

## ORIGINAL ACQUISITION OF OWNERSHIP

### PART 1

#### Introduction

We now begin the section of the course concerned with the acquisition, extinction and protection of ownership rights. We do so with a discussion of the various forms of **original acquisition** of ownership. At the outset, original acquisition of ownership must be distinguished from **derivative acquisition** of ownership.

**Original acquisition** occurs where the title of the acquirer does not depend on the lawfulness of the previous owner's title and takes place without his or her co-operation. For example, imagine that a ship with valuable cargo sinks at sea. A passing ship salvages the cargo and it is distributed between the crew of the salvage vessel. Each crew member becomes owner of their portion of the cargo through a process known as "appropriation" or "occupation". They do so without the co-operation of the previous owner and their title to their portion is in no way affected by the lawfulness of the previous owner's title. This marks appropriation out as a form of original acquisition. Another example is expropriation. Property is expropriated irrespective of the consent of the previous owner. Expropriation normally extinguishes all other claims and rights over the property which may have existed at the time of expropriation and so does not depend on whether the previous owner had clean, lawful title over the property. All rights in the property accrue to the expropriating authority.

**Derivative acquisition**, however, is dependent on the lawfulness of the previous owner's title and only takes place with the previous owner's co-operation. The two

principal examples of derivative acquisition are **delivery** and **transfer**. We will consider derivative acquisition later in the term. The next few lectures will be devoted to original acquisition of ownership.

### **Original acquisition**

Original acquisition “wipes clean” previous legal relationships between the thing owned and the previous owner. Accordingly, it can only take place in a limited number of circumstances. The main ones are –

- Where unowned property is **appropriated** or **occupied**;
- Where one piece of property **accedes** or **attaches** to another, thereby creating a new thing, ownership of which is vested in the owner of the principal object to which the accessory object became attached;
- Through **specification** or **manufacture**. Where a person makes a new thing out of materials owned by another, without the permission of the owner of the materials, he (the manufacturer) becomes the owner of the new thing;
- Through **acquisitive prescription**. Where a person has possession over a thing, openly and undisturbed, for a period of 30 years, he becomes its owner.
- Through **expropriation**, where ownership of a thing is taken by the state against compensation.
- Through **mixing**, where two liquids or “liquid solids” (e.g. money, cattle) are mixed with each other, without the owners’ permission, such that neither is the principal or accessory thing, the owners normally become co-owners of the new, composite, entity.
- Through **forfeiture**, as a penalty for the commission of a crime.

In this lecture, we will address each of the above, except for accession – which has given rise to most of the controversy in the cases and must be dealt with separately. We will deal with accession next week.

### Occupation / Appropriation

A thing is appropriated when a person (the acquirer) obtains **physical control** over a **corporeal thing** which is **unowned** and **with the intent to become the owner**.

The nature and extent of the physical control is important. Mere detention is not enough. It is important that the control enables the acquirer to exercise the rights associated with ownership.

In **Reck v Mills** the Appellate Division had to consider the meaning of this physical control requirement. In that case, Mills had commenced a salvage operation during which he was trying to harvest a large condenser from a shipwreck. Mills attached a rope and a buoy to the condenser, after which Reck attempted to commence a salvaging parts of the shipwreck too. In the High Court, Mills obtained an interdict against Reck prohibiting him from interfering in Mills' salvage operation. Mills succeeded. Reck appealed.

On appeal, the Appellate Division decided that Mills had not yet established the degree of control required to amount to "possession". It is not enough, the court held, to simply mark something out (as Mills had done with a rope and a buoy). Possession must be such that the possessor must be in a position "to deal with the subject at [his] pleasure" to the exclusion of all others. Some element of actual control, rather than marking-out is required. Given that Mills had not established the control required, Reck's appeal was successful.

The other requirements for appropriation are less controversial, and are summarised as follows –

- Unowned property may be either abandoned (*res derelicta*) or simply not owned at that time (*res nullius*), but must in all cases be capable of ownership.
- In the case of *res derelicta*, it is important to note that property is not lightly inferred to have been abandoned, and a clear intention to abandon property must be evident before abandonment can be demonstrated.
- The principal examples of *res nullius* are wild animals in their natural state. Ownership can be established if they are captured.
- Where a captured animal which is generally thought to be “wild” in nature escapes from its owner, it reverts to being unowned **unless** it is a wild animal held for commercial or hunting purposes. In that case, by virtue of the provisions of section 2 (1) of the Game Theft Act 105 1991, the animal remains owned and can be vindicated.
- A “domestic” animal – such as a dog or cat – remains the property of its owner even if it escapes. What counts as a domestic animal depends on the mores of the community at the time.

### Manufacture

Ownership can be acquired by making a completely new thing out of materials owned by another person **without** that person’s permission. This is known as **manufacture** (or “specification”, a word derived from the Latin word “specificatio”). The product manufactured is then owned by the manufacturer.

The product must be a completely new thing and be incapable of being returned to the state of the raw materials from which it came.

The owner of the material can, of course, claim compensation from the manufacturer of the product. What can be claimed, and how it can be claimed, depends on the state of mind of the manufacturer. If the manufacturer genuinely believed the materials were his, the owner of the materials has only an enrichment claim for the value of the materials. If there was bad faith, he has a damages claim under the Aquilian action.

### Prescription

At the outset, it is important to distinguish between **acquisitive** prescription and extinctive prescription. Acquisitive prescription governs the principles applicable to the passing of ownership after a long period of possession by a non-owner. **Extinctive** prescription regulates the time periods within which claims for repayment of debts must be brought before the courts.

Here, we are concerned with **acquisitive** prescription. It is regulated by statute. The applicable statute is the Prescription Act 68 of 1969. Parts of its predecessor (the Prescription Act 18 of 1943) are still in force, and apply to prescription which commenced before 1 December 1970. But because of the time which has elapsed since the passage of the 1968 Act, it is unlikely that the 1943 Act will be relevant in any but the smallest number of cases. We will accordingly concentrate on the 1969 Act.

Section 1 of the Prescription Act provides that a person becomes the owner of a thing if he openly exercises the rights associated with ownership for an uninterrupted period of 30 years. He must exercise control –

- Without force
- Openly
- Without consent
- As if he were the owner. This means that a reasonable person must deduce from the circumstances that the possessor's intent is to exercise all the rights associated with ownership. This can include, for example, effecting a permanent improvement to land.

As stated above, possession should be for an **uninterrupted** period of 30 years. Prescription is interrupted by voluntary loss of possession and/or by the owner bringing legal proceedings in respect of the land, in which the owner asserts his ownership. When prescription is interrupted, it ceases to run and the period for which it has been running will not count together with any future period of prescription. The possessor must go back to square one.

Section 2 of the Act provides that prescription is **not** interrupted where –

- The possessor involuntarily loses possession of the property and brings legal proceedings to recover possession within 6 months of losing it; and/or
- The owner brings proceedings in respect of the property in which he or she asserts ownership over it, but does not prosecute his or her claim to conclusion, or abandons a judgment in his or her favour.

Section 3 of the Act provides that prescription can also be suspended. Prescription is suspended when –

- The person against whom it runs is a minor, or insane, or under curatorship or prevented by circumstances beyond his control from interruption prescription; or
- The person in whose favour prescription runs is outside South Africa, married to the person against whom prescription is running, or is a member of the controlling body of a juristic person against whom prescription is running.

If the period of suspension ends more than three years before the period in which prescription would be completed, prescription continues to run as if unsuspended. If it ends within three years of the date on which prescription would be complete, prescription must run for an additional 3 years after the date on which it would otherwise be complete. For examples of the application of this principle see page 122 of the Van Der Walt textbook (6ed).

Once prescription is complete, the possessor becomes owner notwithstanding the absence of transfer of the property into his or her name, or the absence of delivery of the property to him or her.

### Expropriation

Expropriation is the taking of ownership by an authority statutorily empowered to do so, against the payment of compensation. Expropriations follow the procedure set out in the Expropriation Act 63 of 1975. These are summarised at p 113 of the Vander Walt textbook (6 ed.).

Compensation must be calculated in a manner consistent with section 25 (3) of the Constitution. A *solatium* of 10% is normally paid in addition to the actual loss incurred to the owner by the expropriation.

### Mixing

Where two liquids or “liquid solids” owned by different people are fused together or mixed in such a way as they cannot be separated, without the owners’ permission, ownership of the resulting mass passes to the owners jointly, in proportion to the parts of the whole they owned prior to the mixing.

A good example of ownership passing through mixing is depositing money into a bank. When one does so, the bank acquires ownership of the money because the depositor’s money mixes with all the other money in the bank. The depositor merely acquires a personal right to reclaim the deposit in terms of the contract governing the account with the bank. Where a deposit or withdrawal is made incorrectly into or out of an account, either the bank or the depositor has a claim for unjustified enrichment. For an example of the application of some of these principles, see *Lombard Insurance Company v First Rand Bank ZAGPJHC 131 (8 February 2011)*.

### Forfeiture

Forfeiture takes place in order to prevent people from using property to commit a crime, or from financially benefitting from crime. Property can be forfeited to the state where it is an “instrumentality” of an offence, or where it was acquired with the proceeds of criminal activity.

Forfeiture must be authorised by a court order in terms of the relevant statute. The principal statute dealing with asset forfeiture is the Prevention of Organised Crime



Act 121 of 1998, which sets out the conditions under which asset forfeiture orders may be made. There are a range of other statutes which authorise seizure of property in order to preserved evidence or detect or prevent crime. These include the Criminal Procedure Act 51 of 1977, which provides for the forfeiture of weapons and motor vehicles used in the commission or crime. The Constitutional Court is currently considering whether a home used as an illegal shabbeen should be forfeited to the state in *Van der Burg v Director of Public Prosecutions* - a case which it heard on 8 March 2012. The details of that case are available on the Constitutional Court website.