

# THE ROLE OF USUCAPIO (ADVERSE POSSESSION) IN DIFFERENT SYSTEMS

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Almost all jurisdictions possess some form of mechanism for transferring title in accordance with principles usually known as usucapio or (acquisitive) prescription in the civil law tradition and - with a slightly different meaning – adverse possession in the Anglo-American world.

The period after which the “true” owner may no longer bring an action to repossess his land varies widely among jurisdictions, the most typical period being 20-30 years

Proof of good faith on the part of the possessor of the land significantly reduces the limitation period in some jurisdictions (France, Italy, Spain); in other jurisdictions evidence of good faith is not a relevant consideration (Germany, United Kingdom).

# USUAL JUSTIFICATIONS

FIRST JUSTIFICATION: TO PROTECT DEFENDANTS  
FROM STALE CLAIMS AND TO ENCOURAGE  
PLAINTIFFS NOT TO SLEEP ON THEIR RIGHTS

(Adverse possession is one aspect of the law of  
limitations)

**SECOND JUSTIFICATION: TO AVOID  
LAND BECOMING UNDEVELOPED  
AND NEGLECTED**

# THIRD JUSTIFICATION: TO PREVENT HARDSHIP IN CASES OF MISTAKE

Example: a squatter who incurs expenditure to improve the land under mistake of ownership or boundary.

# FOURTH JUSTIFICATION: TO FACILITATE AND CHEAPEN THE INVESTIGATION OF TITLE TO LAND

This fourth reason is undoubtedly the strongest justification for adverse possession in case of unregistered land, but doesn't work properly for registered land (especially where a "positive" registration system is adopted).



These justifications have been deeply investigated by the European Court of Human Rights (ECHR) in the famous Pye-case.

The case concerns an application brought by two United Kingdom companies, J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd.

J.A. Pye (Oxford) Land Ltd was the registered owner of a plot of 23 hectares of agricultural land in Berkshire (United Kingdom) valued at 21 million pounds sterling. J.A. Pye (Oxford) Ltd is the former owner of the land.

The owners of property adjacent to the land, Mr. and Mrs. Graham (“the Grahams”) occupied the land under a grazing agreement until 31 December 1983.

On 30 December 1983 the Grahams were instructed to vacate the land as the grazing agreement was about to expire.

They did not do so.

In January 1984 the applicants refused a request for a further grazing agreement for 1984 because they anticipated seeking planning permission for the development of all or part of the land and considered that continued grazing might damage the prospects of obtaining such permission.

From September 1984 onwards until 1999 the Grahams continued to use the land for farming without the applicants' permission.

In 1997, Mr. Graham registered cautions (official warnings) at the Land Registry against the applicant companies' title on the ground that he had obtained title by adverse possession.

The applicant companies sought the cancellation of the cautions before the High Court and issued further proceedings seeking possession of the disputed land.

The Grahams contested the applicant companies' claims under the Limitation Act 1980, which provides that a person cannot bring an action to recover any land after the expiration of 12 years of adverse possession by another.

They also relied on the Land Registration Act 1925, which provided that, after the expiry of the 12-year period, the registered owner held the land in trust for the squatter.

On 4 February 2000 the High Court held that, since the Grahams enjoyed factual possession of the land from January 1984 and adverse possession took effect from September 1984, the applicant companies had lost their title to the land under the 1980 Act, and the Grahams were entitled to be registered as the new owners.

The applicant companies appealed successfully, but their appeal was overturned by the House of Lords, which, on 4 July 2002, restored the order of the High Court.



However, Lord Bingham of Cornhill stated that the decision was one he had reached “with no enthusiasm.”

He said: “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.”

Pye took the case in front of the ECHR, alleging that the United Kingdom law on adverse possession, by which they lost land with development potential to a neighbouring landowner, operated in violation of Article 1 of Protocol No. 1 to the Convention in their case.

Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules:

- the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property;

- the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions;
- the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.

The three rules are not, however, 'distinct' in the sense of being unconnected.

The 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.

On 15 November 2005 the Fourth Chamber delivered a judgment in which it held by four votes to three that adverse possession constituted an uncompensated expropriation, which is in conflict with Article 1 of Protocol No. 1 to the Convention;

a joint dissenting opinion was appended to the judgment.

The Grand Chamber reversed (by a 10 to 7 majority) the Fourth Chamber's judgment, holding that sufficient reasons do exist for having adverse possession in a legal system.

The Grand Chamber considered that Article 1 of Protocol No. 1 was applicable as the applicant companies had lost ownership of 23 hectares of agricultural land as a result of the operation of the 1925 and 1980 Acts.



The Grand Chamber also noted that the applicant companies were affected not by a “deprivation of possessions” within the meaning of Article 1 of Protocol No. 1, but rather by a “control of use” of land.

The Grand Chamber further considered that the existence of a 12-year limitation period for actions for recovery of land as such pursued a legitimate aim in the general interest.

There was also a general interest in the extinguishment of title at the end of the period.

The Court concluded that the fair balance required by Article 1 of Protocol No. 1 was not upset in the applicant companies' case.

Five Judges expressed a joint dissenting opinion  
and two Judges expressed a separate  
dissenting opinion.

The “core” of the dissenting opinions of the five Judges is that “in the case of unregistered land, title was made out by establishing a number of years' possession. Title deeds served only as evidence in support of possession, and could be defeated by a person who could prove actual (adverse) possession for the requisite number of years. In such a system, the extinguishment of title at the end of the limitation period could be seen as a coherent element in the rules on acquisition of title.

In the case of registered land, however, title depends not on possession, but on registration as the proprietor. A potential purchaser of land can ascertain the owner of the land by searching the register, and there is no need for a potential vendor to establish title by proving possession....While we can accept that, where land is abandoned, it may be in the general interest that it should be acquired by someone who would put it to effective use, we are unable to accept that the general interest would extend to depriving a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation ...”.

A comparative analysis (Moccia, 1993; Marais, 2011) confirms the tension existing between land registers and adverse possession.

Actually this is not surprising, bearing in mind that usucapio contains a counter-principle capable of defeating even the most reliable and professionally handled system of registration.



The above mentioned comparative perspective demonstrates that the requirements for acquisitive prescription and adverse possession are stricter in jurisdictions with a positive registration system.

In order not to lose the primary benefit of allowing potential buyers to rely on the results of the registers, positive land register systems try to reduce to the minimum the operation of usucapio.

The solutions envisaged are:

- 1) to establish that, after the expected time has elapsed, the possessor does not acquire the property, but only the right to obtain registration in the land register;
- 2) not to change the traditional rule of acquisition by usucapio ex se and erga omnes, but safeguarding the purchases made by third parties on the faith of the land register.

The German system limits *usucapio extra tabulas* to truly exceptional cases and provides almost exclusively for *usucapio secundum tabulas* (§ 700 BGB), which essentially constitutes a remedy against the mistakes that have escaped the preventive control of legality; if no opposition is entered by the true owner, the contrast between the “formal” situation resulting from the land register and the one that actually exists is remedied by means of a *usucapio secundum tabulas* of thirty years' duration

The Austrian system, instead, has opted for the second solution: usucapio is considered to directly produce acquisitive effects (through thirty years possession in good faith) and the relative judgement only has declarative effects. However, according to § 1500 ABGB (Allgemeines bürgerliches Gesetzbuch), "the right acquired by adverse possession or by prescription cannot prejudice anyone who, on the faith of public books, has acquired something or some right before its registration".

The Italian “Libro Fondiario” system also provides for an extra tabulas usucapio, which occurs with possession (no matter whether in good or bad faith) lasting twenty years. In order to safeguard his purchase, however, the person who has acquired property by usucapio must promptly register the judgement that has recognized his right; otherwise that person bears the risk of not being able to oppose his purchase against the third party who has bought on the faith of the land register

# These distinctions are related to a prominent structural difference of usucapio in the two Italian systems

In the “trascrizione” system, usucapio is the pillar on which the entire system rests; thanks to it, as a method of original acquisition, the search regarding the validity of the individual transactions based on derivative acquisitions can be limited backwards to twenty years. The expiration of this term results in the maximum guarantee offered by the law regarding the certainty of the acquisition of the right of ownership by the person who had (or received, in a relationship of legal succession) the possession of the immovable

In the “Libro Fondiario” system, on the contrary, *usucapio* is an element of weakness, since it gives rise to a situation of incompleteness of the public books: whoever is listed as proprietor in the land registry may in fact not be the actual owner, since another person may have acquired the same right extra tabulas by virtue of a possession that has lasted for twenty years



Very instructive is also the experience of English law. Prior to the Land Registration Act 2002 a registered owner's title could simply be extinguished after 12 years of sustained possession by the squatter; there was no mechanism to alert the registered owner to the fact that his title to land may be automatically extinguished after the 12-year period.

The Land Registration Act 2002, although allowing the squatter to apply to be registered as owner of the dispossessed land after 10 years of continued possession, requires the registered owner to be given an opportunity to claim his land back. The registered proprietor has two years in which to regularize his possession of the land by evicting the squatter.

The explanation of the change provided by the report “Land Registration for the Twenty-First Century” is as follow: “We consider that this new scheme strikes a fairer balance between landowner and squatter than does the present law. It also reflects the fact that the basis of title to registered land is the fact of registration, not (as is the case with unregistered land) possession”.

Also significant and worthy of mention is what has happened in New Zealand (where the acquisition of title to registered land through adverse possession was prohibited by the Land Transfer Act 1885 and reintroduced by the Land Transfer Amendment Act 1963) and in New South Wales [where the acquisition was prohibited by the Real Property Act 1900 and reintroduced by the Real property (Possessory Titles) Amendment Act 1979].

In Ontario, section 51(1) of the Land Titles Act 1990 provides that no title, right or interest can be acquired adverse to or in derogation of the title of the registered owner by any length of possession or by prescription. As a result in that Country adverse possession is still applicable only in respect of unregistered land.

An opposite approach is followed by countries with a “negative” registration system, like France and Italy (limited to the regions where “trascrizione” system applies).

In these countries, registration does not confer or guarantee title, with the result that the buyers must examine the deeds and draw their own conclusions.

These registration systems couldn't survive without usucapio: possession ensures that ownership and possession coincide, especially in situations where there may be defects as to ownership in the LR; proof of possession permits avoiding the *probatio diabolica*, which would consist of climbing up the chain of title to its origin.

Both Italian and French law require the possessor to possess the land *animo domini* (not only *animo possidendi*) for an uninterrupted period of time without acknowledging the rights of the owner. The length of the period required for usucapio depends on whether the possessor was bona or mala fide.



Both in Italy and in France it is improbable that in a case similar to Pye the owners would have lost their land by usucapio: whoever receives a property from someone else and acknowledges that his/her title is ancillary, is merely considered to have custody (detention) and is not qualified as a possessor.

However we could say that negative registration systems, paradoxically, comply with human rights better than positive ones.

The Pye case has highlighted that human rights may have a significant future role to play in real property law.

This could happen not only about the close interaction between land registers and adverse possession, but also about the role of indefeasibility, which is a foundation stone of Torrens system.