached considerable weight to the grazing agreement of 1 February 1983, which it described as “an important document” and as constituting a “contemporaneous and irrefutable record of the common intention of Pye and the Grahams regarding possession of the disputed land.”²⁸³ Consequently, it created a personal licence for the Grahams to go onto and use the disputed land for the specified purposes, since Pye was anxious to avoid giving possession of it to the Grahams.²⁸⁴ The parties “plainly did not intend that the Grahams should have exclusive possession of the disputed land.”²⁸⁵ Accordingly, the Court of Appeal held that “[t]his point is relevant to the ascertainment of the probable intentions of the parties regarding the continued use of the disputed land after the grazing agreement expired.”²⁸⁶

Mummery's LJ focus then shifted to the seven factors used in the High Court, which led Neuberger J to find that the Grahams did have the intention to possess.²⁸⁷ The Court of Appeal criticised this approach, as it “significantly underestimated the importance of uncontradicted direct evidence”, which – in the view of Mummery LJ – led to the incorrect conclusion that the Grahams had the *animus possidendi*.²⁸⁸ After rejecting this reasoning by the High Court, the Court of Appeal gave eight reasons to justify the conclusion that the Grahams did not have the intention to possess the disputed land.²⁸⁹ These reasons may be summarised as follows:

- i) The question of the Grahams' intentions at the relevant time is one of fact.²⁹⁰

²⁸² *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 812 per Mummery LJ, relying on *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 24 per Diplock 24, *Lodge v Wakefield Metropolitan City Council* [1995] 2 EGLR 124 126 and comparing them to *R v Secretary of State for the Environment, Ex parte Davies* (1990) 61 P & CR 487 496.

²⁸³ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 814 per Mummery LJ.

²⁸⁴ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 814 per Mummery LJ.

²⁸⁵ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 814 per Mummery LJ.

²⁸⁶ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 815 per Mummery LJ. If one interprets this *dictum* as meaning “exclusive [factual] possession”, it cannot be correct, as factual possession is a question of fact, not intention. However, if one reads it as meaning “exclusive [ordinary] possession”, that is likely to be correct, since the agreement will clearly negate any intention to possess that the Grahams could have had. Nevertheless, it is questionable whether one should attach such weight to an agreement after it expired concerning the parties' intentions regarding the disputed land. This matter was one of the key points of criticism in the decision of the House of Lords: See section 3.2.3.3.3 below.

²⁸⁷ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 816 per Mummery LJ.

²⁸⁸ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 817 per Mummery LJ.

²⁸⁹ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 817 per Mummery LJ. Although nine reasons were given, only eight of them are relevant for purposes of this discussion.

²⁹⁰ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 817 per Mummery LJ.

- ii) Like other facts, a state of mind must be proven.²⁹¹ The evidence in this instance may take different forms, such as oral or written evidence as to the occupation as well as the squatter's use of the land.²⁹²
- iii) The Court of Appeal held that the High Court, by finding an intention to possess, was wrong in making inferences from circumstantial evidence. According to Mummery LJ, it is the unchallenged evidence of the Grahams that counts against them.²⁹³
- iv) On the expiration of the grazing agreement in December 1983, the Grahams' use of the disputed land was potentially adverse.²⁹⁴ Pye expressly refused to enter into another agreement and, therefore, the use of the land by the Grahams ceased to be permissive.²⁹⁵ However, according to Mummery LJ this reason alone was not enough to constitute dispossession (or ordinary possession). The Court of Appeal found that the crucial factor was whether there was "any other relevant change affecting the requirements of the 1980 Act and, if so, whether that change constituted dispossession of Pye."²⁹⁶ In other words, the expiration of permission alone was not enough to constitute dispossession, even though the Grahams from then onwards used the land as an occupying owner would and that Pye could have brought proceedings to evict them.²⁹⁷ It is doubtful whether this argument by the Court of Appeal holds water, as the only factor that prevented the Grahams from being in adverse possession during the grazing licence was the licence itself. However, after the expiration of the license, Mummery LJ required a further "change" before he could regard the Grahams as having dispossessed Pye. It is hard to see how this approach can be in accordance with the law. This approach by the Appeal Court was, in my opinion, correctly criticised by the House of Lords.²⁹⁸
- v) Nothing changed concerning the actual use of the land, except that the Grahams no longer occupied the disputed land with the permission from Pye.²⁹⁹ Mummery LJ found that both the nature and extent of the Grahams' use of the land, "which

²⁹¹ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 817 per Mummery LJ.

²⁹² *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 817 per Mummery LJ.

²⁹³ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 817-818 per Mummery LJ.

²⁹⁴ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 818 per Mummery LJ.

²⁹⁵ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 818 per Mummery LJ.

²⁹⁶ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 818 per Mummery LJ.

²⁹⁷ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 818 per Mummery LJ.

²⁹⁸ See *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442-443 per Lord Browne-Wilkinson.

²⁹⁹ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 818 per Mummery LJ.

did not amount to factual possession of it during the period of licence”, remained the same.³⁰⁰ The correctness of this finding is also doubtful, as it is clear that the only persons in factual possession of the land were the Grahams, since the *factum possessionis* is a purely factual question. Factual possession cannot depend on a licence; that can only affect the *animus possidendi*. Even though nothing changed except that the licence came to an end, the fact that the Grahams continued using the land must constitute factual possession. The House of Lord also addressed this anomaly.³⁰¹

- vi) Mummery LJ continued this line of argument and held that – as in the case of (v) – the Grahams’ intention regarding the land also did not change after the expiration of the licence.³⁰² The Court of Appeal did not for one moment consider that the Grahams’ possession could, but for the licence, amount to full legal possession. It seems as if the Court of Appeal required an intention of an owner, instead of the intention to possess, even though it earlier found that this was not needed.³⁰³ Mummery LJ based this finding on the evidence that Graham was using the land until requested not to.³⁰⁴ It was also clear that, had Pye requested him, he would happily have paid.³⁰⁵ It appears as if the Court of Appeal conveniently attached no value to the evidence produced by Graham, since it stated that he “took advantage of the ability to use the land as no one challenged [him] ...”³⁰⁶
- vii) Graham’s statement regarding his state of mind, together with the licence and the fact that (after the expiration of the licence) they continued to use the land in the same way was “not that of a person who is using the land with the intention of possessing it to the exclusion of Pye.”³⁰⁷ The Court of Appeal then said the following:

“[The Grahams’ state of mind] is that of a person who, having obtained the agreement of Pye to the limited use of the land in the past, continues to use it for the time being in exactly the same fashion in the hope that in the

³⁰⁰ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 818 per Mummery LJ.

³⁰¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442-443 per Lord Browne-Wilkinson.

³⁰² *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 819 per Mummery LJ.

³⁰³ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 812 per Mummery LJ.

³⁰⁴ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 819 per Mummery LJ.

³⁰⁵ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 819 per Mummery LJ.

³⁰⁶ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 819 per Mummery LJ.

³⁰⁷ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 819 per Mummery LJ.

future Pye will again be willing to accede to his requests to enter an agreement authorising him to use it.”³⁰⁸

The crux of this argument is indeed nothing other than an implied licence. Mummery LJ held that the Grahams never did anything more than they would have been allowed under an implied grazing licence. However, it is clear that the owner’s intention alone cannot be truly decisive, even though the Grahams knew of Pye’s intention regarding the land.³⁰⁹ In my opinion the Court of Appeal erred by placing far too much emphasis on Pye’s intention. Mummery LJ also ignored the fact that Pye expressly refused to renew the grazing agreement. This nullifies the argument that the Grahams’ intention did not change after the expiration of the grazing licence. The House of Lords also voiced criticism in this regard.³¹⁰

viii) The Court of Appeal also found that there was no direct evidence that the Grahams changed their intentions regarding the use of the land after the end of August 1984.³¹¹ After the expiration of the licence, the Grahams merely continued to use the land in the same fashion, which use was of a limited nature and without the *animus possidendi*.³¹² Mummery LJ based this finding on the fact that after 31 August 1984, the Grahams did not do anything on the disputed land that they could not have done under the grazing agreement.³¹³ As indicated above, this argument is founded on an implied licence, for which there can be no justification on the facts. It seems that Mummery LJ attached too much weight to the undisputed evidence of the Grahams, while such evidence is supposed to carry the least weight when adjudicating an adverse possession case. The House of Lords adopted a similar stance against the Court of Appeal in this instance.³¹⁴

For these reasons, the Court of Appeal found the Grahams not to have had the intention to possess the disputed land.

³⁰⁸ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 819-820 per Mummery LJ.

³⁰⁹ See *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438, where Lord Browne-Wilkinson held that “[t]he suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the paper owner is heretical and wrong ...”

³¹⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442-443 per Lord Browne-Wilkinson.

³¹¹ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 820 per Mummery LJ.

³¹² *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 820 per Mummery LJ.

³¹³ *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 820 per Mummery LJ.

³¹⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442-443 per Lord Browne-Wilkinson.

3.2.3.3.3 **JA Pye (Oxford) Ltd v Graham**³¹⁵ (*House of Lords decision*)

The main issue before the House of Lords, as before the Court of Appeal, was whether the Grahams had the intention to possess the disputed land. The House of Lords accepted that, as long as the Grahams occupied the disputed land with Pye's consent, they could neither have dispossessed Pye nor obtained possession of the land.³¹⁶ Therefore, adverse possession could not commence in favour of the Grahams before the expiration of the hay-cutting agreement on or about 31 August 1984.³¹⁷ Consequently, the key question was whether the Grahams had dispossessed Pye after 1 September 1984 for the duration of the 12-year period.³¹⁸ In other words, the issue to be decided was again whether the Grahams had the *animus possidendi*.

As to the requisite intention, Lord Browne-Wilkinson held that “[i]t is hard to see how the intentions of the paper title owner (unless known to the squatter) can affect the intention of the squatter to possess the land.”³¹⁹ The House of Lords confirmed that the taking or continuation of possession by the squatter with the consent of the owner does not constitute dispossession or adverse possession.³²⁰ Furthermore, one cannot have possession without the requisite intention, which intention must be deduced from the squatter's acts.³²¹ Thus, it is worth reemphasising that *factum possessionis* and the *animus possidendi*, although closely entwined, remain two separate elements to legal possession.³²² In light of these findings, the Grahams were “plainly in factual possession before 30 April 1986.”³²³

The House of Lords identified three main issues concerning the *animus possidendi*:

- i) whether one must intend to own or to possess;
- ii) whether the acts by the squatter must be inconsistent with the intentions of the owner; and
- iii) the willingness of the squatter to pay rent or take a tenancy, if asked.

³¹⁵ [2003] 1 AC 419.

³¹⁶ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 432 per Lord Browne-Wilkinson.

³¹⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433 per Lord Browne-Wilkinson.

³¹⁸ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 432 per Lord Browne-Wilkinson.

³¹⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 433 per Lord Browne-Wilkinson.

³²⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 434 per Lord Browne-Wilkinson.

³²¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 435 per Lord Browne-Wilkinson.

³²² *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 435-436 per Lord Browne-Wilkinson.

³²³ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 436 per Lord Browne-Wilkinson.

As to the intention to possess or to own, the House of Lords regarded the decision of *Buckinghamshire County Council v Moran*³²⁴ to be correct, as it found that all that is required is an intention to possess and not an intention to own or to acquire ownership.³²⁵ Lord Browne-Wilkinson, like the judges in the two previous courts, also followed the formulation by Slade J in *Powell v McFarlane*³²⁶ by requiring an “intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”³²⁷

In respect of the second question, the House of Lords held that “[t]he suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong ... [as] [i]t reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user.”³²⁸ Lord Browne-Wilkinson strengthened this position by stating that

“[t]he highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner.”³²⁹

The House of Lords found that there would be few cases where one can draw such an inference if the owner is not present on the land, although Lord Browne-Wilkinson acknowledged that it remained possible.³³⁰

On the subject of the squatter’s willingness to pay rent or take a tenancy if asked, the House of Lords approved of the High Court following *Ocean Estates Ltd v Pinder*,³³¹ where it was

³²⁴ [1990] Ch 623.

³²⁵ *Buckinghamshire County Council v Moran* [1990] Ch 623 643 per Slade LJ, approved in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 436 per Lord Browne-Wilkinson.

³²⁶ (1979) 38 P & CR 452.

³²⁷ *Powell v McFarlane* (1979) 38 P & CR 452 471-472, approved in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 437 per Lord Browne-Wilkinson.

³²⁸ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson, expressly disapproving of Bramwell LJ’s “heresy” in *Leigh v Jack* (1897) 5 Ex D 264.

³²⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson.

³³⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson.

³³¹ [1969] 2 AC 19.

held that such a declaration does not negate the *animus possidendi*.³³² Lord Browne-Wilkinson criticised the Court of Appeal for not attaching enough weight to that decision, as he found that *R v Secretary of State for the Environment, Ex parte Davies*³³³ was wrongly decided.³³⁴ The law only requires the squatter to possess the land, which means that it is possible for the *animus possidendi* to co-exist with a willingness to pay the owner.³³⁵

The House of Lords identified a chain in the reasoning of the Court of Appeal, which led Mummery LJ to find that the Grahams did not possess the land *animo possidendi*.³³⁶ According to Lord Browne-Wilkinson, this chain consists of the following three points:

- i) the grazing agreement “plainly” did not give possession to the Grahams;
- ii) after the expiration of the grazing and hay-cutting agreements, the Grahams continued to use the land for grazing in the same way, which did not amount to factual possession; and finally
- iii) Mr Graham made admissions that negated his intention to possess.³³⁷

According to the House of Lords, each of these steps of reasoning is suspect.³³⁸ However, Lord Browne-Wilkinson did not decide the first step, merely assuming that the Grahams did not have possession during this time, in that “the ... [grazing] agreement [was] inconsistent with any clear distinction being drawn by the parties between possession on the one hand and occupation without possession on the other.”³³⁹

Pye asked the Grahams to vacate the disputed land when the grazing agreement expired. Nonetheless, the Grahams did not adhere to this request and continued to use the land from 1 January 1984 onwards, as well as performing acts of a wider nature than those allowed under the old grazing agreement.³⁴⁰ By continuing to use the land in and after 1984, the Grahams

³³² *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 24 per Diplock, followed in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 692 and approved in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson.

³³³ (1990) 61 P & CR 487.

³³⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson.

³³⁵ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 438 per Lord Browne-Wilkinson.

³³⁶ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442 per Lord Browne-Wilkinson.

³³⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442 per Lord Browne-Wilkinson.

³³⁸ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442 per Lord Browne-Wilkinson.

³³⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 442 per Lord Browne-Wilkinson.

³⁴⁰ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 443 per Lord Browne-Wilkinson.

not only occupied the land without Pye's permission, but they also did so in a way that was contrary to the intentions of Pye regarding the future development of the land.³⁴¹

In respect of the third point, the House of Lords criticised the Court of Appeal for being "selective in its choice of the evidence in Michael Graham's witness statement, relying only on such evidence as was contrary to his interest."³⁴² Instead, one has to look at the whole of Mr Graham's evidence on this subject, which indicates that he indeed treated the disputed land as his own.³⁴³ When viewed from this angle, it is clear that the Grahams occupied the land *animo possidendi*, even though they were willing to pay rent or take a tenancy.³⁴⁴

Consequently, the House of Lords held the decision by the Court of Appeal to be incorrect. According to Lord Browne-Wilkinson, it would lead to an anomalous state of affairs if one accepts the reasons provided by the Court of Appeal. This is because the Court of Appeal held that Pye was in possession of the disputed land, despite the fact that the Grahams were the only persons who did anything on the land from 1984 to 1999.³⁴⁵ Consequently, the House of Lords found that such a conclusion would be "so unrealistic as to be an impossible one."³⁴⁶ On these grounds, the reasoning that the Grahams did not have the *animus possidendi* was, in my view, correctly rejected.³⁴⁷

The House of Lords – for these reasons – restored the decision of the High Court, which found that the Grahams did indeed have the *animus possidendi*.³⁴⁸ However, Lord Bingham of Cornhill echoed the misgivings of Neuberger J at first instance for finding in favour of the Grahams.³⁴⁹

This decision concluded the *Pye* saga in the United Kingdom, with the House of Lords opting for a friendly interpretation of the *animus possidendi* requirement.³⁵⁰ Although the case proceeded to the European Court of Human Rights, those decisions did not influence the

³⁴¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 443 per Lord Browne-Wilkinson.

³⁴² *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 443 per Lord Browne-Wilkinson.

³⁴³ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 443 per Lord Browne-Wilkinson.

³⁴⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 443 per Lord Browne-Wilkinson.

³⁴⁵ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 443-444 per Lord Browne-Wilkinson.

³⁴⁶ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 444 per Lord Browne-Wilkinson.

³⁴⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 444 per Lord Browne-Wilkinson.

³⁴⁸ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 444 per Lord Browne-Wilkinson.

³⁴⁹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham of Cornhill.

³⁵⁰ Van der Walt *AJ Property in the Margins* (2009) 180.

finding of substantive law requirements for adverse possession by the House of Lords.³⁵¹ Chapter five discusses the latter two decisions, since it focuses on the constitutionality of adverse possession or prescription.³⁵²

3.2.4 Adverse possession under the Land Registration Act 2002

The enactment of the LRA³⁵³ did not so much alter the substantive requirements for adverse possession as that it provides procedural safeguards for owners of registered land. It put mechanisms in place that protect owners of registered land from simply losing their land through the limitation effect of adverse possession. According to Lord Hope of Craighead, “a much more rigorous regime has now been enacted in ... the Land Registration Act 2002 ... [which makes] it much harder for a squatter who is in possession of registered land to obtain title to it against the wishes of the proprietor.”³⁵⁴ The LRA expressly alters the law of adverse possession by providing that “[n]o period of limitation under section 15 of the Limitation Act 1980 ... shall run against any person ... in relation to an estate in land ... the title to which is registered.”³⁵⁵ Thus, the 2002 Act creates a regime where the mere lapse of time no longer extinguishes the rights of owners in registered land, because section 58(1) of the LRA stipulates that the register now provides conclusive proof of registered title.³⁵⁶ Thus, English law at present operates with a positive registration system, which guarantees the correctness of their register. This section briefly discusses the protective mechanisms introduced by the LRA, together with how difficult this Act makes it to acquire registered title through adverse possession. It is worth reemphasising that the law of adverse possession regarding unregistered land remains mostly the same as it was prior to the enactment of the LRA.

The first major alteration is that the LRA reduced the 12-year limitation period to 10 years in respect of registered land.³⁵⁷ The 2002 Act stipulates that when a squatter has been in adverse

³⁵¹ See section 3.2.2.3 above.

³⁵² See section 5.3.2.4.2 of chapter five below.

³⁵³ The Act came into force on 13 October 2003 and is prospective in nature: See *Ofulue v Bossert* [2009] UKHL 16 and *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

³⁵⁴ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 446-447 per Lord Hope of Craighead and also per Lord Bingham of Cornhill at 426.

³⁵⁵ Section 96(1) of the Land Registration Act 2002.

³⁵⁶ Section 58(1) of the Land Registration Act 2002: “If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.”

³⁵⁷ Schedule 6, paragraph 1(1) of the Land Registration Act 2002. See also Schedule, 6 paragraph 13(1), which determines that the period of adverse possession applicable to foreshore is 60 years.

possession of registered land for the requisite 10-year period, she may apply to the registrar at the Land Registry to be registered as proprietor of the registered land.³⁵⁸ In this sense it is not required that the land must have been registered throughout the entire period of adverse possession.³⁵⁹ Since this only applies to registered land, a squatter is under no obligation to make such an application if the land is unregistered. When the registrar receives an application for registration from the squatter, she must give notice to the owner of the registered land.³⁶⁰ In the case of leasehold land, the registrar must give notice to the proprietor of any superior registered estate in the land.³⁶¹ Once the registrar notifies the registered owner of the squatter's application for registration, such owner may object to the application.³⁶² If the registered owner objects to the squatter's application, the squatter may make a further application to be registered as the owner of the land after she remained in adverse possession for an additional two years.³⁶³ If the squatter manages to remain in adverse possession for that time, she may be entered in the register as the new owner of the land, irrespective of the wishes of the owner.³⁶⁴

However, even if the registered owner objects to the squatter's application, such squatter is still entitled to be registered as the new owner if she can establish a 10-year period of adverse possession, together with proving that she falls under one of three specific categories provided by the LRA.³⁶⁵ The first category involves situations where it would be unconscionable, due to estoppel, for the registered owner to attempt to dispossess the squatter.³⁶⁶ In other words, if the squatter satisfies the requirements for proprietary estoppel, the owner is estopped from averring her ownership and the squatter is then allowed to be registered as the new owner. The second category entails the situation where the squatter is – for some other reason – entitled to be registered as the owner of the land.³⁶⁷ According to Harpum, Bridge and Dixon, there are no limitations as to what this other reason may be.³⁶⁸ Such a reason could entail the situation

³⁵⁸ Schedule 6, paragraph 1(1) of the Land Registration Act 2002.

³⁵⁹ Schedule 6, paragraph 1(4) of the Land Registration Act 2002.

³⁶⁰ Schedule 6, paragraph 2(1)(a) of the Land Registration Act 2002.

³⁶¹ Schedule 6, paragraph 2(1)(c) of the Land Registration Act 2002.

³⁶² Section 73(1) of the Land Registration Act 2002.

³⁶³ Schedule 6, paragraph 6(1) of the Land Registration Act 2002.

³⁶⁴ Schedule 6, paragraph 7 of the Land Registration Act 2002.

³⁶⁵ Schedule 6, paragraph 5(1) of the Land Registration Act 2002.

³⁶⁶ Schedule 6, paragraph 5(2)(a)-(b) of the Land Registration Act 2002.

³⁶⁷ Schedule 6, paragraph 5(3) of the Land Registration Act 2002.

³⁶⁸ Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-082.

where a squatter, after having been in adverse possession for 10 years, can prove that she is entitled to the land under the will or intestacy of a deceased owner.³⁶⁹

The third category concerns situations where the disputed land is adjacent to land belonging to the squatter and where the exact boundary line between the two erven has not been determined.³⁷⁰ The reason for this exception is that the register, although providing conclusive proof of title, is normally not conclusive as to boundaries.³⁷¹ Should the squatter, under these circumstances, have reasonably believed that the disputed land belonged to her, she is entitled to be registered as the new owner.³⁷² This requirement seems to have imported good faith into English adverse possession law, since the requirement of “reasonably believed” is analogous to the test for determining the presence of *bona fides* in some civil law systems.³⁷³ Interestingly, it seems that what is required in this context is possession with the intention of an owner (*animus domini*), which is denoted by requiring the squatter to reasonably believe that the adjacent piece of land belongs to her.³⁷⁴ Nonetheless, this good faith requirement is confined to adverse possession in the limited instances of boundary disputes.

The *Pye* case is a clear-cut illustration of the injustices that can occur in a system where the requirements for adverse possession are not too difficult to satisfy, as well as where the legislature does not afford enough protection to owners. Yet, as I indicate in the next chapter,³⁷⁵ the arguments for the abolition of adverse possession concerning registered land seem only to apply in systems where the register provides conclusive proof of title. In this context, the English land register is now to the same effect – through section 58(1) of the LRA – as the German *Grundbuch*, which also deems the register to provide conclusive proof of title or ownership.³⁷⁶ Nonetheless, civil-law based jurisdictions without a positive registration

³⁶⁹ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.29.

³⁷⁰ Schedule 6, paragraph 5(4)(a)-(b) of the Land Registration Act 2002.

³⁷¹ See section 58 of the Land Registration Act 2002 and Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-083.

³⁷² Schedule 6, paragraph 4, read with paragraph 5(4)(a)-(c) of the Land Registration Act 2002. Schedule 6, paragraph 4(d) determines that the land to which the application relates must have been registered more than one year prior to the date of such application.

³⁷³ See especially the discussion of Dutch prescription law in section 3.3.2.2.2 below. I am indebted to Dr Waring for discussions that helped me form this opinion.

³⁷⁴ Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-083. To the contrary is Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.30.

³⁷⁵ Chapter four below.

³⁷⁶ For the position in German law, see section 3.5 below.

system, such as South African,³⁷⁷ Dutch and French law employ other mechanisms that protect owners from “easily” losing ownership through prescription. By requiring owners to possess land *animo domini*, coupled with longer prescription periods, the law ensures that owners do not lose ownership through mere inattention or by accident.³⁷⁸ However, English law affords less protection to landowners in pre-LRA adverse possession law,³⁷⁹ where the requisite form of intention is mere *animus possidendi*, coupled with a reasonably short 12-year limitation period. Consequently, the focus now turns to the requirements for prescription in Dutch and French law, together with how it operates in German law.

3.3 Dutch law

3.3.1 Introduction

Dutch law – unlike its South African counterpart – is a codified legal system, which means that all law is primarily contained in either the Civil Code (“*Burgerlijk Wetboek*” or “BW”) or in additional legislation. The BW regulates Dutch prescription law, since it codified this field of law. This stands in contrast to the two prescription acts in South Africa, which do not codify South African prescription law.³⁸⁰

BW 3:99-3:106 regulates acquisitive prescription or *verkrijgende verjaring*, while BW 3:306-3:325 pertains to extinctive prescription. Snijders and Rank-Berenschot refer to extinctive prescription as being of *zwakke werking* (weak effect), as it concerns only the extinction of claims.³⁸¹ Since Dutch extinctive prescription is of *zwakke werking*, it follows that acquisitive prescription is of *sterke werking* (strong effect), as the latter involves the acquisition of ownership.³⁸² For this reason acquisitive and extinctive prescription are dealt with in different

³⁷⁷ Although South Africa has a mixed legal system, South African property law is nearer to the civil-law tradition than to English common law.

³⁷⁸ This position in South African prescription law is discussed in section 2.3.2.1.1 of chapter two above. For the position in Dutch and French law, see sections 3.3.2.2.1 and 3.4.2.1 respectively below.

³⁷⁹ Since the Land Registration Act 2002 only applies to registered title in land, the protective mechanisms do not extend to owners of unregistered land.

³⁸⁰ For instance, see *Pienaar v Rabie* 1983 (3) SA 126 (A) 135 and *Bisschop v Stafford* 1974 (3) SA 1 (A) 7. This issue is discussed more fully in section 2.3.1 of chapter two above.

³⁸¹ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 247; Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 424; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 419, 940.

³⁸² Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 248.

parts of the BW.³⁸³ However, these two concepts can overlap in some instances, as in cases regarding the extinction of the owner's legal claim towards her property after 20 years.³⁸⁴

This discussion focuses on the major aspects of Dutch acquisitive prescription law, while some regard is also had to the provisions regarding extinctive prescription. This section pays special attention to the distinction between *bona* and *mala fide* possessors for purposes of prescription, since the *fides* of the possessor determines the period required for acquiring ownership through *verkrijgende verjaring*.³⁸⁵ This is interesting from a South African perspective, because South African prescription law attaches no legal consequences to the *fides* of the possessor, as both good and bad faith possessors are able to acquire ownership in land after possessing it *possessio civilis* for 30 years.³⁸⁶

3.3.2 *Verkrijgende verjaring* (acquisitive prescription)

3.3.2.1 *Introduction*

The main provisions in the *Burgerlijk Wetboek* relating to acquisitive prescription are BW 3:99.1 and BW 3:105.1, read with BW 3:306. BW 3:99.1 reads as follows:

“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.”³⁸⁷

This provision provides for good faith acquisition of property through acquisitive prescription. It sets the period at three years for non-registered movable property, together with rights pertaining to bearer or order. The period required for all other property – such as immovable property and registered movable property – is 10 years.³⁸⁸ It is only necessary to focus on the acquisition of land through *verkrijgende verjaring* for purposes of this discussion. BW 3:105.1 provides for bad faith acquisition of ownership through prescription:

³⁸³ Acquisitive prescription is dealt with in Book 3 title 4 (acquisition and loss of things) and extinctive prescription in Book 3 title 11 (obligations).

³⁸⁴ BW 3:105.1, read with BW 3:306. See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329.

³⁸⁵ See BW 3:99.1 for possession in good faith and BW 3:105.1, read with BW 3:306, for possession in bad faith.

³⁸⁶ See sections 2.3.1 and 2.3.2.1.1 of chapter two above.

³⁸⁷ “Rights pertaining to movables that are not registered and rights pertaining to bearer or order are acquired by a possessor in good faith who possessed the property for an uninterrupted period of three years. For all other property the prescription period of possession is 10 years.”

³⁸⁸ BW 3:99.1 differentiates between unregistered and registered property. Certain movable property can be registered under Dutch law: See Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 427.

“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.”³⁸⁹

According to this provision, a possessor – even when in bad faith – acquires property the moment the owner’s legal claim towards that property is extinguished.³⁹⁰ BW 3:306 determines the period required for possession in this context by stating that “[i]f the law does not state otherwise, an owner’s legal claim prescribes at the expiration of a period of 20 years.”³⁹¹

Mijnssen *et al* capture the essence of Dutch acquisitive prescription law against this background:

“Iemand aan wie een goed niet toebehoort, kan dit goed door verjaring verkrijgen indien hij gedurende een door de wet bepaalde tijd bezitter van dat goed is geweest. In beginsel is vereist dat het bezit te goeder trouw was. Ook bezit niet te goeder trouw kan echter tot verkrijgen door verjaring leiden.”³⁹²

A person who possessed property in good faith for the requisite period acquires ownership *ipso iure*³⁹³ through *verkrijgende verjaring*.³⁹⁴ Bad faith prescription – in terms of BW 3:105.1 – is also effected *ipso iure*, since authors regard it as being acquisitive in nature.³⁹⁵ It follows that the effect of good and bad faith prescription in Dutch law is similar to that of

³⁸⁹ “He who possesses property at the time when the owner’s legal claim towards that property is extinguished, obtains that property, even though such person’s possession might not have been in good faith.”

³⁹⁰ The words “legal claim towards the property” must be interpreted widely, as including all remedies the owner has to reclaim possession: See Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 254; Mijnssen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 431; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 344a; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 419.

³⁹¹ “Indien de wet niet anders bepaalt, verjaart een rechtsvordering door verloop van twintig jaren.” (“If the law does not state otherwise, an owner’s legal claim prescribes at the expiration of a period of 20 years.”)

³⁹² Mijnssen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423. (“Someone to whom a *res* does not belong, can obtain that *res* by way of prescription by possessing the *res* for a statutorily determined period of time. In principle it is required that possession be *bona fide*. However, *mala fide* possession can also lead to acquisition through prescription.”) See also BW 3:99 and BW 3:105.1, read with BW 3:306.

³⁹³ By operation of law.

³⁹⁴ BW 99.1. See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 258; Mijnssen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 441; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 347; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 414-415.

³⁹⁵ Mijnssen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 441; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 347; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 419.

acquisitive prescription under section 2(2) of the Prescription Act 18 of 1943 in South African law, which is also effected *ex lege*.³⁹⁶ Consequently, acquisitive prescription in Dutch law is an original method of acquisition of ownership and therefore the possessor acquires the property free of any encumbrance.³⁹⁷ It is unnecessary for a possessor to plead prescription in court because she becomes owner of the property through operation of law.³⁹⁸

The possessor only acquires property through prescription once she satisfies all the requirements for prescription.³⁹⁹ Since acquisitive prescription forms part of substantive Dutch property law, it is impossible for parties to alter or waive it.⁴⁰⁰ However, it is possible to waive extinctive prescription.⁴⁰¹ Interestingly, a Dutch court must also take note of acquisitive prescription *mero motu*, should it be justified on the facts.⁴⁰²

It follows that the requirements for prescription are uninterrupted possession – which may be either *bona* or *mala fide* – over property for a certain period. All property, namely movables, immovables and limited real rights, can be acquired through prescription.⁴⁰³ “Property” also includes incorporeal property, such as a usufruct.⁴⁰⁴ Prescription under the new *Burgerlijk Wetboek* plays a more important role than under the previous Civil Code, as the new

³⁹⁶ “As soon as the period of thirty years has elapsed such possessor or user shall *ipso jure* become the owner of the property ...”

³⁹⁷ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 256; Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) paras 424, 441.

³⁹⁸ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 258; Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 441; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 347.

³⁹⁹ As contained in BW 99.1 or BW 3:105.1, read with BW 3:306.

⁴⁰⁰ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 258; Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) paras 424, 441; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 347; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 414-415, 419.

⁴⁰¹ BW 3:322.2-3. See also Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 414.

⁴⁰² Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 258; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 347; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 414, 419. This position is different from South African law, where section 17(1) of the Prescription Act 68 of 1969 expressly stipulates that courts shall not *mero motu* take notice of prescription. See further section 2.3.1 of chapter two above.

⁴⁰³ BW 3:99.1. See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 247; Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 427; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 408.

⁴⁰⁴ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 247.

prescription periods are notably shorter while persons can now acquire both movable and immovable property through prescription.⁴⁰⁵

The main justification for prescription under Dutch law is – as in South African law – the promotion of legal certainty.⁴⁰⁶ Consequently, it is in the interest of legal certainty to afford *de iure* status to long-existing *de facto* situations.⁴⁰⁷ Chapter four discusses this topic in greater detail.⁴⁰⁸

Apart from the two main categories of prescription in BW 3:99.1 and BW 105.1, read with BW 3:306, another type of prescription appears in BW 3:106. This latter form of prescription regulates the extinction of *bepaalde rechten* (limited real rights).⁴⁰⁹ Interestingly, *verkrijgende verjaring* does not extinguish limited real rights conferred on property by the possessor while she still “clocks up” time.⁴¹⁰ Although the possessor is not entitled to burden the property with such rights (as she was not the owner at that time), those rights become effective with retrospective effect from the moment possession was obtained because Dutch law regards the possessor as becoming owner of the property with retrospective effect.⁴¹¹ Therefore, a

⁴⁰⁵ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 247. The periods required for good and bad faith prescription under the previous Civil Code was 20 and 30 years respectively: See BW 2000 (old) and BW 2004 (old). Under the previous Civil Code, persons could not acquire movables through prescription. The provisions of the new BW regarding prescription only came into operation on 1 January 1993: See Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 444. For a discussion pertaining to the law applying to prescription periods that commenced before this date, see Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 444. This latter issue falls outside the scope of this dissertation and is therefore not discussed here.

⁴⁰⁶ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) paras 329, 347; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 136. For the justifications in South African law, see section 4.2.3 of chapter four below.

⁴⁰⁷ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 249; Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 330; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 417, 919. This point is further investigated in section 4.2.4 of chapter four below.

⁴⁰⁸ See section 4.2.4 of chapter four below.

⁴⁰⁹ This provision deals specifically with the extinction of servitudes. This section does not discuss the acquisition or extinction of servitudes through prescription in Dutch law, since prescription pertaining to servitudes falls outside the scope of this dissertation.

⁴¹⁰ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 256; Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) paras 441-442; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 348; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 415.

⁴¹¹ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 256; Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht*

mortgage registered over the property by the possessor remains in force after such possessor acquired the property through prescription.

3.3.2.2 *Requirements for acquisitive prescription*

3.3.2.2.1 **Bezit (possession)**

A person must possess property for prescription to commence.⁴¹² Continuous possession for the duration of the set period results in the acquisition of that property through prescription. Although the *Burgerlijk Wetboek* does not expressly mention the fact, the right in property that the possessor acquires is, in fact, ownership.⁴¹³

BW 3:107 defines possession or *bezit* as follows:

- “(1) *Bezit* is het houden van een goed voor zichzelf.
- (2) *Bezit* is onmiddellijk, wanneer iemand *bezit* zonder dat een ander het goed voor hem houdt.
- (3) *Bezit* is middellijk, wanneer iemand *bezit* door middel van een ander die het goed voor hem houdt.
- (4) Houderschap is op overeenkomstige wijze onmiddellijk of middellijk.”⁴¹⁴

Possession requires a person to hold (*houden*) property for herself (*zichzelf*). Thus, Dutch law also recognises that possession comprises two elements, namely factual possession (*houden*) of property, and the necessary intention of holding for *zichzelf*. One can translate *zichzelf* as meaning “for oneself” and it entails an intention to possess as owner, or *animo domini*.⁴¹⁵ Therefore, the law requires a possessor to possess the property “as if owner”.⁴¹⁶ This is in line

(15th ed 2006) paras 441-442; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 348; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 415.

⁴¹² BW 3:99.1; BW 3:105.1. See also HR 3 May 1996, NJ 1996, 501. See further Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428.

⁴¹³ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) paras 441-442.

⁴¹⁴ “(1) Possession is the holding or detention of a *res* for oneself.

(2) Possession is outright or direct when a person possesses a *res* that is not held for him by another.

(3) Possession is indirect when a person possesses a *res* held on his behalf through another.

(4) Holdership or detention is either direct or indirect.”

⁴¹⁵ This is clear from HR 7 March 1980, NJ 1980, 549. See also Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 124. I am indebted to Dr van Vliet for allowing me to cite his draft chapter in my dissertation.

⁴¹⁶ Compare this to section 1 of the Prescription Act 68 of 1969 of South Africa, which also requires a person to possess “as if owner”. The “as if owner” requirement in South African law is discussed in section 2.3.2.4 of chapter two above.

with the *animus domini* element that forms part of *possessio civilis* in South African prescription law.⁴¹⁷

Whether someone has possession is a factual question and has to be decided on the facts.⁴¹⁸ Factors for determining possession include, *inter alia*, the nature of the property, the way physical control is exercised and the manner in which possession was acquired.⁴¹⁹ Once a person holds property, such person is deemed as holding it for herself.⁴²⁰ A person obtains possession by “taking possession, through transfer or through succession under general title.”⁴²¹

Possession may either be held outright or directly (*onmiddellijke bezit*),⁴²² or indirectly (*middellijke bezit*), such as through an agent.⁴²³ Both types of possession are sufficient for purposes of prescription. Parties such as agents, lessees and *commodatii*⁴²⁴ do not qualify as possessors, as their intention is merely to hold on behalf of the principal and not for themselves.⁴²⁵ Consequently, they qualify as holders (*detentores*) and not as possessors.⁴²⁶ Since the agent possesses on behalf of the principal and not herself, it is the principal who acquires the property held by the agent through prescription, as possession is attributed to her.⁴²⁷ As long as the agent holds the property on behalf of the principal and not for herself, she cannot acquire the property through prescription.⁴²⁸

⁴¹⁷ See section 2.3.2.1.1 of chapter two above.

⁴¹⁸ BW 3:108, which provides that to establish whether someone is holding property for herself or for another must be determined according to the common opinion (*verkeersopvatting*), while also taking into account the relevant law and facts. See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 466, who translate “*verkeersopvatting*” as “common opinion”.

⁴¹⁹ BW 3:108.

⁴²⁰ BW 3:109.

⁴²¹ BW 3:112: “[I]nbezitneming, door overdracht of door opvolging onder algemene titel.” (“The taking of possession occurs through taking possession, through transfer or through succession under general title.”) See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 467.

⁴²² This is where someone personally possesses a thing, without making use of an agent: See BW 3:107.2.

⁴²³ BW 3:107.3 and 3:107.4. Indirect possession, or *middellijke bezit*, is when someone possesses a thing through another, such as an agent.

⁴²⁴ Loan for use (*bruikleen*).

⁴²⁵ BW 3:107. See also Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428a.

⁴²⁶ For instance, see HR 18 November 2005, NJ 2006, 150. See also Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 124.

⁴²⁷ BW 3:111. See also Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428a; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 337.

⁴²⁸ BW 3:111. See also Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428a; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 337.

It is possible for an agent to qualify as possessor once the agency relationship ends.⁴²⁹ However, it is not possible for the agent to change the intention with which she holds the property unilaterally.⁴³⁰ The law requires something more, such as when a lessee denies the owner's right of ownership.⁴³¹ Prescription only commences in favour of the former agent on the day after the one on which the agency relationship ends, namely the day after the former agent obtains possession.⁴³² A principal can also transfer possession to her agent if she wishes.⁴³³

An agent cannot even acquire property with the aid of BW 3:105.1,⁴³⁴ since this provision only stipulates that a *possessor* can acquire property at the expiration of the 20-year period. Since the agent is merely a holder, she is unable to obtain possession, unless one of the grounds in BW 3:111 is present. Consequently, not even a *mala fide* agent is able to acquire property through BW 3:105.1.⁴³⁵

Under the previous Civil Code, the law required possession to also be *openbaar* (open) and *niet dubbelzinnig* (unambiguous or unequivocal).⁴³⁶ These requirements were not included in the new BW, since the decisive factor is now whether someone was in *possession* of the property for the requisite period.⁴³⁷ The reason for this omission is that these requirements are

⁴²⁹ BW 3:111.

⁴³⁰ BW 3:111. See also HR 18 November 2005, NJ 2006, 150.

⁴³¹ HR 18 November 2005, NJ 2006, 150.

⁴³² BW 3:101.

⁴³³ BW 3:102. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428b; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴³⁴ This section provides for the extinguishment of the owner's legal claim towards property.

⁴³⁵ See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428a; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 337. If the *Pye* case was decided in the Netherlands, the *Grahams* – being *mala fide* because they knew that *Pye* was the owner – would only have been able to acquire the disputed land in terms of BW 3:105, which requires a 20 year period according to BW 3:306. Yet, even under these circumstances, it is doubtful whether the *Grahams* would have been able to comply with the *animus domini* required for possession in Dutch law. For a discussion of whether the *Grahams* would have succeeded in Dutch law, see Milo JM “On the Constitutional Proportionality of Property Law in the Netherlands” (2007) 15 *European Review of Private Law* 255-263 261-262.

⁴³⁶ BW 1992 (old). See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428b.

⁴³⁷ BW 3:99, read with BW 3:108. BW 3:108 provides that to determine whether a person holds property for herself or for another, one must have regard to the common opinion (*verkeersopvatting*) and the relevant law and facts. See also Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 408.

regarded as inherently forming part of possession.⁴³⁸ This is clear from a decision where the Dutch Supreme Court found that a claimant could not succeed with a prescription claim because his possession was equivocal.⁴³⁹ This approach is interesting from the perspective of South African prescription law, where the 1969 Prescription Act expressly requires possession to be “open”.⁴⁴⁰

The previous Civil Code also required possession to be *voortdurend* (continuous) and *ongestoord* (undisturbed).⁴⁴¹ The new *Burgerlijk Wetboek* omits these requirements, although it is trite law that the loss of possession usually interrupts the running of prescription.⁴⁴² A possessor – in this context – can continue the running of prescription if she reclaims the property within one year of the loss of possession, unless the person against whom she institutes a claim for repossession has a stronger right towards the property.⁴⁴³ Involuntary loss of possession does not interrupt prescription either, should the possessor regain possession within one year, or if an action instituted within one year of such loss leads to the regaining of possession.⁴⁴⁴ A possessor only loses possession if she knowingly or explicitly⁴⁴⁵ parts with it.⁴⁴⁶ Possession will also be lost if someone else obtains possession over the property.⁴⁴⁷ The law regards possession as being continuous if none of these grounds are present.⁴⁴⁸

The law deems the person in possession to be the owner of the property.⁴⁴⁹ However, BW 3:119.2 qualifies this presumption:

“Ten aanzien van registergoederen wijkt dit vermoeden, wanneer komt vast te staan dat de wederpartij of diens rechtsvoorganger te eniger tijd rechthebbende was en dat de bezitter zich

⁴³⁸ BW 3:99 and BW 3:108. See Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428b; Van Zeven CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 408.

⁴³⁹ HR 7 March 1980, NJ 1980, 549.

⁴⁴⁰ Section 1 of the Prescription Act 68 of 1969. See the discussion in section 2.3.2.3 of chapter two above.

⁴⁴¹ BW 1992 (old).

⁴⁴² BW 3:117. See Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 428b; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 342.

⁴⁴³ BW 3:125.1 and BW 3:125.2.

⁴⁴⁴ BW 3:103.

⁴⁴⁵ “Kennelijk”.

⁴⁴⁶ BW 3:117.1.

⁴⁴⁷ BW 3:117.1.

⁴⁴⁸ BW 3:117.2. See also Van Zeven CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 442.

⁴⁴⁹ BW 3:119.1. See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 468.

niet kan beroepen op verkrijging nadien onder bijzondere titel waarvoor inschrijving in de registers vereist is.”⁴⁵⁰

A person takes possession of property through obtaining control over it.⁴⁵¹ However, where property was in the possession of another, the mere taking of control of that property on its own is insufficient to constitute possession.⁴⁵² BW 3:108 comes into play in this context and provides that in order to establish whether a person holds property for herself, regard must be had to the common opinion (*verkeersopvatting*),⁴⁵³ together with the relevant law and facts of the case.⁴⁵⁴ Therefore, even if a non-owner attains control over property, there can only be a taking of possession if – according to common opinion – the possession of the owner or initial possessor has ended.⁴⁵⁵ This will only be the case if the owner or initial possessor knowingly or explicitly abandons possession, or where another person acquires possession from her.⁴⁵⁶

The law is reluctant to regard a dispossessor as having obtained possession, since dispossession of land occurs to the owner’s detriment.⁴⁵⁷ It will have to be clear that the owner no longer has possession and that it now vests in the dispossessor.⁴⁵⁸ Take the example⁴⁵⁹ where A is the owner of a small field adjacent to her house. Should A’s neighbour (B) cut the grass on the field at certain intervals and think that the field forms part of her property, this will not cause A to lose possession or for B to obtain it. The cutting of grass is insufficient for B to dispossess A, since this act does not unequivocally demonstrate that B has possession.⁴⁶⁰ However, should B fence off the field and lock the gate, causing A not have access to the field, common opinion dictates that B has dispossessed A.

⁴⁵⁰ “The presumption is set aside in respect of registered property, where it is established that another party or his predecessor was the person who has title at any time and the possessor cannot invoke subsequent acquisition by particular title requiring entry in the registers.”: Warendorf H *et al The Civil Code of the Netherlands* (2009) 468. See also Van Zeven CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 409.

⁴⁵¹ BW 3:113.1. See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 467.

⁴⁵² BW 3:113.2.

⁴⁵³ Warendorf H *et al The Civil Code of the Netherlands* (2009) 466 translate “*verkeersopvatting*” as “common opinion”.

⁴⁵⁴ See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 466.

⁴⁵⁵ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴⁵⁶ BW 3:117.1 and BW 3:117.2.

⁴⁵⁷ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴⁵⁸ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴⁵⁹ Example taken from Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴⁶⁰ As required by HR 7 March 1980, NJ 1980, 549.

It is also possible to obtain possession through transfer or delivery (*bezitoverdracht*),⁴⁶¹ which entails delivery of the thing to the transferee.⁴⁶² Registration at the Land Registry is required to effect delivery of land, which causes the transferee to obtain possession only after registration took place.⁴⁶³ Should delivery be unsuccessful due to some defect – such as incapacity on the side of the transferor – the transferee will still obtain possession, despite the fact that she was not entitled to it.⁴⁶⁴ This is due to the requirements in BW 3:84.1, which only pertain to the delivery and not the obtaining of possession.⁴⁶⁵ Possession in this context can lead to the acquisition of ownership through BW 3:105.1, read with BW 3:306.

Prescription starts to run in favour of a possessor on the day after she obtained possession.⁴⁶⁶ A person can acquire land after 10 years' possession in good faith,⁴⁶⁷ while a possessor in bad faith only acquires ownership in land after 20 years.⁴⁶⁸

3.3.2.2.2 **Bona fide (good faith) prescription**

BW 3:118 defines good faith as:

- “(1) Een bezitter is te goeder trouw, wanneer hij zich als rechthebbende beschouwt en zich ook redelijkerwijze als zodanig mocht beschouwen.
- (2) Is een bezitter eenmaal te goeder trouw, dan wordt hij geacht dit te blijven.
- (3) Goede trouw wordt vermoed aanwezig te zijn; het ontbreken van goede trouw moet worden bewezen.”⁴⁶⁹

A possessor is in good faith if she regards herself as entitled to the property, which belief must also be reasonable.⁴⁷⁰ *Bona fides* only has to be present the moment a person obtains

⁴⁶¹ BW 3:112.

⁴⁶² BW 3:84.1, read with BW 3:90.1.

⁴⁶³ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴⁶⁴ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴⁶⁵ BW 3:84.1 provides as follows: “Voor overdracht van een goed wordt vereist een levering krachtens geldige titel, verricht door hom die bevoegd is over het goed te beschikken.” (Warendorf H *et al The Civil Code of the Netherlands* (2009) 460 translate this provision as follows: “Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property.”) See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 335.

⁴⁶⁶ BW 3:101.

⁴⁶⁷ BW 3:99.1. This includes registered movable and immovable property, as well as proprietary rights. See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 247; Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 427; Van Zeven CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 408.

⁴⁶⁸ BW 105.1, read with BW 3:306.

⁴⁶⁹ “(1) A possessor is in good faith if he reasonably regards himself as being entitled to the property.

(2) If a possessor is in good faith, he is deemed as remaining so.

(3) Good faith is deemed to be present, the absence of good faith must be proven.”

possession,⁴⁷¹ since subsequent *mala fides* does not negate earlier good faith.⁴⁷² Thus, it is possible to acquire property through BW 3:99.1, even if a possessor later discovers that she is not entitled to the property.⁴⁷³ Whether a person possessed property in good faith is determined at the moment that she obtained possession.⁴⁷⁴ Accordingly, a thief cannot qualify as a possessor in good faith.⁴⁷⁵ Since the *Burgerlijk Wetboek* deems the presence of good faith, the onus rests on a party averring its absence.

When someone obtains possession through transfer and such transfer was defective for some reason,⁴⁷⁶ the transferee will not hold in good faith if she had known – or should have known – of the existence of the defect.⁴⁷⁷ Accordingly, a transferee obtains possession in good faith if she did not know, or ought not to have known, of the defect.⁴⁷⁸ Possible defects include incapacity on the side of the transferor, absence of valid title⁴⁷⁹ or non-compliance with registration for purposes of transferring land.⁴⁸⁰ Regarding the last-mentioned defect, one has to distinguish between an error of law and an error of fact.⁴⁸¹ BW 3:89 requires registration in cases involving the sale of land. If registration did not occur because the transferee was unaware of BW 3:89 (error of law), then she cannot be in good faith.⁴⁸² However, if the buyer (transferee) commissioned an attorney (a notary in Dutch law) to complete the registration and the attorney neglects to do this (error of fact), then she can be *bona fide*.⁴⁸³

⁴⁷⁰ See also BW 3:11. For an application of this criterion, see HR 8 September 2000, NJ 2000, 629.

⁴⁷¹ BW 3:118.2. For example, see HR 8 September 2000, NJ 2000, 629; HR 20 June 1997, NJ 1999, 301.

⁴⁷² Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 408-410. This is in line with the position in Roman law: See section 2.2.2 of chapter two above.

⁴⁷³ See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 408.

⁴⁷⁴ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁷⁵ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁷⁶ By, for instance, not complying with the requirements set out in BW 3:84.1.

⁴⁷⁷ BW 3:11. The defect should not have been easily discoverable: See Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁷⁸ BW 3:11; BW 3:118.1. See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁷⁹ HR 30 November 1945, NJ 1946, 49.

⁴⁸⁰ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 430; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁸¹ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 430.

⁴⁸² BW 3:11. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 430; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁸³ BW 3:11. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 430; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

As seen above, BW 3:118.2 requires *bona fides* to be present the moment a person obtains possession.⁴⁸⁴ Should the possessor later realise that someone else is the owner, this knowledge will not negate the earlier *bona fide* possession.⁴⁸⁵ Consequently, the possessor is still able to acquire ownership over the property through good faith prescription under these circumstances. It is even possible for a possessor who was not initially in good faith to become *bona fide*.⁴⁸⁶ The Dutch Supreme Court described this possibility as follows:

“[D]at [is] [niet] uitgesloten dat een bezitter, die op het tijdstip waarop hij het bezit verkreeg niet te goeder trouw was, op een later tijdstip ten aanzien van dat bezit alsnog te goeder trouw wordt met als gevolg dat vanaf dit laatste tijdstip de gevolgen gelden die de wet aan het bezit te goeder trouw verbindt.”⁴⁸⁷

However, this change of *fides* does not operate retrospectively, since possession only starts to be in good faith once the possessor becomes *bona fide*.⁴⁸⁸ In this scenario, the running of prescription commences in favour of the possessor on the day after such possessor became *bona fide*.⁴⁸⁹ One finds an example in situations regarding the transfer of land, where an entry into the public register is required before possession can be *bona fide*.⁴⁹⁰ Once the possessor has completed this registration process, her possession is regarded as *bona fide*.⁴⁹¹ Although this example is not fully correct from a legal point of view, it does help to clarify the situation.⁴⁹²

⁴⁸⁴ Confirmed in HR 8 September 2000, NJ 2000, 629; HR 20 June 1997, NJ 1999, 301.

⁴⁸⁵ BW 3:118.2. For example, see HR 20 June 1997, NJ 1999, 301. See also Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 408, 410.

⁴⁸⁶ HR 20 June 1997, NJ 1999, 301. See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 252; Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 430; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 444.

⁴⁸⁷ HR 20 June 1997, NJ 1999, 301. (“[I]t [is] [not] excluded that a possessor, who initially obtained possession in bad faith, may at a later stage become a good faith possessor. Time will only start to run in his favour as a *bona fide* possessor from the moment he obtained good faith.”) See also HR 8 September 2000, NJ 2000, 629.

⁴⁸⁸ HR 20 June 1997, NJ 1999, 301. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 430; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁸⁹ BW 3:101.

⁴⁹⁰ BW 3:89. For example, see HR 8 September 2000, NJ 2000, 629. See also Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 412.

⁴⁹¹ Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 412.

⁴⁹² Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 430 criticise this example because possession cannot be transferred separately from the right. Since registration is required for the transfer of immovables, according to BW 3:89.1, the buyer will not be able to possess the immovable property before the registration is completed. Nonetheless, I use this example merely to illustrate the possibility of becoming *bona fide* at a later stage.

Knowledge of the actual facts or law negates a possessor's good faith.⁴⁹³ This is also the case when a possessor is unaware of the facts or law, but ought to have been aware of them.⁴⁹⁴ The law, under these circumstances, deems a possessor to have been aware of the facts or the law, despite whether it is impossible to ascertain these aspects.⁴⁹⁵ When a person obtains possession by dispossessing the owner, the law is reluctant to deem such a possessor as being in good faith.⁴⁹⁶

When someone obtains possession through general or universal title (under the law of succession, for instance), the law attributes the legal predecessor's *fides* to the successor irrespective of whether the latter was in good or bad faith.⁴⁹⁷ This is in line with the position under Roman law.⁴⁹⁸ Hence, if the predecessor was in good faith, the successor is able to acquire the property through good faith prescription under BW 3:99.1, even though the successor may actually be in bad faith. Should the predecessor have been in bad faith, the successor is – despite her *fides* – unable to acquire the property through BW 3:99.1. However, it may still be possible for her to acquire the property through the provisions regulating bad faith prescription, namely BW 3:105.1, read with BW 3:306.⁴⁹⁹

A possessor of land is in bad faith if she – being unaware of the facts – is able to ascertain the true state of affairs by investigating the register.⁵⁰⁰ Such a possessor is, therefore, unlikely to acquire land through good faith prescription, since good faith depends on consultation of the registers.⁵⁰¹ Nonetheless, the law does not automatically regard a possessor as being in bad faith in the context of boundary disputes simply because she did not consult the cadastral maps.⁵⁰² The cadastral maps show the exact boundaries as determined by surveyors, something that the public register does not do.⁵⁰³ Yet, non-investigation of the cadastral maps could still amount to an absence of good faith even in instances where the actual boundaries

⁴⁹³ BW 3:11.

⁴⁹⁴ BW 3:11.

⁴⁹⁵ BW 3:11. See also Warendorf H *et al* *The Civil Code of the Netherlands* (2009) 434.

⁴⁹⁶ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁴⁹⁷ BW 3:116.

⁴⁹⁸ For the position in Roman law, see section 2.2.2 of chapter two above.

⁴⁹⁹ The 20-year period is laid down in BW 3:306.

⁵⁰⁰ BW 3:23.

⁵⁰¹ The land can still be acquired through BW 3:105 if the possessor is *mala fide*, although the period of prescription will then be 20 years, according to BW 3:306.

⁵⁰² HR 20 February 1987, NJ 1987, 1002. See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338; Van Zeben CJ *et al* *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 1095.

⁵⁰³ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

are uncertain.⁵⁰⁴ Scenarios where investigation by the possessor is less essential are contained in BW 5:36, which provides the following:

“Dient een muur, hek, heg of greppel, dan wel een niet bevaarbaar stromend water, een sloot, gracht of dergelijke watergang als afscheiding van twee erven, dan wordt het midden van deze afscheiding vermoed de grens tussen deze erven te zijn. Dit vermoeden geldt niet, indien een muur slechts aan één zijde een gebouw of werk steunt.”⁵⁰⁵

BW 3:100 creates an exception to BW 3:99.1 by disallowing the possibility of acquiring a deceased person’s estate through good faith prescription. It is only possible to acquire that property after the owner’s legal claim to reclaim possession has expired.⁵⁰⁶

3.3.2.2.3 **Mala fide (bad faith) prescription**

According to BW 3:105.1, a possessor is able to acquire property possessed in bad faith once the owner’s legal claim towards that property is extinguished through (extinctive) prescription after 20 years.⁵⁰⁷ Consequently, a possessor becomes entitled to the property at the expiration of the prescription period.⁵⁰⁸ A possessor is in bad faith when “the possessor knows that the thing in his possession does not belong to him.”⁵⁰⁹

BW 3:99.1 requires the *bona fide* possessor to possess land for 10 years before she can acquire it through *verkrijgende verjaring*. BW 3:105.1 does not require a possessor to possess property for a certain period, but merely requires that property be possessed *at the moment the owner’s legal claim is extinguished*.⁵¹⁰ Mijnsen *et al* are of the opinion that this type of prescription is not acquisitive prescription in the formal sense, but rather a special type of prescription.⁵¹¹ Nonetheless, many authors regard this form of prescription as being

⁵⁰⁴ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 338.

⁵⁰⁵ “Where a wall, fence, hedge, trench or non-navigable running water, ditch, canal or similar waterway serves as a boundary between properties, the middle of this boundary is presumed to be the dividing line between these properties. This presumption is rebutted if a wall supports a building or work only on one side.” (Translation by Warendorf H *et al* *The Civil Code of the Netherlands* (2009) 608.)

⁵⁰⁶ BW 3:105.1, read with BW 3:306.

⁵⁰⁷ BW 3:306.

⁵⁰⁸ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 248; Mijnsen FHJ *et al* *Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 431.

⁵⁰⁹ HR 8 September 2000, NJ 2000, 629: “[D]e bezitter kennis draagt dat de zaak, welke hij bezit, aan hem niet in eigendom toebehoort.” (“[T]he possessor knows that the thing in his possession does not belong to him.”)

⁵¹⁰ See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 344a.

⁵¹¹ Mijnsen FHJ *et al* *Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 431. To the contrary is Van Zeven CJ *et al* *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 419.

acquisitive in nature.⁵¹² Thus, although the extinguishment of the owner's right to reclaim the property is an example of extinctive prescription, Dutch law confers full ownership on the *mala fide* possessor the moment that the owner's legal claim extinguishes.⁵¹³ This type of prescription is reminiscent of the effects of the year-and-a-day rule under Roman-Dutch law.⁵¹⁴

The prescription of the owner's legal claim commences on the day after the one on which the owner obtained the right to reclaim the property,⁵¹⁵ or the day after which a person acquired possession over the owner's property.⁵¹⁶ This type of prescription runs regardless of the time the property remained in the hands of different possessors.⁵¹⁷ In other words, the initial possessor may transfer possession to a second possessor in the nineteenth year of the prescription period. The new possessor then only has to possess the property for one year to acquire ownership. The absence of good faith plays no role here, as no specific period has to be satisfied.⁵¹⁸ This is because this type of prescription runs against the owner's *legal claim* and not in favour of the *possessor*. BW 3:105.1 only applies to the person who possessed the property at the time when the owner's legal claim towards that property is extinguished. If the possessor involuntarily loses possession of the property, but regains possession within one year or through a legal action instituted within one year of such loss, the law deems her as being the possessor for purposes of BW 3:105.1.⁵¹⁹

3.3.2.2.4 *The periods required for prescription*

The possessor must have been in possession of the property for the full duration of the prescription period for purposes of BW 3:99.1.⁵²⁰ The type of property determines the length

⁵¹² Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) paras 248, 254; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 344; Van Zeven CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 416, 419.

⁵¹³ This type of prescription is regarded as acquisitive in nature, which implies that the possessor acquires full ownership of the property in question: See the sources cited in the previous footnote above.

⁵¹⁴ See section 2.2.3 of chapter two above.

⁵¹⁵ BW 3:314.1.

⁵¹⁶ BW 3:314.2.

⁵¹⁷ Mijnssen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 431.

⁵¹⁸ Mijnssen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 431.

⁵¹⁹ BW 3:105.2.

⁵²⁰ BW 3:99.1 requires possession to be uninterrupted. See also Mijnssen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 432.

of the prescription period. Rights to unregistered movable property,⁵²¹ together with rights vesting in the bearer or order of a cheque, can be acquired through prescription in three years.⁵²² The prescription period for land, which forms the focus of this dissertation, is 10 years.⁵²³ The three-year period for unregistered movables is analogous to that of *usucapio* under Roman law, which also had a three-year period for movables.⁵²⁴

The reason that Dutch law has a 10-year period for land is because it views this period as providing ample time for owners to enforce their rights.⁵²⁵ This position differs from South African law, where a 30-year prescription period is required for acquiring ownership in land.⁵²⁶ The running of prescription commences on the day after the one on which a person obtained possession⁵²⁷ and is completed on the last day of the requisite period at 12 pm.⁵²⁸ The period for (extinctive) prescription, namely the extinction of the owner's legal claim, is set at 20 years.⁵²⁹

3.3.2.2.5 Coniunctio temporum (*aggregation of prescription periods*)

As under the 1969 Prescription Act of South Africa,⁵³⁰ the *Burgerlijk Wetboek* also provides for *coniunctio temporum*:

“Hij die een ander onder algemene titel in het bezit opvolgt, zet een lopende verjaring voort.”⁵³¹

BW 3:102.1 specifically provides for the aggregation of periods of possession between predecessors and successors who succeeded one another under universal or general title. This means that the successor is able to succeed the predecessor in her possession for purposes of

⁵²¹ “Niet-registergoederen”.

⁵²² BW 3:99.1.

⁵²³ BW 3:99.1.

⁵²⁴ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 432; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 409. See further section 2.2.2 of chapter two above.

⁵²⁵ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 432; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 409.

⁵²⁶ See section 2.3.1 of chapter two above.

⁵²⁷ BW 3:101.

⁵²⁸ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 433.

⁵²⁹ BW 3:306.

⁵³⁰ See section 2.3.1 of chapter two above.

⁵³¹ BW 3:102.1: “He who succeeds another under general title [under, for instance, succession law] regarding possession, continues the running of prescription.”

prescription. This type of succession is qualified, though, since a successor under *algemene titel* (general or universal title) succeeds to the predecessor's right of possession with all its characteristics.⁵³² Thus, if the predecessor was *mala fide*, the successor is deemed as also being in bad faith, despite whether the successor may actually have been in good faith.⁵³³ It follows that if the predecessor possessed in good faith, the successor is then – despite her own *fides* – regarded as continuing possession in good faith.⁵³⁴ This is in accordance with the position under Roman law, as seen in the historical overview in the previous chapter.⁵³⁵

BW 3:102.2 also provides for the aggregation of periods of possession:

“Hetzelfde doet de bezitter te goeder trouw die het bezit van een ander anders dan onder algemene titel heeft verkregen.”⁵³⁶

One has to distinguish the acquisition of possession under general or universal title (as in the law of succession) from that under specific title (as in the context of a sales agreement).⁵³⁷ The qualification found in BW 3:102.2 stipulates that the transferee can only continue the prescription clocked up by the transferor if the transferee was *bona fide*. Should the transferee later become aware of the true state of affairs, this does not negate her good faith.⁵³⁸ Thus, it is clear that the *fides* of the transferor is irrelevant for purposes of BW 3:102.2.

Coniunctio temporum is irrelevant for purposes of BW 3:105.1, since this provision provides for the extinction of the owner's legal claim towards the property. Accordingly, the time that the property in question spent in the hands of different possessors is immaterial when it comes to the extinction of the owner's legal claim, as discussed above.⁵³⁹

3.3.2.3 *Interruption (stuiting) and postponement (verlenging) of prescription*

⁵³² BW 3:116. See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 468.

⁵³³ BW 3:102.1, read with BW 3:116. See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 340a.

⁵³⁴ BW 3:102.1, read with BW 3:116. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 434; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 340a.

⁵³⁵ See section 2.2.2 of chapter two above.

⁵³⁶ “The same [as in BW 3:102.1] applies to the possessor in good faith, who obtains possession from another in cases other than under general title.”

⁵³⁷ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 435; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 340a.

⁵³⁸ BW 3:118.2.

⁵³⁹ See section 3.3.2.2.3 above.

3.3.2.3.1 *Introduction*

Certain events are capable of interrupting the running of prescription, causing prescription to start running *de novo*.⁵⁴⁰ Interruption (*stuiting*) occurs if the owner makes a claim towards the property, the possessor loses possession of the property or if the possessor acknowledges the rights of the owner.⁵⁴¹

Should a postponing impediment (*verlengingsgrond*) be present during the running of prescription, completion of the prescription period is postponed for six months after the impediment has fallen away.⁵⁴² This also applies to situations where prescription would have completed within six months after the postponing impediment ceased to exist.⁵⁴³ Postponement is based on the widely accepted rationale that prescription ought not to run against those who are incapable of managing their own affairs.⁵⁴⁴ The previous Civil Code referred to postponement as *schorsing* (postponement in the true sense), which entailed that prescription was postponed from completion as long as the postponing impediment existed.⁵⁴⁵ *Verlenging* (prolonging) replaced *schorsing* under the new *Burgerlijk Wetboek* in BW 3:320. For ease of reference, I continue to refer to this notion as “postponement”, instead of using the correct English translation, namely “prolonging”. BW 3:321, discussed below, contains the grounds for postponement.

3.3.2.3.2 *Interruption (stuiting) of prescription*

Interruption can be either natural or civil.⁵⁴⁶ Natural interruption occurs when a possessor loses possession of the property.⁵⁴⁷ In cases involving involuntary loss of possession (through, for instance, theft or negligence), interruption does not take place under the following circumstances:

- i) if possession is regained within one year; or

⁵⁴⁰ BW 3:316-3:319.

⁵⁴¹ BW 3:316.1, BW 3:117.1 and BW 3:318, read with BW 3:104.1.

⁵⁴² BW 3:320.

⁵⁴³ BW 3:320, read with BW 3:104.1.

⁵⁴⁴ Mijnssen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 437.

⁵⁴⁵ Mijnssen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 437.

⁵⁴⁶ BW 3:117; BW 3:316. See also Mijnssen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) paras 438-439.

⁵⁴⁷ BW 3:117.

- ii) if legal proceedings instituted within one year after the loss of possession leads to the recovery of possession over the property.⁵⁴⁸

Should the possessor transfer possession under specific title to someone other than the owner, prescription continues to run in favour of the transferee.⁵⁴⁹ Natural interruption is only applicable to acquisitive prescription and does not apply to extinctive prescription.⁵⁵⁰ However, civil interruption may occur in the context of both acquisitive and extinctive prescription.⁵⁵¹

Civil interruption occurs when the owner asserts a legal claim towards the property, or lodges a claim to regain possession of the property.⁵⁵² It also occurs when the possessor obtains a binding opinion and then realises that she is not owner.⁵⁵³ Interruption may also occur by way of a letter of demand⁵⁵⁴ if the letter of demand is followed – within six months – by an act that constitutes interruption as mentioned in BW 3:316.⁵⁵⁵

Should the owner's claim to regain possession fail for whatever reason, BW 3:316.2 provides that prescription will only be interrupted if the owner – within a period of six months after judgment was given against her – institutes a new claim that leads to judgment against the possessor.⁵⁵⁶ If the owner abandons her claim, prescription will not be interrupted.⁵⁵⁷ Acknowledging the rights of the owner in any way, including conduct by the possessor,⁵⁵⁸

⁵⁴⁸ BW 3:103. This position is remarkably similar to current South African prescription law: See section 2.3.3 of chapter two above.

⁵⁴⁹ BW 3:102.2.

⁵⁵⁰ The type of prescription in BW 3:105.1 only provides for the extinction of the owner's legal claim towards the property. Therefore, it does not matter for what length of time a person was in possession, for she acquires that property the moment the owner's legal claim prescribes. Interruption does therefore not play any role in this regard. BW 3:105.2 provides that if a person who possessed property in terms of BW 3:105.1 involuntarily loses possession and the period of prescription expires, she will be entitled to the property if she regains possession within one year of losing it, or if legal action instituted within one year after such loss leads to the regaining of possession. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 438; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 932.

⁵⁵¹ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 438.

⁵⁵² BW 3:317, read with BW 3:316.1.

⁵⁵³ BW 3:316.3. See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 514.

⁵⁵⁴ BW 3:317.2.

⁵⁵⁵ BW 3:317.

⁵⁵⁶ BW 3:116.2. Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 439; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 934.

⁵⁵⁷ BW 3:116.2. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 439.

⁵⁵⁸ BW 3:37.1.

also interrupts the running of prescription.⁵⁵⁹ The acknowledgement must be made towards the person against whom prescription is running.⁵⁶⁰ When the running of prescription is interrupted due to a legal remedy or action instituted by one of the parties, prescription does not commence again before proceedings are terminated.⁵⁶¹ The taking of possession from the first possessor also interrupts the running of prescription.⁵⁶²

3.3.2.3.3 *Postponement (verlenging or prolonging) of prescription*

The previous Civil Code used the concept of postponement (*schorsing*) as understood in the Roman-Dutch sense of the word.⁵⁶³ This entailed that prescription would not run against the owner at all during the presence of a postponing impediment, with the remainder of the prescription period continuing to run only after the impediment has fallen away. This position is identical to postponement under the common law position in South African prescription law at the time of the 1943 Prescription Act.⁵⁶⁴ However, as with South Africa,⁵⁶⁵ the new *Burgerlijk Wetboek* opted for a more equitable approach in BW 3:320.⁵⁶⁶

Postponement of prescription occurs in a limited number of situations.⁵⁶⁷ Would the prescription period have been completed but for the postponing impediment, it has to run for an additional six months after the impediment has fallen away.⁵⁶⁸ The same happens if the running of prescription would have been completed within six months after the impediment has fallen away. In this regard, the completion of prescription is postponed for an additional six months.⁵⁶⁹ The rationale behind postponement in Dutch law is similar to that of South

⁵⁵⁹ BW 3:318.

⁵⁶⁰ HR 10 June 1983, NJ 1984, 294. See also Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 439.

⁵⁶¹ BW 3:324.2. See also Warendorf H *et al The Civil Code of the Netherlands* (2009) 516.

⁵⁶² Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 253; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 412.

⁵⁶³ *Schorsing* in the true sense: See BW 2023-2029 (old). See also Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 937. The Roman-Dutch position is discussed in section 2.3.4 of chapter two above.

⁵⁶⁴ See section 2.3.4 of chapter two above.

⁵⁶⁵ See section 2.3.4 of chapter two above.

⁵⁶⁶ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 440; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 937.

⁵⁶⁷ BW 3:321.

⁵⁶⁸ BW 3:320.

⁵⁶⁹ BW 3:320.

African law, namely to prevent prescription running against those who are incapable of managing their own affairs.⁵⁷⁰

According to BW 3:321, prescription is postponed in cases where it is running between

- i) spouses who are not judicially separated;
- ii) a curator acting on behalf of a person who cannot administer her own affairs;
- iii) an administrator (*bewindvoerder*) and a principal on whose behalf she is acting, regarding claims concerning the agency agreement;
- iv) a juristic person and its management;
- v) a succession accepted under the benefit of inventory and an heir;
- vi) a creditor and her debtor who intentionally conceals the existence or claimability of the debt; and
- vii) registered partners.

The cases of postponement mentioned under (ii) and (iii) continue to be effective until the legal relationship between the curator (or administrator) and the incapacitated person (or principal) ends.⁵⁷¹ These grounds for postponement are, however, not all applicable to the postponement of acquisitive prescription.⁵⁷² For instance, ground (vi) only applies to cases involving extinctive prescription, since it refers to “debts”. *Prima facie*, the same would seem to apply to ground (iii), which refers to “claims”. However, ground (iii) may also be applicable in cases of acquisitive prescription where the administrator is in charge of property of the principal.⁵⁷³ Under these circumstances, it is clear that the administrator is not able to acquire the principal’s property through acquisitive prescription as long as the agency agreement is in force.⁵⁷⁴

3.4 French law

3.4.1 Introduction

⁵⁷⁰ Mijnssen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 440. For the position in South African law, see section 2.3.4 of chapter two above.

⁵⁷¹ BW 3:321.2.

⁵⁷² Mijnssen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 440.

⁵⁷³ BW 3:111. See also Mijnssen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) paras 428a, 440.

⁵⁷⁴ BW 3:111.

French law also recognises the distinction between ownership and possession, with ownership being the legal relationship between a person and property, whereas possession entails factual control by a person over property.⁵⁷⁵ This distinction is not self-evident when the owner is in possession of her property. Yet, as soon as ownership and possession separate, it becomes possible to acquire ownership through acquisitive prescription. French law knows acquisitive prescription as *prescription acquisitive* or *usucapion*.⁵⁷⁶ As in the other systems under discussion, French law also has specific requirements for the acquisition of property through *prescription acquisitive*.

Prescription acquisitive is justified in that long periods of possession create a presumption of ownership, to which the law affords *de iure* status if it has continued for a sufficient length of time.⁵⁷⁷ Furthermore, prescription is an original method of acquisition of ownership in French law,⁵⁷⁸ as in South African law.⁵⁷⁹ The provisions of the French Civil Code (“*Code Civil*”) relating to *usucapion* were amended in 2008,⁵⁸⁰ both in form and content.⁵⁸¹

3.4.2 *Prescription acquisitive* (acquisitive prescription) and its requirements

3.4.2.1 *Introduction and the role of possession*

Article 2258 of the *Code Civil* contains the following definition for *prescription acquisitive*:

“La prescription acquisitive est un moyen d’acquérir un bien ou un droit par l’effet de la possession sans que celui qui l’allègue soit obligé d’en rapporter un titre ou qu’on puisse lui opposer l’exception déduite de la mauvaise foi.”⁵⁸²

⁵⁷⁵ Steiner E *French Law – A Comparative Approach* (2010) 378; Bermann GA & Picard E *Introduction to French Law* (2008) 155.

⁵⁷⁶ Steiner E *French Law – A Comparative Approach* (2010) 378; Bermann GA & Picard E *Introduction to French Law* (2008) 155-156.

⁵⁷⁷ See generally Steiner E *French Law – A Comparative Approach* (2010) 378, 395; Bermann GA & Picard E *Introduction to French Law* (2008) 156, 159; Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 277. See also Sagaert V “Prescription in French and Belgian Property Law after the *Pye* Judgment” (2007) 15 *European Review of Private Law* 265-272 269. The justifications behind prescription are discussed more fully in chapter four below.

⁵⁷⁸ Articles 2258 and 2219 of the Civil Code. See also Steiner E *French Law – A Comparative Approach* (2010) 395; Bermann GA & Picard E *Introduction to French Law* (2008) 156, 158; Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 277.

⁵⁷⁹ See section 2.3.1 of chapter two above.

⁵⁸⁰ Law of 17 June 2008.

⁵⁸¹ Steiner E *French Law – A Comparative Approach* (2010) 395. The article numbers used in the discussion below are the numbers as they appear after the amendment.

⁵⁸² “Acquisitive prescription is a way of acquiring a thing or a right through possession without the person invoking prescription being required to show a title for the acquisition and without the possibility of opposing to him the exception of bad faith.” (Translation by Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 97.)

In other words, one is able to acquire both property and limited real rights (such as servitudes) through *prescription acquisitive*.

The main requirement for prescription in French law is possession, which Article 2255 defines as follows:

“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.”⁵⁸³

French law also distinguishes between possession and mere holdership. Possession consists of two elements, namely the physical element (*corpus*) and a mental element, which is the intention to hold the thing for oneself (*animus domini*).⁵⁸⁴ These two elements are identical to those required for possession in South African and Dutch prescription law.⁵⁸⁵ It is worth reiterating that it is “easier” to satisfy the requisite form of intent in English adverse possession law, which merely requires a person to intend to possess the property (*animus possidendi*).⁵⁸⁶ Therefore, a case based on similar facts as that of *Pye* would not easily have succeeded under French prescription law.⁵⁸⁷

One must not confuse the concepts of *animus domini* and good faith, since a possessor with *animus domini* acts as if owner, while a possessor in good faith truly believes that she is the owner.⁵⁸⁸ Consequently, it is possible for the *animus domini* and bad faith to co-exist, since the *fides* of a possessor is irrelevant when determining whether the *animus domini* is present for purposes of *prescription acquisitive*.⁵⁸⁹

⁵⁸³“Possession is the holding or the enjoyment of an object or of a right that we have or hold for ourselves, or by another who has or holds it for us.” (Translation by Van Vliet LPW “Creation” in Van Erp JHM (eds) *Ius Commune Case Book* (forthcoming 2012) 100.)

⁵⁸⁴ Steiner E *French Law – A Comparative Approach* (2010) 393; Bermann GA & Picard E *Introduction to French Law* (2008) 156. See also Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 100.

⁵⁸⁵ See section 2.3.2.1 of chapter two above for the South African position. The Dutch position appears from BW 3:107 and is discussed in section 3.3.2.2.1 above.

⁵⁸⁶ See the discussion in section 3.2.2.3.2.3 above.

⁵⁸⁷ For a discussion in this regard, see Sagaert V “Prescription in French and Belgian Property Law after the *Pye* Judgment” (2007) 15 *European Review of Private Law* 265-272 and Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597. Both these articles appeared before the 2008 amendments to the *Code Civil*. The facts of the *Pye* case are discussed in section 3.2.3.2 above.

⁵⁸⁸ Steiner E *French Law – A Comparative Approach* (2010) 393; Bermann GA & Picard E *Introduction to French Law* (2008) 156.

⁵⁸⁹ Bermann GA & Picard E *Introduction to French Law* (2008) 156; Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 277.

A *détenteur* or holder – unlike a possessor – does not hold property *animo domini*, as she intends to hold the property on behalf of someone else and not for herself.⁵⁹⁰ Therefore, lessees and borrowers are merely holders in French law and are unable to hold the property with the *animus domini*. This position is identical to that in South African and Dutch prescription law.⁵⁹¹ Once a person obtains possession, it continues even if the possessor exercises no acts of factual possession over the property.⁵⁹²

Besides the requisite possession, the possessor also has to satisfy other prescription requirements set out in Article 2261 of the *Code Civil*:

“Pour pouvoir prescrire, il faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire.”⁵⁹³

Since these “requirements” inherently form part of possession, it is incorrect to refer to them as “additional” requirements.⁵⁹⁴ Should one of these requirements be absent, possession is “vitiated” and the possessor is then unable to acquire the property through prescription.⁵⁹⁵ The requirement that possession must be unequivocal has – as in English law – given rise to problems pertaining to its definition.⁵⁹⁶ It is generally assumed that in a dispute between a possessor and an owner regarding ownership, possession by the possessor will be equivocal if the possessor and owner have been cohabiting or if they were co-owners.⁵⁹⁷ Under these circumstances, it is clear that the “possessor” will merely qualify as a holder, who is unable to acquire the property through *prescription acquisitive*. The requirement that possession must be unequivocal overlaps to some degree with the condition that possession must also be

⁵⁹⁰ Steiner E *French Law – A Comparative Approach* (2010) 393; Bermann GA & Picard E *Introduction to French Law* (2008) 156; Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 278.

⁵⁹¹ See section 2.3.2.1.1 of chapter two above for the South African position. The Dutch position is discussed in section 3.3.2.2.1 above.

⁵⁹² Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 103.

⁵⁹³ “In order to complete the prescription, possession as an owner is required; it has to be continuous and uninterrupted, peaceful, publicly visible, unequivocal.” (Translation by Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 109.) See also Steiner E *French Law – A Comparative Approach* (2010) 396; Bermann GA & Picard E *Introduction to French Law* (2008) 156. See generally Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 278-279.

⁵⁹⁴ Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 109.

⁵⁹⁵ Steiner E *French Law – A Comparative Approach* (2010) 396.

⁵⁹⁶ Steiner E *French Law – A Comparative Approach* (2010) 396.

⁵⁹⁷ Steiner E *French Law – A Comparative Approach* (2010) 396; Bermann GA & Picard E *Introduction to French Law* (2008) 156. See also Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 112.

without permission from the owner.⁵⁹⁸ It is trite law that precarious possession cannot give rise to acquisition of ownership through prescription.⁵⁹⁹

3.4.2.2 *Periods required for acquisitive prescription*

Article 2272 of the *Code Civil* sets the periods for prescription as follows:

“Le délai de prescription requis pour acquérir la propriété immobilière est de trente ans. Toutefois, celui qui acquiert de bonne foi et par juste titre un immeuble en prescrit la propriété par dix ans.”⁶⁰⁰

The running of prescription commences when the claimant, or her predecessor in title, obtains possession over the property.⁶⁰¹ According to Article 2272, the prescription period for land possessed in bad faith is 30 years. If the possessor seeks to acquire land in good faith and under just title, the prescription period is reduced to 10 years. The law presumes the presence of good faith and, as in Dutch law,⁶⁰² the onus rests on the party alleging bad faith.⁶⁰³ Article 550 of the *Code Civil* defines good faith as “where [the possessor] possesses as an owner under a title whose defects are not known to him.”⁶⁰⁴ In other words, *bona fides* requires the possessor to believe that she acquired ownership from the owner.⁶⁰⁵ A possessor is in good faith if she neither knew, nor could have known, that the transferor was unauthorised to dispose of the property.⁶⁰⁶

As to supervening *mala fides*, Article 550 of the *Code Civil* provides that “[the possessor] ceases to be in good faith from the moment in time when those defects become known to him.”⁶⁰⁷ Therefore, supervening bad faith negates earlier good faith, which is in line with the

⁵⁹⁸ Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 116. This is comparable to the “adverse” requirement in English adverse possession law, see section 3.2.2.3.1 above.

⁵⁹⁹ Articles 2236 and 2240 of the *Code Civil*. See also Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 116.

⁶⁰⁰ “Ownership of immovable property is acquired by prescription following a period of time of 30 years. However, a person who acquires an immovable in good faith (*bona fides*) and under just title (*iustus titulus*) prescribes ownership of it by 10 years.” (Translation by Steiner E *French Law – A Comparative Approach* (2010) 396.) See also the translation by Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 100.

⁶⁰¹ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 278.

⁶⁰² See section 3.3.2.2.2 above.

⁶⁰³ Article 2274 of the *Code Civil*. See also Steiner E *French Law – A Comparative Approach* (2010) 396.

⁶⁰⁴ Translation by Steiner E *French Law – A Comparative Approach* (2010) 396.

⁶⁰⁵ Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 104.

⁶⁰⁶ Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 104.

⁶⁰⁷ Article 550 of the *Code Civil*. Translation by Steiner E *French Law – A Comparative Approach* (2010) 396.

position under Canon law.⁶⁰⁸ This is contrary to the position in Dutch law, where supervening bad faith does not negate good faith if the possessor obtained possession *bona fide*.⁶⁰⁹

French jurists define “just title” (or valid legal ground) as a title that would have conveyed ownership were it not for the transferor’s lack of ownership or power of disposal.⁶¹⁰ It follows that a “just title” is in fact an imperfect title.⁶¹¹ However, for purposes of *prescription acquisitive*, this imperfect title is “good enough” as long as it is the only defect present.⁶¹² Any other defect, such as incapacity or non-compliance with formalities, disqualifies title from being “just”.⁶¹³ Van Vliet gives an example of a just title as being “a contract of sale or a contract creating a servitude.”⁶¹⁴

3.4.2.3 Aggregation of prescription periods (coniunctio temporum)

It is not required that one person should have possessed the property for the entire 10- or 30-year period to acquire ownership through *prescription acquisitive*.⁶¹⁵ This is due to Article 2265 of the *Code Civil*, which provides as follows:

“Pour compléter la prescription, on peut joindre à sa possession celle de son auteur, de quelque manière qu'on lui ait succédé, soit à titre universel ou particulier, soit à titre lucratif ou onéreux.”⁶¹⁶

The universal successor takes over all qualities attached to the possession of her predecessor.⁶¹⁷ Subsequently, if the predecessor was in bad faith, the law then deems the universal successor also to be in bad faith, even though she may actually be in good faith. On the other hand, if the universal successor was *bona fide*, the successor is deemed to be in good faith, regardless of her actual *fides*. The singular or specific successor, such as a buyer,

⁶⁰⁸ See section 2.2.2 of chapter two above.

⁶⁰⁹ See section 3.3.2.2.2 above.

⁶¹⁰ Steiner E *French Law – A Comparative Approach* (2010) 396. See also Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 106.

⁶¹¹ Steiner E *French Law – A Comparative Approach* (2010) 396.

⁶¹² Steiner E *French Law – A Comparative Approach* (2010) 396.

⁶¹³ Steiner E *French Law – A Comparative Approach* (2010) 396-397.

⁶¹⁴ Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 100, 106.

⁶¹⁵ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 278; Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 122.

⁶¹⁶ “To complete a prescription, one may join to one’s possession that of one’s predecessor, in whatever manner one may have succeeded to him, whether by virtue of a universal or specific title, whether for value or gratuitously.” (Translation by Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 122.)

⁶¹⁷ Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 122.

determines her own *fides*, since the *fides* of such a successor does not depend on that of the predecessor.⁶¹⁸

3.4.2.4 *Suspension of the prescription period*

Suspension of the running of prescription takes place where the owner is unable to bring action.⁶¹⁹ Grounds for suspension include where the owner is a minor or where she is incapable of managing her own affairs, for instance due to mental incapacity.⁶²⁰ Supervening force (*vis maior*) affecting the owner may suspend the prescription period, but this only applies where the event makes it impossible for the owner to prevent the running of prescription.⁶²¹

3.5 German law

German law has an extremely rigorous regime in the context of prescription (*Ersitzung*) of land due to the positive nature of its registration system. Consequently, most cases based on *Ersitzung* are unlikely to succeed. The discussion of German prescription law will therefore be brief.

§ 900 of the German Civil Code (“*Bürgerliches Gesetzbuch*” or “BGB”) regulates *Ersitzung* of land and provides as follows:

“(1) 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. Die dreißigjährige Frist wird in derselben Weise berechnet wie die Frist für die Ersitzung einer beweglichen Sache. Der Lauf der Frist ist gehemmt, solange ein Widerspruch gegen die Richtigkeit der Eintragung im Grundbuch eingetragen ist.

(2) 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.”⁶²²

⁶¹⁸ Van Vliet LPW “Creation” in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 122.

⁶¹⁹ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 278.

⁶²⁰ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 278.

⁶²¹ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 278.

⁶²² “(1) A person who has been registered in the land registry as owner of a piece of land, without having wanted the right of ownership, acquires the right of ownership when the registration has existed for 30 years and he has been in possession of the land for his own benefit for that time. The thirty-year period is calculated in the same way as the period for prescription of a movable object. The running of the prescription period is interrupted as long as an objection to the accuracy of the registration in the Land Register is registered.

The main requirement is that the possessor must have been registered as owner in the Land Register (*Grundbuch*) for prescription to run in her favour.⁶²³ Furthermore, the possessor must possess the property *animus domini*.⁶²⁴ Possession *animus domini* need not be in good faith, since the intention to possess as owner can co-exist with *mala fides*.⁶²⁵ The *animus domini* and registration in the *Grundbuch* must coincide for the full duration of the 30-year prescription period.⁶²⁶ Once these requirements are satisfied, the possessor acquires ownership by way of original acquisition of ownership.⁶²⁷ Consequently, *Ersitzung* extinguishes any legal claim to the land held by third parties when the possessor acquires ownership through prescription.⁶²⁸

The purpose behind BGB § 900 is to afford *de iure* status to long-existing *de facto* situations.⁶²⁹ Thus, *Ersitzung* aims to avoid the situation where the ownership of land and the reality of possession do not reside in the same person.⁶³⁰ Another purpose of *Ersitzung* is to prevent the *probatio diabolica* (devil's burden) when having to prove ownership.⁶³¹

(2) These provisions are applicable *mutatis mutandis* when a right has been registered in the Land Register for a person who is not entitled to it, that gives a right to possession or the exercise of which is protected by the provisions on possession. The order of registration is decisive for the priority of the right." (Translation by Van Vliet LPW "Creation" in Van Erp JHM (ed) *Ius Commune Case Book* (forthcoming 2012) 132.)

⁶²³ Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 3; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 900 RdNr 3.

⁶²⁴ Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 4; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 900 RdNr 3. *Animus domini* is defined in BGB § 872: "Wer eine Sache als ihm gehörend besitzt, ist Eigenbesitzer." ("A person who holds a thing for himself has *animus domini*.") I am indebted to Viola Wilke from the University of Erlangen-Nürnberg for her assistance in translating the German sources.

⁶²⁵ Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 1, 4; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 900 RdNr 3. This is similar to South African prescription law: See section 2.3.2.1.1 of chapter 2 above.

⁶²⁶ Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 5.

⁶²⁷ Vieweg K & Werner A *Sachenrecht* (4th ed 2010) § 6 RdNr 8; Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 6; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 900 RdNr 5.

⁶²⁸ Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 6; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 900 RdNr 1.

⁶²⁹ Vieweg K & Werner A *Sachenrecht* (4th ed 2010) § 6 RdNr 8; Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 1; Baur F, Baur JF & Stürner R *Sachenrecht* (18th ed 2009) § 53 RdNr 85.

⁶³⁰ Vieweg K & Werner A *Sachenrecht* (4th ed 2010) § 6 RdNr 8; Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 1; Baur F, Baur JF & Stürner R *Sachenrecht* (18th ed 2009) § 53 RdNr 85; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 900 RdNr 1.

⁶³¹ Baur F, Baur JF & Stürner R *Sachenrecht* (18th ed 2009) § 53 RdNr 85.

BGB § 891 I creates the statutory presumption that the *Grundbuch* provides conclusive proof of a registered right.⁶³² Once a right is registered in the *Grundbuch*, the register is presumed to provide conclusive proof of such right.⁶³³ The LRA is to the same effect, stipulating that the land register in English law now also provides conclusive proof of registered title.⁶³⁴ In German law, the possessor is presumed to be the owner of the land as long as she is registered in the *Grundbuch*.⁶³⁵ One can refute this presumption by proving the opposite or by registering a refutation in the *Grundbuch*.⁶³⁶ It is not necessary to prove the facts for this presumption to be effective.⁶³⁷ Accordingly, the burden of proof for proving that the *Grundbuch* is incorrect rests on the party averring it.⁶³⁸ This presumption in favour of the correctness of the *Grundbuch* is the reason why German law is classified as a positive registration system.

According to Baur, Baur and Stürner, *Ersitzung* no longer fulfils a meaningful role in German law.⁶³⁹ One may deduce this from the small number of judgments concerning *Ersitzung* in German law today.⁶⁴⁰ This makes sense, since the strict requirements for acquiring ownership in land through BGB § 900 are unlikely to be easily satisfied in practice. However, *Ersitzung* does still have a corrective function, such as when one of the requirements for a valid transfer of ownership has not been met.⁶⁴¹

It follows that the role of prescription in a jurisdiction with a positive registration system is extremely limited. Since the *Bürgerliches Gesetzbuch* presumes the correctness of the *Grundbuch*, it is not possible to argue that prescription fulfils a corrective function regarding possession of land. As one of the purposes of this dissertation is to investigate the contemporary role of prescription in various legal systems, it appears that prescription fulfils

⁶³² BGB § 891 I. See also Vieweg K & Werner A *Sachenrecht* (4th ed 2010) § 13 RdNr 8; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 891 RdNr 1.

⁶³³ BGB § 891 I. See also Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 891 RdNr 2, 5.

⁶³⁴ Section 58(1) of the Land Registration Act 2002.

⁶³⁵ Vieweg K & Werner A *Sachenrecht* (4th ed 2010) § 13 RdNr 8; Baur F, Baur JF & Stürner R *Sachenrecht* (18th ed 2009) § 4 RdNr 12; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 891 RdNr 5.

⁶³⁶ Vieweg K & Werner A *Sachenrecht* (4th ed 2010) § 13 RdNr 8; Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 891 RdNr 1, 8.

⁶³⁷ Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 891 RdNr 1.

⁶³⁸ Palandt O *Bürgerliches Gesetzbuch* vol 7 (63rd ed by Bassenge P *et al* 2004) § 900 RdNr 4.

⁶³⁹ Baur F, Baur JF & Stürner R *Sachenrecht* (18th ed 2009) § 6 RdNr 9, § 53 RdNr 86.

⁶⁴⁰ Baur F, Baur JF & Stürner R *Sachenrecht* (18th ed 2009) § 53 RdNr 86.

⁶⁴¹ Vieweg K & Werner A *Sachenrecht* (4th ed 2010) § 6 RdNr 1; Baur F, Baur JF & Stürner R *Sachenrecht* (18th ed 2009) § 6 RdNr 9.

a less important function in jurisdictions with positive registration systems, such as German and English law. In this sense, a positive registration system provides greater protection to owners, especially in English law where it was “easier” – as seen in the *Pye* case – to acquire title in land through adverse possession. This stands in contrast to prescription in civil-law countries, where a case with facts similar to those of *Pye* is unlikely to succeed due to the *animus domini* requirement. For this reason, it was essential to examine how adverse possession operates before and after the 2002 Act. Since these recent developments are unique to English law, it is unnecessary to examine German prescription law in further detail.

3.6 Conclusion

The English law of adverse possession before the enactment of the LRA was by far the most “lenient” system when it came to the extinguishment of title through the limitation of actions. Due to a friendly interpretation of the *animus possidendi* requirement, it is even possible for squatters offering to pay rent or to give up the property to qualify as possessors. This, coupled with the irrelevance of bad faith and a short 12-year limitation period, offers little protection to owners in English law. However, the enactment of the 2002 Act has placed England – together with Germany – at the forefront of jurisdictions that protect registered owners from losing registered land through limitation or prescription. However, since the LRA only applies to registered land, it is still possible to acquire title in unregistered land under the rules of adverse possession as it stood at the time of *Pye*. The amendments made to English law came as a result of the traditional justifications for adverse possession, such as that it promotes legal certainty, no longer applying to registered land when the identity of the proprietor can be ascertained by simply perusing the register. This is because the 2002 Act now deems the register as providing conclusive proof of title. Chapter four elaborates on the reasons why adverse possession or prescription fulfils a more useful role in systems where the correctness of the register is not guaranteed.

Although the civil law systems (which include South African, Dutch and French prescription law) do not have the same special protection for registered owners as in England, they have a much more rigorous *animus domini* element, which must be met before a person may qualify for possession for purposes of prescription. The periods under these systems are also considerably longer in the context of *mala fide* possessors, since Dutch and French law then require 20- and 30-year periods respectively. Furthermore, all these legal systems have

negative registration systems, which causes prescription to have a corrective function by affording *de iure* status to long-existing *de facto* realities. Consequently, through more stringent requirements, owners in these systems are also protected from the possible injustices of prescription, at least when compared to the position of the unregistered owner in English law. Nonetheless, this level of protection is not the same as that afforded in German law or to registered owners under the LRA.

Prescription of land in South African, Dutch and French law is therefore still possible, although longer periods have to be satisfied in the latter two countries involving *mala fide* possessors. Justifying *bona fide* prescription in these contexts is not at issue, since the difficulty seemingly lies with justifying situations where *mala fide* possessors “steal” ownership through prescription. In chapter four, I indicate that the distinction between good and bad faith possessors is fallacious in nature and that it serves no useful purpose to distinguish between these types of possessors for purposes of prescription.

As it was found that adverse possession or prescription plays a more limited role in countries with positive registration systems, the justifications behind this notion need to be scrutinised. This is done in chapter four, which specifically focuses on the rationale for prescription today.

CHAPTER 4: JUSTIFYING ACQUISITIVE PRESCRIPTION – RATIONALE AND JURISPRUDENCE

4.1 Introduction

This chapter analyses the traditional justifications behind acquisitive prescription (“prescription”), as formulated in each of the jurisdictions under consideration. The substantive requirements for prescription or adverse possession in these systems were already discussed and are, therefore, not repeated here.¹ Instead, the focus of this chapter falls on the grounds for justifying prescription in Roman-Dutch, South African, Dutch and French law, together with an investigation as to how the justifications for adverse possession were recently re-evaluated in English law. It was seen in chapter three that prescription no longer fulfils a meaningful role in German law because of the characteristics of its positive registration system.² For this reason, the justifications for prescription in German law are not addressed. Following the analysis of the rationale for prescription in the legal systems mentioned above, the chapter evaluates the justifications (both those in favour and against) for prescription in accordance with three strains of liberal property theory. These theories are the labour theory, the personality theory – as developed by Radin – and finally utilitarianism and law and economics theory.

This chapter argues that the traditional justifications provided for prescription in the Roman-Dutch, South African, Dutch and French systems are unsatisfactory. Although the rationale for adverse possession has been more extensively analysed (and criticised) in English law in light of the enactment of the Land Registration Act 2002 (“LRA” or “2002 Act”), I find that even this approach is lacking in that it fails to incorporate certain moral and economic factors. Therefore, it is necessary to focus on the three liberal property theories mentioned above to properly investigate the *raison d’être* behind prescription or adverse possession. Through addressing how each of these theories specifically relate to prescription, it is shown that prescription or adverse possession concerning land – including registered land – is justified in a negative registration system.

¹ The requirements for prescription or adverse possession are discussed in section 2.3.2 of chapter two (South African law) and sections 3.2-3.5 for English, Dutch, French and German law respectively in chapter three above.

² See the discussion of German prescription law in section 3.5 of chapter three above.

The focus finally falls on the acquisition of ownership through bad faith prescription. This phenomenon seems to “reward” persons who intentionally occupy property by awarding ownership to them, which complicates attempts to justify this manner of acquiring ownership.³ Nonetheless, this chapter concludes that the traditional objections against *mala fide* prescription – namely that it should either be impermissible or have longer prescription periods than instances involving *bona fide* possessors – are flawed in certain respects. Chapter four illustrates that even “bad faith” prescription is justified in modern legal systems if one has regard to the fallacies in these arguments.

4.2 The traditional justifications for acquisitive prescription in Roman-Dutch, South African, Dutch and French law

4.2.1 Introduction

This section only focuses on the justifications for prescription in Roman-Dutch, South African, Dutch and French law, since the substantive requirements for prescription in these systems were already discussed in the previous two chapters.⁴ Nonetheless, I briefly restate the main requirements for prescription in South African law, namely open and continuous possession (*possessio civilis*)⁵ of property for 30 years.⁶ In South African prescription law, both *bona* and *mala fides* can co-exist with the *animus domini*-requirement of *possessio civilis*,⁷ which allows for good and bad faith acquisition of ownership through prescription after 30 years. This phenomenon requires further analysis and is addressed below.⁸

4.2.2 Roman-Dutch law

³ See, for instance, Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1097-1098; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1037-1040.

⁴ The substantive requirements of prescription in these systems are discussed in sections 2.2.3 and 2.3.2 of chapter two (Roman-Dutch and South African law) and sections 3.3-3.4 of chapter three (Dutch and French law) above.

⁵ According to Carey Miller DL & Pope A *Land Title in South Africa* (2000) 160-161, *possessio civilis* consists of factual possession coupled with the *animus domini*, the intention of holding property as owner. See also section 2.3.2.1. of chapter two above.

⁶ Section 2(1)-(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969. See also section 2.3.1 of chapter two above.

⁷ *Bisschop v Stafford* 1974 (3) SA 1 (A) 8-9; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 474. See also Van der Walt AJ *Property in the Margins* (2009) 174 and section 2.3.2.1.1 of chapter two above.

⁸ See section 4.5 below.

Voet – one of the most influential Roman-Dutch authors – denounces Roman law *usucapio* as “embrac[ing] in itself some unfairness.”⁹ Although the provinces of Holland never received *usucapio*, which caused it not to become part of Roman-Dutch¹⁰ or South African law, this observation by Voet remains relevant for purposes of discussing the rationale of prescription. Most of the rules Voet regards as incidental to *usucapio* still apply to Roman-Dutch prescription law.¹¹ It follows that if the rules of *usucapio* are incidental to Roman-Dutch prescription law, then perhaps the justifications for *usucapio* are also applicable. Consequently, these justifications contribute to a jurisprudential discussion,¹² even though Voet bases his discussion of the “unfairness” of *usucapio* on moral and not legal grounds.¹³

Voet views the “unfairness” of *usucapio*¹⁴ as originating from the fact that Roman law *usucapio*¹⁵ only came to be viewed as a “wicked protection” the moment *praescriptio longi temporis* replaced it.¹⁶ One can, therefore, argue that Voet regards the *period* required to obtain ownership through *usucapio* as essential in determining whether it is justifiable or not. Accordingly, the current South African form of prescription – with a 30-year period for immovables – seems to be even less “wicked” than *usucapio* or even *praescriptio longi temporis*, since the latter legal institution had 10- and 20-year periods for immovable property.¹⁷

⁹ Voet 41.3.1. See similarly Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3. Despite the fact that Voet’s discussion regarding the justification of *usucapio* is based on moral and not legal grounds, it proves helpful to investigate these grounds to obtain a full view of the important justifications for prescription. For a *caveat* not to regard these “moral” justifications as legal norms, see *Pienaar v Rabie* 1983 (3) SA 126 (A) 137 and Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478. However, some authors are of the opinion that morals *should* be taken into account when discussing legal norms. See, for instance, Winfield PH “Ethics in English Case Law” (1932) 45 *Harvard Law Review* 112-135 118, where he states that “escape from the moral element in law is impossible.”

¹⁰ Voet 44.3.7.

¹¹ Krause LE “The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law” (1923) 40 *South African Law Journal* 26-41 32.

¹² The door to which was opened by Grosskopf JA in *Pienaar v Rabie* 1983 (3) SA 126 (A) 135.

¹³ *Pienaar v Rabie* 1983 (3) SA 126 (A) 137.

¹⁴ Since this chapter only focuses on the justifications behind prescription and not the differences of the requirements between modern prescription and Roman law *usucapio*, “*usucapio*” can – for purposes of this discussion – be read as meaning “prescription”. See similarly *Pienaar v Rabie* 1983 (3) SA 126 (A) 136-137.

¹⁵ With a one-year period for movables and a two-year period for immovables: See section 2.2.2 of chapter two above.

¹⁶ Voet 41.3.1; *Pienaar v Rabie* 1983 (3) SA 126 (A) 136. Under *praescriptio longi temporis*, immovables could be acquired after a period of 10 years *inter praesentes* or 20 years *inter absentes*: See section 2.2.2 of chapter two above.

¹⁷ Grosskopf JA in *Pienaar v Rabie* 1983 (3) SA 126 (A) 138 is of much the same opinion. Regarding the requirements of *praescriptio longi temporis*, see section 2.2.2 of chapter two above.

Nonetheless, the content Voet gives to this “unfairness” is not confined to the relevant period, but also includes the fact that it is possible for a bad faith possessor to acquire property through prescription.¹⁸ Voet regards *mala fide* acquisition through *usucapio* as the greatest unfairness in the framework of prescription.¹⁹ In this context *bona fides* was only required when the possessor obtained possession of the property; subsequent *mala fides* did not interrupt *usucapio*.²⁰ Indeed, it seems difficult to justify bad faith prescription even in modern legal systems, as observed in *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another*.²¹ Yet, despite Voet’s opposition to this unfairness, he tolerates *mala fide usucapio* because it is “for the benefit of the public welfare, and at the same time [serves] as a penalty for a person who neglects what is his own, and shows contempt by his negligence.”²² Although Voet does not define “public welfare”, it can be seen as synonymous with the argument that prescription promotes legal certainty.²³ However, in a paragraph headed “Voet justifies usucapion in general”, Voet states that *usucapio* accompanied by good faith throughout the required period is a permissible method of acquiring ownership “in the courts of both heaven and earth.”²⁴ According to Voet, in this scenario it is justified to “punish” a careless owner who – by neglecting his property – causes uncertainty as to ownership.²⁵ It follows that Voet advances two main justifications for *usucapio*, namely that it promotes legal certainty and that it punishes neglectful owners. The question of how prescription can be justified concerning the *mala fide* possessor is discussed later, as this scenario has been difficult to justify at least since Roman-Dutch times.²⁶

Grotius is of the same view as Voet in the context of justifying the acquisition of ownership through *mala fide* prescription.²⁷ Grotius – who wrote against a background of Christian morals²⁸ – thinks that prescription will ruin an owner who loses property, while the possessor

¹⁸ Voet 41.3.1.

¹⁹ Voet 41.3.1. See also Grotius *Inleidinge* 2.7.3 and the criticism in Schorer *W Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3.

²⁰ Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 84. See also C 7.31.1.3: “Mala fides superveniens non nocet.” (“Supervening *mala fides* does not break [or interrupt] prescription.”)

²¹ 1972 (2) SA 464 (W) 468. The objection to *mala fide* prescription in this case is discussed in section 4.2.3 below.

²² Voet 41.3.1. This passage is quoted in *Pienaar v Rabie* 1983 (3) SA 126 (A) 136.

²³ Grosskopf JA in *Pienaar v Rabie* 1983 (3) SA 126 (A) 136 is of the same opinion.

²⁴ Voet 41.3.1. See also Grotius *Inleidinge* 2.7.3; Wessels JW *History of the Roman-Dutch Law* (1908) 642.

²⁵ Voet 41.3.1. See generally Grotius *Inleidinge* 2.7.4.

²⁶ See the discussion in section 4.5 below.

²⁷ Grotius *Inleidinge* 2.7.3. The reason I use the word “prescription” here instead of *usucapio* is because of Grotius’s use of the word “*verjaring*” (“prescription”) in his heading at *Inleidinge* 2.7.

²⁸ In this regard, see also *Pienaar v Rabie* 1983 (3) SA 126 (A) 137.

is rewarded for the illegal possession that he knowingly commits.²⁹ In this sense Grotius, like Voet, supports prescription that requires good faith throughout the whole prescription period.³⁰ Yet, despite his criticism of *mala fide* prescription, Grotius acknowledges that the law requires a *middel* or medium “[to] place the property in certainty and to end all disputes.”³¹ Prescription is identified as this *middel* and, accordingly, the two justifications identified by Voet are once more distinguishable. Schorer, in his commentary on Grotius, identifies the reason the Roman Catholic Church required good faith throughout the entire prescription period as “to liberate people’s souls from injustice.”³² Although this justification may be laudable from a background of Christian morals, it is unlikely to qualify as a rationale from a legal point of view. Yet, Schorer criticises this justification and states that it defeats the true purpose behind prescription, namely to put an end to disputes regarding ownership and to promote legal certainty.³³ He mentions that “[t]he purpose of prescription, which may be advanced, is to bring an end to disputes that would otherwise continue into perpetuity and so disrupt the peace of humanity.”³⁴ As illustrated in the next section, the legal certainty and punishment justifications from Roman-Dutch law were received into South African prescription law.

4.2.3 South African law

South African law has two main justifications for prescription due to the reception of Roman-Dutch law.³⁵ The first is captured in the following passage:

“Prescription is based upon the principle that penalties should be imposed on those who, through their negligence and carelessness about their own affairs and property, do an injury to

²⁹ Grotius *Inleidinge* 2.7.3.

³⁰ Grotius *Inleidinge* 2.7.3.

³¹ Grotius *Inleidinge* 2.7.4: “[Om] de eigendommen te stellen in verzeekerheid ende alle gheschillen af te snijden ...” (“[To] place the property in certainty and to end all disputes.”)

³² Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3: “[O]m de zielen der menschen van onrechtveerdigheid te bevrijden.” (“[T]o liberate people’s souls from injustice.”)

³³ Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3.

³⁴ Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3: “Het doelwit der verjaaringe, die alléén is ingevoerd, om een einde van geschillen te maaken, welke andersins tot in het oneindige zouden voortduren, en de rust des menschdoms stooren.” (“The purpose of prescription, which may be advanced, is to bring an end to disputes that would otherwise continue into perpetuity and so disrupt the peace of humanity.”)

³⁵ Voet 41.3.1; Grotius *Inleidinge* 2.7.4; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 160-161; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 256; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 268. See also generally *Pienaar v Rabie* 1983 (3) SA 126 (A).

the State by introducing an uncertainty as to the ownership and an endless multiplicity of lawsuits ...³⁶

One can refer to this justification as the “punishment” justification, since it argues that the owner should be “punished” for neglecting his property by losing ownership through prescription.³⁷ Since prescription in South African law is an original method of acquisition of ownership,³⁸ the loss of ownership occurs without the permission or co-operation of the owner. In this context Schorer argues that the purpose of prescription is not to reward the illegal possessor, but to encourage owners to be more attentive towards their property.³⁹ In other words, prescription can be conceived to serve as an incentive for owners not to neglect their property.⁴⁰ Interestingly, this justification can also be used to justify *mala fide* prescription,⁴¹ since the *fides* of a possessor is irrelevant if the aim of prescription is to punish neglectful owners for not looking after their property.

³⁶ Hall CG *Maasdorp's Institutes of South African Law Volume II – The Law of Property* (10th ed 1976) 76, which is based on Voet 41.3.1, Grotius *Inleidinge* 2.7.4 and Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3. See also *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 477-478; *Welgemoed v Coetzer and Others* 1946 TPD 701 711-712, 721; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 161; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 240; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 268.

³⁷ Voet 41.3.1; Grotius *Inleidinge* 2.7.4; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 268. See also *Ex Parte Puppli* 1975 (3) SA 461 (D) 463; *Barker NO v Chadwick and Others* 1974 (1) SA 461 (D) 466; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468, 477-478; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 682; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 170; *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) 325; *Welgemoed v Coetzer and Others* 1946 TPD 701 711-712, 721; *Van der Merwe v Minister of Defence* 1916 OPD 47 50; *Smith and Others v Martin's Executor Dative* (1899) 16 SC 148 151. To the same effect is *Pienaar v Rabie* 1983 (3) SA 126 (A) 137-139.

³⁸ Section 2(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969. See also Sonnekus JC “Die *Rei Vindicatio* en Verjaring – Of Nie” 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 576-590 576; Sonnekus JC “*Sub Hasta*-veulings en die Onderskeid tussen Afgeleide en Oorspronklike Wysies van Regsverkryging” 2008 *Tydskrif vir die Suid-Afrikaanse Reg* 696-727 699; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 309; Marx FE “Eiendomsverkryging deur Verjaring en Beperkte Saaklike Regte” (1994) 15 *Obiter* 161-171 167, 170-171; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 268. See further section 2.3.1 of chapter two above.

³⁹ Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3. This argument is analogous to one of the justifications for adverse possession in English law, namely that it encourages owners not to sleep on their rights. This justification is discussed in section 4.3.2 below.

⁴⁰ Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3: “[O]m den ontachtsamen en slordigen eigenaar voor zijn goed to beter to doen zorgen.” (“In order that the inattentive and negligent owner may better look after his property.”) This passage was quoted with approval in *Welgemoed v Coetzer and Others* 1946 TPD 701 712. For criticism of this argument in English law, see section 4.3.2 below.

⁴¹ Van der Walt AJ *Property in the Margins* (2009) 174. This issue is discussed in section 4.5 below.

However, despite the fact that the owner's negligence is advanced as a justification for prescription, negligence does not constitute one of the requirements of this legal institution.⁴² Indeed, a person claiming ownership through prescription need not at all show that the owner neglected his property.⁴³ Consequently, an owner can lose property through prescription even if he acted as a reasonable person throughout the entire prescription period.⁴⁴ This state of affairs highlights an inconsistency in the punishment justification, since one can hardly argue that one of the purposes of prescription is to punish the neglectful owner if negligence does not form part of its requirements. This anomaly is further addressed in the discussion of English law.⁴⁵ The punishment justification has at least once been addressed by the then Appellate Division of the Supreme Court in *Pienaar v Rabie*:⁴⁶

“[D]ie nalatigheid van ‘n eienaar wat sy eiendom deur verjaring verloor word wel in ons bronne erken as een van die regverdigings vir verkrygende verjaring. Dit is egter nie die enigste of selfs vernaamste grondslag van verkrygende verjaring nie ...”⁴⁷

Although the High Court⁴⁸ – together with Voet⁴⁹ – regards this rationale as one of the justifications for prescription, some authors voiced their disapproval in this regard. Van der Merwe, for example, provides the most direct criticism:

“Dit staan die eienaar immers vry om na geliewe met sy saak te handel, met inagneming van publiek- en privaatregtelike beperkings. Hy kan, indien hy dit verkies, selfs sy saak verwaarloos.”⁵⁰

⁴² *Pienaar v Rabie* 1983 (3) SA 126 (A) 138-139; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 575, 577; *Hollmann and Another v Estate Latre* 1970 (3) SA 638 (A) 647. This approach was recently confirmed in *De Friedland Eiendomme (Pty) Ltd v Pretorius and Another* (20744/2008) [2010] ZAGPPHC 95 (5 August 2010) para 17.

⁴³ See the cases referred to in the previous footnote above. See also Van der Walt AJ *Property in the Margins* (2009) 174-175; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 161; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 310; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 240; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 269.

⁴⁴ For criticism of this position in English law, see section 4.3.2 below.

⁴⁵ See section 4.3.2 below.

⁴⁶ 1983 (3) SA 126 (A).

⁴⁷ 1983 (3) SA 126 (A) 138. (“The negligence of an owner who loses property through prescription is indeed acknowledged in our sources as constituting one of the justifications for acquisitive prescription. However, it is not the only or even the most important basis for acquisitive prescription ...”)

⁴⁸ *Ex Parte Puppli* 1975 (3) SA 461 (D) 463; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468, 478; *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) 676; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) 170; *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) 325; *Welgemoed v Coetzer and Others* 1946 TPD 701 723; *Smith and Others v Martin's Executor Dative* (1899) 16 SC 148 151.

⁴⁹ Voet 41.3.1.

⁵⁰ Van der Merwe CG *Sakereg* (2nd ed 1989) 268-269. (“The owner is free to use his property as he sees fit, as long as it is in accordance with public and private law limitations. He can, if he so wishes, even neglect his property.”) See similarly Sonnekus JC “Die *Rei Vindicatio* en Verjaring – Of Nie” 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 576-590 577; Sonnekus JC “Samehang van Billikheid, Skulderkenning, Afstanddoening en

As the *ius abutendi* constitutes one of the instances of ownership, Van der Merwe argues that it is unacceptable to base prescription on the very ground that allows owners to neglect their property. This reasoning is founded on the idea that ownership is the most absolute right, which formed a central part of South African property law prior to the constitutional era.⁵¹ Although this approach towards the *ius abutendi* is correct from a legal point of view, namely that it entitles owners to neglect their property, it will be necessary to re-evaluate the content of this entitlement in light of the new values enshrined by the Constitution of the Republic of South Africa 1996 (“the Constitution”). It must be kept in mind that although section 25 of the Constitution provides a negative property guarantee,⁵² this section also contains South Africa’s commitment to land reform.⁵³ The long-term neglect by owners who “allow” others to possess their property could – possibly – serve as a justification for prescription, especially if possessors were precluded from acquiring ownership in land under the previous dispensation.⁵⁴ Indeed, the dire need of homeless people in present-day South Africa can undermine an entitlement to neglect land (by “allowing” people to live on it) in particular, which can serve as an additional justification for prescription.⁵⁵ However, it is worth emphasising that an owner does not lose ownership in property through prescription by merely exercising the *ius abutendi*. Ownership can only be lost if an owner exercises the *ius abutendi* and by doing so “allows” another person to possess his property for the duration of

Stuiting van Verjaring” 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 342-356 342; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 157-158; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 310; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 256; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Marx FE “Die Grondslag van Verkrygende Verjaring in Suid-Afrika” (1979) 1 *Obiter* 11-17 14-16.

⁵¹ Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 105: “Ownership is in principle a most comprehensive right embracing not only the power to use, to enjoy the fruits and to consume the thing, but also the power to possess, to dispose of, to reclaim the thing from anyone who wrongfully withholds it or to resist any unlawful invasion of the thing.” (Footnotes omitted.)

⁵² Section 25(1) – 25(3) of the Constitution; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 72; Van der Walt AJ *Constitutional Property Law* (2005) 12-13.

⁵³ Section 25(4) – 25(9) of the Constitution; Van der Walt AJ *Constitutional Property Law* (2005) 13.

⁵⁴ See Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille’s Principles of South African Law* (9th ed 2007) 405-665 510 and sources cited. This argument is also made in favour of the bad faith possessor, see section 4.5 below.

⁵⁵ Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille’s Principles of South African Law* (9th ed 2007) 405-665 510 and sources cited. See also Van der Walt AJ *Property in the Margins* (2009) 176, together with the discussions concerning the personality theory, utilitarianism and law and economics theory and the anomaly of the bad faith possessor in sections 4.4.3-4.4.4 and 4.5 respectively below.

the prescription period.⁵⁶ I return to the punishment justification in the discussion of English law and the developments that led to the enactment of the LRA below.⁵⁷

The second ground for justifying prescription in South African law – which is mostly regarded as the main justification – is based on the principle that it is in the interests of legal certainty, as well as the public interest, that *de iure* status be afforded to long-existing *de facto* realities.⁵⁸ This justification is referred to as the “legal certainty” justification, for authors argue that prescription promotes legal certainty by preventing parties from unnecessarily litigating about ownership.⁵⁹ Long-term possession of property can also create an impression of ownership that is able to mislead third parties, which is analogous to estoppel. In this context – so it is argued – it is best to grant *de iure* status to *de facto* scenarios that have existed for some time.⁶⁰ Phrased differently, the owner does not lose ownership by neglecting the property, but rather because he “allowed” a certain state of affairs – which does not accord with the legal reality – to persist for a long period of time.⁶¹ Unlike the punishment justification, which was criticised by some authors, one is struck by the lack of criticism or analysis of the second justification. It would seem that most authors

⁵⁶ I am indebted to Prof Sagaert for discussions that helped me to form my arguments in this regard.

⁵⁷ See section 4.3.2 below.

⁵⁸ *Pienaar v Rabie* 1983 (3) SA 126 (A) 137-138; *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC) 577; Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 179; Sonnekus JC “Die *Rei Vindicatio* en Verjaring – Of Nie” 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 576-590; Van der Walt AJ *Property in the Margins* (2009) 181; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 161; Sonnekus JC “Samehang van Billikheid, Skulderkenning, Afstanddoening en Stuiting van Verjaring” 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 342-356 342; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 157; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 309-310; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 239, 254-259; Van der Merwe CG *Sakereg* (2nd ed 1989) 269; Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot (1784) 2.7.3*. See also Voet 41.3.1; Grotius *Inleidinge* 2.7.4; De Wet JC *Opuscula Miscellanea* (1979) 78; Marx FE “Die Grondslag van Verkrygende Verjaring in Suid-Afrika” (1979) 1 *Obiter* 11-17 13-17; Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 82-83; Wessels JW *History of the Roman-Dutch Law* (1908) 634. Grotius *Inleidinge* 2.7.4 is of the opinion that one of the justifications for prescription is “[om] de eigendommen te stellen in verzeekerheid ...” (“[To] place the property in certainty.”)

⁵⁹ Compare Hall CG *Maasdorp’s Institutes of South African Law Volume II – The Law of Property* (10th ed 1976) 76, which is based on Voet 41.3.1, Grotius *Inleidinge* 2.7.4 and Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot (1784) 2.7.3*.

⁶⁰ Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 179; Sonnekus JC “Samehang van Billikheid, Skulderkenning, Afstanddoening en Stuiting van Verjaring” 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 342-356 342; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 157; Sonnekus JC & Neels JL *Sakereg Vonnisbundel* (2nd ed 1994) 309-310; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 256-257; Van der Merwe CG & De Waal MJ *The Law of Things and Servitudes* (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 269; De Wet JC *Opuscula Miscellanea* (1979) 80-98; Marx FE “Die Grondslag van Verkrygende Verjaring in Suid-Afrika” (1979) 1 *Obiter* 11-17 13-17. See also the sources mentioned in the previous footnote above.

⁶¹ *Welgemoed v Coetzer and Others* 1946 TPD 701 711-712; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 161; Marx FE *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 257; Van der Merwe CG *Sakereg* (2nd ed 1989) 269-270.

and court decisions are *ad idem* regarding this ground and that they merely accept it as still being relevant. Nevertheless, this ground, together with the punishment justification, has been put into question in the following *obiter dictum*:

“The justification [for acquisitive prescription] is said to have been a need or desire to penalise neglectful owners. There may have been some social justification for that approach in a village society where it was easy for an owner to supervise and inspect his property, though even there one might question the equity of favouring the cynical usurper at the expense of one whose fault was no more than idleness or negligence. *In a modern society, where unimproved property is frequently held for long periods by owners who live far away, and sometimes even abroad, the social desirability of [acquisitive prescription] may be questioned.*”⁶² (Emphasis added.)

Although not directly aimed at the legal certainty justification,⁶³ this seems to be the only criticism – albeit indirect – that has to date been raised against the promotion of legal certainty argument. As will be seen,⁶⁴ this justification was recently re-evaluated in developments that occurred in the English law of adverse possession. These developments are likely to have implications for how prescription is justified in South African law and are discussed in greater detail below.⁶⁵

The legal certainty justification, like the punishment justification, can also be used to justify situations where *mala fide* possessors acquire ownership through prescription.⁶⁶ This is because the *fides* of the possessor is irrelevant for purposes of promoting legal certainty through prescription. In other words, this aim of prescription is achieved regardless of whether the possessor possessed the property in good or bad faith.

Another justification advanced in favour of prescription, which I view as a sub-category of the legal certainty justification, is the fact that prescription simplifies the process of proving ownership.⁶⁷ In this sense prescription prevents the so-called *probatio diabolica*⁶⁸ one faces if

⁶² *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468. It is worth emphasising that this case was decided long before the dawn of constitutionalism in South Africa, which makes this passage worthy of note. To the same effect as the *Morkels* case are *Pienaar v Rabie* 1983 (3) SA 126 (A) 138 and *Sonnekus JC & Neels JL Sakereg Vonnisbundel* (2nd ed 1994) 210.

⁶³ Since the first sentence in this passage refers to “a need or desire to penalise neglectful owners”, it is clear that this critique by Colman J is aimed only at the punishment justification. Nonetheless, the legal certainty argument is analogous to this justification and therefore this passage can be read as pertaining to both justifications.

⁶⁴ See section 4.3.2 below.

⁶⁵ See section 4.3.2 below.

⁶⁶ Van der Walt AJ *Property in the Margins* (2009) 174. See also the arguments to this effect in section 4.5 below.

⁶⁷ Grotius *Inleidinge* 2.7.4; Schorer W *Aanteekeningen van mr Willem Schorer, over de Inleidinge tot de Hollandsche Rechts-Geleerdheid, van mr Hugo de Groot* (1784) 2.7.3; Van der Merwe CG & De Waal MJ *The*

it would be impossible to acquire property over time through prescription.⁶⁹ Here prescription seems to operate more as a rule of the law of evidence than as a notion of property law. However, this argument seems to carry more weight where land is not surveyed and also where it is hard to determine who the “true owner”⁷⁰ of land is in the absence of a formal Land Registry that guarantees the correctness of the register. Consequently, this argument must also be re-evaluated.⁷¹

A third justification can be deduced from the following *obiter dictum* in *Pienaar v Rabie*:⁷²

“Onder hierdie omstandighede kan daar skaars sprake wees van een enkele samehangende filosofiese grondslag wat onderliggend aan die regsfiguur van verkrygende verjaring *in al sy gestaltes* is. Wat ‘n mens eerder vind by juriste is dat bepaalde regsreëls verduidelik of geregverdig word deur *morele of filosofiese* argumente.”⁷³ (Emphasis added.)

According to Grosskopf JA, there is no single philosophical justification for prescription and it has to be justified through moral and philosophical arguments. This opens the door for a jurisprudential discussion of the justifications behind prescription. This approach is to be applauded, since it widens the spectrum of arguments one can use to justify prescription in South African law. Unfortunately, the Appellate Division of the Supreme Court did not expand on what the content of these moral or philosophical arguments may be. Against this background it is helpful to investigate how prescription can be justified by using the labour theory, Radin’s personality theory and utilitarianism and law and economics theory.⁷⁴ Interestingly, these theories are analogous to the traditional justifications for prescription in South African law. The next section focuses on the justifications for prescription in modern-day Dutch and French law.

Law of Things and Servitudes (1993) para 149; Van der Merwe CG *Sakereg* (2nd ed 1989) 270; Wessels JW *History of the Roman-Dutch Law* (1908) 634. Grotius *Inleidinge* 2.7.4 states that one of the justifications for prescription is “[om] de eigendommen te stellen in verzeekerheid ...” (“[To] place the property in certainty.”) To the same effect is Van Oven JC *Leerboek van Romeinsch Privaatrecht* (3rd ed 1948) 90, since he opines that without prescription the “eigendomsbewijs een *probatio diabolica* zou wezen.” (“[P]roof of ownership would be a devil’s burden.”)

⁶⁸ Devil’s burden.

⁶⁹ Van der Merwe CG *Sakereg* (2nd ed 1989) 270. See also the sources cited in footnote 67 above.

⁷⁰ This term is derived from Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1125.

⁷¹ This justification is analogous to the justification in English law that defendants should be protected from stale claims: See section 4.3.2 below.

⁷² 1983 (3) SA 126 (A).

⁷³ *Pienaar v Rabie* 1983 (3) SA 126 (A) 135. (“Under these circumstances, one can hardly speak of a single encompassing philosophical foundation that underlies the legal institution of acquisitive prescription *in all its forms*. Instead, one finds that jurists explain and justify certain legal rules with regard to *moral or philosophical* arguments.”)

⁷⁴ These three trends are discussed in section 4.4 below.

4.2.4 Dutch and French law

In modern Dutch law *verkrijgende verjaring* is also justified on the premise that it is “undesirable for a factual situation regarding property not to be in line with the judicial reality.”⁷⁵ In the words of Mijnsen *et al*, “[p]rescription is an institution that primarily exists for the sake of the public order.”⁷⁶ This complies with the Roman-Dutch and South African justification that prescription is in the public interest because it promotes legal certainty.⁷⁷ In this sense it is also argued that prescription simplifies the process of proving ownership because it eliminates the *probatio diabolica*.⁷⁸ However, it seems that Dutch prescription law does not regard the punishment justification as an important rationale, but rather views it as a result that is ancillary to the effects of prescription. Furthermore, Reehuis and Heisterkamp state that *verkrijgende verjaring* is not aimed at “rewarding” the bad faith possessor with ownership:⁷⁹

“De bezitter, die op grond van art. 3:119 lid 1 wordt vermoed de rechthebbende te zijn, verwerft op den duur die status wanneer dat aanvankelijk niet het geval was. Daarbij staat niet de bevoordeling van de bezitter voorop, maar het *algemeen belang* en in het bijzonder de

⁷⁵ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423: “[H]et [is] onwenselijk dat een feitelijke toestand niet overeenstemt met de rechtstoestand van een goed.” (“[I]t [is] undesirable for a factual situation regarding property not to be in line with the judicial reality.”) See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 249; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 417. According to Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585, this justification is also applicable to Belgian prescription law.

⁷⁶ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423: “Verjaring is een rechtsfiguur die in de eerste plaats bestaat ter wille van de maatschappelijke orde.” (“Prescription is an institution that primarily exists for the sake of the public order.”) See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 249; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329.

⁷⁷ See the discussions in this regard in sections 4.2.2-4.2.3 above. See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 249; Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 330; Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 417.

⁷⁸ Mijnsen FHJ *et al Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423; Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 249; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 331. This justification is also found in Belgian law: See Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1586-1587.

⁷⁹ See also Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 417.

rechtzekerheid die met duidelijke goederenrechtelijke verhoudingen is gediend. Medelijden met de oorspronkelijk rechthebbende voelt de wetgever niet.”⁸⁰ (Original emphasis.)

It is clear that the primary justification for *verkrijgende verjaring* is to promote legal certainty, even though it occurs at the expense of the owner who loses ownership through prescription.⁸¹ The punishment justification – advanced to justify prescription in Roman-Dutch and South African law – is thus regarded as no more than a secondary result of prescription in Dutch law. *Verkrijgende verjaring* also has a corrective function in cases where all the formalities for transfer of ownership by way of derivative acquisition of ownership have not been complied with, for example when someone who did not have the capacity to act attempted to transfer ownership to another person.⁸² Snijders and Rank-Berenschot admit that “[p]rescription is not primarily based on motives of reasonableness and equity. In this sense it is possible for a wrong to be converted into a right after a certain period of time.”⁸³ I argue that this approach – namely that the traditional justifications for prescription are still accepted without question – needs to be re-examined. The time is ripe for re-evaluating the rationale behind this legal institution to determine whether it is still relevant in modern society. Finally, it is worth emphasising that in Dutch law immovables possessed in good faith can be acquired after 10 years,⁸⁴ while immovables held in bad faith can only be acquired after 20 years.⁸⁵

The rationale for *prescription acquisitive* in French law is that a person who has taken care of another’s property “should be confirmed in his possessory situation without the risk of being

⁸⁰ Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329. (“The possessor, who according to BW 3:119.1, is presumed to be the person entitled to the property, acquires that status through time which initially was not the case. Consequently, the benefit the possessor obtains is not the most important aspect here, but rather the *public interest* and especially legal certainty that is achieved through property law relationships that are certain. The legislature is not sympathetic towards the original owner.”) See also Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 417.

⁸¹ Van Zeben CJ *et al Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) Book 3 417: “Het gaat hier niet om een sanctioneren van der kwade trouw, doch om het beginsel, dat na een zeker tijdsverloop het recht zich bij de feiten dient aan te sluiten.” (“It is not about promoting bad faith, but rather to achieve the purpose of bringing the factual situation in line with legal reality after a certain period of time has elapsed.”) See also Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 249; Mijnsen FHJ *et al Mr C Asser’s Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Goederenrecht – Algemeen Goederenrecht* (15th ed 2006) para 423; Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329.

⁸² Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 330.

⁸³ Snijders HJ & Rank-Berenschot EB *Goederenrecht* (4th ed 2007) para 249: “Verjaring word niet primair ingegeven door motieven van redelijkheid en billijkheid. Zo kan het gebeuren dat onrecht door tijdsverloop toch recht wordt.” (“Prescription is not primarily based on motives of reasonableness and equity. In this sense it is possible for a wrong to be converted into a right after a certain period of time.”)

⁸⁴ BW 3:99.1.

⁸⁵ BW 3:105.1, read with BW 3:306. See also Reehuis WHM & Heisterkamp AHT *Goederenrecht* (12th ed 2006) para 329 and the discussions in sections 3.3.2.2.2-3.3.2.2.3 of chapter three above.

evicted” after a certain period of time has elapsed.⁸⁶ According to Steiner, the “harshness” of this approach is justified because it serves as an incentive to owners to look after their property.⁸⁷ *Prescription acquisitive* is, thus, also regarded as promoting legal certainty,⁸⁸ while the fact that it “punishes” the neglectful owner is considered as being ancillary to the legal certainty argument. In French prescription law, a person can acquire immovable property held in bad faith after 30 years, whereas only 10 years are required for immovable property possessed in good faith and under just title.⁸⁹ Yet, Bell, Boyron and Whittaker voice their concern about this justification in the modern era where immovable property is registered:

“Obviously these days registration of title to land and in relation to some chattels offers an alternative and better method of determining who is the owner of the property.”⁹⁰

Despite this concern, Bell, Boyron and Whittaker state in the very next sentence that *prescription acquisitive* can be useful in dealing with some cases of long-standing possession.⁹¹ Unfortunately, these authors do not elaborate in this regard.

It is clear that prescription is primarily justified on two grounds in Roman-Dutch and modern South African law, whereas Dutch and French law generally accept one justification for this legal institution. In the case of both Roman-Dutch and South African law, the first ground is that owners who neglect their property should be punished by losing ownership, with the second ground advocating the promotion of legal certainty. However, Dutch and French law only regard the latter rationale as the main justification for prescription.⁹² Both these justifications stem from a time that was different from the present. Against this background – and especially since the dawning of the constitutional era in South Africa – it is important that these justifications be re-evaluated and placed under scrutiny to determine whether they still hold water. Special regard must also be had to the scenario where a *mala fide* possessor

⁸⁶ Steiner E *French Law – A Comparative Approach* (2010) 395.

⁸⁷ Steiner E *French Law – A Comparative Approach* (2010) 395.

⁸⁸ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 277, where the authors state that “[i]f a person has held the property for a long period then that has become part of social organization and should not be disturbed.”

⁸⁹ Article 2272 of the *Code Civil*, translated by Steiner E *French Law – A Comparative Approach* (2010) 396.

⁹⁰ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 277. See especially the discussion of adverse possession and the developments that led to the enactment of the Land Registration Act 2002 below in section 4.3.2, where this was one of the main arguments against having adverse possession in relation to registered land when the register provides conclusive proof of ownership.

⁹¹ Bell J, Boyron S & Whittaker S *Principles of French Law* (2nd ed 2008) 277.

⁹² The fact that prescription serves as an aid to prove ownership can be seen as correlative to the justification of promoting legal certainty.

acquires ownership through prescription, as it *prima facie* seems unjust to reward such a “cynical usurper”⁹³ with ownership.⁹⁴

4.3 The grounds for justifying adverse possession in English law and the developments that led to the enactment of the Land Registration Act 2002

4.3.1 Introduction – identifying the root of the problem

The systems discussed above illustrate a lack of critical analysis pertaining to the grounds for justifying prescription.⁹⁵ It seems as if the legal certainty argument runs like a golden thread through each of those jurisdictions, but that the authors never consider whether it is still valid today. English law stands in contrast to these systems concerning the rationale for adverse possession.⁹⁶ This is because English law has recently undergone far-reaching developments in adverse possession law, which culminated in the enactment of the 2002 Act.⁹⁷ This Act – together with developments that led to its enactment – are important for the way South African law justifies prescription and therefore needs to be analysed.

The point of departure is *JA Pye (Oxford) Ltd and Another v Graham and Another*,⁹⁸ as it highlighted some of the modern-day problems of adverse possession. This case was decided before the enactment of the LRA, when the “old” rules of adverse possession still applied to both registered and unregistered land. The facts of this case, together with its implications regarding the substantive requirements for adverse possession, were already discussed in the previous chapter and are not repeated here.⁹⁹ The focus now falls on Neuberger’s J criticism of adverse possession, which sketches the background for this discussion. According to Neuberger J, his conclusion in this decision was one that he “arrive[d] at with no enthusiasm.”¹⁰⁰ He bases this observation on the fact that the result “does not accord with

⁹³ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 468.

⁹⁴ This issue is discussed in section 4.5 below.

⁹⁵ One can also observe this fact in Australian law: See Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

⁹⁶ Adverse possession is the common law equivalent of acquisitive prescription.

⁹⁷ This act came into effect on 13 October 2003 and is prospective in nature: See *Ofulue v Bossert* [2009] UKHL 16; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

⁹⁸ [2000] Ch 676.

⁹⁹ See section 3.2.3 of chapter three above.

¹⁰⁰ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709. See similarly *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham.

justice and [that it] cannot be justified by practical considerations.”¹⁰¹ He confirms that the traditional justification for adverse possession was to prevent uncertainties in relation to the ownership of land.¹⁰² He also emphasises that these uncertainties are – but for a few exceptions – unlikely to arise in the context of registered land, since owners of registered land can be identified by simply inspecting the land register.¹⁰³ Neuberger J further acknowledges that adverse possession played an important role by preventing uncertainties and unnecessary litigation during the days when land was still unregistered.¹⁰⁴

Another justification referred to is that people should not be able to sit or sleep on their rights indefinitely.¹⁰⁵ Neuberger J criticises this rationale and states that it is difficult to see why an adverse possessor should be able to acquire land from an owner merely because such owner had no immediate use for it and was “content” to let such adverse possessor trespass on the land.¹⁰⁶ To conclude that an owner who slept on his rights should lose ownership appears to Neuberger J to be “illogical and disproportionate”.¹⁰⁷ He views this state of affairs as illogical because “the only reason that the owner can be said to have sat on his rights is because of the existence of the 12-year limitation period in the first place; if no limitation period existed the owner would be entitled to claim possession whenever he actually wanted the land.”¹⁰⁸ Neuberger J said the following concerning the disproportionate effect of adverse possession:

“[I]n a climate of increasing awareness of human rights including the right to enjoy one’s own property, it does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no steps to evict a squatter for 12 years, the owner should lose 25 hectares of land to the squatter with no compensation whatsoever.”¹⁰⁹

¹⁰¹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709.

¹⁰² As seen in sections 4.2.2-4.2.4 above, this is regarded as an important justification in Roman-Dutch, South African, Dutch and French law. See further the discussion in section 4.3.2 below.

¹⁰³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham. See also the position in French law discussed in section 4.2.4 above.

¹⁰⁴ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709-710; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham.

¹⁰⁵ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710.

¹⁰⁶ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham.

¹⁰⁷ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710.

¹⁰⁸ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710.

¹⁰⁹ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710. Although adverse possession – as it stood prior to the enactment of the LRA – was found to be in line with Article 1 of Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms 1950 in *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC), this does not necessarily mean that prescription will survive a constitutional challenge in the Constitutional Court of South Africa. This issue is discussed in chapter five, which specifically focuses on the question whether prescription is justifiable in the constitutional setting of South Africa.

These objections to adverse possession are more intense in comparison to those found in the jurisdictions discussed earlier, which are characterised by a lack of critical reflection in this regard. Neuberger’s J criticism of adverse possession was echoed by the House of Lords in *JA Pye (Oxford) Ltd v Graham*.¹¹⁰ In that decision, Lord Bingham commented on adverse possession as follows:

“In the case of *unregistered* land, and in the days before registration became the norm, such a result could no doubt be justified as avoiding protracted uncertainty where the title of land lay. But where land is *registered* it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it. It is reassuring to learn that the Land Registration Act 2002 has addressed the risk that a registered owner may lose his title through inadvertence.”¹¹¹ (Emphasis added.)

It is plain that English law also justifies adverse possession on the grounds that it promotes legal certainty and avoids unnecessary litigation concerning ownership of land. However, as I illustrate below,¹¹² these justifications only seem to hold water in situations where land is unregistered or where the Land Register does not provide conclusive proof of ownership. As soon as land is registered and one is able to determine who the owner is by investigating the register, it becomes “hard to see what principle of justice entitles the [adverse possessor] to acquire the land.”¹¹³

One of the most influential works pertaining to the justifications for adverse possession in English law is an article by Dockray from 1985.¹¹⁴ This article, which the English Law Commission relied on in their Reports¹¹⁵ regarding possible reforms concerning adverse possession law, provides an evaluation of adverse possession and the rationale for having such a rule in a legal system. This article – being the primary source – serves as the point of departure for this discussion, together with the Law Commission’s findings. Use is also made of other sources concerning the justifications of adverse possession. I conclude this section with a brief exposition of how the 2002 Act regulates adverse possession today.

¹¹⁰ [2003] 1 AC 419.

¹¹¹ [2003] 1 AC 419 426 per Lord Bingham. See similarly Lord Hope at 446-447.

¹¹² See section 4.3.2 below.

¹¹³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709-710; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham.

¹¹⁴ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284.

¹¹⁵ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001); *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998).

4.3.2 Criticism of the traditional justifications for adverse possession

Dockray is sceptical about adverse possession's role in English law, which concern is captured as follows:

“How, it might be asked, could there be any rational explanation for depriving an owner of *property*, simply because of the long continued *possession* of another. And why should the law seem to ignore the demerits of a trespasser? Why should it protect a wrongdoer – a person whose conduct might be tantamount to theft – but whom the law may nevertheless aid even against an innocent owner, that is, a person who did not know and could not have discovered that time had begun to run[?] Why should the long suffering of injury bar the remedy?”¹¹⁶ (Original emphasis.)

Adverse possession does not require good faith, which means that *mala fide* squatters – just as in South African law – are also able to obtain ownership.¹¹⁷ Indeed, one of the problems of adverse possession is that it seems to “reward” *mala fide* squatters with ownership.¹¹⁸ Ballantine describes this state of affairs as “an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.”¹¹⁹ Dockray identifies three justifications attributed to the law of adverse possession against this background, namely

- i) to protect long-term possessors from stale claims (also referred to as the “quieting of title”);¹²⁰

¹¹⁶ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272. See similarly *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.5; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709; *Buckinghamshire County Council v Moran* [1990] Ch 623 643 per Slade LJ.

¹¹⁷ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 436-437 per Lord Brown-Wilkinson.

¹¹⁸ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 236-237; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 113-114; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1125; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135. I am indebted to Dr Dixon for bringing the article of Cobb and Fox under my attention.

¹¹⁹ Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135. See further Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1037, who also refers to this result as “an anomalous figure in the law.”

¹²⁰ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.71, 14.54.1; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709; *A’Court v Cross* (1825) 3 Bing 329 332-333; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.8; Smith RJ *Property Law* (6th ed 2009) 63; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 240. See also Caterina R “Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279 274; Fox D “Relativity of Title at Law and in Equity” (2006) 65 *Cambridge Law Journal*

- ii) to encourage owners not to sleep on their rights;¹²¹ and
- iii) to ensure that a possessor can feel confident that his right cannot be called into question after a certain period of time has elapsed.¹²²

One can equate the first justification with the one found in South African law, namely that adverse possession prevents a “multiplicity of lawsuits”¹²³ where evidence pertaining to ownership has been lost.¹²⁴ This ground is premised on the reasoning that it could be difficult for parties to prove either claims or defences in situations where the events complained of occurred long ago, which can cause litigation to become too great a risk.¹²⁵ This mode of thought is described by Best CJ, who states that “[l]ong dormant claims often have more of cruelty than of justice in them.”¹²⁶ In this context adverse possession operates as a “conclusive presumption” against potential claims after a certain period of time has

330-365 338-339; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1128; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135, 143-144; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 476.

¹²¹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272-274; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.71, 14.54.1; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.11; Smith RJ *Property Law* (6th ed 2009) 63-64. See also Caterina R “Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279 274; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2434-2435; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1130; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 476. To the contrary is Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135, who thinks that this does not form one of the justifications for adverse possession.

¹²² Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.7; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.9; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132.

¹²³ Hall CG *Maasdorp’s Institutes of South African Law Volume II – The Law of Property* (10th ed 1976) 76.

¹²⁴ See the discussion of South African law in section 4.2.2 above. See also Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272-273; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001.

¹²⁵ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 273; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.8; Smith RJ *Property Law* (6th ed 2009) 63; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1128.

¹²⁶ *A’Court v Cross* (1825) 3 Bing 329 332-333.

elapsed.¹²⁷ This justification also has a second element, namely the quieting of titles. This rationale encompasses the fact that adverse possession helps to “quiet titles” when all the formalities for transfer of ownership – such as registration in the case of immovables – have not been complied with. Under these circumstances adverse possession serves as a mechanism to confirm the ownership of the transferee, which would otherwise be impossible if adverse possession did not exist to “cure” defects of this nature. The quieting of titles rationale is analogous to the prevention of the *probatio diabolica* discussed above.¹²⁸

Although Dockray acknowledges that adverse possession can usefully avoid the dangers of adjudicating on stale claims, he states that this ground can provide no more than a “partial explanation” for adverse possession.¹²⁹ He bases this observation on two reasons. Firstly, it is assumed that an owner is generally aware that a right to reclaim possession accrued in his favour.¹³⁰ In this context it would be justified for adverse possession to prevent the owner from reclaiming possession if such owner knew or ought to have known of the accrual of the right, but still did not do anything to rectify the situation. In such a scenario it is understandable why the owner should be “punished” for neglecting the property. Nonetheless, adverse possession also operates in situations where the owner was unaware of the accrual of this right.¹³¹ Here it is more difficult to justify adverse possession, especially if the owner did not know – or could not have known – that it was possible to reclaim possession. Under these circumstances one can rightly ask whether such a position “accord[s]

¹²⁷ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1128.

¹²⁸ Both South African and Dutch law recognise this justification, see sections 4.2.3-4.2.4 above.

¹²⁹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 273. To the same effect are *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.1; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114. Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1128 partially agrees with this argument, although he states that caution must be had because “[r]ecorded deeds may contain defects or omissions; the court house or title plant may burn down [or] surveying errors may ... result[.] in misplaced Boundary markers.”

¹³⁰ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 273; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

¹³¹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 273; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.71; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *Powell v McFarlane* (1979) 38 P & CR 452 480; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; *Rains v Buxton* (1880) 14 Ch D 537 540-541; Smith RJ *Property Law* (6th ed 2009) 64. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

with justice and [whether it is] justified by practical considerations.”¹³² Secondly, adverse possession prevents the recovery of possession, even if the facts are undisputed and possession was wrongful (*mala fide*) throughout the limitation period.¹³³ The second reason is a valid objection to adverse possession, especially in situations where evidence is either available for the owner to prove his case or where the squatter acknowledges that he has no entitlement to the property. This argument carries even more weight in situations where land is registered and legislation guarantees the correctness of the register.¹³⁴ From this reasoning Dockray argues that staleness, though an important consideration, cannot on its own properly justify adverse possession.¹³⁵ Yet, despite Dockray’s persuasive arguments in this context, these objections can be overcome by treating adverse possession as a mechanical entitlement determination rule – as Merrill suggests.¹³⁶ This possibility is discussed in section 4.4.4 below, which specifically focuses on the economic justifications behind adverse possession.

The second justification is that adverse possession encourages owners not to sleep on their rights.¹³⁷ Thus, adverse possession serves as an incentive for owners to look after their property that – if phrased negatively – implies that the law should punish owners for neglecting their property, which is similar to the punishment justification in Roman-Dutch

¹³² *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709. To the same effect is *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.1.

¹³³ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272-273; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

¹³⁴ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 14.2-14.3; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.9-10.11; Smith RJ *Property Law* (6th ed 2009) 63.

¹³⁵ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272-273; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.71, 14.54.1; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 476. To the contrary is Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 250-254, who points out that this argument – even in relation to registered land – is an oversimplification.

¹³⁶ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1145.

¹³⁷ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 274; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.1; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.11; Smith RJ *Property Law* (6th ed 2009) 63-64. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 476.

and South African law.¹³⁸ This justification is based on the assumption that owners who sleep on their rights should not be able to enforce them years later, as it can be unjust to allow old claims to be asserted.¹³⁹ If they were to be allowed, Smith argues that it can lead to “criticism and even violence”.¹⁴⁰ However, Dockray states that adverse possession can only encourage an owner not to sleep on his rights if such owner *knows* (or ought to have known) that time has started to run.¹⁴¹ Nonetheless, adverse possession can bar an owner from recovering possession even if he is blameless, since adverse possession operates despite whether the owner was negligent or not.¹⁴² It may be fair to say that owners who knowingly¹⁴³ sleep on their rights should be punished by losing ownership, but knowledge (actual or constructive) of the accrual of the right is not a requirement for purposes of adverse possession.¹⁴⁴ Therefore, this justification may lead to injustice when the reasonable owner could not have known of the accrual of the right, which can occur in situations where the owner’s estates are large or numerous.¹⁴⁵ Dockray concludes that the “encouragement” argument can thus not be

¹³⁸ See sections 4.2.2-4.2.3 respectively above. See also Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1130; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 476.

¹³⁹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 274; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.1; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.11; Smith RJ *Property Law* (6th ed 2009) 63-64; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001. This justification is analogous to the first one discussed earlier, namely that long-term possessors ought to be protected from stale claims.

¹⁴⁰ *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; Smith RJ *Property Law* (6th ed 2009) 64; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001. To the same effect is Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131. See also Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 476 and the criticism he voices.

¹⁴¹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 274; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

¹⁴² Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 273; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.71; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *Powell v McFarlane* (1979) 38 P & CR 452 480; *Rains v Buxton* (1880) 14 Ch D 537 540-541; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.35; Smith RJ *Property Law* (6th ed 2009) 64. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

¹⁴³ Either intentionally or negligently.

¹⁴⁴ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 273-274; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *Powell v McFarlane* (1979) 38 P & CR 452 480; *Rains v Buxton* (1880) 14 Ch D 537 540-541; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.35; Smith RJ *Property Law* (6th ed 2009) 64.

¹⁴⁵ *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6 and sources there cited, together with *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.71, where it is stated that this state of affairs is also likely to occur in situations concerning public bodies owning multiple properties.

regarded as a major justification for adverse possession.¹⁴⁶ Cobb and Fox criticise this conclusion because no distinction is drawn between owners who *cannot* and those who *do not* supervise their properties, while the Law Commission merely assumes the moral blameworthiness of squatters together with the blamelessness of owners.¹⁴⁷ Such a distinction is important, since the blameworthiness of the owner can play an important role when it needs to be determined whether the loss of ownership through adverse possession is justified.¹⁴⁸ Nonetheless, the Law Commission accepted Dockray's objection,¹⁴⁹ one of the reasons being that by denying owners the right to reclaim their property imposes a positive duty on them to "police" their land, which can involve expensive monitoring costs.¹⁵⁰ Nonetheless, this ground for justifying adverse possession *is* justifiable in terms of law and economics theory, since transaction costs are kept low if such an affirmative obligation is placed on owners.¹⁵¹ The reason for this is that owners are then readily identifiable, which ensures that the land remains marketable.¹⁵²

¹⁴⁶ Dockray M "Why do we Need Adverse Possession?" 1985 *Conveyancer* 272-284 274; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.71; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6. See also Irving DK "Should the Law Recognise the Acquisition of Title by Adverse Possession?" (1985) 2 *Australian Property Law Journal* 112-119 114; Ballantine HW "Title by Adverse Possession" (1919) 32 *Harvard Law Review* 135-159 135. For an argument to the contrary, see Clarke A "Use, Time, and Entitlement" (2004) 57 *Current Legal Problems* 239-275 250-251.

¹⁴⁷ Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 248-253, which is written against the background of urban squatting.

¹⁴⁸ Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 248-523. At 249 these authors are of the opinion that the Law Commission's suggested alterations to adverse possession were flawed by two considerations, namely (i) that adverse possession is presumably "incompatible" with land registration and (ii) that squatters act "immorally" by adversely possessing land belonging to other people.

¹⁴⁹ Dockray M "Why do we Need Adverse Possession?" 1985 *Conveyancer* 272-284 274; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.71; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6. See also Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2434-2435; Irving DK "Should the Law Recognise the Acquisition of Title by Adverse Possession?" (1985) 2 *Australian Property Law Journal* 112-119 114; Ballantine HW "Title by Adverse Possession" (1919) 32 *Harvard Law Review* 135-159 135. For an argument to the contrary, see Clarke A "Use, Time, and Entitlement" (2004) 57 *Current Legal Problems* 239-275 250-251.

¹⁵⁰ *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6 and sources there cited. See also Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2433; Irving DK "Should the Law Recognise the Acquisition of Title by Adverse Possession?" (1985) 2 *Australian Property Law Journal* 112-119 114.

¹⁵¹ See the discussion in section 4.4.4 below.

¹⁵² Goymour A "The Acquisition of Rights in Property by the Effluxion of Time" in Cooke E (ed) *Modern Studies in Property Law* 4 (2007) 169-196 192; Epstein RA "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667-722 678; Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1131.

The third justification Dockray identifies is that adverse possession ensures that a possessor can feel confident – after a certain time – that “an incident which might have led to a claim against him is finally closed.”¹⁵³ Dockray supplies two reasons why the law may wish to encourage such confidence by denying owners to repossess their land, namely

- i) to avoid hardship;¹⁵⁴ and
- ii) to ensure that land does not become sterile and unmarketable.¹⁵⁵

The first reason applies to cases where land is unregistered and where the squatter may – for example – be an innocent (*bona fide*) trespasser who initially entered the land as the result of a reasonable mistake concerning the boundary of the property.¹⁵⁶ Hardship also encompasses the situation where the squatter invested labour – such as time or money – in improving or developing the land.¹⁵⁷ Consequently, such a squatter will suffer hardship if he incurred expenses under the mistaken belief of ownership, should the owner suddenly appear and reclaim the land.¹⁵⁸ Thus, as was also seen from Voet and Grotius,¹⁵⁹ the problem with

¹⁵³ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 272, 274-277; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; *A’Court v Cross* (1825) 3 Bing 329 332-333; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.9; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001.

¹⁵⁴ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 274; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.8, 10.16.1; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; *A’Court v Cross* (1825) 3 Bing 329 332-333. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

¹⁵⁵ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 274; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.7, 10.13, 10.43; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.9; Smith RJ *Property Law* (6th ed 2009) 63-64; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 237, 240; Dixon MJ “Adverse Possession in Three Jurisdictions” 2006 *Conveyancer* 179-187 184. However, Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 258-260 fears that land may become unmarketable in situations where the 2002 Act prevents adverse possessors who possessed land for long periods from acquiring title due to the strict requirements of the Act.

¹⁵⁶ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 274-275; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.72, 14.3; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.8, 10.16.

¹⁵⁷ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 275; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.3; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.8, 10.16; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 140. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114. This argument is analogous to Singer’s “reliance interest” theory advanced for adverse possession, which is discussed in section 4.4.3 below. For arguments as to how a squatter can obtain a labour theory claim in property, see section 4.4.2 below.

¹⁵⁸ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 275; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.3; *Land Registration*

adverse possession does not necessarily reside in cases involving the *bona fide* possessor. It is therefore clear that English law does not wish to impede the *bona fide* possessor from acquiring ownership under certain justified circumstances either. However, the dilemma arises when the *mala fide* possessor acquires land through adverse possession, which some authors describe as “land theft”.¹⁶⁰

Dockray concedes that adverse possession can prevent hardship on the side of the squatter, but fears that it may also work great hardship for an owner who loses ownership through adverse possession.¹⁶¹ As mentioned, adverse possession even operates in cases where the owner did not know that time was running against him.¹⁶² Dockray criticises this state of affairs because adverse possession makes no attempt to balance the hardship of the owner against the hardship of the squatter.¹⁶³ This position is clear from the following *obiter dictum* in *Cholmondeley v Clinton*:¹⁶⁴

“The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which, the plans in life, habits and expences of himself and his family may have been ... unalterably formed and established.”¹⁶⁵

for the Twenty-First Century: A Consultative Document – Number 254 (September 1998) paras 10.8, 10.16; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 140.

¹⁵⁹ See section 4.2.2 above.

¹⁶⁰ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 236-237; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 113; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 281; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135. This issue is addressed in section 4.5 below.

¹⁶¹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 275. To the same effect is Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

¹⁶² Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 273-275; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.6; *Powell v McFarlane* (1979) 38 P & CR 452 480; *Rains v Buxton* (1880) 14 Ch D 537 540-541; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 139-140; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.35; Smith RJ *Property Law* (6th ed 2009) 64. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 114.

¹⁶³ This is clear from Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 275; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 140. See also Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 136. This balancing that Dockray suggests could provide a helpful method for solving adverse possession disputes if the moral blameworthiness of the parties is allowed to be taken into account, as implied by Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 248-253. This possibility is analogous to Radin’s personality theory and is addressed in section 4.4.3 below.

¹⁶⁴ (1820) 2 Jac & W 1.

¹⁶⁵ (1820) 2 Jac & W 1 140. This passage is analogous to Singer’s “reliance interest” theory, which is discussed in section 4.4.3 below.

It seems that this justification is built on the assumption that it is always the squatter who suffers the greater hardship and that the owner should, therefore, not be able to reclaim possession after the expiration of the limitation period. Dockray questions whether the balance of hardship normally favours the squatter after 12 years and also whether adverse possession must necessarily adopt an “automatic and imperative form”, without the possibility of judicial discretion to determine which party truly suffers hardship.¹⁶⁶ Dockray also criticises the relatively short limitation period,¹⁶⁷ which is even more relevant in situations where the land is registered and the parties are able to determine the owner’s identity through investigating the register.¹⁶⁸ As a result, Dockray concludes that hardship cannot adequately justify adverse possession.¹⁶⁹ Yet, if one has regard to the moral and utilitarian justifications addressed below,¹⁷⁰ together with employing adverse possession as a mechanical entitlement determination rule,¹⁷¹ it is clear that ample grounds exist for retaining adverse possession in a modern jurisdiction with a negative registration system.

The second reason advanced under this justification is based on economic considerations, namely that adverse possession encourages the “use, maintenance and improvement of natural resources”.¹⁷² Adverse possession is seen to be in the public interest because it rewards the purposeful labourer who makes constructive use of available land.¹⁷³ The

¹⁶⁶ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 275. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 113.

¹⁶⁷ The period for adverse possession in English law regarding unregistered land, which also applied to registered land prior to the LRA, is 12 years: See section 3.2.2.1 of chapter three above.

¹⁶⁸ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 275-276; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.3; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.11.

¹⁶⁹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276. For an argument to the contrary, see Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260.

¹⁷⁰ See sections 4.4.2-4.4.4 below.

¹⁷¹ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1145. See further section 4.4.4 below.

¹⁷² Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.72, 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.7, 10.13; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.11; Smith RJ *Property Law* (6th ed 2009) 63; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 237. See also Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 81; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135. This reason is discussed in greater detail in section 4.4.4 below.

¹⁷³ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.72, 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.7, 10.13; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.11; Smith RJ *Property Law* (6th ed

squatter – in the absence of the owner – can start to invest in the land and come to regard it as his own after many years of possession.¹⁷⁴ This ground is – apparently – strengthened if the squatter occupied the land with the (*bona fide*) belief that he owned it.¹⁷⁵ Nevertheless, this argument remains valid even if the squatter is aware (*mala fide*) that he is not the owner, since possessors will not invest in land if the owner suddenly appears and then simply reclaims the property.¹⁷⁶ For this reason the law wishes to encourage effective land use, especially if the land would otherwise lie abandoned by the owner.¹⁷⁷ Therefore, adverse possession encourages owners to develop their land, since it is in the public interest to promote the use of limited resources.¹⁷⁸

The second leg of this justification is that adverse possession prevents land from becoming unmarketable. This can happen in situations where the ownership of land and the reality of possession are “out of kilter”, which causes land to become unmarketable if there is no mechanism available to align long-term possession with ownership or to quiet titles.¹⁷⁹ This situation can occur in cases where

2009) 63; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 237. See also Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 81; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135.

¹⁷⁴ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.7; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 140; Smith RJ *Property Law* (6th ed 2009) 64;

¹⁷⁵ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.7; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 140; Smith RJ *Property Law* (6th ed 2009) 64.

¹⁷⁶ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.72, 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.7, 10.13; Smith RJ *Property Law* (6th ed 2009) 63-64. See also the economic justifications in this regard in section 4.4.4 below.

¹⁷⁷ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.11; Smith RJ *Property Law* (6th ed 2009) 63. See also Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 81; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135.

¹⁷⁸ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.13; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.6; Smith RJ *Property Law* (6th ed 2009) 64-65; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115. See further the utilitarian and economic justifications advanced in favour of adverse possession in section 4.4.4 below.

¹⁷⁹ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.54.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.7; Smith RJ *Property Law* (6th ed 2009) 64-65.

- i) the owner has disappeared and the squatter – in the owner’s absence – has been in possession of the land for a substantial period of time;¹⁸⁰ or
- ii) there were dealings with registered land “off the register”, causing uncertainty as to who truly owns the land.¹⁸¹

Though this ground constitutes a valid justification for adverse possession, Dockray states that it “seems only rarely to have influenced judicial opinion” in cases involving adverse possession.¹⁸² Still, the Law Commission views this justification as playing an important role, even in situations concerning registered land or where the squatter is *mala fide*, since adverse possession ensures that land – even under these circumstances – remains in commerce and is not rendered sterile.¹⁸³ The Law Commission’s findings in this regard overlap with the economic grounds advanced for adverse possession below.¹⁸⁴ Although even an important consideration in the context of registered land, Dockray finds that this reason cannot adequately justify adverse possession, since it is not limited to cases of “long and peaceable possession” of neglected property.¹⁸⁵

To summarise, Dockray provides the following three reasons to justify adverse possession:

- i) it promotes legal certainty by protecting long-term possessors from stale claims (through quieting titles);

¹⁸⁰ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 278-279; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.72; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.7.1; Smith RJ *Property Law* (6th ed 2009) 64-65. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115-116; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2443.

¹⁸¹ *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.7.2. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115-116; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 282-283.

¹⁸² Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 276. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115.

¹⁸³ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.72; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.7, 10.13, 10.43. To the same effect are Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.11; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 81. This is an important economic justification for adverse possession, see section 4.4.4 below. For criticism on this economic justification, see Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115.

¹⁸⁴ See section 4.4.4 below.

¹⁸⁵ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 277; Smith RJ *Property Law* (6th ed 2009) 64.

- ii) it encourages owners not to sleep on their rights; and
- iii) it ensures that a possessor can feel confident that his right cannot be called into question after a certain period of time has elapsed.

As discussed above, the third justification is premised on two reasons, namely (i) that adverse possession prevents hardship and (ii) that it encourages effective land use and ensures that land remains in commerce. Nonetheless, the Law Commission concludes that these three justifications are unable to justify adverse possession, especially concerning registered land where the register is conclusive as to the ownership of land.¹⁸⁶

Dockray also identifies a fourth justification for adverse possession, namely that it helps to ascertain ownership in unregistered land.¹⁸⁷ In many ways this ground can be equated to the “promotion of legal certainty” justification in South African law.¹⁸⁸ Although this objective “seems to have slipped from the general legal consciousness”,¹⁸⁹ Dockray argues that it constitutes one of the main justifications for adverse possession by making the investigation of unregistered title both safer and cheaper.¹⁹⁰ The Law Commission took cognisance of Dockray’s argument and it stated that “[t]his fourth reason is undoubtedly the strongest

¹⁸⁶ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 277; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 14.2-14.3, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.11; Smith RJ *Property Law* (6th ed 2009) 64.

¹⁸⁷ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 277; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.2, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.9-10.10; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) paras 9.1.9-9.1.10; Smith RJ *Property Law* (6th ed 2009) 64-65; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001; Nield S “Adverse Possession and Estoppel” 2004 *Conveyancer* 123-136 128. See also Caterina R “Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279 275; Fox D “Relativity of Title at Law and in Equity” (2006) 65 *Cambridge Law Journal* 330-365 338; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2441-2442; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 282-283, 288; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135, 143-144.

¹⁸⁸ See section 4.2.3 above.

¹⁸⁹ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 277.

¹⁹⁰ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 277-284; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.2, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.9-10.10; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) paras 9.1.9, 9.1.14; Smith RJ *Property Law* (6th ed 2009) 64-65; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001. See also Caterina R “Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279 275; Merrill TW & Smith HE “The Property/Contract Interface” (2001) 101 *Columbia Law Review* 773-852 803; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 282-283.

justification for adverse possession.”¹⁹¹ Two reasons are advanced as to why adverse possession facilitates conveyancing in the case of unregistered land, namely that

- i) it diminishes litigation;¹⁹² and
- ii) it saves expenses on the alienation of land and cheapens the investigation of title.¹⁹³

Dockray expands on these two reasons and emphasises that this justification indeed qualifies as the fourth and main ground for justifying adverse possession.¹⁹⁴ The Law Commission accepted it, especially in the context of the second reason Dockray provides.¹⁹⁵ Nonetheless, the Law Commission established that this justification is only relevant regarding *unregistered* land, since title to unregistered land is relative and, thus, depends on possession.¹⁹⁶ The Law Commission reasoned that this justification does not take into account the significance of registration of title.¹⁹⁷ It argued that any uncertainty pertaining to the status of title is removed

¹⁹¹ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.10. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135, 143-144.

¹⁹² Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 278-279; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 140.

¹⁹³ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 278-279; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.9; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.10; Smith RJ *Property Law* (6th ed 2009) 64-65. See also Fox D “Relativity of Title at Law and in Equity” (2006) 65 *Cambridge Law Journal* 330-365 338; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115.

¹⁹⁴ Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284 280-284; *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.9-10.10.

¹⁹⁵ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.2; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.9.

¹⁹⁶ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.2-14.3, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.9-10.10; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) paras 9.1.10, 9.1.12, 9.1.14; Smith RJ *Property Law* (6th ed 2009) 65; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) para 35-001; Nield S “Adverse Possession and Estoppel” 2004 *Conveyancer* 123-136 128. See also Caterina R “Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279 274; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2441-2442; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 282-283, 288; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 137, 143-144.

¹⁹⁷ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.70, 14.3, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.9-10.10; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) paras 9.1.10, 9.1.14; Smith RJ *Property Law* (6th ed 2009) 65. See also Caterina R “Some Comparative Remarks on *JA Pye*

once it is registered *and* the register provides conclusive proof of ownership of land.¹⁹⁸ To allow adverse possession in such a framework would be inconsistent with the principle that the register is conclusive concerning the ownership of land.¹⁹⁹ In other words, possession forms the basis of title when land is unregistered, whereas the register performs this function in cases involving registered land.²⁰⁰ Consequently, registration of title under the LRA in English law today fulfils the same role as the *Grundbuch* in German law, where the register also provides conclusive proof of the ownership of land.²⁰¹ This means that the English registration system – like the German *Grundbuch* – is now also positive in nature. It follows that adverse possession fulfils a greater role in a negative registration system where the correctness of the register is not guaranteed.

Through this evaluation of the traditional justifications for adverse possession, the operation of unqualified adverse possession regarding registered land suddenly seemed to some to “endorse” a form of “land theft”.²⁰² The disappearance of the conveyancing justification led

(*Oxford*) v. *The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279 274; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 143-144.

¹⁹⁸ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.3, 14.6, 14.10, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.10-10.11; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 710; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) paras 9.1.10, 9.1.14; Smith RJ *Property Law* (6th ed 2009) 65; Harpum C, Bridge S & Dixon M *Megarry and Wade: The Law of Real Property* (7th ed 2008) paras 35-001, 35-071; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 137. See also Goymour A “The Acquisition of Rights in Property by the Effluxion of Time” in Cooke E (ed) *Modern Studies in Property Law* 4 (2007) 169-196 193; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2441-2442; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 143-144.

¹⁹⁹ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73, 14.2-14.6, 14.54; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.3, 10.10-10.11; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709; Smith RJ *Property Law* (6th ed 2009) 65. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115-116; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 143-144. For an argument to the contrary, see Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260.

²⁰⁰ See Fox D “Relativity of Title at Law and in Equity” (2006) 65 *Cambridge Law Journal* 330-365 for a discussion on the doctrine of relativity of title.

²⁰¹ The position in German law is discussed in section 3.5 of chapter three above.

²⁰² *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.11, 10.44; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.15; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 236-237; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151. See also Rose CM “Property and Expropriation: Themes and Variations in American Law” (2000) 1 *Utah Law Review* 1-38 9; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 113; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 281. Irving is of the opinion at 113 that a limitation period of 12 years minimises the possibility of

the Law Commission to conclude that it can no longer be justified to have adverse possession in relation to registered land.²⁰³ Therefore, the Law Commission found that the doctrine of adverse possession “runs counter to the fundamental concept of indefeasibility of title that is a feature of registered title.”²⁰⁴ Only in a few instances where the register is not conclusive – as is the case in relation to boundaries – would the conveyancing justification still hold water.²⁰⁵ The Law Commission decided that adverse possession concerning registered land should no longer extinguish ownership, since in only a limited number of situations will the conveyancing justification regarding registered land be the same as it is in relation to unregistered land.²⁰⁶ Gray and Gray capture the effects of this alteration to English law as follows:

“With the drive towards comprehensive registration of title there has emerged a new conceptualism of *ownership* or *dominium*. The common law principle of relativity of title [and by implication also adverse possession] now operates only marginally within the statutory scheme of registered land.”²⁰⁷ (Original emphasis.)

Yet, some authors state that the position is not this simple, claiming that there still exist valid reasons for having adverse possession in relation to registered land that were not taken into

“land theft”. To the contrary of Irving is Neuberger J in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709-710.

²⁰³ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 14.1-14.8; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.5-10.19, 10.65-10.69, 10.100-10.101; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.16; Smith RJ *Property Law* (6th ed 2009) 65; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 150-151. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119.

²⁰⁴ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.3; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 1.14, 10.11; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.16. See also Fox D “Relativity of Title at Law and in Equity” (2006) 65 *Cambridge Law Journal* 330-365 335-336. For an argument to the contrary, see Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 260-263.

²⁰⁵ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.72, 14.3, 14.7, 14.44; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115-116; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 287.

²⁰⁶ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 14.1-14.8; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) paras 10.5-10.19, 10.49; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.20; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 150-151. See also Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115-116.

²⁰⁷ Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.20. See also Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 240-241. For an argument to the contrary, see Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 260-263.

consideration by the Law Commission.²⁰⁸ Nonetheless, the LRA now severely restricts adverse possession concerning registered land. As appears from the discussion of the LRA in the previous chapter,²⁰⁹ the enactment of this Act did not so much alter the substantive requirements for adverse possession as that it provides compelling procedural safeguards for registered owners by putting mechanisms in place that protect owners of registered land from losing their land through the limitation effect of adverse possession.²¹⁰ Lord Hope describes these amendments by stating that “a much more rigorous regime has now been enacted in ... the Land Registration Act 2002 ... [which makes] it much harder for a squatter who is in possession of registered land to obtain title to it against the wishes of the proprietor.”²¹¹ The LRA expressly alters the relevant provisions of the Limitation Act 1980 by providing that no limitation period can “run against any person ... in relation to an estate in land ... the title to which is registered.”²¹²

These developments in England were followed by an extensive discussion surrounding the compatibility of adverse possession with Article 1 of Protocol No 1 (“Article 1”) to the European Convention of Human Rights and Fundamental Freedoms 1950 (“the Convention”) at the European Court of Human Rights in Strasbourg. This debate pertained to adverse possession as it operated prior to the enactment of the LRA, when the “old” rules of adverse possession still applied to both registered and unregistered land. Although this issue was settled in *JA Pye (Oxford) Ltd v United Kingdom*,²¹³ where the Grand Chamber held pre-LRA adverse possession law to be compatible with Article 1 of the First Protocol, I return to this

²⁰⁸ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 236-240; Dixon MJ “Adverse Possession in Three Jurisdictions” 2006 *Conveyancer* 179-187 179; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 245-263. See also Dixon M “Adverse Possession and Human Rights” 2005 *Conveyancer* 345-351 351, where he argues that the alterations made by the 2002 Act to adverse possession are “an unnecessary and economically unjustified ‘bolt on’ to the reform of registered land.” In this regard, see further Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152. Cobb and Fox criticise the Law Commission at 239-240 for not taking the labour theory, Radin’s personality theory and utilitarianism into account in their reasoning as to the curtailment of adverse possession regarding registered land. According to these authors at 239, the reforms introduced by the Law Commission require “more robust” justification. These three theories – together with their impact on the justification of adverse possession – are discussed in section 4.4 below.

²⁰⁹ See section 3.2.4 of chapter three above.

²¹⁰ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 14.5.1; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.49.

²¹¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham and also per Lord Hope at 446-447.

²¹² Section 96(1) of the Land Registration Act 2002, disapplying section 15 of the Limitation Act 1980. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) para 9.1.21.

²¹³ (2007) 46 EHRR 1083 (GC).

issue in the next chapter. Chapter five specifically focuses on whether prescription is justifiable in the constitutional setting of South Africa.

4.3.3 Conclusion – the death of traditional adverse possession in English law

In light of the new regime introduced by the 2002 Act, it may not be too bold to state that adverse possession in its traditional sense is dead, as it is no longer possible in English law to acquire registered land through adverse possession alone. This is because the LRA now prevents the extinguishment of registered title through the mere passage of time. The findings of the Law Commission that the justifications for adverse possession involving unregistered land do not extend to registered land affected this departure from the traditional position. Two of the main points of criticism in this context are that it cannot be said that adverse possession promotes legal certainty or that it encourages owners not to sleep on their rights, since registered landowners can now be identified through investigating the register. Yet, I argue that this criticism only applies to legal systems where the register provides *conclusive* proof of ownership, such as German law.²¹⁴

These developments necessitate a re-evaluation of the justifications advanced for prescription in South African law. The reason for this re-evaluation is because many of the reasons provided for justifying adverse possession in English law are the same as those found in South African law, most notably the fact that both adverse possession and prescription promote legal certainty. Therefore, it has to be determined whether Dockray's criticism against these justifications also applies to the justifications for prescription in South African law. This question is addressed in the next section, which focuses on three liberal property theories that provide reasons for retaining adverse possession or prescription in a legal system.

4.4 Three liberal theories for justifying acquisitive prescription

4.4.1 Background

²¹⁴ German law is discussed in section 3.5 of chapter three above.

This section analyses the justifications for adverse possession or prescription²¹⁵ against the background of three liberal property theories, namely the labour theory of Locke, the personality theory, as developed by Radin, together with utilitarianism and law and economics theory. The reason I chose these three theories is because they cover the justifications provided for prescription in South African law. Attention is also paid to situations involving the *mala fide* possessor, as these cases are the most difficult to justify.²¹⁶ This is due to the fact that prescription – especially in cases involving *mala fide* possessors – *prima facie* seems to undermine the security and exclusivity of ownership.²¹⁷ In United States (“US”) law these possessors have been described as “acquisitive [property] outlaws”²¹⁸ to illustrate that they are consciously (ab)using the law of adverse possession to “steal” property from owners.²¹⁹ Van der Walt emphasises the problem with bad faith adverse possession:

“Considering the social importance attached to the sanctity and security of property ownership in the rights paradigm, allowing bad faith unlawful possessors to acquire ownership through acquisitive possession represents a significant qualification of the paradigm.”²²⁰

Since *mala fide* possessors pose a threat to the security of ownership, it is understandable why judges and commentators are unwilling to award ownership to such persons simply because they satisfied the requirements for adverse possession.²²¹ Nonetheless, arguments

²¹⁵ I refer to adverse possession and prescription interchangeably in this section, since the jurisprudential discussion pertains to both the common law and civil law notions of this legal institution.

²¹⁶ Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585, 1594; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2454-2455; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161-162; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 881-884; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 217, 219; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1135. The “anomaly” of the bad faith possessor is discussed in greater detail in section 4.5 below.

²¹⁷ Van der Walt AJ *Property in the Margins* (2009) 173. See also Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 238; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1132.

²¹⁸ This term was coined by Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186.

²¹⁹ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1105-1113; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 236-237; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 281; Ballantine HW “Title by Adverse Possession” (1919) 32 *Harvard Law Review* 135-159 135.

²²⁰ Van der Walt AJ *Property in the Margins* (2009) 173. See also Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1097.

²²¹ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 426 per Lord Bingham; *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676 709-710; Van der Walt AJ *Property in the Margins* (2009) 173. See also the discussion of this issue in US law in Helmholz RH “More on Subjective Intent: A Response to Professor Cunningham” (1986) 64 *Washington University Law Quarterly* 65-106; Helmholz RH “Adverse Possession and

have been voiced in support of prescription, even in the context of bad faith possessors.²²² The issue of bad faith prescription is addressed in section 4.5 below.

It was seen above that adverse possession law in England was recently reformed with the enactment of the LRA, which prevents the extinguishment of ownership of registered land through the mere passage of time.²²³ Yet, some authors criticise the Law Commission for failing to incorporate certain moral and economic reasons into its arguments when it decided to “abolish” adverse possession.²²⁴ They argue that the position adopted by the Law Commission oversimplifies matters because it simply distinguishes between good faith and bad faith squatters, the former being morally acceptable whereas the latter – being labelled as “immoral” – ought to be prevented from stealing land from “blameless” owners.²²⁵ It seems as if the Law Commission, without much in-depth reasoning, merely accepted that “registration is right and ‘land theft’ wrong”,²²⁶ without providing sufficient reasons as to why it reached such a conclusion. Dixon said the following when commenting on the reforms suggested by the Law Commission:

“[M]odern expositions of the law on adverse possession appear to have favoured the rights of possessors over the rights of paper owners and the existence of an off-register mechanism for destroying titles seems to make a mockery of the state guarantee of title. *On the other hand, the social and economic justifications for principles of adverse possession have been well*

Subjective Intent” (1984) 61 *Washington University Law Quarterly* 331-358. This point is discussed in greater detail in section 4.5 below.

²²² Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186; Caterina R “Some Comparative Remarks on *JA Pye (Oxford) v. The United Kingdom*” (2007) 15 *European Review of Private Law* 273-279; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096; Dixon M “Adverse Possession and Human Rights” 2005 *Conveyancer* 345-351; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288.

²²³ See section 4.3.3 above.

²²⁴ See especially Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 248-253; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 272-275. See also Dixon M “Adverse Possession and Human Rights” 2005 *Conveyancer* 345-351 351; Auchmuty R “Not Just a Good Children’s Story: A Tribute to Adverse Possession” 2004 *Conveyancer* 293-307 306; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152.

²²⁵ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 248-253; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 272-275. See also Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1097-1098; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1037-1040; Auchmuty R “Not Just a Good Children’s Story: A Tribute to Adverse Possession” 2004 *Conveyancer* 293-307 306.

²²⁶ Auchmuty R “Not Just a Good Children’s Story: A Tribute to Adverse Possession” 2004 *Conveyancer* 293-307 306. This article provides an interesting take on the morality of adverse possession.

documented and instead of 'land theft', adverse possession can be seen as encouraging 'productive land use'. Again, there is nothing inherently contradictory in having principles of adverse possession operate in registered land, at least if those principles are seen positively as a method of transferring title from one person to another instead of a method of unfairly snatching it from them."²²⁷ (Emphasis added.)

The Law Commission's failure to incorporate these moral and economic grounds into its reports necessitates an investigation of these factors. This is achieved through employing the three liberal property theories mentioned to emphasise the fallacy in the reasoning of the Law Commission concerning the "abolition" of traditional adverse possession.

4.4.2 The labour theory

According to Locke's labour theory, God gave the world to mankind in common for its preservation.²²⁸ It is from this commons that man – who has property in his own person – is able to appropriate property through "the labour of his body, and the work of his hands."²²⁹ Property is awarded to those who mix labour with it, namely the "industrious and rational", as opposed to those who do not, whose non-laborious acts Locke describes as "the fancy or covetousness of the quarrelsome and contentious."²³⁰ Locke rejects the idea that prior consent is required from the rest of mankind to acquire ownership in property.²³¹ Consequently, a person acquires ownership over a thing by taking it out of the commons and

²²⁷ Dixon M "The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment" 2003 *Conveyancer* 136-156 151-152 (footnotes omitted).

²²⁸ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 25. See also Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 965-966, who relies on Locke to help justify her personality theory.

²²⁹ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 26-28, 44. Locke implies that every person literally owns his limbs and, therefore, also owns the products of those limbs. See also Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 965-966 and Epstein RA "Possession as the Root of Title" (1979) 13 *Georgia Law Review* 1221-1243 1227, both of whom agree with this interpretation. For criticism on the assumption that one owns one's limbs and the products thereof, see Rose CM "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73-88 73-74. Nozick R *Anarchy, State, and Utopia* (1974) especially criticises Locke's assumption that a person acquires a claim to that which he employs labour with his famous tomato juice analogy. In this sense Nozick at 174-175 asks the following: "[W]hy isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules ... mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" It seems that Locke's theory is not able to adequately answer this question. Nonetheless, there is something to be said for a labour theory claim when a person invests labour into land by occupying and working it.

²³⁰ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 34. See also Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 249; Rose CM "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73-88 79. Rose makes an interesting connection between the labour theory and the common law theory of first possession, which she uses to justify adverse possession. For another take on the role of the rule of first possession, see Epstein RA "Possession as the Root of Title" (1979) 13 *Georgia Law Review* 1221-1243.

²³¹ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 28. See also Rose CM "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73-88 74 and the sources cited there.

through mixing his labour with it.²³² Since labour belongs to the person performing it, once labour is mixed with a thing it becomes the property of the labourer and no one else is then able to obtain a right in it.²³³ Locke's theory concerns situations of first acquisition of ownership, which means that it will be of no use to mix labour with the property of another, as that property has already been appropriated from the commons and can thus not be acquired by mixing labour with it *ex post*.²³⁴ It follows that one of the characteristics of the Lockean theory is that it prohibits non-contractual redistribution of ownership.²³⁵ This poses a problem for acquiring property through adverse possession, as the labour theory seems to be inconsistent with such a method of acquisition of ownership.²³⁶ Nonetheless, this problem can be overcome by treating the owner's neglect of his land as a form of "quasi-abandonment",²³⁷ which diminishes the owner's claim towards the property.²³⁸ In this context Cobb and Fox think that merit is to be found in a possible labour theory claim in cases involving urban squatters who occupy empty property and invest time and energy to improve it.²³⁹ Still, owners sometimes let their properties lie vacant because of future development plans or because the owner wishes to keep it as an investment or to sell it at a later stage. Although non-use constitutes one of the entitlements of ownership (the *ius abutendi*), it is

²³² Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 27-28.

²³³ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 27.

²³⁴ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 34.

²³⁵ Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 744.

²³⁶ Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 249; Clarke A "Use, Time, and Entitlement" (2004) 57 *Current Legal Problems* 239-275 245-246; Epstein RA "Possession as the Root of Title" (1979) 13 *Georgia Law Review* 1221-1243 1226-1228. According to Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 973-794 and Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 739, initial labour is sufficient to acquire ownership under the labour theory, which illustrates that one does not have to constantly invest labour in the thing to maintain ownership. This is where the problem arises in trying to justify prescription under the labour theory, since the initial labour of the owner seems to cause his ownership to last forever. To the contrary is the Hegelian approach of acquiring property, since Hegel believes that ownership is lost when a person withdraws his will from an object and abandons possession. This latter issue is discussed in section 4.4.3 below.

²³⁷ This term is derived from Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260.

²³⁸ Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 249-250. Rose CM "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73-88 79 implies that the owner's neglect of land can allow a squatter to invest labour in the land, which justifies the transfer of ownership to said squatter through adverse possession. She furthers her argument by stating that the purpose of adverse possession is "to require the owner to assert her right publicly." To the same effect is Green K "Citizens and Squatters: Under the Surfaces of Land Law" in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241-243. Furthermore, Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 750 expresses her sympathy towards the possibility of using the labour theory to justify acquisition of ownership through adverse possession.

²³⁹ Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 250. See also Clarke A "Use, Time, and Entitlement" (2004) 57 *Current Legal Problems* 239-275 272-273.

more difficult to justify the existence of such an entitlement when one's property is possessed by others for long periods of time, especially in societies characterised by housing shortage problems such as South Africa.²⁴⁰ However, it is worth emphasising that prescription does not limit an owner's right to neglect his property, since owners are entitled to let their land remain unused even for a 100 years if they so desire. Ownership can only be lost through prescription if the owner – through exercising the *ius abutendi* – does not assert his ownership by “allowing” a possessor to possess the land for the duration of the prescription period. In this regard Rose states that one of the purposes of adverse possession is “to require the owner to assert her right publicly.”²⁴¹ Consequently, an owner does not lose property through mere non-use alone but because another person has taken possession of it in the owner's absence, which possessor is then able to acquire the property through prescription.

The *quasi*-abandonment argument of Cobb and Fox is strengthened by the fact that Locke qualifies his theory by stating that it will only be a valid method for acquiring property “at least where there is enough, and is good left in common for others.”²⁴² This implies that the labour theory only suffices as long as there remain enough unowned things in the commons for other people to appropriate. Such an approach can also be used to justify urban squatters acquiring ownership over abandoned houses or premises. Indeed, Locke wrote during an era when “there [was] land enough in the world to suffice double the inhabitants”,²⁴³ which now is no longer the case. This supports the argument that prescription should be allowed in the Lockean framework. Thus, the abovementioned qualification can warrant the use of the labour theory to justify the acquisition of things through law (prescription) where property is already owned (but not used by the owner) and possessed by another person in situations where there no longer remains enough land in the commons for people to appropriate.²⁴⁴

²⁴⁰ Van der Merwe CG (with Pope A) “Property” in Du Bois F (ed) *Wille's Principles of South African Law* (9th ed 2007) 405-665 510 and cases cited: See section 4.2.3 above. See also Van der Walt AJ *Property in the Margins* (2009) 176; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260. For an argument in this regard, see Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1130-1131; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 81-82. This issue is addressed in section 4.5 below.

²⁴¹ Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79.

²⁴² Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 27, 33. See also Epstein RA “Possession as the Root of Title” (1979) 13 *Georgia Law Review* 1221-1243 1228 in this regard.

²⁴³ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 36.

²⁴⁴ To the same effect is Green K “Citizens and Squatters: Under the Surfaces of Land Law” in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 243.

However, prescription is not only confined to cases involving urban squatters and thus one also has to consider whether the labour theory can be used to justify prescription when squatters invest time and labour in rural land. In § 31, Locke states that no person is free to appropriate from the commons as much as he desires, since a person may not take more from the commons than he is able to enjoy.²⁴⁵ Should a person appropriate more than his share or what he is able to use, such things will spoil, causing it to “belong to others”.²⁴⁶ The justification for this approach is that “[n]othing was made by God for man to spoil or destroy.”²⁴⁷ Although this particular paragraph²⁴⁸ only pertains to acorns or other fruit of the Earth, which are by their nature perishable things, through analogy one can read this qualification as also applying to land that is not *used* by owners, who thereby “spoil” it.²⁴⁹ Such an argument is justified through the use of the word “nothing” in this context,²⁵⁰ which is indicative of all kinds of property, including land. Although Locke does not directly state what happens to things that spoil, other than it “will belong to others”, it seems as if these things remain in or at least revert to the commons from where other persons are then able to appropriate them. In § 32, Locke mentions that land is acquired in the same way as fruits of the Earth described in § 31, which implies that land is subject to the same qualification mentioned in § 31. In the context of land it is stated that “[a]s much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.”²⁵¹ The latter paragraph entails that an owner who does not *use* his property is “spoiling” it, which opens the door for allowing prescription in the Lockean framework.²⁵² The spoiling of land by an owner can be said to have “offended against the common Law of Nature, and [such owner is]

²⁴⁵ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 31.

²⁴⁶ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 31, 46.

²⁴⁷ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 31. See also Green K “Citizens and Squatters: Under the Surfaces of Land Law” in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241, 243 in this context. Green claims that the “theft” of the owner’s property through adverse possession is justified if the owner is “a waster of the natural national resource [which is land].” To the same effect is Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585.

²⁴⁸ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 31.

²⁴⁹ For a source supporting such an argument, see Green K “Citizens and Squatters: Under the Surfaces of Land Law” in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241, 243.

²⁵⁰ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 31: “Nothing was made by God for man to spoil or destroy.”

²⁵¹ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 32.

²⁵² Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 31-32. For an argument along similar lines, see Green K “Citizens and Squatters: Under the Surfaces of Land Law” in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241, 243; Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585.

liable to be punished; [for] he invaded his neighbour's share."²⁵³ This logic provides further accommodation for prescription in the labour theory, especially if one considers that one of its justifications is to "punish" the neglectful owner and to reward the "industrious and rational".²⁵⁴ This argument is similar to the justification found in the jurisdictions discussed above, namely that prescription encourages owners to make use of their property.²⁵⁵ Indeed, Locke declares that whatever is beyond the enjoyment or use of a person before it spoils may not be appropriated as property, as it will be "more than his share" and will then belong to others.²⁵⁶ Although one may encounter problems with the word "spoil" in the context of land, I argue that spoilage entails letting land lie unused or abandoned for long periods of time.²⁵⁷ The following statement advances the possibility of such an interpretation:

"But if either the grass of his [e]nclosure rotted on the ground, or the fruit of his planting perished without gathering, and laying up, this part of the earth, notwithstanding his [e]nclosure, was still to be looked on as *waste*, and *might be the possession of any other*."²⁵⁸ (Emphasis added.)

If the non-use of land by an owner constitutes "waste", causing it to "be the possession of any other", it follows that the land then resides in or reverts to the commons, from where it can be acquired through prescription. The arguments by Cobb and Fox in the context of urban squatters strengthen the possibility of such an interpretation.²⁵⁹

An interesting element of the labour theory is found in the last paragraph of Locke's chapter on property. According to § 51, a person has a right to all things in which he can invest

²⁵³ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 37, read with § 38. The latter paragraph specifically justifies this approach regarding land, see also § 46.

²⁵⁴ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 34. See also Green K "Citizens and Squatters: Under the Surfaces of Land Law" in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241, 243; Sagaert V "De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht" (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585. To the same effect is Dixon M "The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment" 2003 *Conveyancer* 136-156 151-152. For the economic considerations favouring this approach, see section 4.4.4 below.

²⁵⁵ This justification, also known as the "punishment" justification, is a well-known ground for justifying prescription or adverse possession in Roman-Dutch, South African and English law: See sections 4.2.2, 4.2.3 and 4.3.2 respectively above. Although Dutch and French law regard this ground as being merely ancillary to the legal certainty argument, they also recognise it: See section 4.2.4 above.

²⁵⁶ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 31. See also Green K "Citizens and Squatters: Under the Surfaces of Land Law" in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241, 243.

²⁵⁷ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 37-38.

²⁵⁸ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 38.

²⁵⁹ Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260. See also Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096.

labour, causing no temptation to labour for more than such person can make use of. The result of this is captured as follows:

“This left no room for controvers[y] about the title, nor for [e]ncroachment on the rights of others; what portion a man carved to himself, was easily seen; *and it was useless as well as dishonest to carve himself too much, or take more than he needed.*”²⁶⁰ (Emphasis added.)

According to this paragraph it seems to be a waste (“useless”) if owners have too much property or more than they need. This is analogous to situations where people own more land than they are able or willing to use or look after, which serves as an additional justification for allowing prescription in this context.

One cannot ignore the role that time fulfils in theories such as the labour theory, since Epstein states that “[a]ll human interactions, and hence all legal rules, have a temporal dimension.”²⁶¹ Although time plays an important role in the personality theory²⁶² as well as in utilitarian and law and economics theory,²⁶³ it seems that the temporal dimension has no relevance in Locke’s theory.²⁶⁴ The reason why the temporal dimension is irrelevant in the labour theory is because it only focuses on the moment entitlements are created.²⁶⁵ A person acquires ownership – or entitlements – in property the moment he takes something from the commons and mixes labour with it. According to Epstein, the labour theory entails that entitlements are created through first possession of a thing, which entitlements are then fixed “forever”.²⁶⁶ Thus, time is only relevant to Locke the moment property is appropriated from the commons. It follows that the temporal dimension before and after this defining moment, when ownership is acquired, is irrelevant for the labour theory. This approach towards time is problematic for justifying adverse possession, since it is impossible to acquire ownership in property if the original owner’s entitlement toward it is forever recognised.²⁶⁷ Nonetheless,

²⁶⁰ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) § 51.

²⁶¹ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 667.

²⁶² This theory is discussed in section 4.4.3 below.

²⁶³ These theories are discussed in section 4.4.4 below.

²⁶⁴ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 739-740; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 669-670, 674.

²⁶⁵ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 739-740; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 669-670, 674.

²⁶⁶ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 669-670, 674; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 739.

²⁶⁷ This problem is pointed out by Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 740.

one overcomes this problem by employing Epstein's doctrine of relative title, which recognises the importance of the temporal dimension in the context of competing claims.²⁶⁸ Since time eradicates evidence pertaining to ownership, this doctrine entails that adverse possession is able to resolve conflicting claims to ownership by awarding title not to the first possessor (owner), but to the prior possessor (squatter).²⁶⁹ Accordingly, the doctrine of relative title "has the same virtues that the doctrine of first possession [or labour theory] has with respect to land originally unowned."²⁷⁰ Consequently, it is possible to accommodate adverse possession in the labour theory if one follows Epstein's proposition by incorporating a time element into Locke's theory.

Prima facie it seems as if the labour theory is unable to accommodate adverse possession, since this legal institution entails the acquisition of property that is already owned. However, the labour theory can justify prescription if an owner's neglect – or non-use – of urban or rural property is recognised as constituting *quasi*-abandonment or "waste". In this context the purposeful squatter who makes use of neglected land indeed provides support for including prescription in this theory. Furthermore, the labour theory is also subject to certain internal qualifications. For instance, Locke states that the acquisition of ownership through his theory will only be warranted as long as there remain enough unowned things in the commons for others to appropriate. Moreover, Locke forbids persons to take more from the commons than they are able to use and enjoy. These conditions open the possibility to allow prescription in the Lockean framework. Although the absence of a temporal dimension in the labour theory is another factor that counts against accommodating prescription, Epstein's doctrine of relative title can overcome this problem. I predict that these factors, when taken together, offer enough support for concluding that the labour theory can justify prescription.

The last issue warranting attention is how the labour theory reacts to *mala fide* adverse possession. In this sense it seems that the labour theory accommodates both good and bad faith prescription. The reason for this is because the subjective intent of the purposeful labourer is irrelevant for Locke; he merely requires a person to mix his labour with an object

²⁶⁸ Epstein RA "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667-722 675.

²⁶⁹ Epstein RA "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667-722 675. This approach definitely has undertones of law and economics theory: See section 4.4.4 below.

²⁷⁰ Epstein RA "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667-722 675.

to acquire ownership. Consequently, the subjective mindset of a person is unimportant to the labour theory, since both good and bad faith adverse possessors are able to acquire ownership in an object through mixing labour with it.

4.4.3 The personality theory

The second liberal theory that can justify prescription is the property and personhood theory (“personality theory”) of Radin.²⁷¹ The following passage captures the essence of this theory:

“The premise underlying the personhood perspective is that to achieve proper self-development – to be a *person* – an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.”²⁷² (Original emphasis.)

The personality theory entails that certain objects (property) are bound up with one’s personhood because they become part of the way we constitute ourselves as humans.²⁷³

Although these objects differ from person to person, Radin identifies four examples, namely

²⁷¹ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 957; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 745. Other authors are in favour of this theory, see – for instance – Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1131-1132; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 250-251; Goymour A “The Acquisition of Rights in Property by the Effluxion of Time” in Cooke E (ed) *Modern Studies in Property Law* 4 (2007) 169-196 171; Singer JW *Introduction to Property* (2nd ed 2005) 159-161; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 274; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2420, 2456; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 310-311; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 83-84; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668 footnote 174; Merrill TW (ed) “Time, Property Rights, and the Common Law – Round Table Discussion” (1986) 64 *Washington University Law Quarterly* 793-865 814; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1127, 1131-1132; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. This theory also has an interesting resemblance to Alexander’s social-obligation norm: See Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820. Nonetheless, criticism has been voiced against this theory, especially by Schnably SJ “Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood” (1993) 45 *Stanford Law Review* 347-407. For ease of reference, I refer to Radin’s theory as the “personality theory”.

²⁷² Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 957, which is based on Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) 22-31 para 41. See also Radin MJ *Reinterpreting Property* (1993) chapter 1, where this article is incorporated. Radin formulates her personality theory by basing her ideas on the Hegelian personality theory.

²⁷³ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 959. This approach is similar to the relationship described by Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3 supports this approach from an economic perspective, though only in the context of good faith adverse possessors. The economic aspects of adverse possession are discussed in section 4.4.4 below.

a wedding ring, a portrait, an heirloom and a house.²⁷⁴ The essence of her theory is that ownership of objects is needed to help constitute healthy self-constitution or human flourishing.²⁷⁵ The strength of a person's relationship with an object is measured by taking into account the kind of "pain"²⁷⁶ he will suffer should the object be lost in some way.²⁷⁷ Consequently, an object is closely bound up with someone's personhood if its loss causes pain that cannot be relieved by replacing that object with its monetary value.²⁷⁸ An example analogous to one provided by Radin is where a valuable watch was stolen from a watchmaker. The insurer can simply reimburse the watchmaker, but if the same watch was stolen from a sentimental owner, simple monetary reimbursement will not provide adequate satisfaction.²⁷⁹ The reimbursement of the watchmaker by the insurer is viewed as possession of an object that is replaceable with something of equal worth.²⁸⁰ Such objects are held for instrumental reasons, examples being money, watches held by a watchmaker and land in the hands of a developer.²⁸¹ Radin refers to these two types of property (relationships) as (i) "personal property",²⁸² which involves property that individuals are attached to as persons,

²⁷⁴ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 959. For a discussion of the applicability of the personality theory in the context of a home, see Fox L *Conceptualising Home: Theories, Law and Policies* (2007) 287-303. For how the personality theory can be used to justify adverse possession in the context of urban squatters, see Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 250-252.

²⁷⁵ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 968-969; Radin MJ *Reinterpreting Property* (1993) 1. See further Radin MJ *Reinterpreting Property* (1993) 5-6, who thinks that her argument can be improved by using the term "human flourishing" instead of "healthy self-constitution", although she admits that not even this new term is entirely free of difficulty.

²⁷⁶ This pain can be equated to what Michelman FI "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harvard Law Review* 1165-1258 1214 describes as "demoralization costs", a connection already made by Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 727-728. Ellickson at 727-728 describes demoralisation costs as not only encompassing personal losses, but also "social losses that result when those who have been demoralized become more antisocial in their behaviour." Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 1003 and Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1130 also refer to this demoralisation aspect in and.

²⁷⁷ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 959. It is not the "object" that is personal, but rather the *relationship* between a person and object, according to Radin MJ *Reinterpreting Property* (1993) 14.

²⁷⁸ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 959.

²⁷⁹ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 959; Radin MJ *Reinterpreting Property* (1993) 16.

²⁸⁰ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 959-960; Radin MJ *Reinterpreting Property* (1993) 14.

²⁸¹ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 960; Radin MJ *Reinterpreting Property* (1993) 14.

²⁸² Radin MJ *Reinterpreting Property* (1993) 2 is of the opinion that she should rather have used the word "constitutive property" and not "personal property" to refer to this kind of relationship, but for purposes of this dissertation I use her original term. For an interesting take on the application of "personal property" from Radin's theory, see Green K "Citizens and Squatters: Under the Surfaces of Land Law" in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241-242.

and (ii) “fungible property”, which entails property that individuals are not bound up with.²⁸³ Yet, the fact that persons can become bound up with certain things does not imply that such property deserves recognition or protection, since there is both a good and bad way of being bound up with objects.²⁸⁴ In this sense “object-fetishism” – which implies a wrong or unhealthy way of being bound up with objects – will not be recognised as personal property because such property it is not constitutive of one’s personhood.²⁸⁵ The “shoe fetishist’s” relationship with his shoe does not deserve the same recognition or respect as the relationship between a sentimental watch owner and his watch, since a shoe cannot be constitutive of someone’s personhood.²⁸⁶ To ascertain whether a person’s relationship with an object is “good” or “bad” (fetishistic), one has to establish whether an “objective moral consensus” determines that to be bound up with that category of thing is consistent with personhood or healthy self-constitution.²⁸⁷ However, refusing to classify fetishist or fungible property as personal property does not mean that such objects are not regarded as *property*.²⁸⁸ The shoe fetishist will still hold or own his shoe as property, albeit with a weaker right than had it qualified as personal property.²⁸⁹

Radin’s theory is built on the Hegelian personality theory, since it supports her theory of “property for personhood”.²⁹⁰ According to Hegel, a “person must translate his freedom into

²⁸³ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 960; Radin MJ *Reinterpreting Property* (1993) 2; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 748 footnote 26. In *Reinterpreting Property* (1993) 2, Radin acknowledges that she should rather have referred to these properties – namely personal and fungible – as property *relationships*, hence the placing of the word “relationships” in brackets in the main text.

²⁸⁴ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 961; Radin MJ *Reinterpreting Property* (1993) 4.

²⁸⁵ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 961. For a more complete discussion on the differences between “good” and “bad” object-relations, see the same article at 961-970.

²⁸⁶ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 961. In the same article at 961-970, Radin establishes a method for distinguishing between good and bad property relationships.

²⁸⁷ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 969. Radin reassesses her use of the words “objective” and “consensus” in Radin MJ *Reinterpreting Property* (1993) 4-5 and states that “objectivity” can imply “a kind of transcendent reality divorced from the activities of human beings”, while “consensus” has its own “baggage” relating to groups of individuals entering into a social contract. She also reconsiders her use of the word “health” in “healthy self-constitution” at 5 and mentions that her argument would be advanced by simply speaking of “human flourishing”. Schnably SJ “Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood” (1993) 45 *Stanford Law Review* 347-407 362-379 critiques Radin’s use of the word “consensus”.

²⁸⁸ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 970, 1008; Radin MJ *Reinterpreting Property* (1993) 12-14.

²⁸⁹ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 970. This means that even though the object will be treated as fungible property, ownership prevails. However, it entails that certain claims regarding the property will be denied had it not been fungible property but personal property. See also Radin MJ *Reinterpreting Property* (1993) 12-14.

²⁹⁰ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 972.

an external sphere in order to exist as [an] Idea.”²⁹¹ This means that before a person can truly exist, it is necessary for such person to invest his will into “the sphere capable of embodying his freedom”.²⁹² As to what precisely this “external sphere” entails, one only has to look to the following passage to find the answer:

“A person has as his substantive end the *right of putting his will into any and every thing and thereby making it his*, because it has no such end in itself and derives its determination and soul from his will. This is the absolute right of appropriation which human beings have over all ‘things.’”²⁹³ (Own emphasis.)

It follows that “property is the first existence of freedom and so is in itself a substantive end.”²⁹⁴ Consequently, “property” is the external sphere into which a person must invest his will in order to exist. Hegel’s personality theory can be classified as an occupancy theory, since the owner must “invest” his will into a thing together with possessing it before ownership can be obtained.²⁹⁵ Hegel’s occupancy theory – as opposed to the labour theory – does not result in an entitlement that is then fixed “forever”.²⁹⁶ To maintain ownership, a person’s will must remain present in the object, otherwise “the thing becomes ownerless, because it has been deprived of the actuality of the will and possession.”²⁹⁷ It follows that as this will to possess property “comes and goes” over time, so property must also “come and go”.²⁹⁸ Consequently, the essence of the personality theory entails that property for

²⁹¹ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 41.

²⁹² Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 41; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 972; Radin MJ *Reinterpreting Property* (1993) 7.

²⁹³ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 44.

²⁹⁴ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 45.

²⁹⁵ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 51; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 973.

²⁹⁶ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 973-794. The source of entitlement for Locke is labour, while Hegel regards the will as the source of such entitlement: See Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 961 footnote 7. For a discussion of the doctrinal implications of such a will theory in property law, see Van der Walt AJ “Ownership and Personal Freedom: Subjectivism in Bernhard Windscheid’s Theory of Ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589. Windscheid, like Hegel, also regards the human will as decisive in the context of property rights: See Van der Walt AJ “Ownership and Personal Freedom: Subjectivism in Bernhard Windscheid’s Theory of Ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 572. In the latter context, see also Van der Walt AJ “Unity and Pluralism in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part I” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 22-24.

²⁹⁷ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 974.

²⁹⁸ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741. According to Hegel para 64, this is why persons can acquire or lose ownership in property through prescription or adverse possession: “The form given to a possession and the sign it presents are themselves externalities but for the subjective presence of the will which alone constitutes their meaning and value. This presence, however, which is use, employment, or some other mode in which the will expresses itself, falls within time, and what is objective in time is the continuance of this expression of the will. Without this the thing becomes ownerless, because it has been deprived of the actuality

personhood, namely personal property, gives rise to a stronger moral claim than other (fungible) property. Put differently, personal property is more worthy of protection than fungible property in terms of Radin's theory. Nonetheless, this does not entail that fungible property does not constitute property at all, as seen earlier. It merely denotes that personal property is ranked higher than fungible property in the hierarchy of property that is worthy of protection or recognition because it is essential to constituting personhood. A similar approach to Radin's distinction between personal and fungible property is reflected in German constitutional law, where the state's power to regulate the limits of property rights depends on how far a property right is located from the personal autonomy of an owner.²⁹⁹ Accordingly, a person's home (personal property) in German law is more strongly protected against state regulation than property rights in commercial property (fungible property).³⁰⁰

The personhood dichotomy of personal and fungible property is located on a continuum that ranges from personal property at the one end to fungible property at the other.³⁰¹ Radin states that such a dichotomy is useful because "within a given social context certain types of person-thing relationships are understood to fall close to one end or the other of the continuum."³⁰² This entails that if rights lie nearer to the fungible end of the continuum, they can be overridden in some cases where those nearer the personal end cannot be.³⁰³ This is

of the will and possession. Therefore I gain or lose possession [or ownership] of property through prescription." This passage is quoted with approval by Clarke A "Use, Time, and Entitlement" (2004) 57 *Current Legal Problems* 239-275 274 and Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 745 footnote 15.

²⁹⁹ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135; Van der Walt AJ "Unity and Pluralism in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part I" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 27-28; Van der Walt AJ "Subject and Society in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part II" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 322-345 327-328.

³⁰⁰ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135-136; Van der Walt AJ "Unity and Pluralism in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part I" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 27-28; Van der Walt AJ "Subject and Society in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part II" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 322-345 327-328.

³⁰¹ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 986; Radin MJ *Reinterpreting Property* (1993) 2-3; Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 748 footnote 26.

³⁰² Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 987. See further Radin MJ *Reinterpreting Property* (1993) 3, where she states that this implicitly constitutes a "pragmatic approach". For a discussion as to why Radin feels that this dichotomy (personal property *vis-à-vis* fungible property) is "useful", see the discussion in *Reinterpreting Property* (1993) 3-5, 11-19.

³⁰³ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 986. At 988 Radin discusses the possibility of using Calabresi and Melamed's distinction between property rules and liability rules in the context of personal and fungible property by suggesting that personal property should be protected by a property rule and that fungible property should perhaps be protected by a liability rule. Calabresi and Melamed developed this theory in Calabresi G & Melamed AD "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089-1128. However, Radin at 988 acknowledges that protecting

how one can use Radin's theory to justify prescription, especially in situations where the squatter values the property more than an owner by using and cultivating it, as long as it is constitutive to such squatter's personhood.³⁰⁴ This is affected by the fact that the dichotomy of personal and fungible property within the personality theory creates a "hierarchy of entitlements", which means that personal property will receive stronger protection than property that is merely fungible.³⁰⁵ In such a scenario the entitlement obtained by the possessor of the property *vis-à-vis* the neglectful owner can allow his claim to trump the claim of such owner. The reason for this is that the squatter will probably be treating the property as personal property, whereas in relation to the owner it can be classified as fungible property. However, one will have to determine in each case where the property falls on the continuum to establish which party holds the property as personal property and who is thus entitled to greater protection. If it is assumed that a house that is owned and inhabited by someone lies nearer the personal end of the continuum,³⁰⁶ one can argue that this will also be the case when a squatter inhabits unused property as a home.³⁰⁷ It seems that Gray's theory of moral excludability supports such a finding, especially if the purpose of limiting the owner's ownership is in line with public morality.³⁰⁸ In this sense, "claims to 'property' may sometimes be overridden by the need to attain or further more highly rated social goals",³⁰⁹ such as protecting people's homes. Indeed, an occupier's relationship with his home is a

fungible property with liability rules will not always be justifiable, for instance where "fungible claims of the rich deprive the poor of meaningful opportunities for personhood." In this context she admits that problems can arise in using the property/liability rule dichotomy, although she is of the opinion that personal property should always be protected by a property rule.

³⁰⁴ To the same effect are Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2456-2457 and Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1127. For a discussion on using Radin's theory to justify adverse possession in cases involving urban squatters, see Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 250-252.

³⁰⁵ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 986.

³⁰⁶ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 987, 991-992. See also Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 250-252; Fox L *Conceptualising Home: Theories, Law and Policies* (2007) 300-303. For a utilitarian argument in favour of this assumption, see Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2457.

³⁰⁷ Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 250-252. See also Auchmuty R "Not Just a Good Children's Story: A Tribute to Adverse Possession" 2004 *Conveyancer* 293-307 307; Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2457.

³⁰⁸ Gray K "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252-307 280-292.

³⁰⁹ Gray K "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252-307 281.

prime example used by Radin, as according to “social consensus” this relationship is likely to be constitutive of one’s personhood.³¹⁰ In this context Radin says the following:

“[I]n our social context a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum. There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic.”³¹¹

In this context Radin’s personality theory provides an interesting view regarding the claims of urban squatters toward occupied property *vis-à-vis* owners that neglect it.³¹² This line of argument is likely to also be applicable in the context of squatters who occupy rural land as their home.

Against this background one can argue that the personal relationship that develops between the squatter and the land is more worthy of protection than an absent owner’s (probably) fungible relationship with his property. However, such a conclusion will only be justified if it can be shown that the squatter’s personal interest in the land is “stronger” than the owner’s interest. Yet, for purposes of this argument the owner must come to regard the property as “fungible”, something that – according to Stake – cannot be assumed merely because the owner is out of possession.³¹³ Yet, even if the property is of greater personal importance to the squatter than to the owner, it will have to be shown that the owner no longer “believes” in his ownership.³¹⁴ A solution here is to equate the owner’s (long-term) non-use with abandonment, an argument made by Cobb and Fox and supported (from an economic

³¹⁰ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 992; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 251; Fox L *Conceptualising Home: Theories, Law and Policies* (2007) 300-303.

³¹¹ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 987. See also Radin MJ *Reinterpreting Property* (1993) 54.

³¹² Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 251.

³¹³ Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2456. However, Posner RA *Economic Analysis of Law* (6th ed 2003) 78 says that “[o]ver time, a person becomes attached to property that he regards as his own, and the deprivation of the property would be wrenching. Over the same period of time, a person loses attachment to property that he regards as no longer his own, and the restoration of the property would cause only moderate pleasure.” Posner bases this economic approach on Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. See similarly Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 251-252. Nonetheless, Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 875 criticises Posner for equating non-use with abandonment. This issue is addressed further under the economic analysis of prescription in section 4.4.4 below.

³¹⁴ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252; Posner RA *Economic Analysis of Law* (6th ed 2003) 78-79.

perspective) by Posner.³¹⁵ Yet, this argument is harder to justify when owners who are out of possession still value their ownership but are unaware of the fact that their property is being adversely possessed.³¹⁶ In such a scenario it will not be easy to show that the owner has come to regard the land as mere “fungible property”. Despite this difficulty, a powerful argument is to be made in situations where the property is truly constitutive of the squatter’s personality, even if the owner is merely absent due to his inactivity regarding the property. Another solution is to determine which party – either the squatter or owner – is in direct, physical possession of the land, together with who is investing time and labour in it. The person who satisfies these two criteria is likely to have a more “personal” interest in the land than one who does not perform these positive and direct acts on the property. Hegel’s theory – which requires an owner to invest his will into a thing and to possess it to maintain ownership – contributes to such a conclusion.

Other authors (such as Holmes,³¹⁷ Singer³¹⁸ and Alexander³¹⁹) also provide justifications for adverse possession that are analogous to Radin’s personality theory. The following passage from Holmes clearly justifies adverse possession in terms of a personality-theory approach:

“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”³²⁰

Thus, Holmes acknowledges that property becomes bound up with a person if it has been enjoyed for a long time. This is similar to a squatter who comes to regard occupied land as personal property.

³¹⁵ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 251-252; Posner RA *Economic Analysis of Law* (6th ed 2003) 78, 83. Such an approach is analogous to the social-obligation norm developed by Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820. This theory is addressed in the next few paragraphs.

³¹⁶ As was the situation in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676. See further Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252. This difficulty can be overcome if non-use is equated with abandonment, as suggested by Posner RA *Economic Analysis of Law* (6th ed 2003) 78, 83. However, some authors oppose this approach: See Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2456; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 875.

³¹⁷ Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478.

³¹⁸ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751.

³¹⁹ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820.

³²⁰ Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. This view is analogous to the theory advanced by Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 that human beings become attached to property, especially land, through evolutionary biology.

The second theory that is related to the personality theory – which can also be used to justify prescription – is Singer’s theory of the “reliance interest in property”.³²¹ Singer describes the effect of the reliance interest as follows:

“The legal system sometimes protects the more vulnerable party to the relationship by recognizing and protecting her reliance interest in property and limiting protection of the stronger party’s interests.”³²²

Singer explicitly states that the reliance interest of a squatter can be used to justify adverse possession.³²³ By “allowing” the squatter to possess his land, the owner condones the occupation of the squatter through conveying “a message to the [squatter] that the owner has abandoned the property.”³²⁴ The squatter then begins to rely more and more on the “legitimacy” of his occupation, which causes the squatter’s interest in the property to grow stronger as time passes.³²⁵ Conversely, the owner’s interest in the property diminishes with the squatter’s length of occupation of the property.³²⁶ Singer concludes – through relying on Holmes – that it would be “morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependant party.”³²⁷ To protect the reliance interest of the squatter (the vulnerable party), adverse possession then enters the picture by awarding ownership to the squatter.³²⁸ I argue that the same result is reached in Radin’s terms by treating the squatter’s interest in the property as personal, while the owner’s interest becomes more and more fungible as time passes.³²⁹

The third trend that bears resemblance to Radin’s personality theory is the social-obligation theory of Alexander. I analyse Alexander’s theory in more detail than the two previous ones

³²¹ This theory was developed by Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751. Interestingly, this theory is analogous to one of the justifications provided for extinctive prescription, namely that it protects the reasonable reliance of debtors: See Loubser MM *Extinctive Prescription* (1996) 8-9. Nonetheless, a discussion of the justifications of extinctive prescription falls outside the scope of this dissertation.

³²² Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 664. See also Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131, where he states that adverse possession protects “the reliance interests that the possessor may have developed through long standing possession of the property.”

³²³ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666.

³²⁴ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666.

³²⁵ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668.

³²⁶ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 667-668.

³²⁷ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 667.

³²⁸ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 668-669.

³²⁹ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 669 footnote 183 shares this view.

(of Holmes and Singer) because of the intricate nature of this theory as well as the fact that it offers an interesting alternative perspective on the moral obligations of owners. Alexander argues that American property law contains an implicit social-obligation norm, although it has not yet been explicitly recognised in this field of law. According to him, the social-obligation norm promotes human flourishing (in the Aristotelian sense of the term), which “enables individuals to live lives worthy of human dignity.”³³⁰ In this context, people need access to both community life and property to foster their human flourishing.³³¹ Radin also requires (personal) property – which is constitutive of one’s personality – to attain human flourishing, although she does not focus on the social element as such. However, it must be emphasised that Alexander and Radin draw on different conceptions of human flourishing, since Alexander uses the Aristotelian notion of human flourishing³³² while Radin relies on Hegel.

Alexander develops his theory by stating that the traditional perspective of ownership is that it merely entails *rights*, with little or no obligations toward others. He criticises this rights-based view of ownership and claims that owners have inherent obligations towards other people, which obligations he identifies as embodying the social-obligation norm. The following passage sketches the background of this theory:

“Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally. In the interest of human flourishing, the community, or more colloquially, the state, affords legal recognition to asserted claims to resources. Accordingly, the state does not take away when it abstains from legally vindicating asserted claims to resources that are inconsistent with human flourishing or with community itself.”³³³

According to Alexander, humans – as social and political animals – must develop their capabilities (through virtues) to attain human flourishing.³³⁴ Alexander borrows from the

³³⁰ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 748.

³³¹ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 749.

³³² Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 760-763. See further Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 129, 134-145.

³³³ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 749.

³³⁴ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 761. Virtues, which constitute the building blocks of capabilities, refer to dispositions to do actions that contribute to living a distinctly human life. Capabilities, on the other hand, may be understood to encompass the ability to exercise different functionings to constitute a well-lived life. Alexander at 765 identifies four main capabilities in this regard, namely life, freedom, practical reasoning and sociality. I do not provide an in-depth

“capabilities” approach of Nussbaum and Sen to develop his notion of human flourishing through advancing one’s capabilities.³³⁵ To cultivate human flourishing, persons must be able to develop their capabilities to live a well-lived life, which must include the capability to choose between alternative life horizons.³³⁶

People depend on others (the community) to flourish as humans, since no-one can “acquire these capabilities or secure the resources to acquire them by one’s self.”³³⁷ This approach illustrates another difference between the theories of Alexander and Radin, since for Alexander the *community* (and not only property) is the main requirement for constituting human flourishing.³³⁸ To this end, every person in a community is equally entitled to the necessary capabilities to help promote flourishing. However, mere virtues are not enough for human beings to develop their capabilities; they also need material resources to foster these capabilities. Because humans are social animals and dependent on each other, it follows that “human flourishing requires distributive justice, the ultimate objective of which is to give people what they need in order to develop the capabilities necessary for living the well-lived life”.³³⁹ This notion of distributive justice (which is required for every person to flourish) forms one of the roots of the social-obligation norm. Another basis for this norm is the idea that the well-being of the community, which aids the flourishing of individuals, depends on each individual’s assistance to the community.³⁴⁰ Furthermore, if a person – as a rational being – values his own flourishing, it follows that he must also value the flourishing of others. The core of this third source of the social-obligation norm can be captured as follows:

analysis of the contents of virtues, capabilities or functionings here. For a more detailed discussion, see Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 134-138.

³³⁵ See Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 762-765, who relies on Nussbaum MC *Women and Human Development: The Capabilities Approach* (2000) and Sen A *Commodities and Capabilities* (1985). A detailed discussion of the “capabilities” approach, together with the work of these two authors, falls outside the scope of this dissertation. For a discussion, see Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 136-138.

³³⁶ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 761-762. See further Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 134-135.

³³⁷ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 765. See further Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 134-135.

³³⁸ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 761.

³³⁹ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 768.

³⁴⁰ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 768.

“Our affirmation of the moral value of the requisite capabilities means that we recognize that capabilities [to attain human flourishing] have a special moral status and that we acknowledge as a good that those capabilities develop both in ourselves and in others. [Therefore], we must make the same normative commitment to developing them in *others* as we have committed to developing them in *ourselves*.”³⁴¹ (Own emphasis.)

Since persons unavoidably rely on other people to develop their capabilities to flourish, there rests a social obligation on individuals in the community to help others to foster their capabilities for attaining human flourishing. Alexander describes the content of the social-obligation norm as entailing that owners have a moral obligation to contribute to the society or community – of which he forms part – those benefits “that the society reasonably regards as necessary for human flourishing.”³⁴² These benefits encompass things that are necessary for members of the community to develop their capabilities to flourish, which includes resources like land. Alexander then illustrates that his social-obligation norm underlies important legal institutions such as expropriation (eminent domain in US law), which requires individuals to sacrifice property for legitimate government initiatives that benefit the flourishing of the community.³⁴³ Take, for example, a scenario where the state wishes to acquire property situated in a specific area that is the only viable location where it can build a crucial new highway. In such a case the state must use its power of expropriation to acquire the properties at a reasonable price, otherwise the owners may hold out in an attempt to extort absurd offers from the government. Although the affected owners will receive compensation, compensation cannot always make good the personal and sentimental losses some owners experience when their property is expropriated, especially when considering Michelman’s notion of demoralisation costs.³⁴⁴ Nonetheless, this burden that the state places on some individual owners is justified – according to Alexander – in terms of the social-obligation norm, since the flourishing of the community is greatly enhanced by the construction of important infrastructure, namely a highway that will lead to reduced traffic congestion.³⁴⁵ It

³⁴¹ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 769 (footnotes omitted).

³⁴² Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 774. See further Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 140-141.

³⁴³ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 773-779.

³⁴⁴ This notion was developed by Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258.

³⁴⁵ The more widely accepted rationale behind expropriation in US law is based on law and economics theory, namely that it helps to shift property to a higher-valuing user (the state, in this case) in situations where high transaction costs prevent such voluntary transaction from taking place: See Posner RA *Economic Analysis of Law* (6th ed 2003) 55-56. It is worth emphasising that although the law and economics theory solution overlaps

follows that the social-obligation norm requires the affected owners to sacrifice their property for purposes of fostering the human flourishing of the community. The state recognises the social obligation of the owners through expropriating their land against payment of compensation and by building the important new highway over those properties.

Against this background, I argue that the social-obligation norm also underlies the acquisition of ownership through prescription.³⁴⁶ Prescription normally involves a situation where an owner has “allowed” a squatter to possess his land for a long period of time. Such squatters are often poor and/or landless,³⁴⁷ although this may not always be the case. What is certain, however, is that the property must be sufficiently unimportant to the owner for him to be unaware of the presence of the squatter during the running of prescription. In this sense it is clear that the longer the squatter possesses the land, the more it will contribute to his human flourishing, a position that is similar to Radin’s personality theory as well as the approach of Holmes. On the flipside, the property will become more unimportant to the owner, as one can deduce from his neglect or inattention. This conclusion is based on the observation that the land will steadily become essential to the squatter’s development of his capabilities to flourish, as he will be investing time and energy into the property. At the same time the property will probably become less constitutive to the flourishing of the owner because of his neglect of the land. Under these circumstances, the social-obligation norm obliges the owner to help the squatter – as a member of the community – to develop his capabilities to attain human flourishing by “giving” the land to him, since the land is no longer constitutive of the owner’s flourishing. Consequently, the law recognises the social obligation of the owner (as with expropriation in US law)³⁴⁸ by awarding ownership to the squatter through prescription for purposes of fostering his capabilities to lead a well-lived life. This position is analogous to Singer’s reliance-interest theory, which entails that the settled expectations of squatters (and third parties) must be protected if they have existed for long periods of time. Indeed,

with that of the social-obligation norm in this specific instance, the two theories are not the same: See Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 777. See section 4.4.4 below for the economic analysis of prescription.

³⁴⁶ I am indebted to Prof Alexander for discussions that helped me formulate my arguments in this context.

³⁴⁷ This observation was made by Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1081.

³⁴⁸ The enforcement of social-obligation norm through prescription differs from cases concerning expropriation, which requires the payment of compensation. The reason that the rules of prescription do not require the squatter to compensate the owner is because the property is unlikely to be constitutive of the flourishing of the owner. This position differs from that of expropriation, where the state must compensate owners who lose property that most of them will regard as essential for leading a well-lived life. Since the property is likely to be unimportant to the flourishing of the owner in the context of prescription, no compensation is needed to offset this negative impact, namely the loss of ownership.

Alexander acknowledges his theory's "family resemblance" to that of Singer.³⁴⁹ If one views prescription from this angle, it is clear that the social-obligation norm justifies prescription, since this legal institution entails that the state "abstains from legally vindicating [absent owners'] claims to resources that are inconsistent with [their] human flourishing or with community itself."³⁵⁰

Another way of interpreting the social-obligation norm is through recognising – as Cobb and Fox advocate – that each owner has an obligation or "duty of stewardship"³⁵¹ to look after his property, although such an obligation does not compel owners to make use of their property.³⁵² To use the language of Rose, this obligation or duty merely requires an owner to "assert [his] right publicly"³⁵³ by evicting persons who may be trespassing on his land. Should an owner not adhere to this obligation, the land is likely to be less important to him for attaining the capabilities to flourish. In this context the land is capable of becoming a vital resource for the squatter to develop his capabilities to lead a well-lived life, as argued in the previous paragraph. It follows that the social-obligation norm dictates that the owner must then "give" the land to the squatter – as a member of the community – to help him attain human flourishing. However, it may be problematic to determine at what point in time the property has become sufficiently *unimportant* to the flourishing of the owner, as well as sufficiently *important* to the possessor, to justify the shifting of ownership to the squatter.³⁵⁴ This problem can be solved, in my view, by having a long prescription period, which will be indicative of how the land contributes to the flourishing of the two parties. In this sense the land will probably be more essential to the capabilities of the squatter to achieve the well-lived life if he possessed the land for a long period of time. This will be even more so if the squatter occupies the property as a home,³⁵⁵ which resembles Radin's personality theory. If so, it can be argued that prescription in South African law, which has a 30-year prescription period, properly internalises the social obligation of owners in this regard.

³⁴⁹ Alexander GS "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745-820 748 footnote 7.

³⁵⁰ Alexander GS "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745-820 749.

³⁵¹ I borrow this term from Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 254.

³⁵² Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 253-256.

³⁵³ Rose CM "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73-88 79.

³⁵⁴ This is also a problem for Radin's personality theory, as mentioned earlier.

³⁵⁵ Alexander GS "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745-820 816.

The *fides* of the squatter seems irrelevant for the social-obligation theory, since land can become essential to developing one's capabilities even when you know (*mala fide*) that it does not belong to you. This will especially be the case where the squatter is poor and/or landless and has no viable means to acquire property necessary to attain human flourishing. This argument finds further support in the fallacious arguments for distinguishing between good and bad faith possessors, which are addressed below.³⁵⁶ I now return to Radin's personality theory.

With the interplay between personal and fungible property, together with Hegel's personality theory, it is clear that the temporal dimension is important to the personality theory.³⁵⁷ It was seen that ownership in terms of the Hegelian theory is acquired by placing one's will into the object together with possessing it.³⁵⁸ According to Radin, this idea suggests that a squatter's interest in land grows stronger as the squatter becomes "bound up" with it over time.³⁵⁹ On the other hand, the "claim to an object grows weaker as the will (or personhood) is withdrawn."³⁶⁰ It follows that – in terms of Radin's theory – the strength of property claims is dynamic, since the relationship between persons and objects can increase or diminish as time passes.³⁶¹ Furthermore, the personality theory does not have the same problems that rule-utilitarianism has regarding the temporal dimension, since it concerns itself with the relationship between persons and property and not general happiness or utility.³⁶² The personality theory also circumvents one of the labour theory's problems by focusing on the relationship that develops between persons and objects rather than on some "aboriginal

³⁵⁶ See the discussion of the anomaly of the *mala fide* possessor in section 4.5 below.

³⁵⁷ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 741.

³⁵⁸ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 51; Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 973.

³⁵⁹ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 741.

³⁶⁰ Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 741; Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 974.

³⁶¹ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 741.

³⁶² Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 742. This issue is elaborated upon in section 4.4.4 below, which focuses on utilitarianism and law and economics theory.

appropriation”.³⁶³ Instead, the personality theory must establish how to define personhood and how to determine whether a person-thing relationship is either personal or fungible.³⁶⁴

The personality theory entails that – if it takes time for a person to invest his will into property – a (neglectful) owner’s initial personal interest becomes more fungible as time passes.³⁶⁵ Consequently, a squatter’s interest in property is likely to become more personal as time passes,³⁶⁶ as long as it does not become one that is fetishistic in nature. In this context the problem lies in determining at what moment in time the owner’s interest is sufficiently fungible for a squatter, who maintains a personal interest, to be entitled to acquire that property through prescription. Since the personality theory entails a moral judgment, it may be best to have a formal rule – such as a mechanical entitlement determination rule³⁶⁷ with a fixed time period – if such an approach entails less risk of moral error.³⁶⁸ I believe that this

³⁶³ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 961 footnote 7; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 742.

³⁶⁴ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 742. It is clear that Radin focuses on the relationship between persons and objects, instead of the relationship between persons regarding an object. Schnably SJ “Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood” (1993) 45 *Stanford Law Review* 347-407 352, 379 critiques Radin in this context and points out that her theory contains “an implicit conservative bias”. According to him (352), Radin’s theory “both hides and glorifies power” by using “social consensus” to determine the type of relationships that exist between persons and property. By separating moral issues from legal ones (in allowing personal property interests to trump fungible interests), Schnably (353) emphasises that Radin ignores the role of power in informing the consensual norm she uses to distinguish between personal and fungible property relationships. This is indeed a problem for Radin, especially against the background of the rights as relationships theory developed by Nedelsky J “Reconceiving Rights as Relationships” (1993) 1 *Review of Constitutional Studies* 1-26 7-8, 13-14. In this context Nedelsky (13) states that “property rights are not primarily about things, but about people’s relation to each other as they affect and are affected by things.” The focus on the relationship between people and objects is less of a problem for Hegel, though, since for him the will theory is a matter of power towards other people. Windscheid also refers to this will in property as constituting a power relationship between people regarding property, although he regards it as negative in nature: See Van der Walt AJ “Ownership and Personal Freedom: Subjectivism in Bernhard Windscheid’s Theory of Ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 573 and Van der Walt AJ “Unity and Pluralism in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part I” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 22-24. Yet, this shortcoming in Radin’s theory can be overcome if one has regard to Alexander’s social-obligation norm, which incorporates elements of community and property: See Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 761-768.

³⁶⁵ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 748-749.

³⁶⁶ Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2464-2466 warns that this could present a problem concerning the aggregation of periods of adverse possession if one attempts to justify adverse possession under Radin’s personality theory. It seems that this anomaly cannot be adequately explained by the personality theory. Accordingly, the principle of *coniunctio temporum* is better accommodated in the legal certainty argument, since it rests on the impression of ownership being transferred from one person to another.

³⁶⁷ As developed by Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1145. The advantages of having prescription operate as a mechanical entitlement determination rule is discussed in section 4.4.4 below.

³⁶⁸ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 749. Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law*

approach is preferable to one decided on a case-by-case basis, especially since Radin's theory does not prescribe definitive rules for making a moral judgment call under these circumstances. A moral judgment could lead to diverging results based on similar sets of facts, which can result in legal uncertainty. If the formal-rule route is followed, there is no simple answer as to what time period will be sufficient to deem an owner's property interest as fungible. In this setting English law now requires 12 years for adverse possession of unregistered land, while South African law operates with a 30-year period.³⁶⁹ Radin evades a direct answer in this regard by suggesting that the period chosen must be based on a "socially acceptable" or "right" time that it takes to become attached to or detached from objects.³⁷⁰

From this discussion it is clear that it is possible to use the personality theory to justify adverse possession.³⁷¹ It follows that ownership is dependent on the presence of someone's will (or personhood) in the property, coupled with possession of the thing.³⁷² For instance, if the original owner withdraws his will and abandons possession, another person is then able to acquire a right in that property by investing his own will into it together with taking possession. This provides a moral ground for justifying the acquisition of property by the adverse possessor, since he will regard the property as personal while the owner probably treats it as fungible property. The question of whether the personality theory justifies bad faith prescription is addressed below.³⁷³

4.4.4 Utilitarianism and law and economics theory

Review 1122-1154 1141 thinks that "an arbitrary number of years" will be the best in this context, although he writes against the background of *bona fide* adverse possession.

³⁶⁹ See section 3.2.2.1 of chapter three and section 2.3.1 of chapter two respectively above.

³⁷⁰ Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 749.

³⁷¹ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 745. In the words of Radin at 745, the personality theory "eas[ily]" accommodates adverse possession. See further Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 250-251; Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2420, 2456; Merrill TW (ed) "Time, Property Rights, and the Common Law – Round Table Discussion" (1986) 64 *Washington University Law Quarterly* 793-865 814; Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1127, 1131; Holmes OW "The Path of the Law" (1897) 10 *Harvard Law Review* 457-478 477.

³⁷² Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64; Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 745; Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015 974.

³⁷³ See section 4.5 below.

Finally, I turn to the justifications for prescription in utilitarianism and law and economics theory. Bentham is the father of the utilitarian school of thought, yet it was Mill who coined the term “utilitarianism”.³⁷⁴ Utilitarianism attempts to maximise “the greatest happiness of the greatest number” and regards this as “the measure of right and wrong”.³⁷⁵ Therefore, the aim of utilitarianism is to arrange legal rules to maximise happiness (or utility), which is achieved through maximising happiness for the greatest number of people.³⁷⁶ Law and economics theory – on the other hand – aims to structure law to maximise another form of utility, namely economic efficiency.³⁷⁷ Since both these theories aim to maximise utility, which is viewed as either happiness of the greatest number or economic efficiency, it is clear that law and economics theory has its roots in utilitarianism.³⁷⁸ This is why these two theories are discussed together in this section.

Unfortunately, Benthamite utilitarianism falls prey to criticism, namely that it can be (ab)used to justify laws that provide happiness for the majority, while those laws cause the minority to endure pain.³⁷⁹ Nonetheless, one can overcome this problem by focusing on the work of Mill, the most famous utilitarian after Bentham.³⁸⁰ Mill’s theory of utilitarianism attempts to establish a relationship between utility and justice,³⁸¹ which eliminates the mentioned injustice. Although the content of justice is elusive, Mill thinks that the answer to this conundrum is found in the *resentment* caused by injustice.³⁸² By identifying injustice, utilitarianism is then able to maximise happiness by eliminating it. Against this background, Mill states that possession ought to be recognised as ownership if it has not been challenged within a “moderate number of years”:

“Even when the acquisition was wrongful, the dispossession, after a generation has elapsed, of the probably *bona fide* possessors, by the revival of a claim which had been long dormant,

³⁷⁴ Kelly JM *A Short History of Western Legal Theory* (1992) 317.

³⁷⁵ Bentham J *A Fragment on Government and an Introduction to the Principles of Morals and Legislation* (1776, Harrison W ed 1948) 3 para 2.

³⁷⁶ Kelly JM *A Short History of Western Legal Theory* (1992) 315. See also Kroeze IJ “Legal Positivism” in Roederer C & Moellendorf D (eds) *Jurisprudence* (2004) 62-83 66.

³⁷⁷ Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246; Posner RA *Economic Analysis of Law* (6th ed 2003) 27-28.

³⁷⁸ Kelly JM *A Short History of Western Legal Theory* (1992) 436-437.

³⁷⁹ Ross D “Law and Economics” in Roederer C & Moellendorf D (eds) *Jurisprudence* (2004) 186-213 190-191.

³⁸⁰ Ross D “Law and Economics” in Roederer C & Moellendorf D (eds) *Jurisprudence* (2004) 186-213 189; Kelly JM *A Short History of Western Legal Theory* (1992) 317.

³⁸¹ Kelly JM *A Short History of Western Legal Theory* (1992) 318.

³⁸² Kelly JM *A Short History of Western Legal Theory* (1992) 318.

would generally be a *greater injustice*, and almost always [cause] a greater private and public mischief, than leaving the original wrong without atonement.”³⁸³ (Emphasis added.)

This approach is similar to the one adopted in *Cholmondeley v Clinton*,³⁸⁴ where the Court assumed that the squatter will suffer greater hardship if the owner is allowed to reclaim possession after the expiration of the limitation period.³⁸⁵ As was seen in the discussion of English law above,³⁸⁶ Dockray criticises this argument for oversimplifying matters.³⁸⁷ However, adverse possession could be justified under Mill’s theory if injustice entails that (neglectful) owners can never lose ownership in property possessed by a squatter. Furthermore, one can also argue in favour of Mill if the “hardship”³⁸⁸ he refers to includes elements of Radin’s personality theory, the social-obligation norm³⁸⁹ of Alexander as well as the “reliance interest”³⁹⁰ of the adverse possessor.³⁹¹ Without specifying a time period, Mill mentions that the acquisition of ownership through wrongful occupation is justified “after a generation has elapsed”. It seems that Mill had a longer period in mind than the mere 12 years required for adverse possession in English law before the 2002 Act came into operation.³⁹² Indeed, Mill’s argument provides an even stronger justification in systems with longer periods, such as South Africa, where the prescription period is 30 years.³⁹³

³⁸³ Mill JS *Principles of Political Economy* (1902) 134-135 § 2, quoted with approval by Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 272-273.

³⁸⁴ (1820) 2 Jac & W 1.

³⁸⁵ (1820) 2 Jac & W 1 140. Of the same mind is Mill JS *Principles of Political Economy* (1902) § 2, where he states that “[i]t may seem hard, that a claim, originally just, should be defeated by mere lapse of time; but there is a time after which ... the balance of hardship turns the other way.”

³⁸⁶ See the paragraph where the relevant passage from *Cholmondeley v Clinton* (1820) 2 Jac & W 1 140 is quoted in section 4.3.2 above.

³⁸⁷ Near the end of this section I discuss Merrill’s economic approach for justifying adverse possession as a mechanical entitlement determination rule, which helps to refute this objection from Dockray.

³⁸⁸ The phrase “balance of hardship” is used by Mill JS *Principles of Political Economy* (1902) § 2.

³⁸⁹ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 developed this theory, which is discussed in greater detail in section 4.4.3 above.

³⁹⁰ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 developed this theory, which is discussed in greater detail in section 4.4.3 above.

³⁹¹ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741, 748-750; Singer JW *Introduction to Property* (2nd ed 2005) 159-161; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 310-311; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 83-84; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668 footnote 174; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1332; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477.

³⁹² See section 3.2.2.1 of chapter three above.

³⁹³ See section 2.3.1 of chapter two above.

There are two types of utilitarianism, namely consequentialism (act-utilitarianism) and rule-morality (rule-utilitarianism).³⁹⁴ Act-utilitarianism takes the consequences of an act into account to determine whether that act can maximise utility, while the consequences of an act are irrelevant for rule-utilitarianism.³⁹⁵ Instead, rule-utilitarianism attempts to ascertain which (moral) rules – as opposed to acts – are able to maximise utility.³⁹⁶

It must be emphasised that the role of time is vital for discovering whether utilitarianism can justify prescription. In this sense, act-utilitarianism attempts to maximise utility now.³⁹⁷ Radin criticises act-utilitarianism in this regard, since “human interactions and our environment are dynamic, so as time moves on the preferred or justified course of action changes.”³⁹⁸ Accordingly, act-utilitarianism must look to the future to decide whether an act is able to maximise utility, which is an undesirable approach because of its uncertainty.³⁹⁹ To the contrary is rule-utilitarianism, which seeks to maximise utility in “the long run”.⁴⁰⁰ In order to maximise utility, rule-utilitarianism focuses on how a certain rule affects a property regime over time.⁴⁰¹ It follows that time is central to rule-utilitarianism.⁴⁰² Unfortunately, this approach involves problematic questions. For instance, how long is “the long run”? Does it include people who are no longer alive?⁴⁰³ These questions are – unfortunately – not easily answered by rule-utilitarianism.

Epstein justifies adverse possession in this context through the doctrine of relative title, which provides a “clear and expeditious temporal rule to resolve conflicting claims”.⁴⁰⁴ This is because first possession – in the Lockean sense – is not always “best”, since “what comes last

³⁹⁴ Knowles D *Political Philosophy* (2001) 25.

³⁹⁵ Knowles D *Political Philosophy* (2001) 25.

³⁹⁶ Knowles D *Political Philosophy* (2001) 25.

³⁹⁷ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741.

³⁹⁸ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741.

³⁹⁹ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741.

⁴⁰⁰ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 724-725.

⁴⁰¹ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 724-725.

⁴⁰² Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741.

⁴⁰³ These two questions are asked – amongst others – by Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741.

⁴⁰⁴ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 675.

is more reliable and certain.”⁴⁰⁵ Accordingly, utility is maximised in a legal system by having a rule, namely the acquisition of property through adverse possession, which resolves conflicting claims and promotes legal certainty. Though Epstein advances his justification for prescription from a transaction-cost point of view, Radin – to my mind – correctly states that this approach constitutes a species of rule-utilitarianism.⁴⁰⁶ I agree that utility is maximised through rule-utilitarianism when it allows adverse possession to decide disputes and to clear titles, as Epstein mentions.⁴⁰⁷ Indeed, for him the issue is not whether adverse possession should be allowed or not, but rather how its rules can be structured to maximise utility.⁴⁰⁸ This conclusion finds further support if adverse possession operates as a mechanical entitlement determination rule, since its aims are clearly analogous to those of rule-utilitarianism.⁴⁰⁹ Even Mill is in favour of justifying adverse possession in this context, for he states that “title, after a certain period, should be given by prescription.”⁴¹⁰

Since rule-utilitarianism maximises utility through clearing titles and by facilitating transactions in the long run, this type of utilitarianism seems to regard a squatter’s subjective mindset as irrelevant.⁴¹¹ Indeed, Radin is of the opinion that utilitarianism can justify both good and bad faith adverse possession.⁴¹² Furthermore, Mill⁴¹³ does not seem to exclude the *mala fide* squatter from his scheme of prescription, which ties in with Fennell’s argument that it is fallacious to only allow “already-landed” *bona fide* squatters to succeed with adverse

⁴⁰⁵ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674.

⁴⁰⁶ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 743.

⁴⁰⁷ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252 and Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 743-745, 747-748 agree with this conclusion.

⁴⁰⁸ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 680-693. See also Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 725-734.

⁴⁰⁹ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1145 thinks that adverse possession is economically justified if it operates as a mechanical entitlement determination rule, which I discuss near the end of this section. There are definite similarities between such a rule and rule-utilitarianism, since both notions attempt to maximise utility, albeit in different contexts.

⁴¹⁰ Mill JS *Principles of Political Economy* (1902) § 2.

⁴¹¹ This is in line with the reading of Mill JS *Principles of Political Economy* (1902) § 2. See further Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 747; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252.

⁴¹² Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 747.

⁴¹³ Mill JS *Principles of Political Economy* (1902) § 2.

possession claims.⁴¹⁴ Nonetheless, Epstein argues that bad faith adverse possessors must be subjected to a longer prescription period before acquiring title.⁴¹⁵ The utilitarian ground for this argument is that “[p]arties who engage in deliberate wrongs constitute a greater threat than those who make innocent errors or are simply negligent: there is a greater danger that intentional wrongdoers will do it all again.”⁴¹⁶ However, is it truly “wrong” to accommodate bad faith adverse possession in a utilitarian framework if such possessors use the land productively in the absence of a neglecting owner?⁴¹⁷ Epstein’s approach⁴¹⁸ – which differentiates between good and bad faith adverse possession – is unattractive because bad faith will then have to be proved in court, which will increase litigation costs.⁴¹⁹

Since a squatter may have a greater need for property than the owner, one can argue that adverse possession is also justified in a utilitarian scheme that aims to maximise utility for both squatter and owner.⁴²⁰ This argument is even more convincing in the context of a

⁴¹⁴ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1081; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁴¹⁵ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 685-689. For a similar suggestion, see Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1143-1153.

⁴¹⁶ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 686.

⁴¹⁷ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 747 footnote 21; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 219.

⁴¹⁸ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 685-689. For a similar suggestion, see Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1143-1153.

⁴¹⁹ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 747 footnote 21; Singer JW *Introduction to Property* (2nd ed 2005) 162; Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 249; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 25.

⁴²⁰ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 724-725, 725-734. To the same effect are Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 819; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674-675, 680; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 743. For criticism of the utilitarian justification for adverse possession in general, see the objections with reference to the loss aversion theory raised by Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2458-2463. According to Stake at 2459, in the theory of loss aversion “losses have greater subjective impact than objectively commensurate gains.” However, Stake at 2463-2471 acknowledges that the theory of loss aversion can be used to justify both good faith and bad faith adverse possession regarding *land*, if the adverse possessor is able to prove that he was more attached to the land than the owner.

homeless adverse possessor who occupies land that is of no present use to the owner.⁴²¹ Consequently, a squatter occupying property as a home will have a greater “need” for such property than an owner who does not use it.⁴²² Interestingly, the English Law Commission acknowledged the relevance of use-value to urban squatters by not classifying all squatters as “land thieves”.⁴²³ The Law Commission expressed “understandable sympathy” for homeless squatters occupying empty properties, since it recognised that unlawful occupation may arise from a housing shortage.⁴²⁴ Nonetheless, the Law Commission circumvented this matter by stating that “the much more typical case in practice is the landowner with an eye to the main chance, who encroaches on his neighbour’s land.”⁴²⁵ It seems that the Commission’s sympathy was limited, with bad faith squatters labelled as “land thieves” in comparison to the tolerance shown towards persons making mistakes concerning boundaries.⁴²⁶ In this context Fennell makes an important distinction between good faith or inadvertent squatters and bad faith or advertent squatters:

“The prototypical squatter is poor and landless. People who own no land cannot mistakenly believe that the land they are occupying is their own. In this regard, a good faith requirement is distributively conservative, designed to benefit only the already-landed.”⁴²⁷

⁴²¹ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252. To the same effect is Auchmuty R “Not Just a Good Children’s Story: A Tribute to Adverse Possession” 2004 *Conveyancer* 293-307 307.

⁴²² Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083. Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2458 challenges this model for apparently condoning theft on grounds of an individual’s relative poverty, together with the increase in monitoring costs and protection of property. Yet, Stake at 2458 acknowledges that there is a difference between the usual cases of theft and acquiring land through adverse possession. For an argument contrary to his objection, see Green K “Citizens and Squatters: Under the Surfaces of Land Law” in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241.

⁴²³ This is clear from *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.70; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252-253.

⁴²⁴ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.70; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 252-253.

⁴²⁵ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.70; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253. This position is contested by Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 250, who reviewed 44 adverse possession cases decided since 2000 and found that only six of these concerned “landowner[s] with an eye to the main chance” that encroached onto their neighbours’ land.

⁴²⁶ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.72; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.5; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁴²⁷ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1081, quoted with approval in Cobb N & Fox L “Living Outside the System?”

Fennell prefers to refer to squatters as either “advertent” (knowing) or “inadvertent”, as opposed to labelling them as being in “good” or “bad faith”.⁴²⁸ She then argues that adverse possession helps to reallocate property to advertent squatters when markets cannot achieve this purpose, since advertent squatters – knowing that they do not own the land – qualify as “higher-valuing users” of the land.⁴²⁹ This approach counters the argument made by the Law Commission and suggests that adverse possession can provide a medium for property redistribution to advance social welfare.⁴³⁰ As a result, Fennell thinks that the presence of bad faith should not prevent the possibility of acquiring land through adverse possession, since land occupied by the squatter may be more important to him than to the absent owner.⁴³¹

The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁴²⁸ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1037 footnote 1.

⁴²⁹ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1077, 1080-1083; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253; Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585; Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1169. Peñalver and Katyal at 1169 refer to this instance as rather constituting “efficient theft”. See further Cooter R & Ulen T *Law and Economics* (4th ed 2004) 155; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152; Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 360; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1130-1131; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79, all of whom argue that adverse possession encourages efficient land use. However, this point is contentious: See Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 255; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2433; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 219, all stating that owners know best how to use their property efficiently, which includes letting it lie unused. Of the same mind is Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 875, although he addresses adverse possession against the background of wild and undeveloped lands. Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1130-1131 counters these objections – to my mind – correctly by saying that the critics overstate what is required of an owner to prevent loss of ownership through adverse possession, which is simply to assert one’s ownership from time to time.

⁴³⁰ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1153-1154; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁴³¹ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1081-1082; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253. The value that the land represents may not only be higher for the squatter in utilitarian or economic terms, but also in terms of Radin’s personality theory, together with Singer’s analysis of the reliance interest of the squatter: See Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741, 748-750; Singer JW *Introduction to Property* (2nd ed 2005) 159-161; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Singer JW

Utilitarian explanations are discernable in the economic justifications Fennell presents in her approach.⁴³² Her reference to squatters as “higher-valuing users” makes a moral judgment of who deserves the property more,⁴³³ a dichotomy that is analogous to Radin’s distinction between “personal” and “fungible” property.⁴³⁴ Ellickson strengthens the utilitarian justification for adverse possession by focusing – like Radin – on the relationship that develops between a person and an object over time.⁴³⁵ According to him

“[a] utilitarian should see value in protecting people’s territorial roots. The notion of territoriality is extremely important in biology. The sociobiologists who have ventured to apply biological theory to humans have understandably created controversy. Yet it is plausible that humans are to some degree territorial, and that this tendency has helped shape adverse possession law. Someone who resides or works on a particular piece of land has, in Peggy Radin’s terms, invested his personhood in it, or, in my terms, is vulnerable to suffering demoralization costs upon being dispossessed from the property. ... I therefore treat damage from uprooting as a demoralization cost. During the early stages of adverse possession, I assume demoralization considerations favor the original owners, but as time passes the adverse possessor can lay claim to deeper roots.”⁴³⁶

“The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668 footnote 174. For the view that adverse possession qualifies as a medium to advance social welfare, see Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1153-1154; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083. Furthermore, according to the social-obligation theory developed by Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820, the property may also come to be more essential to the squatter than it is for the owner for purposes of achieving human flourishing.

⁴³² Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 310.

⁴³³ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁴³⁴ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741, 748-750. To the same effect is Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585. For an economic argument along these lines, see Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 219.

⁴³⁵ Merrill TW (ed) “Time, Property Rights, and the Common Law – Round Table Discussion” (1986) 64 *Washington University Law Quarterly* 793-865 814; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 274; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 986; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477.

⁴³⁶ Merrill TW (ed) “Time, Property Rights, and the Common Law – Round Table Discussion” (1986) 64 *Washington University Law Quarterly* 793-865 814, quoted with approval by Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 274. Here Ellickson refers to his findings made in Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737, where he (at 727) borrowed the term “demoralization costs” from Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258 1214. To the same effect

Merrill emphasises that the reliance interest of third parties – as developed by Singer – must also be protected in this context, especially in a negative registration system.⁴³⁷

Against this background the English Law Commission’s assumption that squatters are mostly blameworthy is indeed an oversimplification. The same goes for the Law Commission’s assumption that owners are mostly “blameless” and, thus, “deserve” better protection. As mentioned, some academics criticise this argument because the Law Commission did not distinguish between owners who cannot and those who do not look after their property.⁴³⁸

Cobb and Fox argue that owners have an obligation to look after their property, based on the landowner’s “duty of stewardship” over property.⁴³⁹ In this setting one can say that “a landowner who does not adequately fulfil the duty of stewardship [has] a morally weaker claim to that property compared to [a] squatter who occupies it as a home.”⁴⁴⁰ As indicated

are Singer JW *Introduction to Property* (2nd ed 2005) 159-161; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2040; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668 footnote 174; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741, 748-750; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. This approach by Ellickson is analogous to the theory advanced in Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2469, which entails that human beings become attached to property – especially land – through evolutionary biology.

⁴³⁷ Merrill TW (ed) “Time, Property Rights, and the Common Law – Round Table Discussion” (1986) 64 *Washington University Law Quarterly* 793-865 813, referred to with approval by Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 275. See also Singer JW *Introduction to Property* (2nd ed 2005) 159-161; Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668 footnote 174; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 726, 730-731; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-80. However, Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 255 warns that “modern land records are ordinarily easily accessible to would-be buyers.” To the same effect are Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 219, where the authors state that this justification by Merrill carried more weight in an era when record keeping was less efficient. Yet, the correctness of the register is not guaranteed in a jurisdiction with a negative registration system, which affords strength to Merrill’s argument.

⁴³⁸ See section 4.3.2 above.

⁴³⁹ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253-256 and sources cited. See also Auchmuty R “Not Just a Good Children’s Story: A Tribute to Adverse Possession” 2004 *Conveyancer* 293-307 307; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79.

⁴⁴⁰ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 254. See further Fox L *Conceptualising Home: Theories, Law and Policies* (2007) 300-303; Auchmuty R “Not Just a Good Children’s Story: A Tribute to Adverse Possession” 2004 *Conveyancer* 293-307 307.

earlier, this approach is analogous to Alexander's social-obligation norm.⁴⁴¹ Nonetheless, the reforms affected by the LRA make it unnecessary for owners to protect their land against squatters, since registered land can no longer be acquired through the mere passage of time.⁴⁴² However, certain utilitarian and economic considerations do provide support for such a duty of stewardship. For instance, owners need not develop or even occupy their land to prevent prescription from running; all that is required of them is to periodically assert their right to exclude others from their property.⁴⁴³ Furthermore, if such an obligation is placed on the owner it will be easier to locate him for purposes of purchasing the land, which will increase overall utility and efficiency.⁴⁴⁴ In this sense adverse possession encourages productive land use, ensures the marketability of land, protects the reliance interests of parties and lowers transaction costs.⁴⁴⁵ This leads us to the second trend for justifying prescription in this section, namely law and economics theory.

Law and economics theory views man as a "rational maximiser of his ends in life", which ends are referred to as a person's satisfactions or "self-interest".⁴⁴⁶ To avoid confusion with

⁴⁴¹ This analogy is addressed in section 4.4.3 above.

⁴⁴² Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 256. See also Auchmuty R "Not Just a Good Children's Story: A Tribute to Adverse Possession" 2004 *Conveyancer* 293-307 307.

⁴⁴³ Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1130-1131; Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1077; Rose CM "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73-88 79. For an argument to the contrary, see Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2436-2437.

⁴⁴⁴ Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1130.

⁴⁴⁵ Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1131; Epstein RA "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667-722 678; Goymour A "The Acquisition of Rights in Property by the Effluxion of Time" in Cooke E (ed) *Modern Studies in Property Law* 4 (2007) 169-196 192; Dixon M "The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment" 2003 *Conveyancer* 136-156 151-152; Baker M, Miceli T, Sirmans CF & Turnbull GK "Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes" (2001) 77 *Land Economics* 360-370 360; Singer JW "The Reliance Interest in Property" (1988) 40 *Stanford Law Review* 611-751 666-668; Netter JM, Hersch PL & Manson WD "An Economic Analysis of Adverse Possession Statutes" (1986) 6 *International Review of Law and Economics* 217-227 219. However, Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2433 is not convinced that adverse possession reduces transaction costs, as according to him the "additional monitoring stimulated by the statute of limitations is a waste of resources." See further Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1062; Singer JW *Introduction to Property* (2nd ed 2005) 159, who argue that the requirements of adverse possession lead to increased litigation, since they are open textured and open to judicial interpretation.

⁴⁴⁶ Posner RA *Economic Analysis of Law* (6th ed 2003) 3.

the notion of selfishness, economists use the word “utility” instead of self-interest.⁴⁴⁷ Posner sketches the background of law and economics theory as follows:

“The concept of man as a rational maximizer of his self-interest implies that people respond to incentive – that if a person’s surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so.”⁴⁴⁸

Law and economics theory regards rationality as an objective rather than a subjective standard, which means that rationality is seen as the ability to use reasoning for purposes of everyday life.⁴⁴⁹ However, one of the problems with law and economics theory is that it is sometimes seen as ignoring “justice”, since the aim of it is to structure law in such a way as to maximise economic efficiency and to prevent conduct that wastes resources.⁴⁵⁰ Stated differently, the main aim of law and economics theory is to structure legal rules to promote efficiency (or utility) through awarding resources to those who value them the most and will thus use them optimally.⁴⁵¹ Interestingly, even law and economics theory thinks that it is immoral to allow limited resources to be wasted.⁴⁵² Consequently, the protection of private property rights is imperative to law and economics theory, since the legal protection of such rights promotes the efficient use of resources.⁴⁵³ Nevertheless, law and economics theory

⁴⁴⁷ Posner RA *Economic Analysis of Law* (6th ed 2003) 3. This assumption that man is a rational utility maximiser again illustrates the connection between utilitarianism and law and economics theory. Furthermore, this assumption regards man as a rational utility maximiser in “all areas of life”, not just economic affairs: See 3-4. Utility in this sense encompasses, *inter alia*, happiness, pleasure and satisfactions: See 3-5.

⁴⁴⁸ Posner RA *Economic Analysis of Law* (6th ed 2003) 4.

⁴⁴⁹ Posner RA *Economic Analysis of Law* (6th ed 2003) 17.

⁴⁵⁰ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 750; Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246; Posner RA *Economic Analysis of Law* (6th ed 2003) 26-28; Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 360; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 81. Yet, Posner at 27-28 warns that one should be aware of the different contents of efficiency, as efficiency – just like utilitarianism – can also be (ab)used to justify notions like discrimination on the basis of race, torture for purposes of national security or even blackmail.

⁴⁵¹ Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246; Posner RA *Economic Analysis of Law* (6th ed 2003) 27-28; Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 360; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 81.

⁴⁵² Posner RA *Economic Analysis of Law* (6th ed 2003) 27; Green K “Citizens and Squatters: Under the Surfaces of Land Law” in Bright S & Dewar JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241. To the contrary are Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2433; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 821, 874-875.

⁴⁵³ Posner RA *Economic Analysis of Law* (6th ed 2003) 31-32; Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 369-370; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 81. See also Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University*

acknowledges that absolute property rights are impossible in the framework of an efficient economic setting.⁴⁵⁴ This is where law and economics theory – by aiming to promote efficiency through the (re)allocation of resources – can be used to justify prescription.

There is a fundamental distinction in law and economics theory between scenarios involving low transaction costs and those with high transaction costs. In settings where transaction costs are low, the Coase theorem dictates that a present owner’s property right must be made “absolute”, which then obliges a party – who attaches a higher value to the owner’s property – to negotiate with that owner for voluntarily exchange to occur.⁴⁵⁵ On the other hand, the law must provide ways through which resources can be shifted to the more valuable user in situations where transaction costs are high, since the market is then – due to these circumstances – unable to realise this function.⁴⁵⁶ It follows that one can justify prescription under this theory if it can be illustrated that prescription effectively reduces transaction costs in situations that would otherwise prevent voluntary exchange due to high transaction costs.⁴⁵⁷

Law Quarterly 723-737 737, where he agrees with Posner that the purpose of the law is to maximise overall wealth.

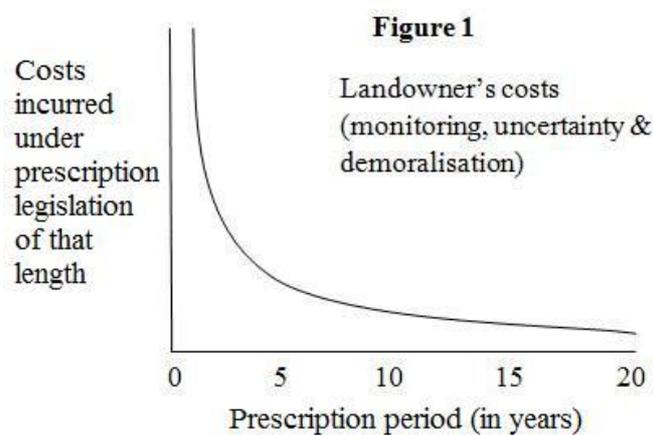
⁴⁵⁴ Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246; Posner RA *Economic Analysis of Law* (6th ed 2003) 49-54. See also generally Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722.

⁴⁵⁵ The Coase theorem was developed by Coase R “The Problem of Social Cost” (1960) 3 *Journal of Law & Economics* 1-44 and is founded on the assumption that efficiency is maximised through voluntary exchange between parties in settings where transaction costs are low. See also Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246-249; Posner RA *Economic Analysis of Law* (6th ed 2003) 55; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 82; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 724.

⁴⁵⁶ Posner RA *Economic Analysis of Law* (6th ed 2003) 55; Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246-248, 254-255; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1040; Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 724-725; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1131. The situation where transaction costs are so high that they prevent voluntary exchange between parties is known as “market failure”, which phrase was coined by Buchanan J & Stubblebine W “Externality” (1962) 29 *Economica* 371-384.

⁴⁵⁷ See also Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1040, who is of the opinion that this is the “niche goal” of adverse possession.

This chapter analyses the economic effects of prescription in four categories to determine whether it is able to sufficiently reduce transaction cost, namely (i) owners, (ii) possessors, (iii) third parties and (iv) litigation. Concerning the costs of the owner, it is imperative to have regard to what Michelman describes as “demoralization costs”.⁴⁵⁸ According to this concept, the more wrongful an owner perceives the loss of property through legal mechanisms such as prescription, the more severely such an owner is demoralised.⁴⁵⁹ Owners unaware of the risk of losing property through prescription will mostly bear no uncertainty or monitoring costs during the prescription period and can experience severe demoralisation when ownership is lost to an adverse possessor.⁴⁶⁰ The following graph illustrates the relationship between the costs of the owner in relation to the length of the prescription period:⁴⁶¹



According to Figure 1, the costs suffered by the owner increase with the shortening of the prescription period. The owner's uncertainty costs increase as the period becomes shorter, which – in turn – leads to increased monitoring costs, together with causing the demoralisation costs to be higher on the side of an owner not expecting to lose property through prescription.⁴⁶² This also contributes to the dangerous possibility that an owner can

⁴⁵⁸ Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258 1214.

⁴⁵⁹ Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258 1214. Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728 first made the connection by using “demoralization costs” in the context of adverse possession. See similarly Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1130; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 1003.

⁴⁶⁰ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728.

⁴⁶¹ Based on Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728.

⁴⁶² Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727-728; Baker M, Miceli T, Sirmans CF &

lose ownership by accident or through negligent inattention.⁴⁶³ On the flipside, the longer the prescription period, the more secure ownership will be, since the owner then has more time to discover a squatter possessing his land.⁴⁶⁴ In this context the costs of monitoring the land decrease, along with the negative effects demoralisation can potentially have.⁴⁶⁵ This reduces the necessity for the owner to “police” his property, but it also reduces the security of ownership by increasing the likelihood that an adverse possessor may have taken possession of the owner’s land.⁴⁶⁶ Accordingly, one can argue that the longer the prescription period, the more likely it is that the owner has abandoned the land or that the register was incorrect from the start, which increases the intensity of the “Holmes effect”.⁴⁶⁷ To address this issue, longer

Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 361, 364-365.

⁴⁶³ Posner RA *Economic Analysis of Law* (6th ed 2003) 78-79; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727-728.

⁴⁶⁴ Posner RA *Economic Analysis of Law* (6th ed 2003) 80; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 667; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727-728. See also Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 22. See further Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 167, who are of the opinion that the difficulty of the requirements of adverse possession, namely that possession must be “actual, open, notorious, and exclusive”, contribute to this prediction.

⁴⁶⁵ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1057, 1087; Singer JW *Introduction to Property* (2nd ed 2005) 163; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2453; Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 361, 364-365; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 22-23; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 311; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 168; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 667; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 692; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 217, 222. Epstein strengthens this argument and reasons at 692 that effective avoidance measures are available to owners at low costs, which will even further reduce monitoring costs. Nonetheless, Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2433 thinks that the costs of monitoring one’s property exceed the gains that are achieved by adverse possession.

⁴⁶⁶ Posner RA *Economic Analysis of Law* (6th ed 2003) 80; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2453; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727-730; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 692.

⁴⁶⁷ Posner RA *Economic Analysis of Law* (6th ed 2003) 78-79; Singer JW *Introduction to Property* (2nd ed 2005) 163-165; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 272; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2040; Singer JW *Entitlement – The Paradoxes of Property* (2000) 46; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 311; Singer

prescription periods are required in scenarios where an owner's monitoring costs are high.⁴⁶⁸ Against this background it seems that the overall costs an owner suffers will be even less in a system with a 30-year period for both good faith and bad faith possessors, such as South African law, as opposed to a regime with shorter periods.⁴⁶⁹

One of the economic grounds for justifying adverse possession is provided by Holmes, who states that property possessed for a long time "takes root in your being and cannot be torn away without [such person] resenting the act".⁴⁷⁰ According to Posner, the deprivation of property under these circumstances would be "wrenching",⁴⁷¹ which feeling he describes as the "Holmes effect".⁴⁷² Bentham is of the same mind as Holmes in this regard:

JW "The Reliance Interest in Property" (1988) 40 *Stanford Law Review* 611-751 666-668 footnote 179; Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 727-730; Radin MJ "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 739-758 748-750; Goodman MJ "Adverse Possession of Land – Morality and Motive" (1970) 33 *Modern Law Review* 281-288 288; Holmes OW "The Path of the Law" (1897) 10 *Harvard Law Review* 457-478 477. The "Holmes effect" is explained in the next paragraph.

⁴⁶⁸ Posner RA *Economic Analysis of Law* (6th ed 2003) 80; Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 728; Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1087; Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2453; Baker M, Miceli T, Sirmans CF & Turnbull GK "Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes" (2001) 77 *Land Economics* 360-370 361; Miceli TJ, Sirmans CF & Turnbull GK "Title Assurance and Incentives for Efficient Land Use" (1998) 6 *European Journal of Law and Economics* 305-323 311; Miceli TJ & Sirmans CF "An Economic Theory of Adverse Possession" (1995) 15 *International Review of Law and Economics* 161-173 168; Epstein RA "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667-722 692; Netter JM, Hersch PL & Manson WD "An Economic Analysis of Adverse Possession Statutes" (1986) 6 *International Review of Law and Economics* 217-227 217, 222.

⁴⁶⁹ I extrapolate this from Posner RA *Economic Analysis of Law* (6th ed 2003) 78-79; Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 727-728; Holmes OW "The Path of the Law" (1897) 10 *Harvard Law Review* 457-478 477.

⁴⁷⁰ Holmes OW "The Path of the Law" (1897) 10 *Harvard Law Review* 457-478 477. Although I use Holmes's theory to justify prescription in terms of Radin's personality theory in section 4.4.3 above, Posner identifies this theory as able to justify prescription in terms of law and economics theory: See Posner RA *Economic Analysis of Law* (6th ed 2003) 77-78.

⁴⁷¹ Posner RA *Economic Analysis of Law* (6th ed 2003) 77-78, who relies on Holmes OW "The Path of the Law" (1897) 10 *Harvard Law Review* 457-478 477. See similarly Goymour A "The Acquisition of Rights in Property by the Effluxion of Time" in Cooke E (ed) *Modern Studies in Property Law* 4 (2007) 169-196 171; Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 240; Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 255; Clarke A "Use, Time, and Entitlement" (2004) 57 *Current Legal Problems* 239-275 251, 274; Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2420; Miceli TJ, Sirmans CF & Turnbull GK "Title Assurance and Incentives for Efficient Land Use" (1998) 6 *European Journal of Law and Economics* 305-323 310; Miceli TJ & Sirmans CF "The Economics of Land Transfer and Title Insurance" (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 83; Singer JW "The Reliance Interest in Property" (1988) 40 *Stanford Law Review* 611-751 666-668; Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 728-729; Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1132;

“Everything about [my property] represents to my eye that part of myself which I have put into it – those cares, that industry, that economy which denied itself present pleasures to make provision for the future. Thus our property becomes part of our being, and cannot be torn from us without rending us to the quick.”⁴⁷³

This approach by Bentham is related to Radin’s personality theory, which entails that objects possessed as personal property becomes constitutive of one’s personhood.⁴⁷⁴ If this analogy holds true, it entails that an absent owner will become “detached” from property over time, resulting in a situation where the returning of that property to the owner will only provide “moderate pleasure”.⁴⁷⁵ Posner describes this as the “diminishing marginal utility of income”, since the squatter will experience the owner’s repossessing of the land as a diminution in his wealth, while the owner will experience the restitution of the land as an increase in his wealth.⁴⁷⁶ The combined utility of these parties – should they be of the same wealth – will be greater if the law awards the land to the possessor, since he will be putting the land to higher-valued use.⁴⁷⁷ According to Stake, the combined utility will be even greater if the possessor is less well-off than the owner at the time before prescription is completed.⁴⁷⁸

Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477 justifies this approach by stating that “[t]he law can ask not better justification than the deepest instincts of man.” This is analogous to the theory advanced by Stake at 2469 that human beings become attached to property, especially land, through evolutionary biology. For an analogy of this “pain” to “demoralization costs” of Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258, see Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727.

⁴⁷² This phrase was coined by Posner RA *Economic Analysis of Law* (6th ed 2003) 79.

⁴⁷³ Bentham J *The Theory of Legislation* (1789, Baxi U ed 1975) 70-71 para 2.

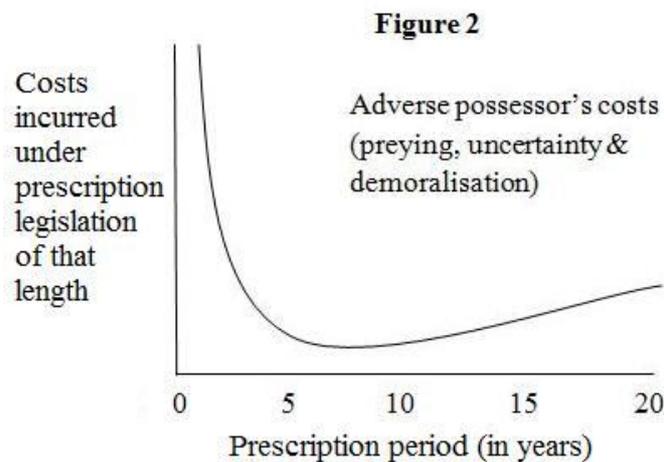
⁴⁷⁴ Radin’s personality theory in the context of prescription is discussed in section 4.4.3 above.

⁴⁷⁵ Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 251; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2420; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727-729; Irving DK “Should the Law Recognise the Acquisition of Title by Adverse Possession?” (1985) 2 *Australian Property Law Journal* 112-119 115; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. Such a conclusion is in line with social-obligation norm developed by Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820, which is addressed in section 4.4.3 above.

⁴⁷⁶ Posner RA *Economic Analysis of Law* (6th ed 2003) 78.

⁴⁷⁷ Posner RA *Economic Analysis of Law* (6th ed 2003) 78. To the same effect are Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1081; Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674-682; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 725-734. According to Green K “Citizens and Squatters: Under the Surfaces of Land Law” in Bright S & Dewar

Against this background it is possible to determine the economic impact of prescription on the possessor. The following graph demonstrates how the squatter's costs can fluctuate with the length of the prescription period:⁴⁷⁹



In Figure 2, “preying” represents the legally informed squatter’s attempts to obtain evidence to succeed with a prescription claim; uncertainty costs involve the levels of anxiety the informed squatter faces; while demoralisation costs represent the suffering such a squatter experiences if he is evicted before the prescription period expires.⁴⁸⁰ This graph illustrates that the costs the squatter suffers are lowest in the time slot between five and 10 years and

JK (eds) *Land Law: Themes and Perspectives* (1998) 229-256 241, the “theft” of the owner’s property through adverse possession is justified if the owner is “a waster of the natural national resource [which is land].” For an argument to the contrary of the economic efficiency justification, see Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2433; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 821, 874-875. Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 668 footnote 181 also criticises Posner in this regard by pointing out that situations where both the adverse possessor and the owner are of the same wealth would be rare, which undermines this argument for justifying adverse possession on economic grounds. Singer thinks that the adverse possessor’s reliance interest constitutes a more powerful justification, an approach confirmed in Singer JW *Introduction to Property* (2nd ed 2005) 162. The reliance interest of the possessor is addressed in section 4.4.3 above. For further criticism on Posner’s argument, see Singer JW *Introduction to Property* (2nd ed 2005) 161-162.

⁴⁷⁸ Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2456-2457. Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 668 footnote 181 can also be read to this effect. However, Stake at 2457 thinks that this justification provided by Posner does not sufficiently take into account the situations concerning boundary disputes, where the neighbouring owners will normally be of equal wealth.

⁴⁷⁹ Based on Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728-729.

⁴⁸⁰ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728-730; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 310; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 83. See also Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666, where he states that “[i]f the adverse possessor were to be ousted from the property, she would experience a loss ... [since] [t]he adverse possessor’s interests grow stronger over time.”

that these costs, including the squatter's demoralisation costs, increase with the lengthening of the prescription period.⁴⁸¹ This conforms to Radin's personality theory that the squatter becomes bound up with property over time, while the owner probably begins to regard it as fungible property the longer he is out of possession.⁴⁸²

Another theory that can be used to justify adverse possession in the law and economics context – alongside those of Holmes and Radin – is the fact that adverse possession protects the “reliance interest”⁴⁸³ or settled expectations of possessors.⁴⁸⁴ Although it is important that the protection of a possessor's settled expectations should not result in overreliance, this problem is countered by the possibility that the owner will reclaim the land before the

⁴⁸¹ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728-730; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 83; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 222. To the same effect are Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 364.

⁴⁸² Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 974; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741, 748-750; Singer JW *Introduction to Property* (2nd ed 2005) 159-161; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 310-311; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 83-84; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-668 footnote 174; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. This prediction also conforms to the social-obligation norm developed by Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820, which is addressed in section 4.4.3 above. See also Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2463-2471, where he acknowledges that the theory of loss aversion can be used to help justify adverse possession regarding land. In this regard Singer JW *Introduction to Property* (2nd ed 2005) 159-160 thinks that because an adverse possessor may come to feel entitled to land in his possession, litigation concerning ownership will continue despite the abolition of adverse possession. In this sense he argues that adverse possessors “will invent new theories to justify recognizing these rights, and the courts are likely to respond to these demands.”

⁴⁸³ I address this theory under the discussion of Radin's personality theory in section 4.4.3 above.

⁴⁸⁴ Singer JW *Introduction to Property* (2nd ed 2005) 160; Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 664, 666-668; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-80. To the same effect are Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 254-255; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 819-820. However, Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161-162 say that adverse possession only protects the reliance interest of “inadvertent” squatters. Nonetheless, this approach does not take into account the possibility that the *mala fide* possessor is not always morally reprehensible, as discussed in section 4.5 below.

expiration of the limitation period, which then eliminates the squatter's reliance.⁴⁸⁵ These factors provide powerful justifications for shifting the property to the higher-valuing squatter through prescription or adverse possession.

It is worth emphasising that Figure 2 combines both good faith and bad faith possessors. Ellickson opines that the graphs for good and bad faith squatters differ because bad faith possessors do not suffer the same demoralisation costs as good faith possessors and that only bad faith possessors are – because of their knowledge – capable of incurring preying costs.⁴⁸⁶ I have chosen not to distinguish between these two types of possessors, since this chapter argues that the distinction between them is based on incorrect reasoning and is thus incoherent.⁴⁸⁷ The best prescription model seems to be the one that does not distinguish between good or bad faith possessors, as found in South African law.⁴⁸⁸ Nonetheless, Posner believes that the “Holmes effect” implies that the adverse possessor possesses in good faith.⁴⁸⁹ Interestingly, certain studies predict that good faith squatters are likely to fare better in US adverse possession cases than their bad faith counterparts, despite the irrelevance of a squatter's subjective mindset in black letter US adverse possession law.⁴⁹⁰ I doubt whether this favouring of good faith claims is a preferable approach, since it is clear that by simply

⁴⁸⁵ Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3.

⁴⁸⁶ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 734.

⁴⁸⁷ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260; Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186. See the discussion of the anomaly of the bad faith possessor in section 4.5 below.

⁴⁸⁸ Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 is of the same mind. Furthermore, litigation costs are reduced if one does not take into account the subjective intent of the adverse possession: See Singer JW *Introduction to Property* (2nd ed 2005) 162; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 25.

⁴⁸⁹ Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3.

⁴⁹⁰ See especially Helmholz RH “Adverse Possession and Subjective Intent” (1984) 61 *Washington University Law Quarterly* 331-358; Helmholz RH “More on Subjective Intent: A Response to Professor Cunningham” (1986) 64 *Washington University Law Quarterly* 65-106. Helmholz analysed 850 US appellate opinions concerning adverse possession decided since 1966 and concluded that not only did many decisions favour good faith adverse possessors above their bad faith counterparts, the courts in some cases even re-interpreted the possession requirement to prevent bad faith claims from succeeding. See Helmholz RH “Adverse Possession and Subjective Intent” (1984) 61 *Washington University Law Quarterly* 331-358, especially 341-349. Nonetheless, the subjective intent of the adverse possessor is considered irrelevant in black letter US adverse possession law, see Dukeminier J & Krier JE *et al Property* (6th ed 2006) 126-127; Helmholz RH “Adverse Possession and Subjective Intent” (1984) 61 *Washington University Law Quarterly* 331-358 331-332; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1123-1125.

classifying *mala fide* possession as immoral amounts to an oversimplification⁴⁹¹ because of the fact that bad faith adverse possession does not always denote squatters who are morally reprehensible.⁴⁹²

When considering the economic impact of prescription, it is important not to lose sight of the effects it can have on third parties.⁴⁹³ In this sense prescription lowers costs incurred through investigating the register (search costs), since parties can – due to the corrective function of prescription – disregard errors in the register that predate the prescription period.⁴⁹⁴ However, because of this corrective function the register will not always show who the actual owner is, since registration is not a prerequisite for acquiring ownership through prescription.⁴⁹⁵ To ascertain the identity of the actual owner under these circumstances requires an inspection of the land to verify who occupies it (inspection costs). These two costs must then be weighed up to determine what the net impact of prescription will be on third parties.⁴⁹⁶ According to

⁴⁹¹ See generally Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096; Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186.

⁴⁹² Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1081; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253. See also Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 and the discussion in section 4.5 below.

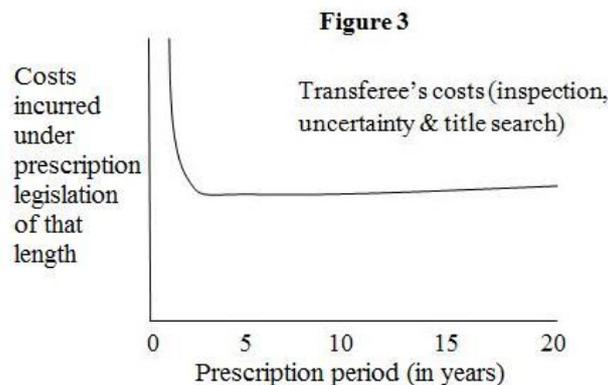
⁴⁹³ Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 726, 730-731; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-80; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132. According to Ellickson at 726, there are four interested parties in this regard, namely owners, possessors, transferees and the courts.

⁴⁹⁴ Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 254-255; Cooter R & Ulen T *Law and Economics* (4th ed 2004) 155; Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-82. Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2441-2444 argues against having adverse possession in this context, since third parties are able to discover the identity of an owner by investigating the land register, should acquisition of ownership by adverse possession not be possible. However, this argument is founded on the assumption that the register will always be correct, which is not the case in a negative registration system. This possibility of incorrectness can even arise in a positive registration – as pointed out by Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 252-258 – namely when adverse possessors choose never to lodge a claim out of fear of failure, which can lead to developments “off the register”. According to Clarke (at 252-258), if there is no way of affording *de iure* status to long-existing *de facto* situations, the same problems can arise as those that the abolition of adverse possession was supposedly meant to overcome. Furthermore, Singer JW *Introduction to Property* (2nd ed 2005) 159-160 believes that even if adverse possession should be abolished, adverse possessors “will invent new theories to justify recognizing these rights, and the courts are likely to respond to these demands.”

⁴⁹⁵ This is the position in South African law: See section 2.3.1 of chapter two above.

⁴⁹⁶ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 730-731; Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Janczyk JT “An Economic Analysis of the Land Title Systems for Transferring Real Property” (1977) 6 *Journal of Legal Studies* 213-233 213. To the same effect are Singer JW *Introduction to*

Netter, Hersch and Manson, there is empirical support for the claim that prescription eliminates mistakes in the land register after a certain period of time has elapsed, thereby reducing information costs.⁴⁹⁷ They assume that a purchaser's certainty is increased through shortening the prescription period and, furthermore, that increased certainty is preferable when land values are higher.⁴⁹⁸ The following graph illustrates how changes to the prescription period can affect the administration costs of land transfers:⁴⁹⁹



Property (2nd ed 2005) 164-165; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-82. However, Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1062-1064 and Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2442-2443 mention the possibility that adverse possession can cause further uncertainty in this regard, which will not be able to reduce transaction costs.

⁴⁹⁷ Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 219-220. See also Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 254-255; Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 20; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674-680; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 81-82; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1128.

⁴⁹⁸ Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 217, 119-222, 224. See also Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 365; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 22-23; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 730-731; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674-680. To the contrary are Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 255; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2442-2443.

⁴⁹⁹ Based on Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 730. Ellickson at 730 states that adverse possession is a mixed blessing for third parties. Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2442 is of the same mind as Ellickson in this regard.

In terms of Figure 3, prescription reduces costs through eliminating errors that can only be found by investigating the register.⁵⁰⁰ Moreover, prescription entitles possessors to acquire ownership in land without requiring registration.⁵⁰¹ A transferee has three ways – according to Ellickson – of dealing with unrecorded ownership, namely

- i) to bear the risk (which increases uncertainty costs);
- ii) to insure against it⁵⁰² (which increases insurance costs); or
- iii) to physically inspect the land to ascertain the identity of the possessor (which increases inspection costs).⁵⁰³

Figure 3 predicts that the costs pertaining to inspection, uncertainty and searching the register will be higher the shorter the prescription period. The costs are lower the longer the period, though they even out around a five-year period, after which they start to climb steadily with the lengthening of the prescription period.⁵⁰⁴ It follows that prescription is in the economic interest of third parties, a fact captured by Epstein: “As a matter of principle, what comes first is best; as a matter of proof, however, what comes last is more reliable and certain.”⁵⁰⁵ This

⁵⁰⁰ Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 360; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 20; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 730; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674-680; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-82; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1128. To the same effect is Singer JW *Introduction to Property* (2nd ed 2005) 164-165. To the contrary are Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 255; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2441; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161, since they think that modern-day land registers are able to solve these problems. Nonetheless, this argument is only valid in the context of a positive registration system where the correctness of the register is guaranteed.

⁵⁰¹ This is the position in South African law: See section 2.3.1 of chapter two above.

⁵⁰² Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2441-2442. For an argument against an adverse possession regime that requires the squatter to compensate the owner, see Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1081; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2466.

⁵⁰³ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 730.

⁵⁰⁴ Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 166; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 730-731; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 217.

⁵⁰⁵ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674. To the same effect is Singer JW *Introduction to Property* (2nd ed 2005)

view is in line with the conclusions drawn above, namely that greater certainty reduces transaction costs.

Whether a country employs a negative or positive registration system is important for purposes of the economic analysis of prescription and thus deserves attention.⁵⁰⁶ From chapter three it was seen that legislation guarantees the correctness of the land register in countries with a positive registration system, such as England and Germany.⁵⁰⁷ In these jurisdictions the register fulfils the role of possession, since one only has to look at the register – which legislation deems as providing conclusive proof of ownership – to ascertain the identity of the landowner. This entails that uncertainty and inspection costs are lower in a positive registration system, since a prospective purchaser of land need only investigate the register, thereby incurring search costs, to conclusively determine who the true owner of the land is.

To the contrary are jurisdictions with a negative registration system, such as South Africa,⁵⁰⁸ The Netherlands and France, where the correctness of the register is not guaranteed.⁵⁰⁹ The main problem in a negative registration system is that the register will inevitably be defective in some instances, in which case prescription steps in to promote legal certainty.⁵¹⁰ Indeed,

164-165. Baird D & Jackson T “Information, Uncertainty, and the Transfer of Property” (1984) 13 *Journal of Legal Studies* 299-320 300 emphasise the fundamental problem that a registration system must solve, namely that “[i]n a world where information is not perfect, we can protect a later owner’s interest fully, or we can protect the earlier owner’s interest fully. But we cannot do both.” This passage is quoted with approval in Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 306 and referred to in Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88 82.

⁵⁰⁶ For a discussion concerning transfer of property through registration systems, see Baird D & Jackson T “Information, Uncertainty, and the Transfer of Property” (1984) 13 *Journal of Legal Studies* 299-320.

⁵⁰⁷ See sections 3.2.4 and 3.5 respectively of chapter three above.

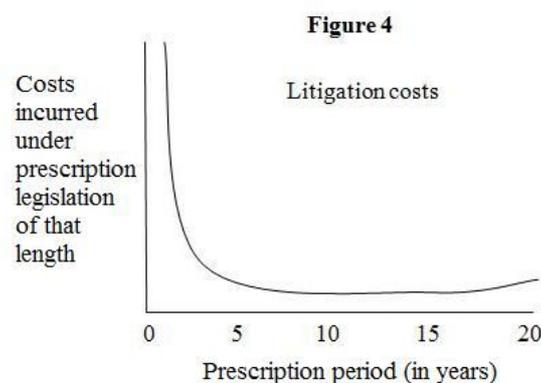
⁵⁰⁸ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 229-238; Van der Merwe CG *Sakereg* (2nd ed 1989) 341-345.

⁵⁰⁹ I do not investigate the question whether it would be more efficient for South Africa to adopt a positive registration system, as such a study falls outside the scope of this dissertation. For an evaluation of which of these two systems is more efficient, see Miceli TJ, Munneke HJ, Sirmans CF & Turnbull GK “Title Systems and Land Values” (2002) 45 *Journal of Law and Economics* 565-582; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323; Miceli TJ & Sirmans CF “The Economics of Land Transfer and Title Insurance” (1995) 10 *Journal of Real Estate Finance and Economics* 81-88; Janczyk JT “An Economic Analysis of the Land Title Systems for Transferring Real Property” (1977) 6 *Journal of Legal Studies* 213-233.

⁵¹⁰ Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 254-255; Cooter R & Ulen T *Law and Economics* (4th ed 2004) 155; Posner RA *Economic Analysis of Law* (6th ed 2003) 78-80; Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1586-1587; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 81-82. Sagaert at 1587 correctly states that this justification for prescription carries less weight in jurisdictions with a positive registration system, such as Germany and Austria. Nonetheless, the difficulty of finding a balance between the

Netter, Hersch and Manson opine that the greater a country's population density, the higher the number of transfers, thereby increasing the possibility of errors in the register.⁵¹¹ Therefore, costs pertaining to uncertainty and searching the register are higher in a negative registration system, since it can be inconclusive to merely consult the register when determining who owns certain land. This means that prescription indeed plays a role in clearing up titles and lowering transaction costs in South African law.

The following graph illustrates how litigation costs in the context of prescription vary with the length of the prescription period.⁵¹²



Litigation costs are made up of (i) the number of litigated cases and (ii) the costs of erroneous judicial decisions.⁵¹³ Law and economics theory – which purports to enhance efficiency – aims to keep the sum of these two costs as low as possible. From this graph it is clear that the number of litigated cases (or outlays) decreases with the lengthening of the prescription period, although this increases their complexity (possibility of erroneous decisions) due to loss of evidence and witnesses. In the short run, litigation costs are saved by a longer prescription period, since it reduces the number of cases coming to court.⁵¹⁴ Yet, over a longer prescription period the costs of incorrectly decided decisions start to outweigh the

formal indicators (registers) and informal indicators (possession) of ownership is pointed out by Singer JW *Entitlement – The Paradoxes of Property* (2000) 46.

⁵¹¹ Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 223.

⁵¹² Based on Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 731.

⁵¹³ Posner RA *Economic Analysis of Law* (6th ed 2003) 563-571; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 731.

⁵¹⁴ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 732; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1128. To the contrary is Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2438-2439, who thinks that the uncertainty caused by the requirements for adverse possession prevents a reduction in litigation costs.

costs saved from hearing fewer cases, since evidence will be lost over time, which can result in incorrect judgments.⁵¹⁵ This is where prescription reduces litigation costs through awarding ownership – after a certain period of time – to the squatter to prevent the problems that involve stale claims and loss of evidence.⁵¹⁶

If one combines the findings from the four figures above, the result can be as follows:⁵¹⁷

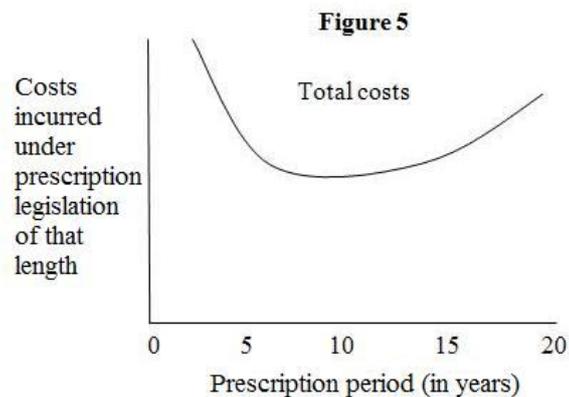


Figure 5 shows that the optimal period for prescription falls between five and 15 years, since it is undesirable to have periods that are either too short or too long.⁵¹⁸ This is because too short or too long periods will fall outside the cost-minimising range, together with the fact

⁵¹⁵ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 676 implies that litigation costs rise with time. See also Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2453. Ellickson draws this figure assuming that the costs of deciding cases incorrectly will eventually outweigh the initial costs of not having to hear numerous cases as time passes: See Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 732 footnote 18.

⁵¹⁶ Baker M, Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 360-361; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 21; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 219; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1130.

⁵¹⁷ Based on Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 733, although he acknowledges that all these graphs were drawn from intuition and may not accurately represent reality. Ellickson (footnote 20 at 733) also recognises that the fact that most US states have limitation periods ranging between five to 15 years could have influenced the way he drew this figure.

⁵¹⁸ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 733-734; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 681-682; Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1596; Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 255. Both Ellickson at 733 and Epstein at 681 think that too short limitation periods are undesirable. Of the same opinion are Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 217.

that too short periods can encourage people to wilfully commit trespass.⁵¹⁹ Bouckaert and Depoorter capture the conclusion reached from the results contained in this graph:

“Although there are costs associated with adverse possession[,] ... sufficient economic arguments can be forwarded to uphold the assumption that the concept of adverse possession is called-for and economically justified within a property order.”⁵²⁰

Thus far, the economic analysis provides strong support for the claim that prescription indeed reduces transaction costs in jurisdictions with a negative registration system. Consequently, law and economics theory clearly regards prescription as a mechanism that clears titles and – more importantly – helps to reallocate resources from low-valuing owners to higher-valuing possessors when voluntary exchange is prevented due to the presence of high transaction costs. Consequently, prescription fulfils an important economic role in South African law. As to the period, Ellickson acknowledges that he drew these graphs from intuition, with the “short” US adverse possession periods of between five and 15 years possibly having influenced him. Nonetheless, I argue that these economic predictions justify the presence of a 30-year prescription period in South African law.

Another economic (and utilitarian) theory – apart from those addressed above – that helps justify adverse possession is based on entitlement determination rules.⁵²¹ In his theory, Merrill distinguishes between mechanical or formalistic entitlement determination rules and judgmental entitlement determination rules. Mechanical rules give little discretion to courts to establish substantive and remedial rights.⁵²² This rule is inexpensive to apply because the

⁵¹⁹ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 733; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 681; Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 255; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 24.

⁵²⁰ Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 22.

⁵²¹ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1145, although he confines this justification to *bona fide* possessors. Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 685-687 also supports an adverse possession regime that distinguishes between good faith and bad faith possessors, which has a shorter period for good faith possessors and a longer period concerning bad faith possessors. Similar to Epstein is Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 25-26. Epstein at 687 suggests a period of between six and 10 years for good faith possessors and a period between 12 and 20 years for bad faith possessors.

⁵²² Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137.

absence of a discretion removes the uncertainty factor, which results in legal certainty and reduced litigation.⁵²³ As a result, efficiency is maximised due to the fact that mechanical rules reduce litigation and information costs. On the other hand, judgmental rules afford broad discretion to courts when they determine entitlements or remedial rights.⁵²⁴ Since judgmental rules involve a discretion, it follows that they are unpredictable and thus more expensive to apply.⁵²⁵ It follows that the application of a mechanical rule can result in an arbitrary allocation of resources in situations where transactions costs are high and the social desirability of the result is uncertain.⁵²⁶ Judgmental rules can achieve more efficient outcomes in such a situation.⁵²⁷ For purposes of promoting economic efficiency in the framework of utilitarianism and law and economics theory, one has to determine whether adverse possession operates optimally as a mechanical or a judgmental rule. Merrill – to my mind – correctly states that it is best if adverse possession operates as a mechanical rule, as long as it adheres to the following two requirements:

- i) the passage of a sufficient period of time between the dispossession and the extinguishment of ownership; and
- ii) adequate notice of the adverse possession to the owner and third parties.⁵²⁸

Under this model (the mechanical rule), courts do not investigate whether the owner truly sleeps on his rights, nor do they take into account whether evidence was actually lost. Consequently, litigation costs are lowered because the limitation period (first requirement), coupled with the requirements of open possession (second requirement), are deemed to conclusively answer these questions. As a result, this rule is similar to rule-utilitarianism, which aims to maximise utility in the long run through laying down certain moral or

⁵²³ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137.

⁵²⁴ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137.

⁵²⁵ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137.

⁵²⁶ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1138.

⁵²⁷ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1138.

⁵²⁸ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1140. See also Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 725-734; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-80; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477. These two requirements correspond to the conclusions reached in the economic analysis at Figures 1 and 3 above.

utilitarian rules.⁵²⁹ The mechanical-rule approach – as well as rule-utilitarianism – overrules the objections made by Dockray against allowing adverse possession in cases where an owner did not really sleep on his rights and where evidence as to ownership is available.⁵³⁰ In this sense Dockray seems rather to support a regime where adverse possession operates as a judgmental rule. According to this rule, the courts will have to determine in every case whether the owner has truly slept on his rights, whether evidence was lost and whether the adverse possessor and third parties have indeed developed a reliance interest in the property.⁵³¹ To decide these questions increases litigation costs and the uncertainty of outcomes, which impacts negatively on the marketability of the land due to the increase in transaction costs. Thus, it is preferable for adverse possession to operate, as it currently does, as a mechanical entitlement determination rule.⁵³² It follows that even though an owner did not “sleep” on his rights and evidence concerning ownership is readily available, the law lays down conclusive presumptions or rules for purposes of maximising efficiency. However, Merrill is doubtful whether a mechanical rule serves the best purpose in situations involving *mala fide* possessors, since he prefers a (more expensive) judgmental rule under these circumstances to prevent “coerced transfers”.⁵³³ I argue – from an efficiency point of view – that it is best to use a mechanical rule for both good faith and bad faith adverse possessors, since one derives the same economic benefits from such a model as one where it would only be applicable to good faith adverse possessors.⁵³⁴ Such a conclusion finds further support in

⁵²⁹ Rule-utilitarianism is discussed in greater detail at the beginning of this section.

⁵³⁰ See the discussion in section 4.3.2 above.

⁵³¹ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1140-1143. See also Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 819-820; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 666-669; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 726, 730-731; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-80.

⁵³² Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1140-1143.

⁵³³ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1143-1144. Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 685-687 also opts for a model of adverse possession that differentiates between good and bad faith adverse possessors.

⁵³⁴ I extrapolate this from the economic analysis of adverse possession in Figures 1 to 5 above. Further support for this point is found in Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260; Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096. These sources are discussed in section 4.5 below.

the unhelpful – and fallacious – distinction between good and bad faith possessors, which is discussed in the next section.⁵³⁵

Another suggestion by Merrill is that an adverse possessor should indemnify an owner who loses ownership through adverse possession by converting such owner's entitlement from one protected by a property rule to one protected by a liability rule.⁵³⁶ This will require the adverse possessor to pay the fair market value to the owner to be able to retain possession of the acquired property.⁵³⁷ However, this solution subverts many of the objectives of adverse possession, namely the quieting of titles, elimination of old claims, the protection of the reliance interests of squatters and third parties and the reduction of transaction costs, especially if the adverse possessor is unable to pay.⁵³⁸ Indeed, even the California Supreme

⁵³⁵ Section 4.5 below.

⁵³⁶ Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1145-1153, relying on Calabresi G & Melamed AD "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089-1128. The difference between these two rules are set out by Calabresi G & Melamed AD "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1092. Calabresi and Melamed explain at 1902 that an entitlement (such as property) is protected by a *property rule* if a person who wants to acquire it from its owner has to buy it from such owner in a voluntary transaction where the value of the entitlement is determined by the seller. On the other hand, an entitlement is protected by a *liability rule* when someone is allowed to "destroy" that entitlement (such as through adverse possession), provided that he is willing to pay an "objectively determined value" for it. This value could be equal to what the original owner would have sold the entitlement for, but this need not necessarily be the case, since the value of the entitlement will be determined objectively by the state. For a concise discussion in this regard, see Miceli TJ "Property" in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 249. This suggestion by Merrill is criticised by Miceli TJ & Sirmans CF "An Economic Theory of Adverse Possession" (1995) 15 *International Review of Law and Economics* 161-173 165-166.

⁵³⁷ Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1145, relying on Calabresi G & Melamed AD "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1092. Merrill at 1145-1149 further refines such an approach by introducing the possibility of indemnification, which he divides into "universal indemnification" (where the subjective intent of the adverse possessor is irrelevant) and "limited indemnification" (where the subjective intent of the adverse possessor has to be determined). This refined approach of Merrill falls outside the scope of my dissertation and is therefore not discussed here.

⁵³⁸ Stake JE "The Uneasy Case for Adverse Possession" (2001) 89 *Georgetown Law Journal* 2419-2474 2466; Miceli TJ & Sirmans CF "An Economic Theory of Adverse Possession" (1995) 15 *International Review of Law and Economics* 161-173 161, 165-166; Singer JW "The Reliance Interest in Property" (1988) 40 *Stanford Law Review* 611-751 666-669; Epstein RA "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667-722 689. Epstein at 689 and Miceli and Sirmans at 166 criticise this approach by stating that liability rules are costly to administer and that requiring the adverse possessor to indemnify the owner will – according to Epstein – "undercut the security of transactions concern that lies at the base of [adverse possession]." Furthermore, the fact that the adverse possessor won't be able to pay is a very real consequence, especially if one has regard to the fact that "[t]he prototypical squatter is poor and landless", as pointed out by Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1081; Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 253. In this regard Stake at 2466 fears that if the adverse possessor is forced to sell the land to satisfy the liability rule, he will suffer the very subjective losses that adverse possession tries to avoid, which will result in a nett decrease in utility. Furthermore, Singer in footnote 183 at 669 states that it would be "immoral" to allow the owner to claim an interest – in the form of a liability rule – after the adverse possessor has acquired

Court voices its opposition to such an approach in *Warsaw v Chicago Metallic Ceilings Inc*,⁵³⁹ where it held that “[t]o exact such a charge would entirely defeat the legitimate policies underlying the doctrines of adverse possession and prescription ...”⁵⁴⁰ The argument for excluding the bad faith adverse possessor from the mechanical rule is also based on the premise that *mala fide* possessors are morally reprehensible,⁵⁴¹ which I argue is not always the case.⁵⁴²

To summarise, utilitarianism and law and economics theory provide powerful grounds for justifying adverse possession or prescription. Utilitarianism achieves this purpose by recognising prescription (through rule-utilitarianism) as a permissible method of acquisition of ownership, since prescription maximises utility by deciding disputes and promoting legal certainty. It has been established that law and economics theory can also accommodate prescription. The reasons for this conclusion are, *inter alia*, that prescription recognises and protects the “reliance interest” of the squatter and third parties by affording legal status to long-existing factual scenarios and by reducing transaction costs in jurisdictions with a negative registration system. Through connecting the potential demoralisation costs a squatter may suffer to the “Holmes effect” and Radin’s personality theory – should the squatter not be able to acquire ownership through adverse possession – law and economics theory indicates that economic efficiency is maximised by shifting the property to the more efficient user of it.

the land through his reliance interest. It can also be argued that the adverse possessor has by this time become so bound up with the property that having to part with it, in a situation where he cannot pay, would be detrimental to his personhood, according to Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 959-960; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 748-750. Indeed, I argue that Alexander’s social-obligation norm obliges an owner to “give” his (neglected) property to the squatter if it has become essential for such squatter to lead a well-lived life: See generally Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 769. See further the discussion of the social-obligation theory in section 4.4.3 above.

⁵³⁹ 676 P.2d 584 (Cal 1984).

⁵⁴⁰ 676 P.2d 584 (Cal 1984) 590. Despite this criticism, Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1150-1151 thinks that a stronger argument can be made for adopting a limited indemnification rule to prevent coerced transfers in cases concerning *mala fide* possessors, so that they cannot be “rewarded” for their unlawful conduct.

⁵⁴¹ Merrill’s approach is similar to the one adopted by the English Law Commission in *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) para 2.72; *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998) para 10.5.

⁵⁴² See the discussion in section 4.5 below. See further Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1081; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2466. By requiring the adverse possessor to indemnify the owner will also reduce efficiency, according to Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 166; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 689.

4.5 The “anomaly” of the bad faith possessor

It was seen that most of the three liberal theories discussed above are able to accommodate not only adverse possession, but also bad faith adverse possession. Nevertheless, acquisition of ownership through bad faith adverse possession seems to present a “significant qualification of the rights paradigm in the sense that the security of ownership is reduced or undermined”.⁵⁴³ For this reason it is necessary to investigate whether bad faith adverse possession truly undermines ownership and whether it is, perhaps, founded on fallacious assumptions.

Many authors view the acquisition of property through bad faith adverse possession as constituting an anomaly in the law, such a possessor normally being labelled a “land-thief” who (ab)uses the law to “steal” property from owners.⁵⁴⁴ Epstein describes them as “both bad people in the individual cases and a menace in the future”,⁵⁴⁵ while Merrill invokes “our shared sense of the greater moral culpability of the bad faith possessor.”⁵⁴⁶ According to Helmholz

“[t]here is something wrong in claiming land when one has known all along that it belonged to someone else. It is impossible not to feel differently about such bad faith possessors than one does about claimants who have made an honest mistake and relied upon it.”⁵⁴⁷ (Original emphasis.)

⁵⁴³ Van der Walt AJ *Property in the Margins* (2009) 187.

⁵⁴⁴ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1097-1098; Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585, 1594; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1037-1040; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2454-2455; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161-162; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 881-884; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 217, 219; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1135. However, Peñalver and Katyal are of the opinion that intentional lawbreakers play an important role in the evolution of property law: See Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1105-1131. See also Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 288, who thinks that adverse possession is not immoral because it influences social policy and that it grants security to long possession of land.

⁵⁴⁵ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 686, 685-689.

⁵⁴⁶ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1126.

⁵⁴⁷ Helmholz RH “More on Subjective Intent: A Response to Professor Cunningham” (1986) 64 *Washington University Law Quarterly* 65-106 75. See also Helmholz RH “Adverse Possession and Subjective Intent” (1984) 61 *Washington University Law Quarterly* 331-358 343.

Radin argues that her personality theory is more likely to accommodate good faith adverse possessors than bad faith ones,⁵⁴⁸ whereas Posner also thinks that adverse possession ought only to be allowed in cases involving good faith possessors.⁵⁴⁹ These sentiments toward the bad faith possessor are also reflected in the proposals for reform to the law of adverse possession, with Merrill suggesting that bad faith possessors should indemnify owners for property acquired through adverse possession.⁵⁵⁰ Furthermore, Epstein advocates instituting an adverse possession regime that requires longer periods in cases involving bad faith, similar to what is found in some civil law jurisdictions.⁵⁵¹ One can also observe the anomaly of the bad faith adverse possessor in US law, where some academics predict that good faith adverse possessors tend to fare better in cases based on adverse possession than their bad faith counterparts, despite the fact that the subjective intent of the possessor is irrelevant in the adverse possession law of most US states.⁵⁵²

Despite the criticism directed against the bad faith possessor, there are authors who think that bad faith adverse possession is justified.⁵⁵³ Fennel – amongst them – argues that the terms “bad faith”⁵⁵⁴ and “good faith”⁵⁵⁵ are insufficient labels for situations that involve adverse possessors, as she prefers to refer to these persons as “knowing” (or advertent) and

⁵⁴⁸ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 749.

⁵⁴⁹ Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3.

⁵⁵⁰ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1126.

⁵⁵¹ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 685-689. See similarly Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 25-26; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 167. Both Dutch and French prescription law have longer prescription periods if the possessor is in bad faith, see sections 3.3.2.2.3 and 3.4.2.2 respectively of chapter three above.

⁵⁵² Helmholz RH “Adverse Possession and Subjective Intent” (1984) 61 *Washington University Law Quarterly* 331-358 331-332. For authority that the subjective intent of the possessor is irrelevant in black letter US adverse possession law, see Dukeminier J & Krier JE *et al Property* (6th ed 2006) 126-127. The discussion of the substantive requirements for US adverse possession falls outside the scope of this dissertation and are not addressed here. For discussions of the requirements for adverse possession in US law, see Dukeminier J & Krier JE *et al Property* (6th ed 2006) 112-157; Singer JW *Introduction to Property* (2nd ed 2005) 145-158.

⁵⁵³ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096.

⁵⁵⁴ Helmholz RH “More on Subjective Intent: A Response to Professor Cunningham” (1986) 64 *Washington University Law Quarterly* 65-106 69-70 defines “bad faith” adverse possession as “continuing trespass the claimant knows to be without right”, explaining that it has “no necessary connection to hardness of heart or design to appropriate wrongfully, although of course it may involve both.”

⁵⁵⁵ Helmholz RH “More on Subjective Intent: A Response to Professor Cunningham” (1986) 64 *Washington University Law Quarterly* 65-106 69 describes “good faith” as to “mean[.] that the claimant believed the land belonged to him.”

“inadvertent” adverse possessors.⁵⁵⁶ This stands in contrast to other authors who argue that good faith adverse possessors should be favoured above their bad faith counterparts.⁵⁵⁷ In this sense Fennell states that “[i]nstead of triggering moral condemnation and legal disadvantage, [an adverse possessor’s] knowledge of the encroachment should be a *prerequisite* for obtaining title under a properly formulated doctrine of adverse possession.”⁵⁵⁸ The following argument reinforces this approach:

“It is inconsistent to view someone as a thief or a bad faith actor for doing nothing more than knowingly employing the law’s own process for acquiring land.”⁵⁵⁹

Fennell maintains that it is best to view adverse possession as a “doctrine of efficient trespass”.⁵⁶⁰ Interestingly, she argues that adverse possession concerning land should only be justified if two conditions are met, namely (i) when there is a substantial difference in the parties’ valuations of the land and (ii) when a market transaction is unavailable.⁵⁶¹ Indeed, one of the main justifications for adverse possession is that it moves land to higher-valuing users when the market is unable to achieve this goal.⁵⁶²

⁵⁵⁶ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1037 footnote 1.

⁵⁵⁷ See generally Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154; Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3; Bouckaert B & Depoorter BWF “Adverse Possession: Title Systems” in Bouckaert B & De Geest G (eds) *Encyclopedia of Law and Economics* (1999) <http://encyclo.findlaw.com/> (accessed 7 October 2010) 1200: 18-31 25-26.

⁵⁵⁸ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1038 (Own emphasis). Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 supports a system of adverse possession that does not distinguish between good faith and bad faith possessors.

⁵⁵⁹ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1044. See also Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1098-1104.

⁵⁶⁰ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1038. Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1169 are of the opinion that the term “efficient theft” is more fitting in this context.

⁵⁶¹ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1040-1041. See also Posner RA *Economic Analysis of Law* (6th ed 2003) 83 and Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1131, although both authors require good faith under these circumstances. For the relevance of these two requirements from a perspective of law and economics theory, see the discussion in section 4.4.4 above.

⁵⁶² Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1040 is of the opinion that this is the “niche goal” of adverse possession. See also Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585; Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246-248, 254-255; Cooter R & Ulen T *Law and Economics* (4th ed 2004) 155; Posner RA *Economic Analysis of Law* (6th ed 2003) 55, 83; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003

Fennell disagrees with the literature directed against bad faith adverse possessors and advances an argument favouring such possessors. She indicates that the apparently uncomplicated distinction between good faith and bad faith adverse possession is an oversimplification,⁵⁶³ which is illustrated in the following table:⁵⁶⁴

Table 1: Belief, fact and knowledge

Objective fact	Possessor actually owns the land	Possessor does not actually own the land
Subjective belief		
Possessor believes he owns the land	I. Secure owner	II. Inadvertent encroacher ["good faith"]
Possessor believes he does not own the land	III. Insecure owner	IV. Knowing trespasser ["bad faith"]
Possessor is unsure of whether he owns the land	V. Doubting owner	VI. Doubting possessor

This table demonstrates that the possessor's knowledge depends on the interaction between the possessor's subjective belief and the objective facts, while cells II and IV illustrate the distinction between good faith and bad faith possessors. Fennell correctly argues that the line between these two mental states is less clear than it *prima facie* seems. According to her it is difficult to establish whether the possessor's entry was either knowing (bad faith) or inadvertent (good faith), unless the possessor makes an overt move (such as an offer to buy the land) that reveals his mental state towards the land.⁵⁶⁵ Furthermore, possessors can choose whether or not to inform themselves of their position, which makes knowledge an unstable criterion to determine whether good faith or bad faith is present.⁵⁶⁶ In this sense a "false belief in ownership may be based on the most extensive efforts available, minimally reasonable efforts, ... no efforts at all, or wilful ignorance stubbornly maintained against all

Conveyancer 136-156 151-152; Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 724-725.

⁵⁶³ Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1049.

⁵⁶⁴ I borrow this table from Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1049.

⁵⁶⁵ Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1050.

⁵⁶⁶ Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1050.

signs to the contrary.”⁵⁶⁷ From this argument it appears that the “obvious” distinction between good and bad faith is not so simple in reality, since it is possible to be in good faith even though a possessor did the absolute minimum to inform himself as to the objective facts of a situation. The distinction between good and bad faith involves the further complication of evidence, which problem applies to the possessor who is unsure of whether he owns the land and which is illustrated by cells V and VI. How is an owner to prove that an adverse possessor who claims ownership to his property was indeed in bad faith? A possible solution to this conundrum is the approach adopted by Dutch and French law where good faith possession is presumed, which has the effect that the owner then has to prove the presence of *mala fides*.⁵⁶⁸

The problem with distinguishing between good and bad faith is further complicated if one takes into account the difference between knowledge and intent.⁵⁶⁹ These two categories can produce a multiplicity of mental states if they are combined, as the following table illustrates:⁵⁷⁰

Table 2: Adding intent to knowledge

Intent Knowledge (from table 1)	Possessor intends to claim even if it is not his	Possessor does not intend to claim anything that is not his
Inadvertent (“good faith”) encroacher (table 1, cell II)	Aggressive innocent (hypothetical intent)	Deferential innocent (hypothetical intent)
Knowing (“bad faith”) trespasser (table 1, cell IV)	Aggressive trespasser	Deferential trespasser
Doubting possessor (table 1, cell VI)	Passive-aggressive trespasser	Deferential doubter

⁵⁶⁷ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1050.

⁵⁶⁸ See section 3.3.2.2.2 for Dutch law and section 3.4.2.2 for French law in chapter three above. This was also the position under Roman law, see section 2.2.2 of chapter two above.

⁵⁶⁹ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1051; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2427-2428.

⁵⁷⁰ I borrow this table from Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1051.

This table highlights the problems one can encounter with the seemingly unproblematic distinction between good faith and bad faith adverse possession. If the adverse possessor is inadvertent, will he necessarily have the requisite intention to claim land through adverse possession even if such possessor is convinced that he already owns the land? What will happen to the inadvertent possessor who believes himself to be the owner, but who is then confronted by the owner and decides not to claim the property through adverse possession (even though ownership was already acquired *ex lege*)? These difficulties emphasise the following question: “Is the passive-aggressive trespasser who chooses not to resolve her doubts really morally superior to the aggressive trespasser[,] [or] [s]hould the aggressive innocent be preferred over the deferential but aware trespasser?”⁵⁷¹ Fennell states that it is not clear whether a moral distinction exists, even if all innocent possessors are viewed as deferential and all knowing trespassers are regarded as aggressors.⁵⁷²

Against this background one may rightly ask why the academic stance is so weighed against bad faith possession, labelling it as constituting “land theft”. Fennell argues that by disentangling the way law and morality are conflated in the word “thief”, one is able to discover why the law opposes bad faith adverse possession.⁵⁷³ Firstly, it is clear that acts that violate the law are classified as crimes. However, it cannot be a crime if someone follows a legally recognised method to acquire ownership in an object.⁵⁷⁴ Yet, one may object to such a notion by claiming that no legal rule can change a moral wrong into a right because even though the state sanctions or legalises something like adverse possession (or abortion), it could possibly still amount to an immoral state of affairs.⁵⁷⁵ In this sense Fennell argues – if one leaves aside the adversity of possession – that the mere desire to obtain property through possession cannot truly create moral difficulties, since no rights or interests of others are infringed through this desire alone.⁵⁷⁶ If such an infringement indeed exists, the “moral fault

⁵⁷¹ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1052.

⁵⁷² Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1052.

⁵⁷³ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1053-1059.

⁵⁷⁴ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1053.

⁵⁷⁵ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1053-1054.

⁵⁷⁶ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1055.

would appear to lie with the party responsible for it.”⁵⁷⁷ In this context a possessor’s mere desire to acquire property does not infringe an owner’s property rights purely because the government allows for the shift of ownership in favour of the possessor.⁵⁷⁸ Consequently, it is governmental power that takes ownership away from the owner, not the acquisitive thoughts of the possessor.⁵⁷⁹ This argument needs to be further analysed, since adverse possession requires the possessor to be in physical possession before the property can be acquired through prescription. In this instance the possessor is responsible for the occupation of the property, while the government awards ownership to that possessor at the expiration of a certain period of time, which results in the loss of ownership on the side of the owner.⁵⁸⁰ In other words, the fault for the loss of ownership resides not with the possessor but with the state, since it is the state that awards ownership to the possessor if he was in possession for the duration of the prescription period. Yet, even if one accepts this line of argument, it seems that it only “shifts the blame” from the possessor to the government, which still necessitates an inquiry as to whether the notion of adverse possession should be allowed at all.

It is clear that trespassing on the property of another is both morally and legally wrong. The law provides remedies to owners to regain possession from such adverse possessors, causing the legal position of the adverse possessor to be relatively weak. The law protects owners by requiring an adverse possessor to be in possession of the property for a substantial period of time before he can acquire ownership. Furthermore, the owner can stop this possession at any time through intervening and evicting the possessor. By relying on these two grounds, Fennell concludes that owners who fail to reclaim possession from the trespasser are unlikely to be pained⁵⁸¹ by the trespass itself.⁵⁸² The loss of ownership through prescription is a

⁵⁷⁷ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1055.

⁵⁷⁸ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1055.

⁵⁷⁹ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1055.

⁵⁸⁰ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1056.

⁵⁸¹ Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 727-728 uses the notion of “demoralization costs” developed by Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258 1214 to capture this pain. See also Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1130; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 1003.

⁵⁸² Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1057. See also Singer JW *Introduction to Property* (2nd ed 2005) 163; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2453; Baker M,

separate issue that may pain the owner, but this pain will be felt despite the subjective intent of the possessor.⁵⁸³ It follows that if we believe that ownership should never – either morally or legally – be extinguished in favour of possessors, it will require the abolition of adverse possession and not merely limiting it to cases involving good faith possessors.⁵⁸⁴ If Fennell is correct in her reasoning, it follows that no true benefit is gained by distinguishing between good and bad faith possessors. Accordingly, I agree that it serves no useful purpose to distinguish between good and bad faith prescription, which is in line with the current position in South African law.⁵⁸⁵

Another take on bad faith adverse possession is the approach of Peñalver and Katyal,⁵⁸⁶ who divide these so-called “property outlaws”⁵⁸⁷ or lawbreakers into two categories, namely “acquisitive outlaws” and “expressive outlaws”.⁵⁸⁸ The difference between them is that the former group seeks to acquire ownership in the property of others, while the latter group – rather than seeking ownership – attempts to influence the ways owners use or enjoy their property.⁵⁸⁹ For purposes of justifying bad faith adverse possession it is only necessary to consider the category of acquisitive outlaws. In this sense the focus of Peñalver and Katyal’s analysis falls on the European settlers who settled on land in the American West that mostly

Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 361, 364-365; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 311; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 168; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 667; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 692; Netter JM, Hersch PL & Manson WD “An Economic Analysis of Adverse Possession Statutes” (1986) 6 *International Review of Law and Economics* 217-227 217, 222; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728.

⁵⁸³ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1057. As indicated by Figure 1 in section 4.4.4 above, the pain (in terms of demoralisation costs) suffered by the owner decreases with the lengthening of the prescription period.

⁵⁸⁴ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1057.

⁵⁸⁵ See section 2.3.1 of chapter two above.

⁵⁸⁶ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186.

⁵⁸⁷ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1095.

⁵⁸⁸ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1105.

⁵⁸⁹ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1105. Because many outlaw movements represent a complex mixture of motives, Peñalver and Katyal also discuss a hybrid category of “intersectional outlaws”. However, it is not necessary to focus on this category here.

belonged to either the Native Americans or the federal government.⁵⁹⁰ As to these lands the settlers argued that “[e]very citizen ... is entitled to own land, and the claims of those who actually work the land should take precedence over the fungible interests of absentee land speculators.”⁵⁹¹ Interestingly, this argument for justifying the “taking” of Western lands contains elements of both the labour theory and Radin’s personality theory.⁵⁹² Yet, these settlers – who squatted on public land – were a major concern to the federal government in the East, since the government viewed them as taking land without paying for it. The fact that many owners of western land were absent and thus let their property lie unused, coupled with the difficulty of regulating squatting in the vast areas of the West, ultimately forced the federal government to relax the laws pertaining to unlawful occupation of federal land and through this the “shameless lawbreakers and usurpers reviled by the eastern elite [were transformed] into the revered pioneers of American mythology”.⁵⁹³ Peñalver and Katyal capture the influence of these squatters on US land law as follows:

“Their persistent and acquisitive lawbreaking raised the political profile of conflicts over how to dispose of the massive quantities of public land acquired by the United States government during the first half of the nineteenth century, and it ultimately led to the resolution of the conflict in their favor.”⁵⁹⁴

Peñalver and Katyal agree with Radin that property is important to individual identity, as controlling property extends our capacity to live as humans.⁵⁹⁵ This significance of property to people emphasises two points, namely the importance of protecting existing property rights,⁵⁹⁶ and that existing property rules should be challenged in situations where persons are

⁵⁹⁰ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1105-1106.

⁵⁹¹ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1107. This is analogous to Radin’s personality theory, see Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 986. See also Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2456-2457; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1127; Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477.

⁵⁹² These two theories are discussed in sections 4.4.2 and 4.4.3 respectively above.

⁵⁹³ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1113.

⁵⁹⁴ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1113.

⁵⁹⁵ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1131. See further Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 972-973; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741, 748-750. This position is analogous to social-obligation norm developed by Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820, which is addressed in section 4.4.3 above.

⁵⁹⁶ See, for instance, Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 986, where she states that personal property should enjoy greater protection than fungible property.

excluded from participating in the ownership system.⁵⁹⁷ For example, people excluded from access to ownership – such as the poor – find themselves isolated from the social and commercial activity many take for granted.⁵⁹⁸ This is where the “ambiguous role of the property outlaw ... sets the stage for productive disobedience.”⁵⁹⁹

In this sense adverse possession plays an important role in situations where a squatter places a greater value on property than the owner and where certain factors – such as high transaction costs and/or the poverty of the squatter – prevents voluntary exchange.⁶⁰⁰ This is an ideal setting to reallocate the property from a neglecting owner to an adverse possessor who actually uses the property. However, like the problem with Radin’s personality theory, it is difficult to identify cases where the squatter truly attaches greater value on the property than the owner for such an involuntary transfer to be permitted.⁶⁰¹ Yet, the adverse possessor’s long-term use of the property can provide evidence of the high value such possessor places on the property, especially because the owner can simply reclaim possession at any time before the limitation period expires.⁶⁰² These factors – when combined – indicate

⁵⁹⁷ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1132. To the same effect is Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083.

⁵⁹⁸ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1132; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083. To the same effect are Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁵⁹⁹ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1133.

⁶⁰⁰ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1145; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1065, 1080-1081; Posner RA *Economic Analysis of Law* (6th ed 2003) 78; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674-682; Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 725-734. To the same effect are Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-82. To the contrary is Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2435-2436, 2445.

⁶⁰¹ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1145; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 742; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 987, 991-992. This difficulty can be overcome if non-use is equated with abandonment, a solution advocated by Posner RA *Economic Analysis of Law* (6th ed 2003) 78, 83. However, this approach by Posner is criticised by Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2456; Sprankling JG “An Environmental Critique of Adverse Possession” (1994) 79 *Cornell Law Review* 816-884 875.

⁶⁰² Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1145-1146; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100

that the adverse possessor indeed values the property more than the absent owner.⁶⁰³ This state of affairs is even more justified in circumstances where the access to property by the adverse possessor and owner is out of balance, the owner being wealthy while the adverse possessor is poor and perhaps socially marginalised.⁶⁰⁴ Adverse possession performs a dual function in this context by (i) generating informational value as to the inefficient distribution of property rights in society, together with (ii) promoting redistributive value through affecting transactions that would otherwise not be able to occur due to high transaction costs.⁶⁰⁵ Consequently, if certain involuntary transfers sufficiently maximise utility for the greatest number of people, property reallocating mechanisms – such as adverse possession – become an advantageous solution.⁶⁰⁶

Northwestern University Law Review 1037-1096 1040-1041; Singer JW *Introduction to Property* (2nd ed 2005) 160; Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 664, 666-668; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-80. This will most likely be the case in the context of squatters occupying property as a home, see Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 250-252; Auchmuty R “Not Just a Good Children’s Story: A Tribute to Adverse Possession” 2004 *Conveyancer* 293-307 307; Stake JE “The Uneasy Case for Adverse Possession” (2001) 89 *Georgetown Law Journal* 2419-2474 2457. See further Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275 272; Goodman MJ “Adverse Possession of Land – Morality and Motive” (1970) 33 *Modern Law Review* 281-288 288.

⁶⁰³ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1146. See also Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253; Singer JW *Introduction to Property* (2nd ed 2005) 160; Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3, 83; Singer JW *Entitlement – The Paradoxes of Property* (2000) 45-46; Miceli TJ & Sirmans CF “An Economic Theory of Adverse Possession” (1995) 15 *International Review of Law and Economics* 161-173 161; Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751 664, 666-668; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1131-1132; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-80. See especially Singer JW *Introduction to Property* (2nd ed 2005) 162, who states that “[i]f an owner abandons her rights, it is not accurate to call the intentional trespasser a pirate or a thief.”

⁶⁰⁴ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1146; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁶⁰⁵ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1146-1147.

⁶⁰⁶ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1150; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1065. To the same effect are Sagaert V “De Verkrijgende Verjaring van Onroerende Goederen Herbezocht. Een Aanzet tot het Debat over het Verjaringsrecht” (2007) 39 *Rechtskundig Weekblad* 1582-1597 1585; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-82. See also the discussion under utilitarianism in section 4.4.4 above.

Nonetheless, the main problem of attempting to justify acquisitive outlaws is in justifying those situations where the adverse possessor knows that he is occupying the land of another because the possessor either does not or cannot acquire it through voluntary transfer. Under these circumstances it is indeed hard to argue that the behaviour of the squatter is of informational or any other social value.⁶⁰⁷ In this sense Peñalver and Katyal state that, even though a squatter may act out of greed and self-interest (*mala fides*), it would be justified to award ownership to him through prescription in terms of “objective distributive justice” if the squatter had real need of the land.⁶⁰⁸ Nevertheless, this justification in cases of “need” should not be interpreted as only including squatters who would otherwise starve or suffer harm. It can also encompass broader needs, such as that property is needed to “facilitate a minimally acceptable degree of participation in social life”, as well as the advancement of human flourishing in accordance with Radin’s personality theory.⁶⁰⁹

Adverse possession can also be justified by other non-utilitarian means, according to Peñalver and Katyal. For instance, the adverse possessor is normally a poor person, but someone who is willing to invest labour to improve the property of a neglecting owner.⁶¹⁰ The squatter then puts the property to efficient use, while the property must be sufficiently unimportant to the owner for him to “allow” this state of affairs to continue for the entire limitation period.⁶¹¹ Another consideration – even in cases involving the *mala fide* adverse

⁶⁰⁷ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1152-1153.

⁶⁰⁸ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1153-1154. See similarly Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 768. See further Van der Walt AJ *Property in the Margins* (2009) 184-185; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁶⁰⁹ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1156; Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 968-969; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 745-747; Radin MJ *Reinterpreting Property* (1993) 1. Justifying adverse possession or prescription on grounds of social justice falls outside the scope of this dissertation and will therefore not be investigated here. For a list of sources in this regard, see those cited by Van der Walt AJ *Property in the Margins* (2009) 184-185; Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1153-1158. The social-obligation theory developed by Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 offers another interesting take on the advancement of human flourishing.

⁶¹⁰ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1170.

⁶¹¹ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1170; Miceli TJ, Sirmans CF & Turnbull GK “Title Assurance and Incentives for Efficient Land Use” (1998) 6 *European Journal of Law and Economics* 305-323 310-311. See also Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1064, 1077; Cooter R & Ulen T *Law and Economics* (4th ed 2004) 155; Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156 151-152; Baker M,

possessor – is the view that it is “not wrong to appropriate someone else’s surplus property in order to provide for one’s own need when viable legal alternatives are not available.”⁶¹² These grounds Peñalver and Katyal advance indeed provide persuasive reasons for allowing the *mala fide* possessor in the framework of prescription.

Finally, I turn to the assessment of bad faith prescription according to the personality theory. Radin thinks that the personality theory cannot accommodate bad faith prescription. According to her, it is unclear how property possessed in bad faith can become constitutive of someone’s personhood if the possessor does not *bona fide* believe that he is the owner of it.⁶¹³ In other words, she casts doubt as to how a bad faith squatter can become strongly enough bound up with property to justify the squatter’s personal interest trumping the owner’s fungible interest. However, Hegel seems to deem the subjective intent of the possessor as irrelevant, since the Hegelian personality theory – on which Radin built her theory – merely requires an investment of the will into an object, coupled with possession.⁶¹⁴ In this context Hegel’s view can justify acquisition of ownership through bad faith prescription. Still, even if one assumes that this point is insufficient to include the *mala fide* possessor in Radin’s personality theory, regard must be had to the arguments that Cobb and Fox, Peñalver and Katyal and Fennell put forward, as discussed above. All these authors provide convincing reasons as to why *mala fide* possessors should be permitted in the framework of prescription,

Miceli T, Sirmans CF & Turnbull GK “Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes” (2001) 77 *Land Economics* 360-370 360; Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1130-1131; Rose CM “Possession as the Origin of Property” (1985) 52 *University of Chicago Law Review* 73-88 79-82, all of whom argue that adverse possession encourages productive and efficient land use. Peñalver and Katyal at 1170 use this example in US law to justify adverse possession with seven or 10-year limitation periods.

⁶¹² Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1170. See also Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1080-1083. Although acknowledging criticism pertaining to adverse possession, Peñalver and Katyal think that the stringent requirements of this legal institution help adverse possession to “get around” these problems. Indeed, they are of the opinion (at 1170-1171) that the period and requirements for adverse possession should be relaxed in our modern era of technology concerning property monitoring, so that this legal rule can better fulfil its redistributive function. This statement is remarkable, as sections 3.2.2.1 and 3.2.2.3.2.3 of chapter three above illustrate that some of the requirements for adverse possession – such as the *animus possidendi* requirement and the length of the limitation period – are less stringent than those of prescription in the civil law systems.

⁶¹³ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 749. Posner RA *Economic Analysis of Law* (6th ed 2003) 78 footnote 3 – relying on Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477 – is also of the opinion that only good faith adverse possession will be accommodated in this sense.

⁶¹⁴ Hegel GWF *Outlines of the Philosophy of Right* (1821, Houlgate S ed 1952) para 64, read with paras 51-52; Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 749.

which is also applicable in the context of the personality theory.⁶¹⁵ For instance, an urban squatter will always be aware of the fact that the property he occupies is the property of another and hence such a squatter will always be in bad faith.⁶¹⁶ Yet, despite the *mala fides* of these squatters, an argument is to be made that urban – and even rural – squatters indeed become as attached to occupied property as legal owners of homes become to their houses.⁶¹⁷ In this context it is possible that the occupied property starts to be constitutive of the squatter’s personhood, despite him being in bad faith.

4.6 Conclusion

This chapter investigates the traditional justifications behind prescription in Roman-Dutch, South African, Dutch and French law. Although these systems mainly provide two grounds for justifying prescription, namely the promotion of legal certainty and the punishment of neglectful owners, these rationales seem to fall short when compared to the justifications that English law provides for adverse possession. This shortcoming is illustrated by the number of justifications taken into consideration in the recent re-evaluation and reform of English adverse possession law. Although certain English law justifications are similar to those found in the four civil-law jurisdictions⁶¹⁸ mentioned, Dockray advances persuasive reasons as to why the effects of adverse possession ought to be limited. Although Dockray identifies the strongest reason for adverse possession as that it helps to ascertain ownership in unregistered land, which is analogous to the legal certainty argument in South Africa, the English Law Commission reasons that this rationale does not carry weight when the register provides conclusive proof of ownership. Therefore, it decided to “abolish” adverse possession regarding registered land.

⁶¹⁵ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260; Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186; Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096.

⁶¹⁶ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1081; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 253.

⁶¹⁷ See especially Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 and Fox L *Conceptualising Home: Theories, Law and Policies* (2007) 300-303 in this regard.

⁶¹⁸ South African law has a mixed legal system and not a civil law system in the formal context of the term. Yet, South African property law – of which prescription law forms part – is much nearer to the civil law tradition than to the common law.

I indicate that this approach by the Law Commission is flawed because it failed to take into account certain key moral and economic arguments. Consequently, this chapter relies on Locke's labour theory, Radin's personality theory, and utilitarianism and law and economics theory to show that adverse possession still plays an important role in a modern legal system, even regarding registered land. Although it is more difficult to justify having prescription in countries with a positive registration system, prescription clearly fulfils an important corrective and economic function in jurisdictions with a negative registration system, since it promotes legal certainty and lowers transaction costs.

In terms of the labour theory, chapter four establishes that an adverse possessor can obtain a labour theory claim in occupied property if he invests labour and effort in land that would otherwise lie abandoned. Although the labour theory *prima facie* seems to prevent non-consensual redistribution of ownership, one overcomes this problem by treating the owner's neglect of the property as *quasi*-abandonment. In this sense the property reverts to or remains in the commons from where an adverse possessor is able to obtain a labour theory claim in it through mixing labour with the land. Such an approach gains further support through certain qualifications Locke builds into his theory, such as that it will only be a permissible method of acquiring ownership as long as there remain enough unowned things in the commons. Furthermore, Locke strongly disapproves of the waste or non-use of property and mentions that property – under these circumstances – will remain in the commons from where others will then be able to appropriate it. Furthermore, the labour theory seems to regard the subjective mindset of the adverse possessor as irrelevant, since even a bad faith possessor is capable of mixing labour with an object. Accordingly, the labour theory justifies both good and bad faith adverse possession.

The second theory used to justify prescription is Radin's personality theory, which regards ownership of property as essential for human flourishing. She bases her theory on the Hegelian personality theory, which entails that a person must invest his will into an object – together with possessing it – before such person can obtain ownership. Radin develops her theory through acknowledging that certain property is more important to the way we constitute ourselves as humans (personal property) than property that does not serve this purpose (fungible property). These two kinds of property relationships are located on a continuum ranging from personal property at the one end to fungible property on the other. It follows that if a person has a personal property interest in a thing it will trump the mere

fungible interest another person may have in that same object. This is how the personality theory can justify prescription, since a possessor will normally treat possessed property as personal property while the absent owner probably regards it only as fungible property. Although it may not be simple to judge whether a possessor truly has a personal interest in occupied property, certain factors – such as the investment of time and labour into the property – serve as indications that the property is more constitutive to the possessor’s personality than to that of the neglectful owner. Such a scenario justifies protecting the rights of the long-term possessor over those of the absent owner. Singer’s “reliance interest” theory strengthens this conclusion, since it entails that the settled interests or expectations of squatters and third parties regarding property should enjoy protection if they existed for a long time. The personality theory finds further support in Alexander’s social-obligation norm, which obliges owners to help others in their community to develop their capabilities for attaining human flourishing.

Finally, I employ utilitarianism and law and economics theory to justify prescription. These two theories are discussed together, since both aim to maximise utility, albeit in different contexts. Classic utilitarianism – according to Bentham – attempts to maximise utility or happiness for the greatest number of people. Although this approach can lead to instances that justify minorities to suffer pain or injustice, one overcomes this problem through using Mill’s suggestion of coupling utility with justice, which is achieved through identifying – and then eliminating – instances of injustice. One can use Mill’s theory of utilitarianism to justify the transfer of ownership to a long-term possessor if it would cause greater justice to permit the absent owner to reclaim the property after having left it idle for long periods of time. Rule-utilitarianism embodies this approach, since it attempts to maximise utility in the long run through laying down certain rules (like prescription).

The second leg of the utilitarian justification is law and economics theory, which aims to structure the law to promote economic efficiency. The Coase theorem is central to law and economics theory and entails that voluntary exchange occurs in settings where transaction costs are low. Conversely, the law must provide ways to help reallocate scarce resources when high transaction costs prevent the occurrence of voluntary exchange. It follows that prescription will be economically justified if it promotes the shifting of resources to higher-valuing users by sufficiently lowering transaction costs. For this purpose I investigate the costs of prescription pertaining to the owner, the possessor, third parties and litigation. This

chapter concludes that prescription reduces transaction costs with the lengthening of the prescription period in all four these contexts. Prescription especially reduces search and inspection costs in a negative registration system that does not guarantee the correctness of the register. In this regard prescription clears titles and promotes legal certainty, since one can disregard (incorrect) information contained in the register that predate the period of prescription. However, this justification carries less weight in a positive registration system, which explains the presence of the strict requirements for prescription and adverse possession in German and English law. Consequently, prescription succeeds to shift property to higher-valuing users that would otherwise be prevented due to high transaction costs, especially if it operates as a mechanical entitlement determination rule – as suggested by Merrill.

Finally, chapter four indicates that the arguments against bad faith adverse possession are founded on incorrect reasoning, for it shows that sound reasons exist to disregard the distinction between *bona fides* and *mala fides*. To establish this point, I rely on the conclusion that the apparently simple distinction between good faith and bad faith is based on the fallacy that all adverse possessors who knowingly or advertently possess the property of others are “morally reprehensible”. This assumption is incorrect, as seen in the cases where urban squatters – who have no alternative accommodation – occupy unused property out of necessity. Fennell points out the misleading distinction between good and bad faith through focusing on the difficulty to determine whether someone is truly an advertent or inadvertent possessor. She furthers her argument through disentangling the way law and morality is conflated in the word “thief”. Fennell concludes that it is not the mere acquisitive thoughts of the possessor that pains or dispossesses the owner, but rather governmental action – in the form of prescription – that takes ownership away. In this sense Fennell indicates that if we want to prevent owners from experiencing this pain, then we have to completely abolish adverse possession and not merely limit it to cases of *bona fide* possession.

Peñalver and Katyal also provide convincing reasons for allowing bad faith prescription by focusing on the role that “acquisitive [property] outlaws” play in shaping US property law. These authors acknowledge – like Radin – that property is important to our individual identity, since it extends our capacity to live as human beings. In this sense *mala fide* possessors fulfil an important role, since they generate information as to the inefficient distribution of property rights in society. Accordingly, (bad faith) prescription qualifies as a medium to affect social welfare if the law allows the (bad faith) possessor – who is normally

poor and marginalised – to obtain ownership over property from the abundance of a (wealthy) owner. Peñalver and Katyal require that the law must protect long-existing property relationships if it contributes to a person's participation in the ownership system and in society, which participation will be detrimentally affected if such person cannot acquire ownership through prescription. Consequently, these authors acknowledge that prescription helps to reallocate resources to higher-valuing users when high transaction costs would otherwise prevent it. In this context one of the stronger justifications for adverse possession is that it affects social welfare through the redistribution of property.

The next chapter focuses on the constitutionality of prescription in the context of South African constitutional law. The conclusions drawn in this chapter play an integral role in my arguments to establish that prescription does not infringe the South African property clause.

CHAPTER 5: ACQUISITIVE PRESCRIPTION IN VIEW OF THE PROPERTY CLAUSE

5.1 Introduction

The previous chapter showed that there are valid moral and economic reasons to have acquisitive prescription (“prescription”) in a legal system, especially in countries with a negative registration system.¹ Nonetheless, arguments to the contrary also exist, as was seen with the English Law Commission’s Reports² and the litigation surrounding the *Pye* case in the United Kingdom and the European Court of Human Rights in Strasbourg.³ Indeed, it cannot be denied that prescription has drastic effects, considering it extinguishes ownership on the side of the owner.⁴

In previous chapters I discuss the requirements for prescription in South African law,⁵ as well as Dutch, French and German law.⁶ The requirements for prescription in Dutch and French law have interesting similarities with those of South African law, particularly since all these systems require possessors to possess property *animo domini*.⁷ This is contrary to English adverse possession law, where the possessor merely has to possess the property *animo possidendi*.⁸ As shown earlier, this is a vital difference between prescription and adverse possession.⁹

Chapter four highlights the objections to adverse possession in English law, which led to the enactment of the Land Registration Act 2002 (“LRA” or “2002 Act”).¹⁰ This Act effectively abolished adverse possession in English law concerning registered land, as it was found that

¹ See especially section 4.4.4 of chapter four above.

² *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001); *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998).

³ *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676; *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. These cases are discussed in section 3.2.3 of chapter two above. The two decisions by the European Court of Human Rights are reported as *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) and *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC), both of which are discussed in section 5.3.2.4.2 below.

⁴ For the requirements in South African law, see sections 2.3.1-2.3.2 of chapter two above. For the requirements of this legal institution in English, Dutch, French and German law, see sections 3.2, 3.3, 3.4 and 3.5 respectively in chapter three above.

⁵ See sections 2.3.1-2.3.2 of chapter two above.

⁶ See sections 3.3, 3.4 and 3.5 respectively of chapter three above.

⁷ With the intention of an owner: See section 2.3.2.1.1 of chapter two (South African law) and sections 3.3.2.2.1 and 3.4.2.1 of chapter three (Dutch and French law) above.

⁸ With the intention to possess: See section 3.2.2.3.2.3 of chapter three above.

⁹ See sections 3.2.2.3.2.1 and 3.2.2.3.2.3 of chapter three above.

¹⁰ See section 4.3.2 of chapter four above.

the traditional justifications for adverse possession do not carry weight if the register provides conclusive proof of title.¹¹ This position is similar to German law, which also has a positive registration system.¹² Nonetheless, three liberal property theories were considered to justify having adverse possession – or prescription – in modern legal systems.¹³ These theories are Locke’s labour theory, Radin’s personality theory and utilitarianism and law and economics theory, which theories play a vital role in justifying prescription in view of section 25 of the Constitution of the Republic of South Africa 1996 (“the Constitution”).¹⁴

Since prescription results in the extinguishment of ownership on the side of the owner, its implications in terms of the property clause must be considered, as section 25 provides for legitimate state interference with property. In view of this section, prescription may either amount to an arbitrary deprivation in terms of section 25(1) or an uncompensated expropriation under section 25(2)-(3), both of which would be unconstitutional. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (“FNB”)¹⁵ provides a framework within which this chapter assesses the effects of prescription. I also consider the possibility that prescription may – possibly – amount to constructive expropriation.

Some legal systems, such as Dutch and French – and perhaps also United States (“US”) law¹⁶ – distinguish between good and bad faith possessors in the context of prescription. It was indicated in chapter four that this distinction is based on incoherent reasoning and false preconceptions of the differences between *bona* and *mala fide* possessors.¹⁷ Accordingly, it is irrelevant to distinguish between these two kinds of possessors for purposes of the section 25 analysis.

¹¹ See sections 4.3.2-4.3.3 of chapter four above.

¹² See section 3.5 of chapter three above.

¹³ See section 4.4 of chapter four above. For the application of these theories in this chapter, see section 5.3.2.4.1 below.

¹⁴ See section 5.3.2.4 below.

¹⁵ 2002 (4) SA 768 (CC).

¹⁶ For the position in Dutch and French law, see sections 3.3.2.2-3.3.2.3 (for Dutch law) and section 3.4.2.2 (for French law) of chapter three above. This issue is not clear-cut in US law: See Helmholz RH “Adverse Possession and Subjective Intent” (1984) 61 *Washington University Law Quarterly* 331-358; Helmholz RH “More on Subjective Intent: A Response to Professor Cunningham” (1986) 64 *Washington University Law Quarterly* 65-106, together with the discussions in sections 4.4.4 and 4.5 of chapter four above.

¹⁷ See section 4.5 of chapter four above.

5.2 Analysis of the effects of acquisitive prescription

The section 25 analysis of prescription requires a brief overview of the functioning of this rule in South African law.¹⁸ Two pieces of legislation regulate prescription in South African law, namely the Prescription Act 18 of 1943 (“1943 Act”) and the Prescription Act 68 of 1969 (“1969 Act”). Both of these acts provide that a possessor acquires ownership *ex lege* over someone else’s property if she has been in open, continuous and undisturbed possession *animo domini* of that property for 30 years.¹⁹

*Pienaar v Rabie*²⁰ is a classic example that illustrates the harsh effects prescription can have in practice. I use the facts of this case for two reasons. Firstly, it serves as the factual situation to investigate prescription in terms of section 25. Secondly, this case has notable similarities with the facts of *JA Pye (Oxford) Ltd v United Kingdom*.²¹

The litigants in *Pienaar v Rabie*²² were the owners of two neighbouring farms in the district of Windhoek in Namibia. Although the boundaries of the farms were fenced, it appeared that a certain part of the appellant’s farm – consisting of 179 hectares – was fenced in as part of the respondent’s land by mistake. Neither party had knowledge of this error. The Court *a quo* found that the respondent indeed acquired ownership through prescription. The fact that the respondent satisfied the requirements for prescription was not challenged on appeal.²³ However, on appeal the appellant averred that a claim based on prescription could not succeed if there was no negligence on the side of the owner. The Appellate Division of the Supreme Court, as it then was, conducted an extensive analysis of the sources and justifications for prescription in Roman-Dutch and South African law. It concluded that the absence of negligence does not constitute a defence against a prescription claim because

¹⁸ See chapter two above for a more comprehensive discussion pertaining to prescription in South African law.

¹⁹ Section 2(1)-(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969. The requirements for prescription in South African law are discussed in greater detail in sections 2.3.1-2.3.2 of chapter two above.

²⁰ 1983 (3) SA 126 (A).

²¹ (2008) 46 EHRR 45 (GC). The facts of this case are discussed in section 3.2.3.2 of chapter three above and are therefore not repeated here.

²² 1983 (3) SA 126 (A).

²³ *Pienaar v Rabie* 1983 (3) SA 126 (A) 134. The respondent was found to have possessed the property with the necessary *possessio civilis*, which possession was also *nec vi*, *nec clam* and *nec precario*, as required by section 2(1) of the Prescription Act 18 of 1943.

negligence is not a requirement for prescription.²⁴ Accordingly, the Appellate Division confirmed that the respondent had acquired the land through prescription.

This case emphasises the impact prescription can have in practice, since the appellant in this context lost a substantial 179 hectares of farmland. This, coupled with the fact that prescription can run even in the absence of negligence, emphasises the necessity to analyse this legal institution in terms of the property clause.

5.3 Constitutional analysis of the effects of acquisitive prescription in terms of the *FNB* methodology

5.3.1 Introduction

The South African property clause – section 25 of the Constitution – can be divided into two main parts, namely protective provisions (section 25(1)-(3), read with section 25(4)) and reform provisions (section 25(5)-(9), read with section 25(4)).²⁵ This division illustrates a tension within section 25, which aims to both protect existing property rights and to achieve transformation in the form of land and other reforms. Yet, it is possible to read section 25 as a coherent whole and to view it as constituting a “creative tension”, without falling prey to conflicting interpretations.²⁶ To this end it is necessary to interpret the property clause purposively.²⁷ This much is clear, as the Constitutional Court states that section 25 must be viewed “as part of a comprehensive and coherent Bill of Rights in a comprehensive and coherent constitution.”²⁸

Section 39 of the Constitution determines how courts should interpret the Bill of Rights as well as legislation. It provides as follows:

²⁴ *Pienaar v Rabie* 1983 (3) SA 126 (A) 138-139.

²⁵ Van der Walt AJ *Constitutional Property Law* (2005) 12-13. Van der Walt at 12 further divides these two parts into four clusters of provisions, namely deprivation (section 25(1)), expropriation (section 25(2)-(3)), interpretation (section 25(4)) and land and other reforms (section 25(5)-(9)).

²⁶ Van der Walt AJ *Constitutional Property Law* (2005) 17-18.

²⁷ Van der Walt AJ *Constitutional Property Law* (2005) 17, 22-42. The Constitutional Court has indicated that it will interpret the Constitution purposively; see for instance *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-23; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 63-64; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 48. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 47-50.

²⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 63.

- “1. When interpreting the Bill of Rights, a court, tribunal or forum –
 - a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b) Must consider international law; and
 - c) May consider foreign law.
2. When interpreting any legislation ... every court ... must promote the spirit, purport and objects of the Bill of Rights.”

Section 8(2) of the Constitution provides that a provision in the Bill of Rights binds both natural and juristic persons. Section 8(4) states that juristic persons are entitled to rights contained in the Bill of Rights “to the extent required by the nature of the rights and the nature of that juristic person.” In terms of section 8(4) the Constitutional Court held in *FNB* that juristic persons – such as public companies – are entitled to the property rights under section 25.²⁹ Therefore, both private individuals and juristic persons are beneficiaries of the property rights in section 25.

This raises the issue of the vertical and horizontal application of the Bill of Rights, since prescription occurs almost exclusively through the actions of private parties. Vertical application of the Bill of Rights relates to the “vertical” relationship between an individual and the state, which imposes a duty on all state branches to respect the provisions of the Bill of Rights.³⁰ Direct horizontal application entails that individuals can rely directly on a provision in the Bill of Rights to protect themselves against abuses of their rights through the conduct of others.³¹ This distinction may *prima facie* seem to denote horizontal application of the Bill of Rights in the context of prescription, since prescription cases invariably relate to the actions (possession) of a possessor over the property of an owner. The owner loses ownership the moment the possessor satisfies all the requirements for prescription, while ownership is protected by section 25. However, closer analysis indicates that prescription does not, in fact, entail horizontal application of section 25 but rather direct vertical application. According to section 8(1) of the Constitution, the Bill of Rights “applies to all law, and binds the legislature”. Furthermore, section 39(2) of the Constitution stipulates that “[w]hen interpreting any legislation ... every court ... must promote the spirit, purport and objects of the Bill of Rights.” Therefore, legislation enacted by Parliament – such as the

²⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 45. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) para 57.

³⁰ Currie I & De Waal J *Bill of Rights Handbook* (5th ed 2005) 43.

³¹ Currie I & De Waal J *Bill of Rights Handbook* (5th ed 2005) 43.

prescription acts – must comply with the Bill of Rights.³² The prescription acts provide that a possessor acquires ownership over immovable property possessed for a period of 30 years.³³ It is not through the actions of the possessor alone that she acquires ownership, but through the empowering legislation, namely the prescription acts. Although the state seems to play no direct role in the context of prescription cases, it does so indirectly through its enactment of the two prescription acts that provide for the acquisition of ownership in this regard.³⁴ Through the prescription acts the state “awards” ownership to the possessor once all the requirements are met, while “taking ownership away” from the owner. Thus, a section 25 attack on prescription will not target the actions of the possessor, but rather the legislation that allows for the extinguishment of ownership on the side of the owner. Accordingly, prescription is an instance of vertical and not horizontal application of section 25.

5.3.2 *FNB* methodology

5.3.2.1 *Introduction*

In the leading Constitutional Court judgment on the property clause to date,³⁵ namely the *FNB* decision, the Court set out a seven-stage methodology for adjudicating section 25 disputes. Ackermann J set out these seven stages as follows:

- “(a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?”³⁶

³² Currie I & De Waal J *Bill of Rights Handbook* (5th ed 2005) 44.

³³ Subject to the other requirements also being met; see sections 2.3.1-2.3.2 of chapter two above.

³⁴ The European Court of Human Rights in *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 56 and *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 57 reached an interesting conclusion in this regard. It found that although the state does directly interfere with property rights through adverse possession (or prescription), the actions of the possessor – through obtaining ownership – are ascribed to the state, which triggers Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

³⁵ Nkabinde J describes this decision as “the leading judgment regarding the property clause” in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 35.

³⁶ I formulate the questions of the *FNB* case as set out by Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-3 (footnotes omitted). These questions were originally set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

In what follows, this chapter analyses prescription in the framework of the *FNB* methodology to determine whether it is in line with section 25.³⁷

5.3.2.2 *Does that which is taken away amount to “property” for purpose of section 25?*

The first question that concerns the constitutionality of prescription is whether the affected interest amounts to “property” that should enjoy constitutional protection. The Constitutional Court in *FNB* only briefly touched on this issue, since Ackermann J declined to provide “a comprehensive definition of property for purposes of s[ection] 25”, for he claimed that such an endeavour would be “judicially unwise” and “practically impossible”.³⁸ Yet, the Court acknowledged that ownership of corporeal movables, together with land ownership, “must ... lie at the heart of our constitutional concept of property”.³⁹ This *dictum*, read with section 25(4)(b)⁴⁰ of the Constitution, makes it clear that section 25 must apply to cases that involve ownership of land. In the context of prescription, an owner loses her land – a corporeal immovable – to a possessor who has been in possession of that land for 30 years and who has also satisfied all the requirements as set out by the prescription acts.⁴¹ It follows that the affected interest is ownership in land, since the owner loses such ownership in its totality should a possessor satisfy the requirements for prescription.

Since this dissertation only focuses on prescription pertaining to land, it is unnecessary to consider whether “property” also encompasses other property interests such as incorporeal property. Nonetheless, Van der Walt convincingly argues that this latter form of property

³⁷ This methodology was followed in *Offit Enterprises (Pty) Ltd and Another v COEGA Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) and *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC). Regarding the interesting application of this methodology in *Mkontwana*, see Van der Walt AJ *Constitutional Property Law* (2005) 155-160. For a case where the *FNB* methodology was not followed, see *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

³⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

³⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

⁴⁰ “For purposes of [section 25] – property is not limited to land.”

⁴¹ The requirements for prescription in South African law are discussed in sections 2.3.1-2.3.2 of chapter two above.

interests ought to be regarded as constitutional property and should thus also enjoy constitutional protection.⁴² This is clear from the following passage:

“For purposes of section 25 ‘property’ can therefore relate to a wide range of objects both corporeal and incorporeal, a wide range of traditional property rights and interests both real and personal, and a wide range of other rights and interests which (in the civil-law tradition) have never been considered in terms of property before.”⁴³

Furthermore, in *FNB* the Court found that it is irrelevant whether an owner makes limited or no use of an object for purposes of categorising that thing as constitutional property.⁴⁴ This is especially relevant in the context of prescription, where an owner may have “allowed” a possessor to possess her land for 30 years. Even in such a case the ownership in land will qualify as constitutional property, no matter how the owner used (or did not use) the property. From this discussion it is plain that the property interest in the context of prescription, namely ownership in land, amounts to “property” for purposes of section 25.

5.3.2.3 *Has there been a deprivation of property?*

In *FNB*, Ackermann J attached a wide meaning to deprivation by describing it as “any interference with the use, enjoyment or exploitation of private property”.⁴⁵ The Court went further and found that “[d]ispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense.”⁴⁶ In this situation the Constitutional Court distinguished between deprivation and expropriation and held that all interferences with property qualify as deprivation, while only some deprivations amount to expropriation.⁴⁷ Against this background expropriation is seen as a sub-species of deprivation. Consequently, should an

⁴² Van der Walt AJ *Constitutional Property Law* (2005) 72-78.

⁴³ Van der Walt AJ *Constitutional Property Law* (2005) 77.

⁴⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 54. Yet, this fact may be taken into consideration during the stage where one has to decide whether the deprivation is arbitrary or possibly justifiable under section 36(1). I return to this issue in section 5.3.2.4 below.

⁴⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

⁴⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

⁴⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. This interpretation of the difference between deprivation and expropriation does not contradict *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), although it is more nuanced: See Van der Walt AJ “Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court’s *Harksen* and *FNB* Decisions on the Property Clause” (2004) 121 *South African Law Journal* 854-878 867-869.

interference not pass the scrutiny of section 25(1) and such interference is not capable of being justified under section 36(1), then that is the end of the matter and the impugned law will be declared unconstitutional.⁴⁸ The question of whether the interference could possibly be in line with section 25(2)-(3) then never arises. Thus, the starting point for any constitutional inquiry as to whether there was an infringement of section 25 rights must always start with section 25(1).⁴⁹ This methodology makes it unnecessary to initially distinguish between deprivation and expropriation regarding a section 25 dispute. It only becomes necessary to consider whether prescription amounts to expropriation in terms of section 25(2)-(3) under two circumstances, namely if

- i) the deprivation is found to be in line with section 25(1); or
- ii) should it not be in line with section 25(1), if it is capable of being justified under section 36(1).⁵⁰

This initial wide meaning given to deprivation in *FNB* appears, however, to have been altered in subsequent decisions of the Constitutional Court.⁵¹ In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* (“*Mkontwana*”),⁵² the Constitutional Court seemed at first to follow the approach in *FNB* of what constitutes a deprivation, as it confirmed that the taking away of property is not required for a valid deprivation.⁵³ However, after this initial approach, Yacoob

⁴⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 58.

⁴⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 60.

⁵⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. The possibility that prescription can amount to expropriation is discussed in section 5.3.2.6 below.

⁵¹ See *Offit Enterprises (Pty) Ltd and Another v COEGA Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) and *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC).

⁵² 2005 (1) SA 530 (CC).

⁵³ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

J stated that whether or not there has been a deprivation “depends on the extent of the interference with or limitation of use, enjoyment or exploitation” and that “at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”⁵⁴ This description of deprivation is problematic, especially because the use of the words “normal restrictions” and “substantial interference” appear to limit the ambit of interferences that may constitute deprivation. For the sake of clarity this definition should preferably be regarded as a non-binding *obiter dictum*, as Yacoob J mentioned that the case before him did not require him to determine what precisely constitutes deprivation.⁵⁵ Van der Walt argues that “it serves no useful purpose to restrict the concept of deprivation to substantive or abnormal ... regulatory deprivation”.⁵⁶ I agree with Van der Walt that this qualification in *Mkontwana* should probably “just be ignored”⁵⁷ and that it is preferable to opt for the wider definition in *FNB*.⁵⁸

However, the question as to what constitutes deprivation was further complicated by two later Constitutional Court judgments concerning section 25, namely *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* (“*Reflect-All*”)⁵⁹ and *Offit Enterprises (Pty) Ltd and Another v COEGA Development Corporation (Pty) Ltd and Others* (“*Offit*”).⁶⁰ In its analysis of the deprivation issue the Constitutional Court in *Offit* referred to the definitions in both *FNB* and *Mkontwana* and held that *Mkontwana* expanded on the *FNB* approach.⁶¹ The Constitutional Court in *Offit* thus unfortunately approved the interpretation adopted in *Mkontwana*. In *Reflect-All*, Nkabinde J

⁵⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32.

⁵⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32, where Yacoob J stated that “[i]t is not necessary in this case to determine precisely what constitutes deprivation.” Despite this apparently stricter approach, Yacoob J proceeded to find that the limitation placed on the alienation of property in this case did indeed amount to deprivation: See para 33.

⁵⁶ Van der Walt AJ *Constitutional Property Law* (2005) 127.

⁵⁷ Van der Walt AJ *Constitutional Property Law* (2005) 127.

⁵⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. See also Van der Walt AJ *Constitutional Property Law* (2005) 126-128.

⁵⁹ 2009 (6) SA 391 (CC).

⁶⁰ 2011 (1) SA 293 (CC).

⁶¹ *Offit Enterprises (Pty) Ltd and Another v COEGA Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) paras 38-39.

also referred to *FNB*, after which she stated that that definition was expanded upon in *Mkontwana*.⁶² Fortunately, the Constitutional Court also emphasised – seemingly with approval – the minority judgment by O’Regan J in *Mkontwana*, where she stated that “[i]f one of the purposes of section 25(1) is to recognise both the material and non-material value of property to owners, it would defeat that purpose were ‘deprivation’ to be read narrowly.”⁶³ This position is in line with Van der Walt’s argument, namely that it would be unwise to unnecessarily restrict the meaning of deprivation for purposes of constitutional property law.⁶⁴

Prescription clearly does not result in the loss of only one or two instances of ownership, but affects ownership in its entirety. Should the wide approach towards deprivation – as formulated in *FNB* – be applied to prescription, it must clearly constitute deprivation. This finding remains the same even if one applies the narrower definition set out in *Mkontwana*. The reason for this conclusion is that an interference that causes the loss of full ownership must surely amount to a “substantial interference ... that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society”.⁶⁵ Chapter five bases this assumption on the fact that the Constitutional Court in both *Mkontwana*⁶⁶ and *Reflect-All*⁶⁷ dealt with provisions that merely limited the owners’ entitlements and did not deprive them of their ownership. In *Mkontwana*, the relevant entitlement was the right to alienate the property while *Reflect-All* concerned the use, enjoyment and exploitation of property. Neither of these cases concerned the loss of ownership as was the case in *FNB*. In light of this approach prescription must amount to a deprivation in terms of the definition set out in

⁶² *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 35.

⁶³ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 36, quoted from *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 89.

⁶⁴ Van der Walt AJ *Constitutional Property Law* (2005) 127; Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2.

⁶⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32.

⁶⁶ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 33

⁶⁷ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) paras 37-38.

Mkontwana. A finding to the contrary would “defeat the purpose”⁶⁸ of section 25(1), since it “serves no useful purpose to restrict the concept of deprivation to substantive or abnormal ... regulatory deprivation”.⁶⁹

5.3.2.4 *Is the deprivation in line with section 25(1)?*

5.3.2.4.1 *The position in South African constitutional law*

As the previous section establishes that prescription constitutes deprivation, the next stage of the inquiry concerns the question whether it is in accordance with section 25(1). Section 25(1) stipulates that a valid deprivation needs to comply with two requirements, namely that (i) it must take place in terms of law of general application and that (ii) such law may not permit arbitrary deprivation.

The first requirement entails that the deprivation must be in terms of law of general application. Prescription in South African law is governed by the two prescription acts, more specifically section 2(1)-(2) of the 1948 Act and section 1 of the 1969 Act. These sections clearly amount to law of general application, especially since *FNB* provides authority that legislative provisions such as section 114 of the Customs and Excise Act 91 of 1964 constitute law of general application.⁷⁰ The prescription acts are also specific and accessible, as is required by the constitutional provision.⁷¹ As this satisfies the first requirement in section 25(1), it now has to be determined whether the deprivation is arbitrary.

Ackermann J found in *FNB* that the word “arbitrary” in section 25(1) refers to a situation where the law of general application “does not provide sufficient reason for the particular

⁶⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 89.

⁶⁹ Van der Walt AJ *Constitutional Property Law* (2005) 127.

⁷⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61. See further Van der Walt AJ *Constitutional Property Law* (2005) 143-144 and Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-21.

⁷¹ *Gildenhuis v A Ontheieningsreg* (2nd ed 2001) 93; Van der Walt AJ *Constitutional Property Law* (2005) 143; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-21.

deprivation in question or is procedurally unfair.”⁷² In other words, a deprivation is arbitrary if there is not sufficient reason for it or if it is procedurally unfair.

FNB did not elaborate as to the meaning of procedural fairness in the context of section 25(1), but this aspect did enjoy attention in both *Mkontwana* and *Reflect-All*. In *Mkontwana* the applicants challenged the constitutional validity of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 for being in conflict with section 25(1). Section 118(1) limits an owner’s right of alienation by stipulating that the Registrar of Deeds may not register the transfer of property except on the production by the owner of a prescribed certificate issued by the municipality.⁷³ This certificate certifies that all consumption charges in connection with the property – also those ran up by occupiers other than the owner – have been paid in full during the two years preceding the certificate’s date of issue.⁷⁴ The applicants contended that section 118(1) was procedurally unfair as it did not impose an obligation upon municipalities to keep owners informed of the amounts owing by occupiers at reasonable intervals when requested by the owners in writing.⁷⁵ Yacoob J stated in his judgment that procedural fairness in the context of section 25(1) is a flexible concept and that the question whether a deprivation is procedurally fair depends on all the circumstances.⁷⁶ The Constitutional Court found that the municipality need not furnish owners with information on a continuous basis for the law to be procedurally fair, as this would be costly and impractical.⁷⁷ Furthermore, it held that owners are in a position to take care of their property and to monitor the occupation and use of their property by themselves

⁷² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 39.

⁷³ Section 118(1)(a) of the Local Government: Municipal Systems Act 32 of 2000.

⁷⁴ Section 118(1)(b) of the Local Government: Municipal Systems Act 32 of 2000.

⁷⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 65.

⁷⁶ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 65.

⁷⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 66.

as well as other occupiers.⁷⁸ Consequently, section 118(1) was found not to be procedurally unfair because municipalities are under no obligation to keep owners informed as to amounts owing by them or occupiers of their property.

In *Reflect-All* the applicants averred that section 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 arbitrarily deprived them of land contrary to section 25(1). These provisions pertain to the planning of provincial roads and were challenged for imposing restrictions on the use, enjoyment and exploitation of property owned by the applicants.⁷⁹ Nkabinde J held that the answer to this question is determined by one of two aspects, namely whether there exists sufficient reason for the deprivation and whether it is procedurally fair.⁸⁰ As to the procedural fairness aspect, *Reflect-All* confirmed the approach adopted in *Mkontwana* that it is a flexible concept that depends on all the circumstances.⁸¹ Regarding the procedural fairness issue, the applicants based their case on two grounds. Firstly, they complained that the Gauteng Transport Infrastructure Act 8 of 2001 allowed the relevant authorities to proclaim route determinations without providing for any process by which the applicants' interests as landowners could be considered. Secondly, they claimed that the relevant authorities should individually consider each preliminary design before deciding whether it should be published or not. By making this claim they argued that failure to reconsider the designs is procedurally unfair in that owners were not consulted regarding the designs. The Constitutional Court ruled against them and decided that it would be "unrealistic, impractical and not in the public interest" to adhere to the expectations of the applicants.⁸²

From the discussion of these two cases it follows that procedural fairness is always context- and fact-specific. It is a flexible notion and its content is determined by the circumstances of each case. In light of this it has to be decided whether the legal processes surrounding

⁷⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 66.

⁷⁹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 3.

⁸⁰ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 39.

⁸¹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 40.

⁸² *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 46.

prescription are procedurally fair. This depends on the facts and circumstances of each case, but it is clear that the majority of prescription cases involve a situation where a possessor possessed the land of another for 30 years without the knowledge of the owner.⁸³ The possessor obtains ownership over the land *ipso iure* the moment all the requirements for prescription are satisfied, while the owner loses her ownership over the land.⁸⁴ However, nothing prevents the owner from instituting court proceedings to contest the claim by the possessor that she acquired ownership over the land. The owner is also granted a time frame of 30 years to approach a court for an order to protect her ownership and evict the possessor from her land. Apart from this, the owner need merely grant express or tacit permission to the possessor to stop the running of prescription.⁸⁵ Furthermore, a person must possess the land *animo domini* for the whole duration of the prescription period, which is more difficult to satisfy than the *animus possidendi* requirement in adverse possession law.⁸⁶ In other words, the law grants an opportunity to the owner to contest the claim by the possessor in court, namely to prove that such possessor did not satisfy all the requirements for prescription. In this sense it seems that the process by which prescription functions is procedurally fair.⁸⁷ Apart from this the owner can still challenge the relevant provisions of the prescription acts that allow prescription as being in conflict with section 25. Furthermore, an owner can also lodge a case in terms of section 33, which concerns administrative justice. In terms of the latter, the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) has been promulgated to give effect to the constitutional mandate contained in section 33. However, an attempt to have prescription reviewed in terms of section 6 of PAJA will be to no avail, since prescription does not constitute administrative action. This is because prescription occurs *ipso iure*; no discretion is exercised and hence no decision is taken.⁸⁸ Thus, the only route open to

⁸³ For purposes of this discussion it is assumed that the possessor satisfied all the requirements for prescription as set out by the two prescription acts. The requirements for prescription are discussed in sections 2.3.1-2.3.2 of chapter two above.

⁸⁴ According to section 2(1)-(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969.

⁸⁵ See section 2.3.2.4 of chapter two above for a more detailed discussion in this regard.

⁸⁶ See section 2.3.2.1.1 of chapter two (for South African law) and compare it to section 3.2.2.3.2.3 of chapter three (for English law) above.

⁸⁷ This conclusion is analogous to the Grand Chamber’s decision in *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 80, where adverse possession was also found to be procedurally fair. This finding was confirmed by the first minority in *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) paras O-I22 – O-I23. However, the Fourth Chamber in *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) paras 73-76 found that adverse possession does not provide adequate procedural protection. These decisions are discussed in greater detail in section 5.3.2.4.2 below.

⁸⁸ Section 1 of the Promotion of Administrative Justice Act 3 of 2000 defines administrative action as “any decision taken, or any failure to take a decision”.

a person wishing to challenge the constitutional validity of prescription is through attacking the relevant provisions of the prescription acts via section 25.

The second leg of the test for arbitrariness involves the question of whether the deprivation is substantively arbitrary. In this regard the Constitutional Court has indicated that the substantive arbitrariness test is contextual in nature and depends on the facts and circumstances of each case.⁸⁹ Accordingly, the test is context-specific. The term “arbitrary” in section 25(1) is not limited to a mere rationality inquiry, but neither does it encompass a fully fledged proportionality analysis as found in section 36(1).⁹⁰ This is because the words “reasonable and justifiable”, which denote a proportionality-based inquiry, are only found in section 36(1) and do not appear in section 25(1). The severity or scope of the deprivation determines whether the test for substantive arbitrariness will encompass a rationality- or proportionality-like inquiry, these two concepts being located on two ends of a continuum.⁹¹ If a deprivation is found not to be substantively arbitrary, then it is constitutional and the issue of whether it is justifiable under section 36(1) does not arise.⁹²

According to *FNB*, a deprivation is substantively arbitrary if it “does not provide sufficient reason for the particular deprivation in question”.⁹³ Central to this inquiry is the relationship between the deprivation in question, the purpose it seeks to achieve and the impact the deprivation has on the use and enjoyment of property.⁹⁴ It follows that there must be a sufficient *nexus* between the reason(s) for the deprivation and the deprivation itself for it to be non-arbitrary. Regarding the application of the arbitrariness test, *FNB* also found that the validity of a deprivation depends on “an appropriate relationship between means and ends,

⁸⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 63; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 49.

⁹⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 65.

⁹¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 66, 100; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 49.

⁹² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 70.

⁹³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

⁹⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 49.

between the sacrifice the individual is asked to make and the public purpose this is intended to serve.”⁹⁵ In paragraph 100 of his judgment, Ackermann J provides a list of factors that should be considered when establishing whether sufficient reason is present. I now apply these factors in the context of prescription.

According to the first factor, one has to evaluate the relationship between the means employed and the ends or purpose sought to be achieved by prescription. Prescription entails the acquisition of ownership on the side of the possessor – together with the loss of ownership on the side of the owner – if such possessor has continuously been in possession of the owner’s property for 30 years.⁹⁶ In this sense it has long been accepted in South African law that prescription promotes legal certainty, since it affords *de iure* status to long-existing *de facto* situations.⁹⁷ However, are the means employed in this context, namely the loss of ownership, proportionate to the ends sought to be achieved, namely the promotion of legal certainty? Chapter four indicates that prescription fulfils an important corrective function by lowering transaction costs in systems with a negative registration system, where the law does not guarantee the correctness of the register.⁹⁸ Indeed, the Constitutional Court has indicated that economic considerations *do* play a role in the adjudication of constitutional property cases,⁹⁹ which supports this justification for prescription in terms of utilitarianism and law and economics theory.¹⁰⁰ Though the means employed may seem harsh when compared to the ends sought, one must remember that the grounds for succeeding with a claim based on prescription in South African law are narrow and difficult to satisfy, especially in terms of the *animus domini* requirement.¹⁰¹ This, coupled with the fact that an owner is granted up to 30

⁹⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 98.

⁹⁶ According to section 2(1)-(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969. For purposes of this discussion it is assumed that the possessor also satisfied the other requirements set out by the prescription acts for prescription. These requirements are discussed more fully in sections 2.3.1-2.3.2 of chapter two above.

⁹⁷ *Pienaar v Rabie* 1983 (3) SA 126 (A) 137-138. This issue is discussed in more detail in section 4.2.3 of chapter four above.

⁹⁸ This theme is discussed in greater detail in section 4.4.4 of chapter four above.

⁹⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 45, where Ackermann J found that if the property interests of juristic persons did not enjoy protection under section 25, that it would have “a disastrous impact on the business world”. This approach clearly has undertones of utilitarianism and law and economics theory.

¹⁰⁰ The justifications for prescription in terms of utilitarianism and law and economics theory are discussed in greater detail in section 4.4.4 of chapter four above.

¹⁰¹ This is largely due to the requirement that possession must be *possessio civilis*: See section 2.3.2.1 of chapter two and compare it to the English law position in section 3.2.2.3.2 of chapter three above.

years to protect her property and to evict the possessor or grant permission,¹⁰² seems to create a balance between the loss of ownership and the promotion of legal certainty. This position is strengthened if one takes into consideration that owners need not develop or even occupy their land to prevent the running of prescription; they merely have to periodically assert their right to exclude others to prevent loss of ownership through prescription.¹⁰³

The second factor requires a consideration of the complexity of relationships.¹⁰⁴ In *FNB* the relationships between the parties were quite complex. According to section 114 of the Customs and Excise Act 91 of 1964, the South African Revenue Services could detain and sell the appellant's motor vehicles that were located on the premises of a tax debtor to satisfy the debt of that tax debtor. As there was no relationship between the appellant and the tax debtor regarding the debt the latter owed to the South African Revenue Services, Ackermann J found section 114 to be substantively arbitrary, as it did not provide sufficient reason for the loss of the appellant's ownership to satisfy the debt owed by the tax debtor.¹⁰⁵ In this context the Court found that section 114 "cast the net far too wide."¹⁰⁶ The relationships that exist in cases involving prescription are not nearly as complex as those in *FNB*, since prescription involves a possessor in possession of the land of another. Even though the owner may not be aware of the presence of the possessor, there is a direct link between the owner, the possessor and the land lost and acquired, since the possessor is in possession of the owner's property. In this sense the link is the fact that the property lost is the property acquired, since the person who acts "as if owner" (the possessor) replaces the one not acting "as if owner" (the owner).¹⁰⁷ Consequently, the owner loses the property through prescription because of her inaction. Yet, it is true that owners – in most prescription cases – are not even aware of the

¹⁰² This will immediately cause prescription to stop running in favour of the possessor: See sections 2.3.2.4 and 2.3.3 of chapter two above.

¹⁰³ This is in line with the duty of stewardship (as described by Cobb N & Fox L "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 *Legal Studies* 236-260 253-256), as well as the social-obligation theory of Alexander GS "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745-820. The similarities between the duty of stewardship and the social-obligation norm are addressed in section 4.4.3 of chapter four above. See further Fennell LA "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 *Northwestern University Law Review* 1037-1096 1077; Merrill TW "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122-1154 1130-1131; Rose CM "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73-88 79. See also section 4.4.4 of chapter four above.

¹⁰⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁰⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108.

¹⁰⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108.

¹⁰⁷ For a discussion of the "as if owner" requirement, see section 2.3.2.4 of chapter two above.

presence of the possessor. This factor may be taken into consideration when the Court performs the balancing of interests to determine whether the deprivation is justified or not. Accordingly, one can conclude that there is a sufficient link between the owner and the possessor in prescription cases.

The third factor requires the Court to focus on the relationship between the purpose for the deprivation and the owner whose property is affected.¹⁰⁸ This means that a court must evaluate the relationship between the reasons for prescription and the owner who loses ownership. Chapter four shows that the purpose of prescription is to promote legal certainty by affording *de iure* status to long-existing *de facto* situations.¹⁰⁹ This purpose mainly finds support in utilitarianism and law and economics theory, which indicates that prescription lowers transaction costs and maximises utility in countries with a negative registration system.¹¹⁰ The negative value of the possibility that an owner may lose her property inadvertently through prescription is balanced out by the long prescription period, which is 30 years in South African law.¹¹¹ According to utilitarianism and law and economics theory, the longer the prescription period, the more secure the ownership of the owner, since the owner then has more time to discover the presence of a possessor in whose favour prescription may be running.¹¹² Michelman's concept of demoralisation costs strengthens this conclusion,¹¹³ since a possessor is likely to suffer increased demoralisation if she is evicted after being in possession of the property for a long time.¹¹⁴ On the flipside, an owner is likely to suffer decreased demoralisation the longer she is out of possession, which justifies a shifting of ownership to the possessor after a sufficient period of time has elapsed.¹¹⁵ Nonetheless, the price paid for achieving lower transaction costs and legal certainty is indeed substantial, since

¹⁰⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁰⁹ *Pienaar v Rabie* 1983 (3) SA 126 (A) 137-138. For a more detailed discussion in this regard, see section 4.2.3 of chapter four above.

¹¹⁰ See section 4.4.4 of chapter four above for a more detailed discussion.

¹¹¹ See section 4.4.4 of chapter four above for a more detailed discussion.

¹¹² Posner RA *Economic Analysis of Law* (6th ed 2003) 80; Singer JW "The Reliance Interest in Property" (1988) 40 *Stanford Law Review* 611-751 667; Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 727-728. See further section 4.4.4 of chapter four above.

¹¹³ Michelman FI "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harvard Law Review* 1165-1258 1214. This connection was made by Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 727-728.

¹¹⁴ This concept is discussed in terms of Radin's personality theory together with utilitarianism and law and economics theory: See sections 4.4.3 and 4.4.4 respectively of chapter four above.

¹¹⁵ This is drawn from the conclusions in section 4.4.4 of chapter four above.

the owner loses full ownership in the property possessed by the possessor. Yet, if a possessor possessed land belonging to another for a period of 30 years, it creates the impression that the possessor and not the owner is the true owner of that property. After such a long time of undisturbed possession, third parties – together with the possessor – are induced to believe that the possessor is the actual owner and, accordingly, the law should protect the “reliance interest” of these parties.¹¹⁶ One achieves this object if prescription awards ownership to the possessor after she satisfies the requisite period of possession.¹¹⁷ In this sense prescription is analogous to estoppel, which prevents an owner from vindicating her property in the hands of another when such owner induces parties to believe, to their detriment, that such other person is in fact the true owner.¹¹⁸ The fact that the possessor possessed the property *animo domini* for 30 years without any interference from the owner, coupled with the negative registration system in South African law, provides a strong *nexus* between the purpose of prescription and the owner who loses her property.

Concerning the question whether the deprivation is substantively arbitrary, the Court must look at all the factors/interests to arrive at a conclusion that is both just and equitable under the circumstances. Factors that can be taken into account are the long period required before a possessor can acquire ownership through prescription, the fact that the possessor actively uses the property and the possibility that the owner has forgotten about or neglected the property over a long time.¹¹⁹ Although this point is contested, this chapter establishes that prescription encourages productive land use, ensures the marketability of land and lowers transaction costs.¹²⁰ This provides adequate justification for the effect that prescription has on the deprived owner.

The fourth factor stipulates that regard must be had to the relationship between the purpose of prescription and the nature of the property, together with the extent of the deprivation in

¹¹⁶ Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751. See further sections 4.4.3-4.4.4 of chapter four above.

¹¹⁷ See section 4.4.4 of chapter four above.

¹¹⁸ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 255. The requirements for estoppel are not discussed here; see Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) 255-260 for a more complete discussion in this regard.

¹¹⁹ These factors are discussed in more detail in section 4.4.4 of chapter four above.

¹²⁰ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1129-1131; Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 678. See further section 4.4.4 of chapter four above.

respect of such property.¹²¹ As this dissertation only focuses on prescription in the context of land, the purpose of this legal institution is to promote legal certainty and reduce transaction costs regarding the ownership of land as a limited resource, which is vital for purposes of agriculture and housing.¹²² This rationale must be balanced against the effect of prescription, which results in the extinguishment of ownership in land.

The fifth factor states that where the property in question is ownership of land, a more compelling purpose has to be established to constitute sufficient reason than would be necessary if the deprivation is less intrusive.¹²³ Since prescription extinguishes ownership in land, it is clear that one has to advance more compelling reasons to establish sufficient reason for the deprivation caused by this rule. Given that the affected entitlement was also ownership in *FNB*, a similar approach to that decision is to be expected. The arguments that this chapter advances under the first three factors also pertain to this factor.

According to the sixth factor, more compelling reasons have to be advanced for a deprivation that embraces all the incidents of ownership than for a deprivation which only affects some incidents of ownership.¹²⁴ Prescription results in the loss of all the incidents of ownership on the side of the owner. This confirms the conclusions under the previous factors that more compelling reasons must be advanced to justify this legal institution in South African law. These reasons are discussed under the first three factors and are, therefore, not repeated here.

The seventh factor determines that whether “sufficient reason” is established by either a rationality- or proportionality-like inquiry depends on the interplay between variable means and ends, such as the nature of the property in question and the extent of the deprivation.¹²⁵ Prescription extinguishes ownership in land, which is a very drastic consequence. It follows that sufficient reason in this context has to be established through a proportionality-like inquiry between the means employed (loss of ownership) and ends or purposes achieved by prescription. The Court in *FNB* reached the same conclusion, where the deprivation resulted

¹²¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²² See section 4.2.3 of chapter four above.

¹²³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

in the loss of corporeal movables. Accordingly, a proportionality-like inquiry is required to justify prescription under section 25(1).

Finally, the eighth factor contextualises the substantive arbitrariness test, for it states that sufficient reason has to be decided on all the relevant facts of a particular case.¹²⁶ As a result, regard must be had to all the relevant facts, circumstances and factors of a prescription case if the Court is to decide whether sufficient reason exists for depriving the owner of ownership to achieve the objectives of prescription, as discussed above.

There is another factor a court can take into consideration to determine whether the deprivation was substantively arbitrary or not, although the Constitutional Court did not directly refer to it in *FNB*. This entails the importance of policy values such as personal autonomy of an owner and sanctity of the home in constitutional property law.¹²⁷ In this context, a deprivation is justified more easily if the affected property interest is located further from the personal sphere of the owner and less easily when it is located closer to it.¹²⁸ German constitutional law follows this approach, where the state's power to regulate the limits of property rights depends on how far a property right is located from the personal autonomy of an owner.¹²⁹ Accordingly, property rights concerning a person's home in German law are protected more strongly against deprivation than property rights pertaining to investment or commercial property.¹³⁰ Furthermore, since land – a finite resource of social importance – is subject to stricter social control and regulation,¹³¹ one can argue that prescription is justified in that it constitutes “stricter social control” over unused or neglected land. This approach is similar to Radin's personality theory, a link already identified in

¹²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²⁷ This observation is made by Van der Walt AJ *Constitutional Property Law* (2005) 153 footnote 115.

¹²⁸ Van der Walt AJ *Constitutional Property Law* (2005) 153 footnote 115. According to the author, a similar approach is followed in German constitutional law: See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135-141. This approach is analogous to Radin's personality theory, which is addressed in section 4.4.3 of chapter four above.

¹²⁹ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135; Van der Walt AJ “Unity and Pluralism in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part I” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 27-28; Van der Walt AJ “Subject and Society in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part II” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 322-345 327-328.

¹³⁰ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135-136.

¹³¹ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 136. This is analogous to what the Court said in *FNB*, where Ackermann J states that “property should serve the public good”: See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 52.

chapter four,¹³² where she differentiates between personal property and fungible property, claiming that the former should enjoy stronger protection than the latter.¹³³ It seems that the Constitutional Court approves of this line of thinking, since it acknowledged in *FNB* that this factor (whether an owner makes limited or no use of property) can play an important role to determine whether the deprivation is substantively arbitrary.¹³⁴ This *dictum* by Ackermann J opens the door to the possibility of including the factor whether an owner regards property as personal or fungible property – as identified by Van der Walt – in the substantive arbitrariness test. Such a conclusion is not in conflict with the position that an owner’s use (or non-use) of an object is irrelevant for classifying ownership in that object as constitutional property.¹³⁵ This approach by *FNB* illustrates that the Constitutional Court thinks along lines that are similar to those of Radin’s theory, since the personality theory also entails that even a fungible interest in property is recognised as property.¹³⁶

Alexander’s social-obligation norm, which is analogous to Radin’s personality theory, also provides a powerful moral justification for prescription under this extra factor for establishing whether prescription amounts to an arbitrary deprivation. I only present a brief discussion of this theory here, as it was already addressed in the previous chapter.¹³⁷ According to Alexander, humans must develop their capabilities to achieve human flourishing.¹³⁸ Since people unavoidably depend on others to attain these capabilities,¹³⁹ the social-obligation norm entails that owners have an inherent obligation to help others in their community to foster their capabilities to lead a well-lived life.¹⁴⁰ Chapter four argues that prescription recognises this social-obligation norm by forcing owners to “give” property, which is not constitutive of their capabilities due to their neglect of it, to squatters who regard it as essential to attain human flourishing and who occupy the land in a way that satisfies the strict requirements for

¹³² See section 4.4.3 of chapter four above.

¹³³ Radin MJ “Property and Personhood” (1982) 34 *Stanford Law Review* 957-1015 960, 986. See further section 4.4.3 of chapter four above.

¹³⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 54.

¹³⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 54.

¹³⁶ See section 4.4.3 of chapter four above.

¹³⁷ See section 4.4.3 of chapter four above for a more comprehensive discussion in this regard.

¹³⁸ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 761.

¹³⁹ Resources, such as land, are essential to developing one’s capabilities: See Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 768.

¹⁴⁰ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 774. See further Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 140-141.

prescription. Although it is still has to be seen whether the social-obligation norm underlies South African constitutional property law, such a possibility finds support in the fact that the Constitution aims to promote “an open and democratic society based on human dignity, equality and freedom” for all South Africans.¹⁴¹

If a court takes this extra factor into account, it appears that the possessor – who actively uses the property – regards it as personal property and that the owner, by “allowing” the possessor to use it, views it as mere commercial or fungible property. This entitles the possessor to receive stronger protection of her interest in the property, which protection is granted through prescription.

5.3.2.4.2 *The position in foreign constitutional law*

The jurisprudence of the European Court of Human Rights, which is foreign law, can be helpful in determining whether a deprivation is substantively arbitrary.¹⁴² However, Ackermann J warned that caution should be had for the way the Court interprets and applies the “margin of appreciation” requirement of Article 1 of the First Protocol (“Article 1”) to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (“the Convention”).¹⁴³ According to him, the “margin of appreciation” must not be regarded as being synonymous with “deference” in South African law.¹⁴⁴ This means that the outcome in *JA Pye (Oxford) Ltd v United Kingdom* (“Pye”),¹⁴⁵ as decided by the Grand Chamber, can be informative but not conclusive to determine whether the loss of ownership through prescription in South African law is in line with section 25(1). Nonetheless, the minority judgment by O’Regan J in *Reflect-All* puts an interesting slant on the warning by Ackermann J. O’Regan J is of the opinion that a proportionality-like inquiry as to whether a deprivation is arbitrary is comparable to the approach the European Court of Human Rights adopted to

¹⁴¹ Section 36(1) of the Constitution. I make this point by relying on Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 767 footnote 86.

¹⁴² According to section 39(1)(c) of the Constitution, a court may consider foreign law when interpreting the Bill of Rights.

¹⁴³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 107.

¹⁴⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 107.

¹⁴⁵ (2008) 46 EHRR 45 (GC). The implications of this case are discussed in the next few paragraphs.

adjudicate Article 1 cases.¹⁴⁶ In this context she specifically equates it to the “fair balance” that needs to be struck between the demands of the general interests of the community and the protection of a person’s fundamental rights.¹⁴⁷ Yet, despite the apparent rigidity of the “fair balance” test, the European Court of Human Rights actually defers to the authority of a member state by allowing a margin of appreciation.¹⁴⁸ This makes it clear that the so-called proportionality inquiry envisaged by Article 1 is in reality closer to a rationality inquiry. Accordingly, one should be careful of O’Regan’s J approach, which equates the “fair balance” test of Article 1 with a proportionality-like inquiry in South African law. Nonetheless, section 39(1)(c) of the South African Constitution provides that courts may consider foreign law when interpreting the Bill of Rights, which opens the door to an investigation in the manner in which the European Court of Human Rights adjudicates cases concerning the infringement of property rights.

Article 1 of the Convention provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

According to *Sporrong and Lönnroth v Sweden*,¹⁴⁹ Article 1 consists of three distinct rules.¹⁵⁰ The first rule – in the first sentence – guarantees the peaceful enjoyment of property.¹⁵¹ The second sentence contains the second rule, which subjects the deprivation – or expropriation in the South African context – of possessions to certain conditions.¹⁵² The third rule, in the

¹⁴⁶ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) paras 99-100.

¹⁴⁷ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 100, referring to *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 69.

¹⁴⁸ This is clear from *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 45 and *James v United Kingdom* (1986) 8 EHRR 123 para 51.

¹⁴⁹ (1983) 5 EHRR 35.

¹⁵⁰ *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 61. I do not discuss these three rules extensively here. See Allen T *Property Rights and the Human Rights Act 1998* (2005) 101-122 for a more complete discussion in this regard.

¹⁵¹ *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 61; *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 52; *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36 para 62; *James v United Kingdom* (1986) 8 EHRR 123 para 37.

¹⁵² *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 61; *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 52; *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36 para 62; *James v United Kingdom* (1986) 8 EHRR 123 para 37.

second paragraph, allows member states to regulate the use of property in terms of legislation, which legislation must be in accordance with the general interest.¹⁵³ This analysis of the structure of Article 1 was refined in *James v United Kingdom*,¹⁵⁴ where the Grand Chamber held that “[t]he second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.”¹⁵⁵ To avoid confusion, I use the South African law equivalents when referring to the types of interference mentioned in the second and third rules of Article 1.¹⁵⁶

An interference with property must strike a “fair balance”¹⁵⁷ between “the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights”¹⁵⁸ for it to be in line with the first rule. Accordingly, an expropriation of property under the second rule that does not provide for compensation that is “reasonably related” to the value of the expropriated property will normally be in conflict with Article 1.¹⁵⁹ However, full or reasonable compensation is neither expressly nor tacitly guaranteed under the second rule, which means that an expropriation without compensation can – in certain circumstances – be compatible with Article 1.¹⁶⁰ For deprivations under the third rule to be in line with Article 1, there must exist a “reasonable relationship of proportionality between the means employed and the aim sought to be realised.”¹⁶¹ Member states enjoy a

¹⁵³ *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 61; *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 52; *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36 para 62; *James v United Kingdom* (1986) 8 EHRR 123 para 37.

¹⁵⁴ (1986) 8 EHRR 123.

¹⁵⁵ *James v United Kingdom* (1986) 8 EHRR 123 para 37.

¹⁵⁶ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 110-111; Van der Walt AJ *Constitutional Property Law* (2005) 122. Van der Walt AJ *Constitutional Property Law* (2005) 122 points out the possibility of confusion when using Article 1 for comparative purposes. According to him, the term “deprive” in the second rule does not refer to state regulation in terms of the police power but rather to expropriation. Accordingly, cases of the European Court of Human Rights that pertain to deprivation in terms of the second rule must not be confused with deprivation in terms of section 25(1) of the South African Constitution. Therefore, I use the term “expropriation” when referring to the second rule while I use “deprivation” in the context of the third rule.

¹⁵⁷ This notion is discussed comprehensively by Allen T *Property Rights and the Human Rights Act 1998* (2005) 123-166

¹⁵⁸ *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 69; *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 53; *Beyeler v Italy* (2001) 33 EHRR 52 para 107.

¹⁵⁹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 54; *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 47. See further Allen T *Property Rights and the Human Rights Act 1998* (2005) 112.

¹⁶⁰ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 47. See also Allen T *Property Rights and the Human Rights Act 1998* (2005) 118.

¹⁶¹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 55.

wide “margin of appreciation” concerning the means employed and purpose of a deprivation to determine this “reasonable relationship”.¹⁶²

When Pye first brought its case to the European Court of Human Rights, the Fourth Chamber found that adverse possession amounts to expropriation under the second rule instead of deprivation of property under the third rule.¹⁶³ The Fourth Chamber explicitly rejected the traditional justifications for adverse possession, since it required “factors over and above those which explain the law on limitation.”¹⁶⁴ In this sense the Fourth Chamber decided that the legal certainty argument that adverse possession affords *de iure* status to *de facto* situations carries less weight in a system where land is registered.¹⁶⁵ The Fourth Chamber found adverse possession to be in conflict with Article 1, since it did not provide for compensation to the owner and that there was no adequate procedural protection for such owner either.¹⁶⁶ For these reasons the majority¹⁶⁷ held that adverse possession imposed an individual and excessive burden on the applicants (Pye) that upset the fair balance between the demands of the public interest and their right to peaceful enjoyment of their possessions, which violated Article 1.¹⁶⁸

After this decision the United Kingdom government appealed to the Grand Chamber of the European Court of Human Rights. The Grand Chamber held that adverse possession in the context of registered land amounts to a deprivation under the third rule rather than expropriation under the second rule.¹⁶⁹ The Grand Chamber advanced the following reasons for this finding:

¹⁶² *Allgemeine Gold- und Silberscheideanstalt v United Kingdom* (1987) 9 EHRR 1 para 52; *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 55.

¹⁶³ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 62. The minority agrees with this finding in paras O-II and O-I4.

¹⁶⁴ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) paras 63-64.

¹⁶⁵ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 65.

¹⁶⁶ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) paras 73-76. The minority in paras O-II and O-I4 disagrees with the finding that the absence of compensation causes adverse possession to be in conflict with Article 1.

¹⁶⁷ The Fourth Chamber was split by four votes to three, the majority consisting of judges Pellonpää, Bratza, Strážnická and Pavlovski, while judges Maruste, Garlicki and Borrego Borrego delivered the minority judgment.

¹⁶⁸ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 75. The minority disagrees with the majority on this point in paras O-II – O-I4 and finds that adverse possession is compatible with Article 1.

¹⁶⁹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) paras 65-66. The first minority in para O-I7 agrees with the majority on this point. The opposite conclusion was reached by the majority of the Fourth Chamber in *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) paras 58-62. The second minority in *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) paras O-II1, O-II9 also finds that adverse

“The applicant companies did not lose their land because of a legislative provision which permitted the State to transfer ownership in particular circumstances (as in the cases of *AGOSI*, *Air Canada*, *Gasus*), or because of a social policy of transfer of ownership (as in the case of *James*), but rather as the result of the operation of the generally applicable rules on limitation periods for actions for recovery of land.”¹⁷⁰

The Grand Chamber reinforced this position by arguing that the statutory provisions that resulted in the loss of ownership through adverse possession “were ... not intended to [expropriate] paper owners of their ownership, but rather to regulate questions of title”.¹⁷¹ Furthermore, it held that adverse possession was part of the general land law and intended to regulate “limitation periods in the context of the use and ownership of land as between individuals.”¹⁷² Although the distinction between the three rules is by no means self-evident in the jurisprudence surrounding Article 1,¹⁷³ I argue below that prescription does not amount to expropriation.¹⁷⁴ According to Allen, it makes little difference whether an interference is incorrectly classified under a certain rule, as the application of the “fair balance” principle – which applies to all three rules – should produce the same result on a specific set of facts.¹⁷⁵

When the Grand Chamber decided whether adverse possession pursued a legitimate aim in the public interest, it had regard to justifications provided for limitation periods in personal

possession amounts to expropriation. For a discussion of the *Pye* decisions, see Waring EJL *Aspects of Property: The Impact of Private Takings* (2009) 164-168.

¹⁷⁰ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 65.

¹⁷¹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 66.

¹⁷² *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 66.

¹⁷³ I extrapolate this from the conflicting findings by the Grand and Fourth Chambers pointed out above, together with Allen T *Property Rights and the Human Rights Act 1998* (2005) 103-106 and Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 96-120. According to Allen at 103 and 121-122, the absence of a compensation guarantee under the second rule mostly avoids the issue of having to distinguish between the first, second and third rules. This position is reinforced by Johnston D “*JA Pye (Oxford) Ltd v United Kingdom: Deprivation of Property Rights and Prescription*” (2006) 10 *Edinburgh Law Review* 277-282 279-280. I am indebted to Prof Reid for bringing this article under my attention.

¹⁷⁴ See section 5.3.2.6 below, though my opinion was formed from a South African law perspective. Waring EJL *Aspects of Property: The Impact of Private Takings* (2009) 169-170 and Gretton GL “Private Law and Human Rights” (2008) 12 *Edinburgh Law Review* 109-114 110-112 criticise the Grand Chamber for categorising adverse possession under the third rule. I am indebted to Prof Reid for bringing Gretton’s article under my attention.

¹⁷⁵ Allen T *Property Rights and the Human Rights Act 1998* (2005) 103-104, 118, 121-122. According to Allen, the classification of an interference under one of the rules is relevant but not conclusive to the outcome of a case because compensation is not guaranteed under the second rule. Of the same mind are Gretton GL “Private Law and Human Rights” (2008) 12 *Edinburgh Law Review* 109-114 112 and Johnston D “*JA Pye (Oxford) Ltd v United Kingdom: Deprivation of Property Rights and Prescription*” (2006) 10 *Edinburgh Law Review* 277-282 279-280. The irrelevance of the classification between expropriation and deprivation under Article 1 is analogous to the “telescoping” effect of the arbitrariness test in the context of section 25, as pointed out by Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-2 – 46-3, 46-19 – 46-20, 46-32. However, Allen does provide a *caveat* at 112 where he states that the differentiation between expropriation and deprivation “is one area where the tactical possibilities should not be ignored.”

injury cases in *Stubbings and Others v United Kingdom*.¹⁷⁶ According to that case, limitation periods promote legal certainty, protect defendants from stale claims and prevent injustice.¹⁷⁷ The latter objective is achieved by preventing the adjudication of cases based on evidence that may have become lost over time. The Grand Chamber found that these justifications also hold water in the context of limitation periods for recovery of land.¹⁷⁸ It further confirmed that states enjoy a wide “margin of appreciation” when determining what is in the public interest.¹⁷⁹ Consequently, it held that adverse possession is not “manifestly without reasonable foundation”, as there existed a general interest in both the limitation period itself and the extinguishment of ownership after the expiration of the limitation period.¹⁸⁰

The Grand Chamber regarded the “relatively long” 12-year limitation period – together with the fact that “very little action” on the side of an owner is able to stop time running – as central arguments to justify adverse possession.¹⁸¹ As to procedural protection or fairness, the Grand Chamber found that not only was the option open to an owner to apply for repossession of the land during the limitation period, but that the owner could also contest a claim made by an adverse possession in the domestic courts.¹⁸² It follows that the Grand Chamber found that adverse possession did not upset the fair balance required by Article 1.¹⁸³ The reasons advanced for justifying adverse possession in *Pye* are analogous with the application of the substantive arbitrariness test discussed above. It follows that I arrive at the

¹⁷⁶ (1997) 23 EHRR 213 para 49. *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) referred to this case in para 68. The majority in *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) expressly rejected these reasons for justifying adverse possession in paras 63-64.

¹⁷⁷ *Stubbings and Others v United Kingdom* (1997) 23 EHRR 213 para 49.

¹⁷⁸ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 69. Johnston D “*JA Pye (Oxford) Ltd v United Kingdom: Deprivation of Property Rights and Prescription*” (2006) 10 *Edinburgh Law Review* 277-282 280-281 criticises *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) for not taking these factors into consideration when it found adverse possession to be in conflict with Article 1. The second minority in *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) paras O-II4, O-II7 finds that these justifications do not hold water if one is able to determine who the owner is by investigating the register.

¹⁷⁹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 71, citing *Jahn v Germany* (2006) 42 EHRR 49 para 91.

¹⁸⁰ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 74. The first minority in para O-I9 agrees with the majority on this point.

¹⁸¹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 78.

¹⁸² *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 80. The first minority in paras O-I22 – O-I23 agrees with the majority that adverse possession does afford sufficient procedural protection for the owner. To the contrary is the majority in *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) paras 73-76, where it was held that adverse possession does not provide adequate procedural protection for an owner.

¹⁸³ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 85. The first minority disagreed with the majority on this point in para O-II and holds that adverse possession does violate Article 1. According to the first minority in paras O-I23 – O-I28, adverse possession does not strike a fair balance between the rights of the owners and the general interest served. The second minority also disagreed with the majority and found in paras O-III1, O-III10 and O-III13 that adverse possession does violate Article 1, since it amounts to an uncompensated expropriation.

same conclusion as the majority¹⁸⁴ in the Grand Chamber judgment, namely that the deprivation affected by prescription in South African law is neither arbitrary nor “manifestly without reasonable foundation”. The fact that the Grand Chamber held adverse possession (which merely requires a person to possess land *animo possidendi*) complies with Article 1 of the First Protocol strengthens the possibility that the South African Constitutional Court will find that prescription is in line with the property clause.

5.3.2.5 *Can the deprivation be justified in terms of section 36(1)?*

Should a deprivation not satisfy the requirements of section 25(1), either because it is not authorised by law of general application or because it is arbitrary, such deprivation could theoretically be justified in terms of section 36(1) of the Constitution.¹⁸⁵ Section 36(1) provides that rights in the Bill of Rights may only be limited if such limitation is “reasonable and justifiable in an open and democratic society”.

Roux, supported by Van der Walt, indicates that – if one strictly follows the methodology set out in *FNB* – section 36(1) is unlikely to play any meaningful role in a constitutional property challenge.¹⁸⁶ This is because the proportionality test in section 36(1) “is probably similar in spirit but stronger in force than the (variable) non-arbitrariness test laid down in the *FNB* decision.”¹⁸⁷ Roux bases his observation on two reasons. Firstly, if the deprivation is not authorised by law of general application, it is impossible to survive section 36(1) scrutiny, as section 36(1) also requires the infringement to take place in terms of law of general application.¹⁸⁸ Secondly, if the deprivation is found to be substantively or procedurally

¹⁸⁴ The Grand Chamber split with 10 votes to seven, the majority consisting of judges Costa, Zupancic, Lorenzen, Cabral Barreto, Butkevych, Baka, Zagrebelsky, Mularoni, Jaeger and Ziemele, while judges Rozakis, Bratza, Tsatsa-Nikolovska, Gyulumyan and Šikuta constituted the first minority. The second minority was delivered by judges Loucaides and Kovler.

¹⁸⁵ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-26 – 46-28. The Court acknowledged this possibility in *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) para 34. However, Van der Walt says that although section 25 is not explicitly excluded from limitation under section 36(1), it would be highly unlikely to justify an interference that is in conflict with section 25 under section 36(1): See Van der Walt AJ *Constitutional Property Law* (2005) 56-57. To the same effect is Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 110.

¹⁸⁶ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-26 – 46-28; Van der Walt AJ *Constitutional Property Law* (2005) 53-57.

¹⁸⁷ Van der Walt AJ *Constitutional Property Law* (2005) 53.

¹⁸⁸ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-26; Van der Walt AJ *Constitutional Property Law* (2005) 55.

arbitrary, it is highly unlikely to be “reasonable and justifiable in an open and democratic society”, as required by section 36(1).¹⁸⁹ Even if the deprivation is found to be arbitrary due to the fact that it extinguishes all instances of ownership without sufficient reason (which entails an inquiry on the proportionality side of the spectrum), a section 36(1) analysis will at best merely confirm the conclusion already reached under the arbitrariness test inquiry.¹⁹⁰ In light of the above-mentioned position, it seems that section 36(1) will play an extremely limited, if any, role in cases where a deprivation is found to contravene the requirements of section 25(1). It is worth emphasising that the limitation issue under section 36(1) does not arise if a deprivation is found to comply with section 25.¹⁹¹ Due to the standard of the arbitrariness inquiry – which is a contextual test that varies between “thin” rationality and “thick” proportionality analysis – the matter of the limitation clause seems to have “receded into the background.”¹⁹²

Should prescription be found to amount to an arbitrary deprivation of property in terms of section 25(1) and should the predictions by Roux and Van der Walt prove to be correct, it is highly improbable that such a deprivation will be justifiable in terms of section 36(1). Should this be the case, prescription will be unconstitutional and the matter will end there. However, in the unlikely event that the arbitrary deprivation in this context is found to be justifiable in terms of section 36(1),¹⁹³ the next stage in the *FNB* methodology necessitates an inquiry as to whether prescription amounts to an expropriation in terms of section 25(2). One must also follow this route even if prescription constitutes – as I argue – a non-arbitrary deprivation.

5.3.2.6 *Has there been an expropriation in terms of section 25(2)?*

¹⁸⁹ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-26; Van der Walt AJ *Constitutional Property Law* (2005) 55.

¹⁹⁰ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-27; Van der Walt AJ *Constitutional Property Law* (2005) 55-57. For an example to the contrary, see *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) paras 34-35. In this case the Land Claims Court held that the appropriation of a grave by an occupier on someone else’s land in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) would be justifiable in terms of section 36(1), even if it was regarded as an expropriation of land and even though ESTA does not provide for compensation as required by section 25(2) of the Constitution. However, the Court in this instance did not decide whether there was an expropriation.

¹⁹¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 70.

¹⁹² Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-3.

¹⁹³ As was the case in *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC).

The next stage in the *FNB* methodology, as applied here, involves ascertaining whether prescription amounts to expropriation in terms of section 25(2) of the Constitution. In this regard Ackermann J stated that deprivation encompasses all forms of interference with property while expropriation applies only to a narrower species of such interference.¹⁹⁴ Consequently, if prescription does not constitute an arbitrary deprivation, it has to satisfy the requirements in section 25(2) if it amounts to expropriation.

In light of certain findings by our courts, it is necessary to provide clarity regarding the nature of expropriation before I can focus on the requirements for this kind of interference. In the first constitutional case regarding expropriation Goldstone J stated that expropriation “involves acquisition of rights in property by a public authority”.¹⁹⁵ The recent Constitutional Court judgment of *Reflect-All*¹⁹⁶ followed this approach. In that decision Nkabinde J stated that courts should be “cautious” to extend the meaning of expropriation to situations where the deprivation does not result in the state acquiring the property involved.¹⁹⁷ This approach tends to oversimplify matters, since it is clear that expropriated rights need not be acquired by the state to constitute expropriation.¹⁹⁸ It follows that expropriated property can also be acquired by (or transferred to) parties other than the state – for example third parties – where the transfer is in the public interest or serves a public purpose, such as legitimate land reform initiatives.¹⁹⁹ It is a pity that the Constitutional Court in *Reflect-All* confirmed this position adopted in *Harksen v Lane NO and Others*²⁰⁰ to determine whether a certain interference amounts to expropriation. Nonetheless, this chapter assumes that expropriation in favour of private third parties is constitutionally possible.

¹⁹⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

¹⁹⁵ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 32.

¹⁹⁶ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 63.

¹⁹⁷ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 64.

¹⁹⁸ See generally the objections by Van der Walt AJ & Botha H “Coming to Grips with the New Constitutional Order: Critical Comments on *Harksen v Lane NO*” (1998) 13 *South African Public Law* 17-41; Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2, Van der Walt AJ *Constitutional Property Law* (2005) 180, 182-183, 189 and Gildenhuis A *Onteieningsreg* (2nd ed 2001) 8-9.

¹⁹⁹ Section 6(2)(dA) of ESTA might be of such a nature, since it allows occupiers to bury deceased members of their family on the owner’s farm: See *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC). Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2 cites section 25(4)(a) of the Constitution as an example that allows the state to expropriate property in the interest of private beneficiaries to promote land reform. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-31; Van der Walt AJ *Constitutional Property Law* (2005) 182-183, 189; Gildenhuis A *Onteieningsreg* (2nd ed 2001) 8-9.

²⁰⁰ 1998 (1) SA 300 (CC).

Expropriation refers to the situation where the state extinguishes a person's rights in property, which rights are in turn usually acquired by the state or by a third party against payment of compensation to the expropriated party.²⁰¹ Yet, it is not strictly required that the state or a third party acquire the expropriated rights, as mere extinguishment of rights by the state can also amount to expropriation.²⁰² Furthermore, expropriation in South African law must be in the public interest or for a public purpose to be constitutionally valid.²⁰³ Expropriation is a state action carried out in terms of authorising legislation.²⁰⁴ In this regard expropriation is an administrative action, which means that the state has to exercise a discretion when it decides to expropriate a party.²⁰⁵

It was seen in the previous paragraph that expropriation must take place in accordance with empowering legislation.²⁰⁶ Any attempted expropriation that is not based on legislation that allows expropriation is void.²⁰⁷ Expropriation must be exercised in terms of legislation, which legislation must determine the circumstances, procedures and conditions under which expropriation may be executed.²⁰⁸ Consequently, expropriation in terms of the common law is not possible in South African law, since an act of expropriation "must rest upon a legislative foundation."²⁰⁹ The Expropriation Act 63 of 1975 fulfils this role in South African law. It follows that the power to expropriate must be explicitly granted by legislation to government institutions for specific purposes.²¹⁰ In the recent decision of *Ekurhuleni Metropolitan Municipality v Dada NO and Others*,²¹¹ the Supreme Court of Appeal confirmed the principle that our courts do not have the inherent power to order a forced sale –

²⁰¹ Van der Walt AJ *Constitutional Property Law* (2005) 188-189; Gildenhuis A *Onteieningsreg* (2nd ed 2001) 8.

²⁰² Van der Walt AJ *Constitutional Property Law* (2005) 188-189.

²⁰³ Section 25(2)(a) of the Constitution.

²⁰⁴ *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. See also Van der Walt AJ *Constitutional Property Law* (2005) 239; Gildenhuis A *Onteieningsreg* (2nd ed 2001) 49, 93.

²⁰⁵ Van der Walt AJ "Constitutional Property Law" (2009) 2 *Juta's Quarterly Review* para 2.4; Gildenhuis A *Onteieningsreg* (2nd ed 2001) 10-11, 14-15, 77.

²⁰⁶ *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. See also Van der Walt AJ *Constitutional Property Law* (2005) 239 and Gildenhuis A *Onteieningsreg* (2nd ed 2001) 49, 93.

²⁰⁷ Gildenhuis A *Onteieningsreg* (2nd ed 2001) 49.

²⁰⁸ Gildenhuis A *Onteieningsreg* (2nd ed 2001) 9-10: "Die reg moet ingevolge wetgewing uitgeoefen word, wat die omstandighede, prosedures en voorwaardes waaronder onteiening mag plaasvind, vaslê." ("The right of expropriation must be exercised in terms of legislation, which must set out the circumstances, procedures and conditions under which expropriation may take place.")

²⁰⁹ *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. To the same effect is *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 81. See also Gildenhuis A *Onteieningsreg* (2nd ed 2001) 10, 49.

²¹⁰ *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 81.

²¹¹ 2009 (4) SA 463 (SCA).

or expropriation – of property.²¹² This decision is in line with the view that the power to expropriate must be authorised by specific legislation, which power is a public right that only accrues to the state.²¹³ This means that courts are only allowed to order expropriation if such power is granted by legislation, which legislation must specifically empower the court to make such an order.²¹⁴

In light of the above it is difficult to see how prescription can amount to expropriation. Firstly, neither of the prescription acts grants the state the power to expropriate property. In this sense they do not set out the circumstances, procedures or conditions in any way as required by law to facilitate a valid expropriation.²¹⁵ It was seen in the preceding paragraph that common law expropriation is not possible in South African law, since the power to expropriate must be granted to the state by legislation. It follows that when a court confirms that the requirements for prescription have been met, which a party has to plead *in curiam*,²¹⁶ the Court does not order expropriation but merely confirms the rights in property that are regulated in terms of legislation. Indeed, the “[c]ourts only have the power to order expropriation if that power is granted to them specifically, and that would be by way of exception.”²¹⁷ Furthermore, the prescription acts do not provide for compensation either, which serves as yet another indication that prescription does not amount to expropriation. This conclusion finds support in the presumption that legislation does not authorise expropriation if it contains no explicit or tacit provision that provides for the payment of compensation.²¹⁸ Finally, both the prescription acts determine that the possessor acquires ownership over property *ex lege* the moment all the requirements for prescription are met.²¹⁹

²¹² *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) para 14. Although section 38 of the Constitution empowers courts to grant “appropriate relief”, the Supreme Court of Appeal stated in this paragraph that this notion does not grant the Court authority to order a municipality to purchase property.

²¹³ *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 258: “Die reg van onteiening is ‘n publieke reg want dit kom die Staat alleen toe.” (“The right of expropriation is a public right because it only accrues to the State.”) See also Gildenhuis A *Onteieningsreg* (2nd ed 2001) 9, 49-59; Van der Walt AJ “Constitutional Property Law” (2009) 2 *Juta’s Quarterly Review* para 2.4 and Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2.

²¹⁴ Van der Walt AJ “Constitutional Property Law” (2009) 2 *Juta’s Quarterly Review* para 2.4.

²¹⁵ Gildenhuis A *Onteieningsreg* (2nd ed 2001) 9-10: “Die reg moet ingevolge wetgewing uitgeoefen word, wat die omstandighede, prosedures en voorwaardes waaronder onteiening mag plaasvind, vaslê.” (“The right of expropriation must be exercised in terms of legislation, which must set out the circumstances, procedures and conditions under which expropriation may take place.”)

²¹⁶ See section 14 of the Prescription Act 18 of 1943 and section 17(1)-(2) of the Prescription Act 68 of 1969. Section 17(1) of the latter Act clearly provides that courts may not take *mero motu* notice of prescription.

²¹⁷ Van der Walt AJ “Constitutional Property Law” (2009) 2 *Juta’s Quarterly Review* para 2.4.

²¹⁸ *Belinco (Pty) Ltd v Bellville Municipality and Another* 1970 (4) SA 589 (A) 597. See also Gildenhuis A *Onteieningsreg* (2nd ed 2001) 13, 18 and sources cited.

²¹⁹ Section 2(1)-(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969.

Since no discretion is exercised to determine whether a person has acquired ownership through prescription, as it is purely affected by operation of law, it is clear that no decision is taken. This also negates the possibility that prescription amounts to expropriation, since expropriation takes place as a result of administrative action. In the absence of a discretion, which is the main requirement necessary to constitute administrative action, it follows that prescription does not amount to administrative action and – therefore – it is highly unlikely to constitute expropriation.²²⁰

Even if prescription does not amount to a formal expropriation, one has to determine whether this legal institution perhaps amounts to what is known as constructive expropriation. To answer this question, it needs to be considered what this notion entails as well as whether it forms part of South African law.

In addition to expropriation, some legal systems²²¹ acknowledge the doctrine of constructive expropriation.²²² This doctrine caters for the situation where certain state interference results in a serious loss or limitation of property for an owner. Such interference is then viewed as a *de facto* expropriation that requires compensation, even though the state – through the regulation – may not intend to expropriate the property.²²³ Since prescription results in the total loss of ownership on the side of the owner, there is the possibility that it could amount to constructive expropriation.

Although this issue has not yet been definitively decided in South African law, two of our highest courts have had the opportunity to deal with this notion. In *Steinberg v South Peninsula Municipality*²²⁴ the Supreme Court of Appeal described constructive expropriation as a situation where “a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of property rights and not an expropriation, but

²²⁰ According to section 1 of the Promotion of Administrative Justice Act 3 of 2000, “administrative action” means “any decision taken, or failure to take a decision”.

²²¹ Such as Swiss and US law. For a discussion of constructive expropriation in these systems, see Van der Walt *AJ Constitutional Property Clauses: A Comparative Analysis* (1999) 359-376 (Swiss law) and 398-458 (US law).

²²² This doctrine is also known as “material expropriation” in Swiss law and as “inverse condemnation” or “regulatory taking” in US law: See Van der Walt *AJ Constitutional Property Law* (2005) 209. I do not provide an in-depth discussion of this doctrine in my dissertation. See Van der Walt *AJ Constitutional Property Clauses: A Comparative Analysis* (1999) 359-376 (Swiss law) and 398-458 (US law), Van der Walt *AJ Constitutional Property Law* (2005) 209-237 and Gildenhuys *A Onteieningsreg* (2nd ed 2001) 15, 137-149 for a more comprehensive discussion of the topic.

²²³ Van der Walt *AJ Constitutional Property Law* (2005) 209; Gildenhuys *A Onteieningsreg* (2nd ed 2001) 15.

²²⁴ 2001 (4) SA 1243 (SCA).

which has the effect, albeit indirectly, of transferring those rights to the public body”.²²⁵ Although the Court in that instance entertained the possibility of importing constructive expropriation into South African law, it decided against it for fear that it may frustrate land reform, together with introducing confusion into the law.²²⁶ Furthermore, in *Reflect-All* the Constitutional Court voiced its doubts as to the appropriateness of incorporating constructive expropriation into South African law.²²⁷ Moreover, if one strictly follows the methodology in the *FNB* decision for purposes of a section 25 dispute, it is difficult to see where constructive expropriation will fit into the picture.²²⁸ This is because of the way *FNB* differentiated between expropriation and deprivation by setting up the former as a narrower category falling within the wider category of deprivation. This complicates the question where a third category, namely constructive expropriation, may be situated.²²⁹ This differentiation between deprivation and expropriation – together with Roux’s “telescoping” effect of the arbitrariness test – makes it unlikely that the South African courts will recognise constructive expropriation as long as they adhere to the *FNB* logic.²³⁰ For instance, should a deprivation amount to a *de facto* expropriation of property without providing for compensation, it will already be struck down as an arbitrary deprivation under the section 25(1) inquiry in that it does not provide for compensation as required by section 25(2). As seen above, it is highly unlikely that such a deprivation will be justified in terms of section 36. Therefore, the possibility to treat the deprivation as a constructive expropriation will never arise, for the inquiry as to the constitutionality of a deprivation will either end with the finding that it is arbitrary under section 25(1)²³¹ or that it is not justifiable under section 36. In view of this

²²⁵ *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8.

²²⁶ *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8. Both these reasons for not importing the doctrine of constructive expropriation into South African law are criticised by Van der Walt AJ *Constitutional Property Law* (2005) 231-234.

²²⁷ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 65. This scepticism is shared by Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2, where he states that the “doctrine of constructive expropriation probably does not and should not find application in South African law.”

²²⁸ Van der Walt AJ *Constitutional Property Law* (2005) 236; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-32 and sources cited.

²²⁹ Van der Walt AJ *Constitutional Property Law* (2005) 236; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-32 and sources cited.

²³⁰ Van der Walt AJ *Constitutional Property Law* (2005) 236-237; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-2 – 46-3, 46-19 – 46-20, 46-32.

²³¹ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-32.

“telescoping” effect, the question whether an interference with property amounts to a (constructive) expropriation will never be reached.²³²

Still, some authors are of the opinion that the doctrine of constructive expropriation should be recognised in South African law.²³³ Gildenhuis is one of the advocates that favour the adoption of this doctrine into South African law.²³⁴ Even so, it is worth emphasising that Gildenhuis published his book *Onteieningsreg* one year prior to the handing down of *FNB* by the Constitutional Court. After this decision it seems very unlikely – as already indicated – that the doctrine of constructive expropriation will be recognised in South African law, especially if one strictly follows the *FNB* methodology.²³⁵ Consequently, I agree with Van der Walt that this doctrine “should not find application in South African law.”²³⁶ In light of the above one can safely conclude that this doctrine does not form part of South African law, which means that prescription cannot amount to constructive expropriation. This conclusion makes it unnecessary to consider the final two stages of the *FNB* analysis, namely whether the deprivation complies with section 25(2)(a)-(b), or whether it is justified under section 36.

5.4 Conclusion

This chapter illustrates the effects of prescription in practice, together with the infringement it may cause in terms of section 25. However, it argues that prescription is likely to amount to a non-arbitrary deprivation in terms of section 25(1).²³⁷ Such a conclusion is strengthened by using utilitarianism and law and economics theory, which chapter four discusses in greater detail.²³⁸ Another important factor in this regard is the German approach towards the personal autonomy and sanctity of the home, which is analogous to Radin’s personality theory.²³⁹ This

²³² As was also the case in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), where the Court found that section 114 of the Customs and Excise Act 91 of 1964 amounted to an arbitrary deprivation. Thus, the question of whether that section amounted to expropriation was never reached.

²³³ Gildenhuis A *Onteieningsreg* (2nd ed 2001) 15, 137-149. Van der Walt withdrew from a similar position in Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2, after initially being in favour of recognising constructive expropriation in South African law: See Van der Walt AJ *Constitutional Property Law* (2005) 236-237.

²³⁴ Gildenhuis A *Onteieningsreg* (2nd ed 2001) 15, 137-149.

²³⁵ Van der Walt AJ *Constitutional Property Law* (2005) 236; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2003 original service Dec 2003) 46-32 and sources cited.

²³⁶ Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2.

²³⁷ See section 5.3.2.4.1 above.

²³⁸ See section 4.4.4 of chapter four above.

²³⁹ See section 5.3.2.4.1 above.

approach provides a strong justification for prescription where the possessor may be using the property as a home, especially when the owner merely regards it as commercial or fungible property.

The findings of the Grand Chamber in *JA Pye (Oxford) Ltd v United Kingdom*²⁴⁰ further contribute to classifying prescription as a non-arbitrary deprivation. In that case the Grand Chamber found that adverse possession strikes a “fair balance” in the context of the third rule (deprivation) of Article 1. This is significant, as the *animus possidendi* requirement of adverse possession is not as strict as the *animus domini* element of prescription.²⁴¹ In light of this conclusion, *Pye* provides authority from a comparative law viewpoint that prescription is likely to constitute a non-arbitrary deprivation that complies with section 25(1).

In South African law, prescription is unlikely to amount to an expropriation due to the absence of legislation that authorises expropriation.²⁴² The prescription acts neither authorise the state (or the courts) to order expropriation nor do they provide for compensation. These factors indicate that prescription does not constitute expropriation. This chapter also addresses the possibility that prescription could constitute constructive expropriation. The chapter argues that prescription cannot amount to constructive expropriation, since the logic set out in *FNB* makes it unlikely for this doctrine to form part of South African law.²⁴³ Because prescription constitutes a non-arbitrary deprivation in the framework of section 25(1), I conclude that this legal rule is in line with the property clause and, thus, constitutionally compliant.

²⁴⁰ (2008) 46 EHRR 45 (GC).

²⁴¹ For the differences between *animus domini* and *animus possidendi*, see section 2.3.2.1.1 of chapter two together with sections 3.2.2.3.2.1 and 3.2.2.3.2.3 of chapter three above.

²⁴² See section 5.3.2.6 above.

²⁴³ See section 5.3.2.6 above.

CHAPTER 6: CONCLUSION

6.1 Introduction

Acquisitive prescription (“prescription”), an original method of acquisition of ownership,¹ is an area of South African property law that is generally unproblematic and legally certain.² The two prescription acts, namely the Prescription Act 18 of 1943 (“1943 Act”) and the Prescription Act 68 of 1969 (“1969 Act”), regulate prescription in South African law. Yet, these acts do not codify prescription law in South Africa.³ The two prescription acts determine that a person acquires ownership *ex lege* if such person continuously possessed property openly and “as if owner” for an uninterrupted period of 30 years.⁴

The requirements for prescription in Dutch and French law are similar to those in South African law, since these systems also require a possessor to possess property with the intention of an owner (*animus domini*) for a certain period of time before he can acquire ownership. Pre-2003 English law⁵ is to much the same effect, although adverse possession – the common law equivalent of prescription – merely requires a person to possess land with the *animus possidendi* (intention to possess) in order to acquire title or ownership.

On the face of it, these three jurisdictions also appear to regard prescription or adverse possession as an area of law that is unproblematic and reasonably clear. However, the constitutionality of this seemingly uncomplicated legal institution was recently challenged before the European Court of Human Rights in Strasbourg in *JA Pye (Oxford) Ltd v United Kingdom* (“Pye”).⁶ In this case the Fourth Chamber of the European Court of Human Rights held that adverse possession is in conflict with Article 1 of Protocol No 1 (“Article 1”) to the European Convention on Human Rights and Fundamental Freedoms 1950 (“the Convention”). Article 1, which guarantees the peaceful enjoyment of possessions and

¹ Section 2(2) of the Prescription Act 18 of 1943 and section 1 of the Prescription Act 68 of 1969.

² Prescription in the context of modern South African law is discussed in section 2.3 of chapter two above.

³ See for instance *Pienaar v Rabie* 1983 (3) SA 126 (A) 135; *Bisschop v Stafford* 1974 (3) SA 1 (A) 7; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) 467.

⁴ Section 1 of the Prescription Act 68 of 1969. These requirements are similar to those set out in section 2(1)-(2) of the Prescription Act 18 of 1943, as indicated in sections 2.3.1-2.3.2 of chapter two above.

⁵ The Land Registration Act 2002, which fundamentally altered English adverse possession law, only came into operation on 13 October 2003 and is prospective in nature: See *Ofulue v Bossert* [2009] UKHL 16 and *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

⁶ (2006) 43 EHRR 3 (IV) and (2008) 46 EHRR 45 (GC). A brief exposition of the facts of this case appears in section 1.1.1 of chapter one above and are therefore not repeated here. For a more detailed discussion of the facts of this case, see section 3.2.3.2 of chapter three above.

provides for legitimate state interference with private property, is similar but not identical to section 25 (the property clause) of the Constitution of the Republic of South Africa 1996 (“the Constitution”). According to the Fourth Chamber, adverse possession amounts to an uncompensated deprivation – or expropriation for purposes of South African constitutional law – of property, which upset the “fair balance” required by the Convention. The Fourth Chamber’s main objection is that the traditional justifications for adverse possession do not carry the same weight in jurisdictions where land is registered.⁷ However, on appeal the Grand Chamber of the European Court of Human Rights overturned the Fourth Chamber’s decision and found that adverse possession *is* in line with Article 1 of the First Protocol.⁸ The Grand Chamber found that adverse possession constitutes regulation – or deprivation in the South African sense – of property rather than expropriation and concluded that it strikes a “fair balance” between the interests of the individual and the public interest. The Grand Chamber reached this conclusion by establishing that adverse possession fulfils a legitimate purpose in that it promotes legal certainty, protects defendants from stale claims and prevents injustice, even in the context of registered land.⁹ Consequently, it held that adverse possession complies with Article 1, at least as far as it operated prior to the enactment of the English Land Registration Act 2002 (“LRA” or “2002 Act”). This is an interesting result, since it was “easier” to succeed with an adverse possession claim at the time of *Pye* than it would have been had this case occurred in a civil law country.¹⁰ This is due to the fact that adverse possession merely requires a possessor to possess *animo possidendi*, as opposed to the more onerous *animus domini* requirement for prescription in the civil law systems.¹¹

Despite the judgment by the Grand Chamber, the Fourth Chamber’s decision in *Pye* is significant for purposes of South African constitutional property law, since prescription – like adverse possession – also results in the loss of ownership on the side of an owner. In this sense a possessor acquires ownership through prescription without the co-operation or permission of the original owner the moment such possessor satisfies the requirements for prescription, since it is an original method of acquisition of ownership. Accordingly, the focus of this dissertation falls on whether this “uncomplicated” legal institution complies with

⁷ *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 (IV) para 65.

⁸ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC).

⁹ *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 69, citing *Stubbings and Others v United Kingdom* (1997) 23 EHRR 213 para 49.

¹⁰ This topic is discussed in chapter three above.

¹¹ See section 3.2.2.3.2.3 for English law and compare it to sections 2.3.2.1.1 (South African law), 3.3.2.2.1 (Dutch law) and 3.4.2.1 (French law) in chapters two and three above.

section 25 of the Constitution. The reason for this study is that prescription could possibly be in conflict with the property clause, as it may amount to either an arbitrary deprivation or an uncompensated expropriation, both of which would be unconstitutional. The Fourth Chamber's judgment especially highlights the possibility that prescription could constitute an uncompensated expropriation. As a result, the very existence of prescription – the so-called “unproblematic” rule – was suddenly brought into question for the first time. Since the potential unconstitutionality of prescription will hold serious repercussions for South African prescription law, and possibly also for the other methods of original acquisition of ownership,¹² it was imperative to undertake a study in this field.

To establish whether prescription is in line with section 25, it has to be determined whether there are sufficient justifications for this legal institution today. For this purpose the dissertation focuses on two questions, namely (i) whether adequate grounds exist for prescription and (ii) whether this rule complies with the property clause. To this end it was necessary to evaluate the roots of prescription, together with its requirements in South African law. This is done in chapter two, which focuses on the Roman and Roman-Dutch legal heritage of prescription and analyses its requirements in contemporary South African law. Chapter two establishes that the requirements for prescription under the two prescription acts are similar and reasonably clear, since both acts require a person to possess property openly and continuously with the intention of an owner for an uninterrupted period of 30 years.¹³ In this sense it is rather difficult to succeed with a prescription claim in South African law.

After the discussion of South African law, chapter three establishes how prescription operates in a number of foreign jurisdictions, namely English, Dutch, French and German law.¹⁴ The requirements for prescription in Dutch and French law – both having negative registration systems – are remarkably similar to those in South African law. Both these jurisdictions also require a person to possess property with the *animus domini* before such person can acquire it through prescription. However, these systems draw a sharp distinction between *bona* and *mala fide* prescription, since they require bad faith possessors to possess property for longer periods than their good faith counterparts before they can acquire ownership. German law

¹² Such as *accessio*, *specificatio* and *commixtio et confusio*.

¹³ The similarities between these two acts are discussed in sections 2.3.1-2.3.2 of chapter two above.

¹⁴ My reasons for focusing on these systems are discussed in section 1.2 of chapter one above.

also requires a person to possess property with the intention of an owner, but it has extra requirements for *Ersitzung*¹⁵ due to the positive registration system in German law. Thus, a possessor of land must also be (erroneously) registered in the land register or *Grundbuch* for a period of 30 years before he can acquire ownership through *Ersitzung*. It follows that it is extremely difficult to acquire land through prescription in German law.

Chapter three also specifically focuses on English adverse possession law, since it was challenged under Article 1 of the First Protocol before the European Court of Human Rights. However, this chapter investigates the rules of adverse possession both before and after the enactment of the LRA, since the *Pye* case was instituted before this Act came into force. Although the 2002 Act now provides comprehensive safeguards for owners of registered land, chapter three indicates that the LRA did not alter the substantive requirements of adverse possession. It follows that, but for the amendments by the 2002 Act, adverse possession law before and after 2003 largely remains the same. This Act was the result of suggestions by the English Law Commission, which concluded that the traditional justifications for adverse possession do not carry weight when the register provides conclusive proof of ownership.

Chapter three discovers that adverse possession merely requires a person to possess property with the *animus possidendi* (intention to possess) in order to acquire title. This is a “lower” requirement than *animus domini*, since the *animus possidendi* can, for instance, even co-exist with an offer to pay rent to the owner.¹⁶ An offer to this effect will immediately negate the *animus domini* in a civil law system, since it is inconsistent with the intention of possessing property as an owner.¹⁷ Despite the fact that it is “easier” to acquire ownership through adverse possession, the LRA effectively prevents the extinguishment of title in registered land through mere adverse possession. It follows that post-2003 English law is now similar to German law, since both these legal systems have stricter requirements pertaining to adverse possession and prescription due to their positive registration systems. Consequently, it is clear that prescription or adverse possession has a more important purpose in systems where the law does not guarantee the correctness of the register.

¹⁵ *Ersitzung* is the German law equivalent of acquisitive prescription in South African law.

¹⁶ This was the case in *JA Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch 676. See further section 3.2.2.3.2.3 of chapter three above.

¹⁷ See section 2.3.2.1.1 of chapter two above for the position in South African law.

Chapter four focuses on the rationale for prescription and starts with a brief overview of the justifications that Roman-Dutch, South African, Dutch and French law provide for this rule.¹⁸ These systems advance two main grounds in favour of this legal institution, namely that it promotes legal certainty and punishes neglectful owners. The English Law Commission,¹⁹ which relied on an article by Dockray, criticised these justifications and reasoned that adverse possession does not fulfil the same purpose in a positive registration system.²⁰ This led to the enactment of the LRA, which effectively abolished traditional adverse possession in English law. Accordingly, it is no longer possible to acquire title in registered land in English law through adverse possession.

Despite the Law Commission's abolition of adverse possession in its traditional sense, I argue that the Law Commission failed to take into account certain moral and economic justifications. These justifications provide strong support for having prescription in a legal system, especially in jurisdictions with a negative registration system – such as South Africa – where the correctness of the register is not guaranteed. Chapter four illustrates this point with reference to three liberal property theories, namely the Lockean labour theory, the personality theory, as developed by Radin, and finally utilitarianism and law and economics theory. These theories were chosen because they demonstrate interesting similarities with the traditional justifications for prescription or adverse possession. When read together, these theories indeed provide powerful justification for prescription in the context of a negative registration system. Two factors in this context are that possessors – in Radin's terms – become attached to long-possessed property while law and economics theory predicts that prescription helps to shift property to higher valuing-users (possessors) when the market cannot perform this function due to high transaction costs.

These justifications are used in chapter five to determine whether prescription is in line with section 25 of the South African Constitution. In this sense chapter five employs the methodology set out by Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd*

¹⁸ The reasons for omitting German law from this discussion are discussed in section 1.2 of chapter one above.

¹⁹ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001); *Land Registration for the Twenty-First Century: A Consultative Document – Number 254* (September 1998).

²⁰ Section 58(1) of the Land Registration Act 2002 stipulates that the English register provides conclusive proof of ownership.

t/a Wesbank v Minister of Finance (“*FNB*”)²¹ for adjudicating section 25 disputes. According to this methodology, chapter five first determines whether prescription complies with section 25(1). In this sense the main issue is whether prescription amounts to arbitrary deprivation, which would be in conflict with section 25(1). The chapter incorporates the moral and economic conclusions drawn in chapter four and argues that prescription constitutes non-arbitrary deprivation. This argument finds further support in the Grand Chamber’s decision in *Pye*, where it held (the less onerous) adverse possession to be in line with Article 1 of the First Protocol. In this sense the Grand Chamber’s decision provides authority from a comparative law perspective that prescription – with its stricter requirements – ought to comply with section 25(1). The next stage involves the question whether prescription amounts to uncompensated expropriation contrary to section 25(2), a possibility that the Fourth Chamber highlighted in the *Pye* case. In this regard chapter five also considers the possibility that prescription could amount to constructive expropriation. I rule out both these possibilities, namely expropriation and constructive expropriation, through an analysis of South African expropriation law in terms of the *FNB* methodology. Consequently, chapter five concludes that prescription amounts to non-arbitrary deprivation, which is in line with the South African property clause.

6.2 Conclusions

6.2.1 The law pertaining to acquisitive prescription in South Africa and foreign jurisdictions

Chapter two investigates the Roman and Roman-Dutch roots of prescription in modern South African law. From its earliest days prescription had two main requirements, namely the possession of property belonging to another for a certain period of time.²² A possessor acquired ownership by way of original acquisition of ownership the moment he satisfied these requirements. Furthermore, prescription seems to always have been regarded as a mechanism through which *de iure* status was awarded to long-existing *de facto* situations. It also served as punishment of those owners who introduced uncertainty into the law by “allowing” others to possess their property for long periods of time. Roman-Dutch and South African law received these grounds without question, since both systems regard them as still providing valid justification for this rule.

²¹ 2002 (4) SA 768 (CC).

²² See section 2.2.2 of chapter two above.

Although the prescription acts only formalised South African prescription law fairly recently, neither of them intends to codify the law of prescription and thus the common law remains an important source in this regard.²³ Chapter two establishes that the requirements for prescription under the two prescription acts are similar, despite the difference in their terminology.²⁴ This proposition is supported by the fact that the *animus domini*²⁵ element of *possessio civilis* clearly corresponds to the openness and “as if owner” requirements under the 1969 Act. In short – to succeed with a prescription claim – a possessor has to continuously possess land openly and factually with the *animus domini* for an uninterrupted period of 30 years without acknowledging the rights of the owner. Ownership vests in the possessor *ex lege* the moment he satisfies all these requirements.

Chapter three – which comprises a comparative analysis – examines the requirements of prescription or adverse possession in English, Dutch, French and German law. Although English adverse possession law underwent alterations with the enactment of the LRA, it was necessary to investigate how adverse possession operated both before and after the 2002 Act came into operation. This is because the *Pye* case originated before the LRA came into effect, while that Act now provides comprehensive protection to owners of registered land against the extinguishing effect of adverse possession. Despite the extra protection afforded to owners of registered land, chapter three establishes that the substantive requirements of adverse possession before and after 2003 remain the same. In this sense the chapter recognises that adverse possession differs from prescription, since a person must merely intend to possess land (*animo possidendi*) to acquire title to it through adverse possession. This stands in contrast to prescription in the civil law systems, where the required intention is always *animus domini*. Accordingly, it is “easier” to succeed with an adverse possession claim under these circumstances than it would be in a jurisdiction that requires *animus domini* for purposes of prescription. This can lead to instances of hardship, as was observed in the *Pye* case where the Grahams succeeded with an adverse possession claim pertaining to the registered land of Pye. The *animus possidendi* can even co-exist with a willingness to pay rent to the owner, which was indeed the case in *Pye*, where the Grahams were prepared to rent the land. Such a willingness negates the *animus domini* in civil law systems, which then

²³ See section 15(1) of the Prescription Act 18 of 1943, together with the discussion in section 2.3.1 of chapter two above.

²⁴ This is discussed in greater detail in sections 2.3.1-2.3.2 of chapter two above.

²⁵ Intention of an owner.

interrupts the running of prescription.²⁶ Nonetheless, this possible injustice is now countered by the LRA, which prevents the loss of registered title through the mere passage of time. In this sense adverse possessors must now first apply to the registrar of the Land Registry after having been in adverse possession for 10 years.²⁷ The registrar – in turn – notifies the registered owner, who may then elect to reject the adverse possessor’s claim and institute eviction proceedings. These alterations were made in light of the fact that the LRA now deems the register to provide conclusive proof of title. Consequently, the Law Commission found that the traditional justifications for adverse possession in relation to unregistered land do not apply in the context of registered land when the law guarantees the correctness of the register. This stands in contrast to countries, such as South Africa, where land is also registered, but where the register does not provide conclusive proof of ownership. Against this background the Law Commission decided to introduce mechanisms – through enacting the 2002 Act – that protect registered owners against losing title according to the “old” rules of adverse possession. German law follows a similar approach, since the *Grundbuch* also provides conclusive proof of ownership.²⁸ Consequently, in German law a possessor must not only possess the land *animo domini* for a period of 30 years, but he must also (erroneously) have been registered as the owner of that piece of land in the *Grundbuch* for the duration of the 30-year period.²⁹ These two jurisdictions illustrate that the requirements for adverse possession and prescription are much stricter when the correctness of the register is guaranteed.

The requirements for prescription in Dutch and French law are found to be remarkably similar to those in South African law. Both Dutch and French law also require the possessor to factually possess the land *animo domini* for an uninterrupted period of time without acknowledging the rights of the owner.³⁰ The length of the period required for prescription depends on whether the possessor was *bona* or *mala fide*, a distinction that is less relevant in South African law, where the period is set at 30 years for both good and bad faith possessors. Dutch and French law both have a 10-year period for good faith possessors, while 20- and

²⁶ For the position in South African law, see the discussion in section 2.3.2.1.1 of chapter two above.

²⁷ The alterations by the Land Registration Act 2002 are discussed in greater detail in section 3.2.4 of chapter three above.

²⁸ BGB § 891 I.

²⁹ Säcker FJ & Rixecker R (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 6 *Sachenrecht* (5th ed 2009) § 900 RdNr 5.

³⁰ The requirements for prescription in Dutch and French law are discussed in sections 3.3.2.2 and 3.4.2 respectively of chapter three above.

30-year periods are required in Dutch and French law respectively for bad faith possessors. Chapter three establishes that the protective mechanisms of English and German law are absent in South African, Dutch and French law. The reason for this phenomenon is the fact that the latter three jurisdictions each employ a negative registration system, which does not provide conclusive proof of ownership. Therefore, chapter three establishes that possession plays a more important role in countries with a negative registration system to ensure that ownership and possession coincide, especially in situations where there may be defects as to ownership in the register.

The comparative analysis shows that special safeguards exist in systems with a positive registration system, where the correctness of the register is guaranteed. This is because the register supplanted the role of possession to ensure that ownership and possession correspond. Accordingly, English and German law do not regard the traditional justifications for adverse possession or prescription as applying to situations where the identity of the owner may be conclusively determined by investigating the register.

6.2.2 The justification for acquisitive prescription

Chapter three establishes that certain safeguards exist to protect registered owners from losing ownership through mere adverse possession or prescription in jurisdictions with a positive registration system, such as modern English and German law. These protective mechanisms are absent in countries with a negative registration system, as is the case with South African, Dutch and French law. However, these systems require *animus domini* for purposes of prescription, which prevents the “easy” acquisition of ownership when one compares it to the *animus possidendi* requirement in adverse possession law. In this sense chapter four analyses the justifications for prescription in an attempt to explain the presence of the protective mechanisms in a positive registration system. Therefore, this chapter sets out to establish what the traditional justifications for prescription within a legal system are and whether they are still valid today.

Chapter four discovers that two main justifications are advanced in favour of prescription in Roman-Dutch, South African, Dutch and French law, namely that (i) it fulfils a corrective

function and (ii) that it punishes neglectful owners.³¹ The first justification is found in all four systems and is premised on the argument that *de iure* status should be given to long-standing factual realities to prevent situations where possession and ownership may come to be “out of kilter”. This is because possession provides the strongest proof of ownership in jurisdictions where the information in the register may be defective. This justification also encompasses the fact that prescription prevents the so-called *probatio diabolica* (devil’s burden) one faces if prescription is not available to help prove ownership. The second justification, which carries more weight in Roman-Dutch and South African law than in Dutch and French law, is that an owner who causes legal uncertainty by “allowing” another to possess his land for a long period of time should be “punished” by losing ownership of that land. This justification is sometimes expressed positively, namely that it encourages owners to make active use of their land. Little or no criticism concerning these justifications exists in the four legal systems under discussion, which indicates that these jurisdictions still regard them as able to justify prescription. English law stands in contrast to this seemingly uncritical approach, where the English Law Commission recently re-evaluated the rationale behind adverse possession.

Although English law also recognises the legal certainty and punishment justifications in the context of adverse possession, the Law Commission rejected these grounds in the context of registered land when the identity of the owner may be discovered by investigating the register. In this regard the Law Commission relied on an article by Dockray,³² who criticises the traditional justifications pertaining to adverse possession. This criticism, coupled with the fact that English law was to adopt a positive registration system under the LRA, was sufficient for the Law Commission to abolish adverse possession in its traditional form. Yet, some authors – such as Dixon, Clarke, Cobb and Fox – criticise the Law Commission for not considering moral and economic justifications when it decided to amend the rules of adverse possession concerning registered land.³³ These developments in English law necessitated an evaluation of the justifications provided for prescription in South African law. Chapter four considers the labour theory, personality theory and utilitarianism and law and economics theory as sources of possible justifications for this legal institution, especially because these

³¹ German law is omitted from this discussion for reasons set out in section 1.2 of chapter one above.

³² Dockray M “Why do we Need Adverse Possession?” 1985 *Conveyancer* 272-284.

³³ Dixon M “The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment” 2003 *Conveyancer* 136-156; Clarke A “Use, Time, and Entitlement” (2004) 57 *Current Legal Problems* 239-275; Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260.

theories are analogous to the traditional justifications provided for prescription in South African law.

The first theory one can consider to justify prescription is the Lockean labour theory. According to Locke, man has property in his own person and is able to acquire ownership in things by taking it out of the commons and through mixing labour with it.³⁴ Against this background it will be of no use for someone else to mix labour with it *ex post*. It follows that the labour theory – apparently – prohibits the non-contractual redistribution of ownership.³⁵ This characteristic *prima facie* seems to prevent the labour theory from allowing prescription, since prescription by its very nature results in a form of redistribution of ownership by taking ownership away from the original owner and awarding it to the possessor. However, Cobb and Fox argue that a squatter who occupies land and invests labour in it can obtain a labour theory claim in that property if the owner's non-use or neglect of land amounts to *quasi*-abandonment.³⁶ This argument is strengthened in a setting such as South Africa, where the dire need for housing can undermine an entitlement to neglect land that – in turn – “allows” people to occupy vacant land for long periods of time. The *quasi*-abandonment argument also finds support in certain qualifications put forward by Locke himself as to the applicability of his theory. According to Locke, his theory will only be permitted as a method of acquisition of ownership “at least where there is enough, and is good left in common for others.”³⁷ This means that Locke only regards his theory as a justifiable method of acquisition of ownership as long as there remain enough unowned things in the commons for other people to appropriate. Therefore, chapter four proposes that the labour theory should permit prescription in a modern world with scarce resources when some owners “allow” their property to be used for long periods of time by others.

Although Cobb and Fox specifically structure their *quasi*-abandonment argument in the context of urban squatters, through analogy it can also be made applicable to squatters of unused rural land. Such an interpretation finds support in a further qualification of Locke, namely that no one may appropriate more from the commons than he is able to use or enjoy. Should a person take more from the commons than he is able to use, such property will spoil,

³⁴ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 26-28, 44.

³⁵ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 744.

³⁶ Cobb N & Fox L “Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002” (2007) 27 *Legal Studies* 236-260 250.

³⁷ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 27, 33.

which causes it to “belong to others”.³⁸ An argument to this effect is strengthened by Locke’s disapproval of owners that do not use their land, which causes it to spoil. Since such spoilt land reverts to or remains in the commons, possessors are able to obtain a labour theory claim in that property through mixing labour with it. This is similar to situations where owners have more land than they are able or willing to look after, which can cause a squatter to take possession of that land and start investing energy and labour in it.

Another complication in justifying prescription under the labour theory is the role of time in this framework, as Epstein points out.³⁹ Once a person acquires ownership in an object by taking it out of the commons and mixing his labour with it, it appears that the owner’s entitlement in that object is then fixed “forever”. This seems to once again disallow prescription under the labour theory, since prescription entails that a person acquires ownership in an object through continuous and undisturbed possession over time. If time plays no role, then acquisition through prescription will be impossible. Nonetheless, Epstein overcomes this problem through his doctrine of relative title, which doctrine recognises the role of the temporal dimension in the context of competing claims. According to this doctrine, prescription resolves conflicting claims to ownership – since time eradicates evidence of ownership – by awarding ownership not to the first possessor (owner), but to the prior possessor (squatter).⁴⁰ Consequently, this chapter establishes that it is possible to justify prescription under the labour theory if one incorporates this temporal dimension into Locke’s theory.

For these reasons I argue that the labour theory – due to the qualifications built into it by Locke and the interpretation supplied by Epstein, Cobb and Fox – is able to justify the acquisition of ownership by a purposeful possessor through prescription. It seems that the subjective intent of the possessor – in terms of *mala fide* prescription – plays no meaningful role in the labour theory, as the central question is merely whether someone mixed his labour with an object. Since it is possible that even a *mala fide* person can mix labour with something, it appears that the labour theory is also able to justify bad faith prescription.

³⁸ Locke J *Two Treatises of Government* (1690, Laslet P ed 1963) §§ 31, 46.

³⁹ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722.

⁴⁰ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 675.

The second liberal theory that can justify prescription is Radin's personality theory,⁴¹ which entails that people require ownership of objects to facilitate healthy self-constitution. Radin relies on Hegel's personality theory to establish her theory. The strength of the relationship that forms between a human and property is assessed by determining the "pain"⁴² a person suffers should he lose property in some way. Consequently, if property was constitutive of someone's personhood it will be impossible to relieve the "pain" caused by the loss of such property through simply receiving its monetary equivalent. In this regard Radin distinguishes between "personal" and "fungible" property, the former type encompassing property to which someone is attached as a person, while the latter kind entails property that is perfectly replaceable with the monetary value of the object. However, not all instances of "personal property" will always be constitutive of someone's personhood, as there are also unhealthy ways through which persons may become bound up with property. In this instance Radin states that property relationships that are "fetishistic" in nature should not receive the same protection afforded to relationships that are truly personal. In this context personal and fungible property form two ends of a continuum. Accordingly, relationships located closer to the personal side of the continuum must enjoy more protection than those nearer the fungible end.

It is through the dichotomy between personal and fungible property that Radin's personality theory can justify prescription. In a typical prescription case, the possessor will be in direct contact with the property and it is likely that he will regard it as personal property, especially if the possessor occupies the property as a home. In contrast, the owner – through his absence – is likely to view the property as fungible, which entails that the possessor's interest in the property should receive preference over those of the owner. Such a conclusion also finds support in Gray's theory of moral excludability, especially when the limitation of the owner's ownership – through prescription – is in line with public morality.⁴³ It follows that "claims to 'property' may sometimes be overridden by the need to attain or further more highly rated social goals",⁴⁴ such as protecting people's homes. This line of thinking is analogous to the

⁴¹ Radin MJ "Property and Personhood" (1982) 34 *Stanford Law Review* 957-1015.

⁴² This pain can be equated to what Michelman FI "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harvard Law Review* 1165-1258 1214 describes as "demoralization costs", a connection already made by Ellickson RC "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723-737 727-728.

⁴³ Gray K "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252-307 280-292.

⁴⁴ Gray K "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252-307 281.

position in German constitutional law, where it is held that the further a property interest is located outside the sphere of personal autonomy of the owner, the greater the extent to which the state may regulate the limits of that property right. In other words, if an absent owner attaches purely commercial value to property, it will be justifiable to protect the interests of the possessor (and to limit the property right of the owner) through prescription if he occupies it as a home for a long period of time. The theories of Holmes, Singer and Alexander also support such a prediction. Holmes states that property that has been possessed for a long time by a possessor – even though such possessor may not be the owner – becomes bound up with him and cannot be taken away from the possessor “without [him] resenting the act”.⁴⁵ Holmes thinks that long instances of undisturbed possession should be left untouched, since the property becomes part of the being of the possessor through continuous possession. According to Singer’s theory of the “reliance interest in property”,⁴⁶ a possessor’s interest in property grows stronger the longer the owner “allows” the possessor to be in possession through his neglect of the property. The owner induces the possessor to rely on the fact that his possession will not be disturbed, since such owner creates the impression that the possessor’s possession of the property is “legitimate”. Indeed, the longer the possessor is in possession, the more the owner’s interest in the property diminishes. This also induces the possessor (as well as third parties) to believe that the he – and not the owner – is the true owner of the land. Prescription thus enters the picture, as it allows the possessor to acquire ownership to protect his interests in the property.

Alexander’s social-obligation theory provides a unique perspective on the moral obligations of owners *vis-à-vis* the community. According to him, a person must develop his capabilities in order to live a well-lived life (or to flourish as a human being).⁴⁷ However, individuals depend on others (the community) to attain human flourishing, since no-one can “acquire these capabilities or secure the resources to acquire them by one’s self.”⁴⁸ It follows that Alexander requires two elements for purposes of developing one’s capabilities to flourish, namely community life and property (such as land). In this sense Alexander states that

⁴⁵ Holmes OW “The Path of the Law” (1897) 10 *Harvard Law Review* 457-478 477.

⁴⁶ This theory was developed by Singer JW “The Reliance Interest in Property” (1988) 40 *Stanford Law Review* 611-751.

⁴⁷ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 761.

⁴⁸ Alexander GS “The Social-Obligation Norm in American Property Law” (2009) 94 *Cornell Law Review* 745-820 765. See further Alexander GS & Peñalver EM “Properties of Community” (2008) 10 *Theoretical Inquiries in Law* 127-160 134-135.

owners – who unavoidably depend on people in the community to develop their capabilities to achieve human flourishing – are socially obliged to help others to nurture their capabilities to flourish. This obligation forms the crux of Alexander’s social-obligation norm. For example, if an owner has “allowed” a squatter to possess his land for a long period of time, it is clear that the owner must view the land as unimportant for fostering his capabilities. Yet, the same land may – with the effluxion of time – become essential to the squatter for purposes of attaining human flourishing, especially if he occupies it as a home (ie personal property). Under these circumstances, the social-obligation norm obliges the owner, for whom the land is insignificant, to “give” it to the squatter to help develop his capabilities to lead a well-lived life. In this regard prescription recognises the social-obligation norm by awarding ownership of the land to the squatter at the expiration of the prescription period.

Time plays a more direct role in the personality theory than in the labour theory, since a person’s relationship with an object can intensify or diminish with the passing of time. Accordingly, over time a possessor may come to regard property as personal while an owner may start to treat it as fungible the longer he is out of possession. The only problem in this context is to determine at what point in time the possessor’s relationship is sufficiently personal – as opposed to the fungible interest of the owner – to justify the acquisition of ownership by the possessor through prescription. While Radin does not provide clear guidelines for making this call, I propose that it may be best to adopt a fixed time period as opposed to one established on a case-by-case basis. This solution is similar to Merrill’s suggestion that prescription ought to operate as a mechanical entitlement determination rule.⁴⁹ Although a comparative legal analysis does not assist in discerning which period of time is “sufficient”, chapter four indicates that the 30-year period in South African law – which is the longest period in comparison to English, Dutch, French and German law – may be long enough, from an economic perspective, to justify the acquisition of ownership through prescription. Although Radin does not expressly exclude bad faith prescription, she does mention that *bona fide* possessors are more likely to succeed under her theory than *mala fide* possessors.⁵⁰

⁴⁹ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1145.

⁵⁰ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 749.

Utilitarianism and law and economics theory provide the third ground for justifying prescription. These two theories are discussed together, since both aim to maximise utility, albeit in different contexts. Utilitarianism attempts to maximise overall happiness for the greatest number of people,⁵¹ while law and economics theory seeks to enhance economic efficiency by lowering transaction costs.⁵² Chapter four recognises that Mill’s theory of utilitarianism provides greater justification for prescription than Bentham’s theory, since Mill tries to establish a relationship between utility and justice.⁵³ According to Mill, one can maximise happiness through identifying and then eliminating instances of injustice, which – in the context of prescription – is the protection of long-term possession. Under these circumstances Mill argues that it will be a “greater injustice” if the law allows the owner to reclaim the property than if it permitted the possessor to keep it.⁵⁴ This argument provides a powerful justification for prescription in the context of neglectful or absent landowners, especially against the background of the theories of Radin, Holmes, Singer and Alexander. Since time is important in the context of prescription, it seems that rule-utilitarianism – one of the two forms of utilitarianism – better suits a regime that allows prescription than act-utilitarianism. This is because rule-utilitarianism attempts to maximise utility or happiness in “the long run” by laying down certain (moral) rules, while act-utilitarianism aims to maximise utility right now.⁵⁵ Furthermore, rule-utilitarianism is able to clear titles and to resolve disputes about ownership, especially in the context of Epstein’s doctrine of relative title.⁵⁶ These effects are similar to Merrill’s proposition that prescription must operate as a mechanical entitlement determination rule, which increases utility from an economic perspective.⁵⁷ Since rule-utilitarianism aims to maximise happiness by clearing titles and resolving disputes over ownership in the long run, it appears to disregard the subjective intent of the possessor. Therefore, chapter four regards rule-utilitarianism as being able to justify both good and bad faith prescription.

⁵¹ Kelly JM *A Short History of Western Legal Theory* (1992) 315.

⁵² Miceli TJ “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed 2005) 246-260 246.

⁵³ Kelly JM *A Short History of Western Legal Theory* (1992) 318.

⁵⁴ Mill JS *Principles of Political Economy* (1902) 134-135 § 2.

⁵⁵ Radin MJ “Time, Possession, and Alienation” (1986) 64 *Washington University Law Quarterly* 739-758 741.

⁵⁶ Epstein RA “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 *Washington University Law Quarterly* 667-722 674-675.

⁵⁷ Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137-1145.

The main objective of law and economics theory is to structure the law in such a way as to promote economic efficiency. To achieve this end law and economics theory distinguishes between scenarios involving low transaction costs and those with high transaction costs. According to the Coase theorem, property rights must receive greater protection in settings where transaction costs are low.⁵⁸ Under these circumstances, voluntary exchange will occur in the market when non-owners attach greater value to the property of others. However, if transaction costs are high, the law must provide mechanisms through which property may be shifted to the higher-valuing party, since the market will then be unable to perform this function.⁵⁹ To determine whether prescription qualifies as such a mechanism, I investigate the costs pertaining to prescription in the context of (i) owners, (ii) possessors, (iii) third parties and (iv) litigation.⁶⁰

Chapter four recognises the importance of “demoralization costs”⁶¹ for purposes of the economic analysis of prescription. According to Michelman, a person suffers greater demoralisation if he regards the loss of property through mechanisms – like prescription – as wrongful. For instance, chances are better that an owner may lose ownership through innocence or mere inattention in a regime with a shorter prescription period. Owners are likely to suffer severe demoralisation under these circumstances, as they normally do not expect to lose ownership in this manner. However, if the prescription period is long, an owner has more time to monitor his property and to evict possessors that may be “clocking up” time. Should an owner lose land under these circumstances, the negative effects of demoralisation seem to decrease. This is because an owner’s relationship towards property – in Radin’s terms – may become more fungible the longer he is out of possession. It follows that the longer the period for prescription, the lower the costs an owner suffers in terms of demoralisation. The same applies to an owner’s costs pertaining to the monitoring of the property and uncertainty as to ownership.

⁵⁸ The Coase theorem was developed by Coase R “The Problem of Social Cost” (1960) 3 *Journal of Law & Economics* 1-44.

⁵⁹ Posner RA *Economic Analysis of Law* (6th ed 2003) 55.

⁶⁰ The costs of prescription in these four contexts are discussed in section 4.4.4 of chapter four above.

⁶¹ Michelman FI “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harvard Law Review* 1165-1258 1214. Ellickson RC “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 *Washington University Law Quarterly* 723-737 728 made the connection by using “demoralization costs” in the context of prescription.

Three types of costs are of interest in the context of the possessor, namely “preying”, uncertainty and demoralisation costs. “Preying” involves the possessor’s attempts to obtain legal advice regarding his prescription claim; uncertainty entails the anxiety a possessor experiences before the prescription period is complete; while demoralisation illustrates how attached a possessor becomes to the property. The shorter the prescription period, the lower these costs, since a possessor then has less time to obtain legal advice, become anxious because of settled expectations (in terms of Singer’s “reliance interest”) or to become attached to the property. However, the longer the period, the higher these costs become, especially since a possessor may come to regard the property as personal after possessing it for a long time. This latter point also finds support in the theories of Radin, Holmes, Singer and Alexander. When viewed together, these factors provide strong economic justification for the acquisition of ownership by the higher-valuing possessor through prescription if the possessor has been in possession for a sufficient length of time, especially if the presence of high transaction costs prevents a voluntary transfer in this regard.

Prescription not only reduces transaction costs in the context of the owner and possessor, but also for third parties. Since the law does not guarantee the correctness of the register in a negative registration system, the costs of investigating the (possibly incorrect) register must be weighed up against the costs pertaining to a physical inspection of the land to determine who owns it. This chapter predicts that prescription with longer periods reduces transaction costs relating to inspection, uncertainty of ownership and searching of the records, since third parties may simply disregard (erroneous) information in the register that predates the prescription period. This proposition is in line with Epstein’s doctrine of relative title, which states that prescription aids the process of clearing titles and resolving disputes as to ownership. However, the economic conclusions drawn in relation to third parties are limited to a negative registration system, since possession fulfils a more important role in such a system than in jurisdictions with a positive registration system, as seen in modern English and German law.

The fourth category of costs pertains to litigation, which consists of (i) the outlays on litigation and (ii) the costs of erroneous legal decisions. The sum of these costs must be kept as low as possible in order to maximise economic efficiency. The costs pertaining to litigation increase with the number or outlays and the complexity of cases coming to court. In this sense prescription with longer periods reduces litigation costs because it awards

ownership to possessors over time, which in turn decreases the number of cases coming to court. Although this does not adequately address the issue of complexity, this problem is circumvented in that prescription “simplifies” the process of proving ownership because it vests ownership in the person who has been in possession for a substantial period of time. This eliminates the problems pertaining to stale claims and loss of evidence that normally contribute to the average complexity of cases, which causes litigation costs to increase.

When the costs from these four categories are viewed together, chapter four establishes that prescription indeed shifts valuable resources – through original acquisition of ownership – to higher-valuing possessors in settings where transaction costs are high, since it lowers transaction costs in this context. Under these circumstances the Coase theorem regards prescription as a mechanism to affect exchange in situations involving high transaction costs. Merrill is also of the opinion that prescription achieves this reduction in transaction costs, especially if it operates as a mechanical entitlement determination rule where courts have little or no discretion to establish substantive and remedial rights.⁶² Finally, I argue that the *fides* of the possessor is irrelevant in terms of an economic analysis, since it will increase costs if one has to ascertain the subjective intent of a possessor. Thus, chapter four regards the distinction between good and bad faith prescription as irrelevant in the framework of law and economics theory.

Not only do these three liberal theories seem to justify prescription, they also appear to accommodate bad faith prescription to a large degree. Nonetheless, this chapter investigates this topic separately, since the acquisition of ownership through bad faith possession represents a “significant qualification of the rights paradigm”.⁶³ Although many authors oppose bad faith acquisition of ownership through prescription, some provide strong arguments in favour of this phenomenon, such as Fennell, Peñalver and Katyal. In this sense Fennell states that *bona fides* and *mala fides* are unsuitable labels for purposes of prescription.⁶⁴ Instead, she divides these two instances of possession into possessors who are “advertent” and those who are “inadvertent”. Through her doctrine of “efficient trespass”, coupled with two economic requirements that need to be satisfied before prescription may be

⁶² Merrill TW “Property Rules, Liability Rules, and Adverse Possession” (1985) 79 *Northwestern University Law Review* 1122-1154 1137.

⁶³ Van der Walt AJ *Property in the Margins* (2009) 187.

⁶⁴ Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1037 footnote 1.

allowed,⁶⁵ Fennell indicates that the supposedly simple distinction between good and bad faith possession is not as clear-cut as it initially seems. She focuses on the attempts of possessors to obtain knowledge as to whether their possession qualifies as advertent or inadvertent, and mentions that some parties may employ the absolute minimum effort to obtain information regarding the legitimacy of their occupation. Against this background Fennell concludes that knowledge is an unstable criterion to determine whether a possessor is in good or bad faith. Another aspect of her theory entails an inquiry into the conflation of law and morality in the word “thief”, as bad faith possessors are usually regarded as “land thieves”. Fennell argues that the bad faith possessor cannot be legally blamed for using the law to obtain ownership, since it is actually governmental power – instead of possession – that extinguishes ownership on the side of the owner. She counters possible criticism from a moral viewpoint on two grounds, namely that (i) prescription requires a substantial period of time, together with the fact that (ii) an owner merely has to assert his ownership to prevent prescription from running. On the basis of these two grounds she argues that it is unlikely that the mere presence of the possessor on someone’s land will pain the owner. Instead, it is the loss of ownership through prescription that pains the owner, not the possession of the person who occupies the land. According to Fennell, this pain will occur despite the *fides* of the possessor, which suggests that both good and bad faith prescription must be abolished if one wants to prevent this state of affairs.

Peñalver and Katyal also illustrate the positive role bad faith prescription plays through focusing their attention on so-called “acquisitive [property] outlaws”. These authors state that bad faith possessors (ab)use property law rules to bring about necessary changes in a legal system. For example, prescription “moves” fungible property out of the hands of owners and awards it to non-owners who are normally isolated from social and commercial activity.⁶⁶ Peñalver and Katyal acknowledge that property is important for individual autonomy and recognise the role of Radin’s theory in their theoretical framework. Economic justifications for prescription are also prevalent in their work, since Peñalver and Katyal admit that prescription operates as a tool to transfer property to higher-valuing possessors when high transaction costs prevent voluntary exchange. Although it may not always be simple to

⁶⁵ These are that (i) there must be a substantial difference in the parties’ valuation of the land and (ii) a market transaction must be unavailable: See Fennell LA “Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 *Northwestern University Law Review* 1037-1096 1040-1041.

⁶⁶ Peñalver EM & Katyal SK “Property Outlaws” (2007) 155 *University of Pennsylvania Law Review* 1095-1186 1132.

determine whether the possessor values the property more highly than the absent owner, factors such as the length of the prescription period and the wealth of the possessor *vis-à-vis* the owner may contribute to a result that favours the possessor. Furthermore, Peñalver and Katyal argue that bad faith acquisition of ownership is permissible in terms of “objective distributive justice” if the possessor had real need of the land from the owner.

Finally, chapter four considers whether Radin’s personality theory applies in the context of bad faith possessors. Radin thinks that her theory is unable to accommodate these persons, since it is – apparently – unclear how a *mala fide* person can become bound up with property. I argue that her theory can include this seemingly anomalous instance, especially if one focuses on the foundation of Radin’s theory, namely Hegel. According to Hegel, a person must invest his will into a thing together with possessing it before he can acquire ownership. The *fides* of that person seems to be irrelevant for Hegel, since even someone in bad faith can have the will to acquire ownership in an object. The arguments put forward by Fennell, Peñalver and Katyal strengthen such a proposition, since these authors are of the opinion that the subjective intent of the possessor is irrelevant for the purposes served by prescription. This is especially true in the context of homeless persons who occupy the property of others as a home, as Cobb and Fox emphasise. Therefore, chapter four establishes that there is no true benefit in distinguishing between good and bad faith possessors, which position is in accordance with prescription law in South Africa.

6.2.3 Acquisitive prescription in view of the property clause

Chapter five considers whether prescription is in line with section 25 of the South African Constitution. Since the law – through prescription – affects the loss of ownership by vesting it in the possessor, the issue is whether such loss amounts to a constitutional infringement of the property right concerned, namely ownership. To this end I employ the methodology set out in *FNB*, since any deprivation of property or property rights must be in line with section 25 to be constitutionally compliant.

When a possessor acquires ownership in land through prescription, the landowner is deprived of his ownership in that land. The first stage in terms of the *FNB* methodology is to establish whether that which is taken away from the owner amounts to “property”. This question is easily answered when considering prescription of land, since the Constitutional Court held in

FNB that ownership of movables (and thereby also immovables) is central to the concept of property in South African constitutional law.⁶⁷ As to the second stage of the inquiry, namely whether prescription amounts to deprivation of property, chapter five indicates that prescription of land does qualify as a deprivation for purposes of section 25(1). It follows that prescription of land, which entails a deprivation of property, has to comply with the requirements set out in section 25(1). The requirements for deprivation under section 25(1) are that (i) it must take place in terms of law of general application and (ii) such law may not permit arbitrary deprivation. Since the prescription acts clearly constitute law of general application, the main issue is whether or not prescription results in arbitrary deprivation. To answer this question, the chapter determines whether sufficient reasons exist for the deprivation and whether it is procedurally fair.⁶⁸ Prescription will be procedurally unfair if there are insufficient procedural safeguards that protect the rights of owners. This chapter establishes that prescription is procedurally fair, since ownership is not easily lost due to reasonably strict requirements for prescription in South African law, especially the fact that a person must possess property *animo domini*. Furthermore, the 30-year period within which an owner may assert his rights and interrupt the running of prescription reinforces the security of ownership.

The second leg of the arbitrariness test, also known as the substantive arbitrariness test, entails whether there exists a sufficient *nexus* between the effects of prescription and the purpose it serves. In other words, the chapter had to determine whether the deprivation caused by prescription is arbitrary. The Constitutional Court found that the substantive arbitrariness test is contextual and will depend on the facts of each case. The scope of the deprivation determines whether the substantive arbitrariness test will involve a rationality- or proportionality-like investigation, since instances of severe deprivation require stronger justification than those that are of a lesser degree. Since prescription results in the loss of ownership, it is clear that convincing reasons need to be advanced for it to pass scrutiny under section 25(1). To this end I employ the justifications for prescription identified in chapter four, namely that it fulfils a corrective function in jurisdictions with negative registration systems by lowering transaction costs in terms of utilitarianism and law and economics theory. Furthermore, the strict requirements for prescription – coupled with a very

⁶⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

⁶⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

long 30-year period – are hard to satisfy, which is reinforced by the fact that an owner need only take minimal steps to prevent the running of prescription. In addition, the fault for the loss of ownership can be laid at the door of the owner, since he – through negligence or inactivity – induces the possessor to “rely”, in the words of Singer, on the legitimacy of his possession. In this context Alexander’s social-obligation norm obliges the owner to “give” the land to the squatter, especially if it becomes essential for such squatter to attain human flourishing. Finally, the possessor becomes attached to the property in terms of Radin’s personality theory, especially when read together with the theories of Singer, Holmes and Alexander. This latter point also finds support in German constitutional law, which holds that property located further from the personal autonomy of an owner is subject to greater degrees of regulation or deprivation from the state. Consequently, chapter five concludes that sufficient reasons exist to declare that prescription amounts to non-arbitrary deprivation of property, which is similar to the conclusion reached by the Grand Chamber in *Pye*. This finding by the Grand Chamber is indeed significant, since it found that adverse possession, which merely requires possession *animo possidendi*, is in line with Article 1 of the First Protocol. This finding provides authority from a comparative law perspective that prescription – with its stricter requirements – is likely to amount to non-arbitrary deprivation of property in terms of section 25(1).

The next stage in the *FNB* methodology concerns the question whether prescription could perhaps amount to uncompensated expropriation, which would be in conflict with section 25(2). This possibility was highlighted by the decision of the Fourth Chamber in *Pye*, which found that adverse possession constituted uncompensated expropriation. Chapter five predicts that prescription cannot amount to expropriation, since all expropriations must take place in accordance with empowering legislation.⁶⁹ Since the prescription acts do not empower the state to expropriate and, further, make no provision for the payment of compensation to an owner losing ownership, it is highly unlikely that prescription could amount to expropriation.⁷⁰ This conclusion is strengthened by the fact that common law expropriation is unknown in South African law, since an act of expropriation “must rest upon a legislative foundation.”⁷¹ Therefore, the state can only decide to expropriate if such power is granted

⁶⁹ *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671.

⁷⁰ This issue is discussed in more detail in section 5.3.2.6 of chapter five above.

⁷¹ *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671; *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 81.

through legislation, which legislation must specifically empower the state for this purpose.⁷² Furthermore, there is no common law authority for South African courts to order expropriation, as this power must be granted through empowering legislation. The prescription acts do not empower a court to order expropriation, which is yet another indication that it cannot amount to expropriation. This chapter also considers the possibility that prescription may amount to constructive expropriation. In this sense chapter five supports the argument that if one adheres to the methodology set out in *FNB*, together with judgments from the highest courts in South Africa,⁷³ it seems as if this doctrine does not form part of South African law. Van der Walt advocates this argument, since he states that the “doctrine of constructive expropriation probably does not and should not find application in South African law.”⁷⁴ The chapter indicates that it is unnecessary to consider whether prescription may be classified under this doctrine, since constructive expropriation does not form part of South African law. Consequently, I conclude that prescription complies with section 25 of the South African Constitution.

6.3 The future of acquisitive prescription in South African law

In this dissertation I have shown that prescription, in its current form, is in line with the property clause of the South African Constitution. This will be the case as long as South Africa uses a negative registration system, for prescription will then continue to fulfil the corrective function of affording *de iure* status to long-existing *de facto* realities through clearing titles and resolving conflicting claims pertaining to ownership. Accordingly, prescription shifts resources to higher-valuing possessors because it lowers transaction costs in instances where the market is unable to facilitate this transaction. From a moral perspective, prescription rewards those who invest time and energy into property, since it awards ownership to them and protects the settled expectations of possessors through recognising their reliance interest. In this sense possessors become attached to property, which (personal) attachment must enjoy protection over the fungible interests of neglectful or absent landowners.

⁷² Van der Walt AJ “Constitutional Property Law” (2009) 2 *Juta’s Quarterly Review* para 2.4.

⁷³ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC); *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA).

⁷⁴ Van der Walt AJ “Constitutional Property Law” (2009) 3 *Juta’s Quarterly Review* para 2.2.

Although chapter four establishes that the distinction between good and bad faith rests on fallacious arguments, it could be advantageous to have a future study that investigates whether a shorter prescription period needs to be introduced into South African law for *bona fide* possession.⁷⁵ Such an amendment could be sensible if it is able to rectify defective transfers that, but for a certain legal impediment, would constitute valid transfers of ownership. This argument is central to why Dutch and French law have shorter periods for good faith prescription. However, this dissertation in no way suggests that such an alteration be made to South African law, which has a period of 30 years for both good and bad faith prescription.

⁷⁵ I am indebted to Prof van der Walt for discussions that helped me form this opinion.

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