



## Three of a Kind? Positive Prescription in Sri Lanka, South Africa and Scotland

David L. Carey Miller\*

*Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.*

### Introduction

Within the general category of ‘mixed systems’ a special affinity exists between the laws of Scotland, Sri Lanka and South Africa. This relationship will be considered by commenting first, in Part I, on the general position, followed, in Part II, by a particular case study of positive prescription applicable to land. The mixed civil/common law systems of South Africa and Scotland having been studied in recent projects,<sup>1</sup> Part I will pay most attention to the Sri Lankan system.<sup>2</sup> This approach will continue in Part II with the focus on Sri Lanka and only brief comment on the Scottish and South African systems of prescription which have been analysed, explained and compared in recent expert literature.<sup>3</sup>

---

\* FRSE, Emeritus Professor of Property Law, University of Aberdeen; Senior Visiting Research Fellow, Institute of Advanced Legal Studies, London. The research for this paper was carried out on a study visit to the University of Colombo in October/November 2006. The author acknowledges funding support from the Carnegie Trust for the Universities of Scotland which made the visit possible. Grateful thanks are also due to Dean Selvakkumaran and Head of Law Dr Udagama for their invitation and for making accommodation and facilities available. Finally, while Professor Sharya Scharenguivel bears no responsibility for the paper, her most valuable advice and assistance is acknowledged with gratitude. This paper is appearing in the Stellenbosch Law Review (Stell. L.R., ISSN 1016-4359) and is published in the EJCL with the permission of the Stell. L.R. Editorial Committee.

<sup>1</sup> Most notably so in the publication of ‘Southern Cross’ – R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa*, 1996, followed by ‘Northern Cross’ – K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, 2000 and ‘Double Cross’ – Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective*, 2004. In the last mentioned work see generally Reinhard Zimmermann “‘Double Cross’: Comparing Scots and South African Law”, 1.

<sup>2</sup> This part of the paper draws on an associated contribution, deriving from the same research, which explores the affinity between the three systems in a more general way; see D L Carey Miller “Three of a Kind?” in *Essays in Honour of John Milton*, in press.

<sup>3</sup> For reference to the modern literature and a comparative comment see D L Carey Miller and Anne Pope “Acquisition of Ownership” in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective*, 2004, 673, 686-692.

## Part I: General Affinity

### Related Development Chemistry

By accident of history the legal systems of Sri Lanka and South Africa have much in common. Events in the mid-17<sup>th</sup> and the late 18<sup>th</sup> centuries produced this affinity. In the 1650s the Dutch, at the height of their sea-power, ousted the Portuguese from Sri Lanka and occupied the most southerly part of Africa. As part of a quest to control the oriental spice trade northern and southern Indian Ocean locations came to be subject to the well developed Roman-Dutch legal system.<sup>4</sup> Following the Napoleonic Wars, the Dutch lost control to the British in both jurisdictions. Although the new colonial power chose to leave Roman-Dutch law in place, English law influence commenced through the circumstances of British administration.<sup>5</sup>

A civilian based common law influenced by English law is the basis of a perception that Scots law completes a particular form of mixed systems' triangle with South Africa and Sri Lanka.<sup>6</sup> The common law of Scotland, while not an import from across the North Sea, developed as a part of the *ius commune* with considerable influence from canon and civil law. Following the post 1707 union – and possibly from the beginning – Scots law was subject to influence from her more developed, but essentially different,<sup>7</sup> southern neighbour.<sup>8</sup> Perhaps only since the late 20<sup>th</sup> century can it be said that Scots law is no longer subject to the accidental influence of English law through factors of proximity and power rather than as a natural consequence of the formal United Kingdom relationship position.

---

<sup>4</sup> See, respectively, Eduard Fagan “Roman-Dutch Law in its South African Historical Context” in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa*, 1996, 33 and Marleen H J van den Horst, *The Roman Dutch Law in Sri Lanka*, 1985.

<sup>5</sup> Over time local factors caused the impact and influence of English law to differ in Sri Lanka and South Africa in the contexts of distinct instances of the development of Roman-Dutch common law.

<sup>6</sup> Recognition of commonality is not new. Kenneth Reid “The Idea of Mixed Legal Systems” (2003) 78 *Tulane Law Review* 5, 9 shows how the systems were brought together, with codified Quebec, as a Commonwealth study in Sir Maurice Amos’s “The Common Law and the Civil Law in the British Commonwealth of Nations” (1937) 50 *Harvard Law Review* 1249. Reid’s paper inaugurated the *First Worldwide Congress on Mixed Jurisdictions*, Tulane Law School, New Orleans, 2002 which brought into being *The World Society of Mixed Jurisdiction Jurists* (<http://www.mixedjurisdiction.org>).

<sup>7</sup> Many of the differences are identified in T B Smith’s Hamlyn Lectures, *British Justice: the Scottish Contribution*, 1961; for a stimulating discussion of the topic see Peter B H Birks “More Logic and Less Experience” in David L Carey Miller and Reinhard Zimmermann, *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, 1997, 167.

<sup>8</sup> Views differ as to how the mixed make-up of Scots law should be characterised. It does not have definite staging posts of influence in quite the same way as the two colonial jurisdictions. The picture is piecemeal rather than pattern; see H L MacQueen, “Scots Law” in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2006) 642, arguing that rather than being a consequence of overlaying, “the mixture in some shape or form seems always to have been present.” On this theme see also especially W D H Sellar, “Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions” (2000) 4 *EdinLR* 3 and Esin Örtücü, “The Judge and Jurist in Scotland: on the Verge of a Second Renaissance” (2003) 78 *Tulane Law Review* 89. For a general bibliography see MacQueen, *op cit*, 650-652.

A close affinity in structure and form gives essential commonality in legal methodology between the systems of Sri Lanka, South Africa and Scotland. In all three, while legislation is supreme, the development of the law occurs through similar forms of judicial lawmaking.<sup>9</sup>

### **Sri Lankan Importing from South Africa**

It is trite that the relatively well developed South African Roman-Dutch private law has been influential in the development of the counterpart in its context as the residual common law of Sri Lanka.<sup>10</sup> From relatively early times in the context of colonial legal development, Sri Lankan courts have referred to South African decisions.<sup>11</sup> There is a long established practice of reference to South African sources based on Sri Lankan recognition of affinity with the southern hemisphere development of Roman-Dutch law. A 1965 Appeal Court dictum of Tambiah J is illustrative of the relevant thinking. Noting that Roman Dutch Law “is the common law or the general law of Ceylon” he observed that “it has thrived on the soil of Ceylon, although to a lesser degree of growth than in South Africa.”<sup>12</sup>

In a work published first in 1972, L J M Cooray observed that: “Sri Lanka has been influenced by South African developments, and the South African case law and academic writings<sup>13</sup> have influenced our judges and academics” for “[t]he basic reason that in both countries Roman-Dutch law is the residual<sup>14</sup> law.”<sup>15</sup> The writer goes on to say that “Sri Lankan authors write about the Roman-Dutch law of Sri Lanka and South Africa,<sup>16</sup> and

---

<sup>9</sup> It should be noted that, through a British administration of justice, the two colonial systems were much influenced by the system and methodology of English law in the development of their structure, process and method. In Scotland, however, a distinct native process and procedure developed, though this does have more affinity with Anglo American common law than the civil law.

<sup>10</sup> How the position of Roman-Dutch law is properly characterised is somewhat controversial. In the Privy Council decision in *Kodeeswaran v The Attorney General* (1971) 72 NLR 337 Lord Diplock emphasises the indigenous character of Sri Lankan common law in which Roman-Dutch law is neither a starting nor a finishing point. See T Nadaraja, *The Legal System of Ceylon in its Historical Setting*, 1972, 247 pointing to the problem of identifying Roman-Dutch law as the ‘common law’; see Sharaya Scharenguivel, *Parental and State Responsibility for Children*, 2005, iii, n 4, for a summary on this issue; see also, now, the relevant comments of Rohan Edrisinha, “The Future of the Roman Dutch Law in Sri Lanka’s Mixed Legal System: The Law of Defamation in Sri Lanka: a Case Study” paper at 2007 World Society of Mixed Jurisdiction Jurists Edinburgh Conference.

<sup>11</sup> For example in *Silva v Mohamedu* (1916) 19 NLR 426 the Sri Lankan Supreme Court followed the South African Appellate Division in *Breytenbach v Frankel and Hochstadter* 1913 AD 390 regarding a minor’s contract agreeing to the disposal of property.

<sup>12</sup> *Silva v Johannis Appuhamy* (1965) 67 NLR 457, 464.

<sup>13</sup> Access to South African case law is not infrequently via cotemporary text books; see, for example the dictum of Pereira J in *Fernando v Perera* (1914) 18 NLR 150, 151: “As regards the next question, namely, that of adiation of the inheritance under the will by the 6th defendant, it has been said that there has been a massing of the estate, but as is laid down in Nathan’s work on the Common Law of South Africa...on the authority of a South African case, *Barry v Kunhabrdt’s Executors*...the mere massing of the joint estate does not. constitute adiation.”

<sup>14</sup> See above n 10.

<sup>15</sup> *An Introduction to the Legal System of Sri Lanka*, 2ed.1992, 95.

<sup>16</sup> The use of South African material in Sri Lanka is borne out by reference to the leading property law text; in G L Peiris, *The Law of Property in Sri Lanka*, I, (2<sup>nd</sup> edn 1983) the treatment of Roman-Dutch common law subjects is supported with numerous references to South African case law. Another work by this writer (*Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon*, 1972) is an example of a comparative study. A work already cited (Scharenguivel, *Parental and State Responsibility for Children*) is a recent example of a Sri Lankan scholar contributing a major comparative study on South African and Sri Lankan law.

perhaps even a greater part of their work may be concerned with South African cases”<sup>17</sup> but “it is only the very important Sri Lankan cases that find their way into the text (as distinguished from the footnotes) of the South African works.”<sup>18</sup> A consequence of formally foreign jurisprudence being received into the home system is, of course, that it comes to be part and parcel of the law, to be referred to in subsequent decisions as a matter of the development of domestic law.<sup>19</sup> Sri Lankan legal writers publishing in South Africa would appear to be part of the same fundamentally one-way pattern but also, perhaps, an indication of Sri Lankan esteem for South African legal literature.<sup>20</sup>

Especially from a Sri Lankan perspective, recognition of the bond of Roman-Dutch common law continues despite the charting of different courses in respective modern national legal development. Anton Cooray, writing in 1996, makes this point in demonstrating the affinity factor:

While the severance of colonial ties and subsequent constitutional developments in Sri Lanka and South Africa have been vastly different, the role of Roman-Dutch law in these two countries has been remarkably similar and for that reason some references to the South African developments are more than justified.<sup>21</sup>

These general observations must be qualified by noting the obvious point that the incidence of recourse to South African law varies depending upon the make-up of the Sri Lankan subject or sub-subject area. Comments by Professor G L Peiris<sup>22</sup> in his leading property law text are illustrative. “The law of South Africa is stated and commented on, only to the extent that the principles applicable in South Africa shed light on our own law.”

The Sri Lankan system is very much a mixed one with quite pervasive English law influence. Judge C J Weeramantry, observing that “so little was the difference between the two systems appreciated”, noted that a dependence on English law hampered the development of Roman-Dutch law.<sup>23</sup> A recent critical essay by another distinguished Sri Lankan lawyer, and former Supreme Court judge, Dr A R B Amerasinghe seeks to put matters into perspective in terms of the Roman-Dutch factor with the opening remark that “some hoary beliefs about the status

---

<sup>17</sup> An example of this is Professor Peiris’s treatment (at 138-140) of *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 369, and the associated case law and writings, regarding the abstract theory of derivative acquisition.

<sup>18</sup> Cooray, *An Introduction to the Legal System of Sri Lanka*, 95-96. As author and co-author of works on South African property law – *The Acquisition and Protection of Ownership* (1986) and, with Anne Pope, *Title to Land in South Africa* (2000) – the present writer can vouch for the point that there is negligible reference to Sri Lankan sources in South Africa.

<sup>19</sup> In *Mitrapala and another v Tikonis Singho* (2005) 1 SLR 206, 209 reference is made to the case law development referred to in n 17 via a quotation from C J Weeramantry, *The Law of Contracts* (1967) I, 422.

<sup>20</sup> In the centenary volume of the *South African Law Journal* published in 1993 editor Professor Ellison Kahn acknowledged the contributions since 1949 of “eminent judges, practitioners and academics from abroad” including, “from Sri Lanka, Professor C F Amerasinghe, Professor L J M Cooray, L Kadirgamar, M Somarajah, Professor G L Peiris, R S de Soysa...”

<sup>21</sup> Anton Cooray “Sri Lanka: Oriental and Occidental Laws in Harmony” in Esin Özücü, Elspeth Attwooll and Sean Coyle (Eds) *Studies in Legal Systems: Mixed and Mixing*, 1996, 71, 75.

<sup>22</sup> *The Law of Property in Sri Lanka*, 2<sup>nd</sup> ed 1983, vol I, 3 (referred to hereafter as Peiris, *Property*).

<sup>23</sup> Weeramantry, *The Law of Contracts*, I, 66.

of the Roman-Dutch law and the extent of its impact on the legal system need some dusting.”<sup>24</sup>

## Part II: Positive Prescription

### Historic Diversity

Positive prescription, in the form of *usucapio*, had a significant role in the property law context of classical Roman law. On the basis of a relatively short period of possession, meeting certain criteria, a good title could be obtained despite failings of form in the relevant derivative transaction. The *raison d'être* for *usucapio* was to give a good title where failure to meet required formalities otherwise denied one. The modern counterpart, at any rate in terms of broad policy basis, could be seen to be the protection of the possession of the good faith purchaser of a moveable in the codes of certain European jurisdictions.<sup>25</sup> An important difference, however, is that Roman *usucapio*, concerned with remission from defects of form, did not give a right in the *a non domino* context whereas, of course, the modern European protection of good faith purchase is directed to the rectification of substantive defects of title. The Roman development recognised the distinction between, on the one hand, prescription conferring a title on the possessor and, on the other, the barring of any action in assertion of title against the possessor.<sup>26</sup> Later Roman law came to recognise a form of prescription reflecting a policy basis very much distinguishable from the short term rectification rationale of *usucapio*. *Longi temporis praescriptio*<sup>27</sup> gave title on the basis of a period of unchallenged possession sufficiently long to justify recognition that a change in the title position should be recognised. In essence the thinking behind this form was that a point in time could be reached at which the *de facto* circumstances should be taken to represent the *de jure* position. This justification subsumed the complementary long prevailing factors of, on the one hand, a title holder's neglect for the position of his or her property and, on the other hand, the possessor's active assertion of entitlement. The development was complicated by the influence of Canon law insistence on possession being in good faith.<sup>28</sup> In subsequent development the period of long prescription settled on a norm of the order of a third of a century. In Roman-Dutch law and the associated *ius commune* developments one finds the range of applications of positive prescription in a position notable for uncertainty, if not confusion.<sup>29</sup> Leaving aside the possibility of recourse to negative prescription, the range of forms of positive prescription and the scope for variation in criteria, show the inherent flexibility of the concept and its potential to meet different policy needs.

This disjointed range of civilian thinking and associated *ad hoc* regulation of substance was, of course, part of what went into the differing chemistries of domestic make up in the three jurisdictions. As an additional dimension the English law development of adverse possession

---

<sup>24</sup> “The Dutch Influence on the Legal System of Sri Lanka” in Saman Kelegama and Roshan Madawela (eds) *400 Years of Dutch-Sri Lanka Relations: 1602-2002*, 287.

<sup>25</sup> The strongest example being Art 1153 of the Italian Civil Code.

<sup>26</sup> For the essence of the Roman law development see David Johnston, *Prescription and Limitation*, 1999, paras 1.13-1.19.

<sup>27</sup> See W W Buckland, *A Textbook of Roman Law*, 3<sup>rd</sup> Edn 1963, 241-251.

<sup>28</sup> See J W Wessels, *History of the Roman-Dutch Law*, 1908, 642.

<sup>29</sup> For a valuable survey of the complex Civilian development as the progenitor of the South African Roman-Dutch common law see C G van der Merwe, *Sakereg*, 2ed 1989, 271-274.

– not positive prescription but a form of acquisition by long possession<sup>30</sup> – was a source of influence, at any rate in Sri Lanka and South Africa.

In what follows the primary focus will be on the Sri Lanka model. As stated earlier, the South African and Scottish forms have been considered in a range of specialist work which means that their main features and thrust can be identified. This paper attempts to show the essence of positive prescription in Sri Lanka and make a preliminary triangular comparison. The groundwork for this in terms of a detailed account of the Sri Lankan system worked out from a vast case law has been admirably performed by Professor G L Peiris;<sup>31</sup> this piece seeks to take matters forward by comment, and, also, by reference to case law subsequent to the valuable Sri Lankan academic work.<sup>32</sup> It should also be noted that the work concerned includes a valuable survey of policy underlying Sri Lankan prescription with comparative reference to the South African law.<sup>33</sup>

## **Sri Lanka**

Positive prescription in Sri Lanka will be considered under the following headings:

i. background, general position and context; ii. substantive effect of section 3; iii. the possession requirement; iv. adverse or independent title basis; v. ten year period/disability factor; vi. comment as to mixed character.

### *i. Background, general position and context*

In terms of section 3 of the Prescription Ordinance (22 of 1871) the requirements for positive prescription of land are “undisturbed and uninterrupted possession...by a title adverse to or independent of that of the claimant...for ten years previous to the bringing of such action...” The critical factor of adverse possession is specifically elaborated on in a much discussed part of the section; the import of this is considered in some detail below.<sup>34</sup>

The Roman-Dutch common law was disallowed as the basis of acquisitive prescription of immovable property in Sri Lanka by legislation in 1822.<sup>35</sup> Since 1872 section 3 of the Prescription Ordinance (No. 22 of 1871) has been the basis.<sup>36</sup> That this is the trite position is acknowledged in a number of authoritative dicta, for instance that of Basnayake CJ in a 1964 decision:

It is common ground that the Roman-Dutch law of acquisitive prescription ceased to be in force after Regulation 13 of 1822 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of

---

<sup>30</sup> See W W Buckland and Arnold D McNair, *Roman Law and Common Law*, 2<sup>nd</sup> edn 1952 (F H Lawson) 117-123.

<sup>31</sup> Above, n 22.

<sup>32</sup> By fortunate circumstances my 2006 research visit to Colombo made possible the acquisition of an electronic data base of current Sri Lankan legislation, the New Law Reports and the Sri Lankan Law Reports.

<sup>33</sup> Peiris, *Property*; Appendix: “The Policy Underlying the Law of Prescription in Sri Lanka” 417-433.

<sup>34</sup> See text to nn 77-82.

<sup>35</sup> For details see G L Peiris, *The Law of Property in Sri Lanka*, 2ed 19??, I, 76-78.

<sup>36</sup> Following the terms of s 2 of the Prescription Ordinance no. 8 of 1834.

rights by virtue of adverse possession and that the common law of acquisitive prescription is no longer in force except as regards the Crown.<sup>37</sup>

The present law of positive prescription in Sri Lanka is accordingly found in the case law interpreting the terms and explaining the operation and scope of the controlling legislation. The extent of this case law is very much apparent from a reading of the definitive textbook treatment of the subject;<sup>38</sup> this, in turn, demonstrates the major role of acquisitive prescription in the resolution of property issues. The implications of the central role of a dispute based process involving private litigation for security of title is commented on below.

Viewed as a statutory basis of positive prescription – rather than the English law influenced adverse possession statute which it really is<sup>39</sup> – section 3 is structured in rationally reversed form commencing with a provision for the protection of “a defendant in any action” able to prove the requisite possession against “the claimant or plaintiff in such action.” Following this the section provides for what amounts to positive prescription by way of the initiation of a claim by an entitled party: “[a]nd in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property...” It may be noted at this stage that the use of the word “quieted” is a clue to the influence of the English common law in the Prescription Ordinance.<sup>40</sup>

The requisite basis for positive prescription is provided for in section 3 with the same criteria “as hereinbefore explained” applicable to assertion of title. Stated in claim mode, the criteria, by clear implication, are also “undisturbed and uninterrupted possession...by a title adverse to or independent of that of the claimant...for ten years previous to the bringing of such action...”<sup>41</sup>

Positive prescription is, in principle, an original mode of acquisition which usually functions in a context either to bolster or in competition with the prevailing system of derivative acquisition. The systems of Scotland and South Africa reflect these respective positions.<sup>42</sup> In any event, the controlling position of deeds or title will be the relevant context. There is no scope in this paper to examine the Sri Lankan system of registration in any detail, suffice to say that in its historic form – largely still prevailing – it is relative to the extent that it does no more than provide for a possible priority over an unregistered right. As a system of “registration of documents” its essential effect in the derivative acquisition context is “to give the transferee whatever title the vendor had prior to the execution of the earlier unregistered deeds.”<sup>43</sup> That the system of registration is subject to the controlling position of the substantive law of property is clear from a range of dicta collected by Professor Peiris.<sup>44</sup> As

---

<sup>37</sup> *Perera v Ranatunge* (1964) 66 NLR 337, 339; see also *Wijesundera and Others v Constantine Disa and another* 1987(2) SLR 66

<sup>38</sup> Peiris, *The Law of Property in Sri Lanka*, ch 5, 76-135.

<sup>39</sup> See below, text to n 119.

<sup>40</sup> See K Gray and S F Gray, *Elements of Land Law*, 4<sup>th</sup> edn 2005, para 6.33: “The quieting of possession”.

<sup>41</sup> In *Banda v Banda* (1900) 4 NLR 302, 304 Moncreiff J recognised the categories of claimant under section 3 on the wide statutory basis of those seeking to be quieted in their possession, those resisting usurpation or encroachment and those who wish to establish their claims in any other manner. See further below: iv/ adverse or independent title basis.

<sup>42</sup> See below text to nn 121-124 and 125-130.

<sup>43</sup> *Lairis Appu v Tennakoon Kumarihamy* (1958) 61 NLR 97, 105 per Sinnemamby J.

<sup>44</sup> Peiris, *The Law of Property in Sri Lanka*, 182-193 and, generally, ch 8.

the learned writer shows the possibility of a prescriptive claim is not affected by registration in the sense that it may trump the right deriving from the deed which is accorded priority<sup>45</sup> – against competing deeds<sup>46</sup> – under the system of registration.

One need hardly say that the introduction of a system of land holding and tenure based on a European model was, at very least, likely to be problematic in terms of obvious social and cultural differences. This trite observation is borne out by reference to the experience of the period of Dutch administration in a very evident tension, as regards land issue, between the interests of the colonial power and those of the people.<sup>47</sup> But the position is a complex one and, at the same time, the lack of structure and security of the status quo reflects the legal system seeking to give effect to general social conditions and priorities. A socio-economic instance of this is the widespread fragmentation of agricultural land. A consequence of the recognition of cultural diversity is the complexity which ensues from the possible application of different forms of personal law.<sup>48</sup>

A move away from the weak registration of documents system has commenced with the Registration of Title Act No. 21 of 1998 which was enacted following the recommendations of a Commission appointed in 1985.<sup>49</sup> The implementation of this legislation is in its early stages with pilot projects operating in certain areas.<sup>50</sup>

Under any circumstances the replacement of a national cadastral and registration system would be likely to be a long term process.<sup>51</sup> In Sri Lanka, the long prevailing position in which positive prescription is prominent in providing for finality of title, appears to have some time to run.<sup>52</sup> The focus of this essay will be on that system.

## *ii. Interpretation: substantive effect of section 3*

The interpretation of section 3 was controversial in the earlier case law, however, in *Perera v Perera*<sup>53</sup> the position of the section's active and comprehensive effect was settled by the Full Court. The following dictum of Wendt J<sup>54</sup> is quoted by Professor Peiris as reflecting "the accepted position".<sup>55</sup>

---

<sup>45</sup> In *Gunasekera v Lewis Appuhamy* (1966) 69 NLR 414 it was held competent for a party to rely on a prescriptive claim where he would otherwise fail on the basis of the priority of a registered deed against an unregistered one.

<sup>46</sup> *Appuhamy v Goonetilleke* (1915) 18 NLR 460, 471, per De Sampayo J: "registration only affects titles based on the instruments...and has nothing to do with titles acquired otherwise than upon such instruments."

<sup>47</sup> See K D G Wimalaratne "Dutch Influence on Sri Lankan Land Registration" in in Saman Kelegama and Roshan Madawela (eds) *400 Years of Dutch-Sri Lanka Relations: 1602-2002*, 275.

<sup>48</sup> See Anton Cooray "Sri Lanka: Oriental and Occidental Laws in Harmony" in Özücü, Attwooll and Coyle (Eds) *Studies in Legal Systems: Mixed and Mixing*, 78-88.

<sup>49</sup> See Wijeyadasa Rajapakse, *The Law of Property*, 2003, II, 274-292.

<sup>50</sup> See the 'Land Titling and Related Services Project' Website of the Sri Lankan Ministry of Lands ([www.ltrsp.slt.lk](http://www.ltrsp.slt.lk)).

<sup>51</sup> In much more favourable conditions than Sri Lanka, the Scottish development under the Land Registration (Scotland) Act 1979 only became fully operational on 1 April 2003.

<sup>52</sup> It may be noted that s 57 of the Registration of Title Act No 21 of 1998 disallows prescription from competing with a registered title: "The Prescription Ordinance (Chapter 68) shall not apply to lands or interests in land registered under this Act with a First Class Title of Absolute Ownership or a Second Class Title of Ownership. "

<sup>53</sup> (1903) 7 NLR 173.

<sup>54</sup> At 175-176.

<sup>55</sup> *Property*, 82.

I regard this as established that by ten years' prescriptive possession the possessor acquires not merely the right to continue holding the land against the person who had the *dominium* when that possession began, but a title of which he can only be divested in one of the modes recognised by law, viz., by devolution in due course of law or by express grant *inter vivos*, or by some other person in turn acquiring a prescriptive title against him. Once a prescriptive title is acquired, the consideration whether the holder of it is or is not in possession is as immaterial as if the title was by deed.

This dictum is a comment on the decision<sup>56</sup> which established that the ten year period did not need to be immediately preceding the bringing of the action. As Wendt J's opinion shows this critical interpretation of "for ten years previous to the bringing of this action" remained controversial but, as the learned judge observed, re-enactment in the 1871 Ordinance indicated that the legislature did not want a change of position. The interpretation welcomes claims – indeed, counterclaims – with consequent detriment to security of title. Part of this absence of security arises from the approach's concession to the possibility that A's prescriptive title will turn out to be trumped by B's based on a subsequent ten year period and recognised in subsequent litigation. Obviously, the circumstances may exclude this possibility but its potential is an inevitable consequence of giving acquisitive prescription a role extended beyond the position of 'here and now' possession.

But the law's receptiveness to prescriptive claims is not the only factor in the prevalence of the judicial determination of title disputes in Sri Lanka. A context of the combination of the prevailing position of a weak system of registration of deeds – as outlined in the previous section – and an accessible form of acquisitive prescription gives scope for disputes requiring forensic determination.

In Sri Lankan property litigation there is a prevalence of disputes involving a contest between the holder of a 'paper title' and a party claiming entitlement on the basis of prescription. In this regard, it is relevant to note a relatively recent decision in which the court summarily rejected the proposition that a prescriptive claim could only be competent if associated with a paper title: "there was no question of the plaintiffs having to prove their title by deeds as well as prescription".<sup>57</sup>

Another recent decision reflects the typical contest between a written title and prescription.<sup>58</sup> The title holder in this case had not sought from the court a 'declaration of title', in accordance with the usual practice, in the case of a claim to recover possession of property based upon title. Having decided that the absence of a prayer for a declaration of title was not fatal to the respondent's right to proceed on a vindicatory basis the court found for the title holder. It is significant that the opposing claim to acquisition by prescriptive title was rejected on the evidence. The party claiming on the basis of prescription had taken over possession from his father who was a tenant of the then title holder, from whom the present title holders had acquired by succession. The rejected claim to prescriptive title involved an assertion that the termination of payment of rent was the basis and commencement of a period of adverse possession which had endured for ten years. One interpretation of this scenario is that the only

---

<sup>56</sup> In *Naker v Sinnatty*, 1860 Ramanathan's Reports 75. This case was decided on the basis of the earlier Prescription Ordinance (no. 8 of 1934), the relevant terms of which were exactly followed in the law of 1871; see Peiris, *Property*, 79-82.

<sup>57</sup> *Leisa & Ano v Simon & Ano* 2002 (1) SLR 148, 152 per Wigneswaran J.

<sup>58</sup> *Dharmasira v Wickrematunga* 2002(2) SLR 218.

justification for such an accessible process of acquisitive prescription is the position of a relatively insecure system of provision for title to land. In the context, a decision by the District Court confirming acquisition by prescription is something approaching the optimum position in terms of security of title only bettered by confirmation of the decision on appeal to the Supreme Court.

Social conditions and circumstances in Sri Lanka throw up complex situations of possession and claimed rights to property often involving issues of succession and co-ownership. The unravelling of circumstances and determining of relevant facts is not infrequently the critical aspect in decisions in which the application of the law is relatively straightforward. In the latter aspect no more or less is required than proof of the statutory essentials:

A person in possession who claims title by virtue of prescription must prove that he had possessed the property in the manner and for the period set out in section 3 of the Prescription Ordinance.<sup>59</sup>

This apparently trite statement is by way of lead up to the important point, made by quoting from a 1951 decision that the claimant must “establish a starting point for his or acquisition of prescriptive rights.”<sup>60</sup> Proof of a starting point is, of course, the preliminary essential in proof that possession has endured for ten years. More significantly, it must encompass the adverse possession factor – discussed below – usually associated with new and changed circumstances.

Proof of a starting point is a requirement particularly associated with a claim that adverse possession has commenced *de novo* or started in the context of a longer period of possession not adverse in nature. A very much extended period of possession as owner, possibly involving predecessors in title, could hardly fail for lack of proof of a starting point. The logic of the point is supported by a dictum in a case concerned with the exclusive possession of a co-owner. Bertram C J, saw the relevant question in this way:

It is, in short, a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought.<sup>61</sup>

It may be noted that the Ordinance recognises the special position of long possession in a proviso made in the context of protecting the position of parties affected by disability:

Provided also that the adverse and undisturbed possession for thirty years of any immoveable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant.<sup>62</sup>

---

<sup>59</sup> *Mitrapala & Ano v Tikonis Singho* 2005 (1) SLR 206, 211 per Dissanayake J.

<sup>60</sup> At 212 quoting from Gratiaen J in *Chelliah v Wijanathan* (1951) 54 NLR 337, 342.

<sup>61</sup> *Tillekeratne v Bastian* (1918) 21 NLR 12, 24.

<sup>62</sup> s 13.

*iii. The possession requirement*

The foundation element in a claim to “undisturbed and uninterrupted possession” is obviously possession. The physical (*‘corpus’*) element should be the more straightforward aspect in the complex, sometimes elusive, concept of possession.<sup>63</sup> In the context of any given unit of property this necessarily entails a sufficient physical attachment in the context of the nature and circumstances of the property.

The physical aspect is defining in the sense that, in principle, acquisition by prescription is limited to what is possessed by the claimant.<sup>64</sup> Of course what is possessed must be open to acquisition as a unit of property. The mere possession of a bedroom would be irrelevant for the purpose of possible prescription of the house because the latter is the relevant unit of property. Obviously, there must be a sufficiently defined entity on one or other basis. An important issue here is how far the system allows for the recognition of a new separate unit of land, a subdivision of an existing unit. This, of course, is a matter for the cadastral system.<sup>65</sup>

In the context of a given unit of land the requirement of possession may be met by sufficient acts of possession over only a part of the whole. This approach is appropriate in the relatively common Sri Lankan situation of an area of jungle land only part of which has been cleared for building and cultivation.<sup>66</sup> As Professor Peiris shows, the position of the constructive possession of a unit more extensive than the part physically held may be contrasted with the case of an attempt to increase the size of a unit by fencing off a strip of the adjoining property, where the land concerned was allowed to revert to jungle after initial cultivation.<sup>67</sup>

Possession, of course, can be on a derivative basis in the sense of some party other than the possessor deriving his or her right from the possessor.<sup>68</sup> The law in Sri Lanka that both the physical holding and the requisite mental state can be manifested in this way is well established. The possession of servants or agents is an extended rather than the derivative possession typically manifested by a lessee or a party holding on some other contractual basis – the example of a licensee indicating English law influence. The relationship of usufruct also gives a possible basis; in one case a debtor’s possession under a usufruct security arrangement was seen as deriving from the creditor for the purpose of prescription by the latter.<sup>69</sup>

The Prescription Ordinance’s formula of “undisturbed and uninterrupted possession” puts the lesser before the greater. This was noted in a 19<sup>th</sup> c. dictum characterising a disturbance as “something less than an interruption” as in the situation of another party getting partial possession without entirely excluding the initial possessor.<sup>70</sup>

---

<sup>63</sup> The statement that “the *factum* of possession is an uncomplicated requirement which has not created difficulty in its application”, made by Professor Peiris (*Property*, 30) with reference to a different context, is nonetheless relevant here.

<sup>64</sup> Peiris, *Property*, 88.

<sup>65</sup> See Cadastral Template, Sri Lanka: <http://www.cadastraltemplate.org/countrydata/lk.htm>

<sup>66</sup> See *Raki v Lebbe* (1912) 16 NLR 138; *Cooray v The Ceylon Para Rubber Co Ltd* (1922) 23 NLR 321.

<sup>67</sup> *Perera v Fernando* (1920) 21 NLR 466; see Peiris, *Property*, 89.

<sup>68</sup> See, generally, Peiris, *Property*, 89-90.

<sup>69</sup> *Banda v Alitamby* (1952) 54 NLR 249.

<sup>70</sup> *Simon Appu v Christian Appu* (1895) 1 NLR 288, 292 per Lawrie ACJ.

In the same case Withers J identified “uninterrupted possession” with an unbroken continuity and gave the examples of continuity broken “by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time”, or, if “the party prescribing is not in occupation”, by the other “occupying it himself for a certain time and using it for his own advantage”.<sup>71</sup>

Interruption must be actual; continuity cannot be broken on a constructive or fictitious basis. In a case involving a judicial sale in execution it was held that symbolic delivery to a purchaser did not interrupt possession.<sup>72</sup> Possibly associated with an emphasis on actual interruption, the law has seen quite extensive development on the issue of interruption by the institution of legal proceedings.<sup>73</sup> Professor Peiris<sup>74</sup> has analysed the extensive case law to arrive at three points of conclusion:

- (a) the running of prescription is suspended by the institution of proceedings to recover possession of the property; if the claim fails the possessor is entitled add the relevant period to his or her period of possession;
- (b) an action for declaration of title by a possessor does not interrupt the prescription and the failure of such an action does not extinguish the preceding period of prescriptive possession;
- (c) unless restoration of the property is obtained in a short time,<sup>75</sup> the interruption of physical dispossession is not nullified by bringing a successful possessory action.

The way in which the law gives effect to “undisturbed and uninterrupted possession” is consistent with an emphasis on actual possession and, indeed, compatible with an acknowledged robust position which leaves no room for any requirement of peaceful possession. As Professor Peiris<sup>76</sup> notes the decision in a case,<sup>77</sup> already referred to, militates against “any attempt to regard ‘undisturbed’ possession as synonymous with ‘peaceful’ possession.” A *Colombo Law Review* comment is pertinent to this:

Neither the statute nor the Sri Lanka courts have adverted to the need to prove possession *nec vi* in order to acquire a prescriptive title. It appears, therefore, that the use of force in the possession of property will not jeopardise a prescriber’s claim to title. This may be explicable in terms of the realities existing in our society where rural life does not frown upon the use of force in land disputes.<sup>78</sup>

By the same token, Sri Lankan law does not impose a ‘*nec clam*’ requirement; possession may indeed be concealed. This is also explained by Professor Peiris in terms of domestic policy needs. The following comment is made in the learned writer’s appendix comparing Sri Lankan and South African law:

---

<sup>71</sup> At 291. As Peiris, *Property*, 90 observes this approach was approved in the subsequent mid-20<sup>th</sup> c. case of *Jane Nona v Gunawardene* (1948) 49 NLR 522, 524.

<sup>72</sup> *Ibid*, at 525.

<sup>73</sup> See Peiris, *Property*, 94-98

<sup>74</sup> *Ibid*, 98-99.

<sup>75</sup> See Peiris, *Property*, 97 referring to *Perera v William Attale* (1944) 27 CLW 45, 47 per De Kretser J: “If the person ousted regained possession in a few days, his possession would be continuous but not otherwise.” (This report is not available to me.)

<sup>76</sup> Peiris, *Property*, 99.

<sup>77</sup> *Simon Appu v Christian Appu* (1 895) 1 NLR 288.

<sup>78</sup> See Shirani Ponnambalam “ ‘Adverse Possession’ – A Basis for the Acquisition of Title to Immoveable Property” (1979) 5 *Colombo Law Review* 57, 67 (hereafter Ponnambalam, “Adverse Possession”).

A legal system such as ours, which is prepared to admit a claim to a prescriptive title, notwithstanding that possession was of a secret or concealed nature, would appear to place emphasis on the actualities of the *status quo*.<sup>79</sup>

*iv. Adverse or independent title basis*

The physical possession aspect must be associated with an assertion of entitlement adverse to the interests of the party or parties against whom a prescriptive title is claimed. This will involve proof by the claimant of facts which support the conclusion of adverse possession. The relationship basis concerned – between property possessed and possessor – is the critical core issue in a claim to prescriptive title.

As a matter of elaboration of the character of “undisturbed and uninterrupted possession” as being specifically “by a title adverse to or independent of that of the claimant or plaintiff”<sup>80</sup> the following appears in a bracketed section of the text of section 3:

(that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred).

An extended debate in the case law<sup>81</sup> has arrived at the accepted conclusion that this “parenthetical clause” is (i) by way of definition – rather than merely an illustrative aid to interpretation – of the requirement of a “a title adverse to or independent of that of the claimant or plaintiff”, and (ii) that it “has reference to the phrase ‘adverse title’ and not to the words ‘undisturbed and uninterrupted’ possession.”<sup>82</sup> Professor Peiris<sup>83</sup> quotes the Privy Council dictum of Lord Wilberforce:<sup>84</sup> “Section 3 of the Prescription Ordinance contains, by the words in parenthesis, what is in effect a definition of what is commonly, for convenience, referred to as adverse possession.”

On the basis of the parenthetical clause, prescription is ruled out where there has been payment of rent or produce or in any other circumstances “from which an acknowledgement of the right existing in another person would fairly and naturally be inferred.” This negative aspect is, of course, simply the correlative of the positive formulation of “the pith and substance of ‘adverse possession’” as a state “incompatible with the owner’s title”.<sup>85</sup>

The author of a journal article already referred to identifies the essence of what the law calls for in the requirement of adverse possession:

---

<sup>79</sup> Peiris, *Property*, 419.

<sup>80</sup> As explained above (i/ background and general position) s 3 provides first for prescription as a defense and goes on to cover the possible assertion of a claim “in like manner...[by]...proof of such undisturbed and uninterrupted possession as hereinbefore explained”.

<sup>81</sup> See the authorities referred to and analysed in Peiris, *Property*, 100-111.

<sup>82</sup> *Ibid.*, 111.

<sup>83</sup> *Ibid.*, 109.

<sup>84</sup> *Nonis v Peththa* (1969) 73 NLR 1, 3.

<sup>85</sup> Peiris, *Property*, 110.

This section postulates not only the need to prove an *animus* to hold the land against the claims of all others, but also an overt act or a series of overt acts representing unequivocally a manifestation of that intention. It follows, therefore, that a secret intention entertained by a spoliator to steal the land will not suffice. Instead the law requires a more cogent justification for permitting the usurpation of land. If there is compelling evidence that the possessor was on the land with the manifest intention of acquiring title to it, after the lapse of ten years, the courts will clothe his adverse possession with legal validity.<sup>86</sup>

It is said that adverse possession need not be *in rem* in the sense of any requirement that the possessor assert a title against the whole world. Professor Peiris<sup>87</sup> quotes from a decision,<sup>88</sup> already referred to on this issue, in which Wood Renton J observed that the words “another person” in section 3 did not justify “holding that a declaration of title on the grounds of prescriptive possession could never be successfully claimed unless the claimant was in a position to show a title adverse to the whole world.”

Considering the wording of section 3 and in light of the decision in *Perera v Perera*<sup>89</sup> – that meeting the terms of the statute gives title – it seems questionable whether this is an issue at all.

Three distinct situations of possession are identified in the literature: that commencing on an independent title; that commencing on a dependant or subordinate title; and that of co-owners.

The straightforward case of a party who occupies land *de novo* asserting a non-existent right would, *prima facie*, meet the requirement of adverse possession. Provided the party concerned does not acknowledge any incompatible interest in another, ten years’ possession on this basis will give title. In practice, the incidence of cases of new possession will not be high for the obvious reason that unoccupied land which is open to occupation will be a relative rarity.

The more likely scenario of possession on a derived or succeeding basis is obviously open to a greater number of variables in terms of the what is required for the requisite state of adverse possession. Where possession commences on a dependant (or subordinate) title it is presumed to continue and “prescriptive possession will not commence to run in this situation until and unless the possessor clearly manifests a change in *causa* to possess on an independent and adverse title.”<sup>90</sup> A classic dictum of Bertram CJ makes the requirements clear:

The effect of this principle is that, where any person’s possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession.<sup>91</sup>

---

<sup>86</sup> Ponnambalam, “Adverse Possession”, 67-68.

<sup>87</sup> *Property*, 111-112.

<sup>88</sup> *Raki v Lebbe* (1912) 16 NLR 138, 140.

<sup>89</sup> (1903) 7 NLR 173. See above n 58.

<sup>90</sup> Ponnambalam, “Adverse Possession”, 70.

<sup>91</sup> *Tillekeratne v Bastian* (1918) 21 NLR 12, 19.

One simple example of this is the termination of payment of rent.<sup>92</sup> A more complex instance is a continuation of possession, now adverse to the owner, after the expiry of a period giving the owner the option of redemption under a form of mortgage providing for redemption after a stipulated period.<sup>93</sup>

One analysis<sup>94</sup> of the dependant title situation requires “two requisites to be established” first “a change in *causa*” and, second “an intention to hold *ut dominus*”. The ‘*ut dominus*’ shorthand, commonly used in Sri Lankan case law, signifies adverse possession associated with the state of mind of an owner; otherwise, *animus domini*, the prerequisite state of mind for *possessio civilis*.<sup>95</sup> The Sri Lankan writer quoted says “there is no distinction whatever between the requisites of *ut dominus* and adverse possession” and “[o]ccupation of property *possessio civilis* is an adverse possession”.<sup>96</sup> Professor Peiris,<sup>97</sup> however, points out that the ‘*ut dominus*’ requirement is no longer a prerequisite in that adverse possession may be established without necessary proof that possession was “as owner”. One can see that the claimant may assert a right adverse to the owner’s position without necessarily asserting a right of ownership. A party possessing as a tenant but not paying rent possesses adverse to the owner without assertion of a right of ownership. This wider notion of the requisite mental state of possession gives greater scope for acquisition. Again, this is consistent with a tendency to give scope to prescription as a basis for determining land rights.

Succession to property by offspring not infrequently produces the situation of undivided co-ownership which, of course, may also arise on other bases. A not uncommon occurrence is for the circumstances of co-ownership to lead to the assertion of a right to outright ownership by one co-owner against another or other co-owners. Where co-owners cooperate in the *de facto* division of the co-owned property, and possess for the requisite period on that basis, prescription can give title to the respective divided portions.<sup>98</sup>

A co-owner cannot, of course, by the exercise of a secret intention commence to possess on an adverse basis. Moreover, co-ownership gives a basis for possession in consequence of which an “intention to occupy the land *possessio civilis* is not apparent merely in virtue of a co-owners physical presence on the land.”<sup>99</sup> In a Privy Council<sup>100</sup> decision, Lord Macnaghten, referring to English case law,<sup>101</sup> stated the principle that “[p]ossession is never considered adverse if it can be referred to lawful title.” Accordingly, there will need to be some active assertion of an exclusive position ousting the co-owner or co-owners.<sup>102</sup>

---

<sup>92</sup> In *Dharmasira v Wickrematunga* 2002(2) SLR 218 the claim to termination of payment of rent basis failed; see above text to n 61.

<sup>93</sup> Peiris, *Property*, 112 refers to the early case of *Angohany v Appoo*, Morgan’s Digest 281 (not available to me) and goes on (112-114) to discuss other relevant decisions.

<sup>94</sup> Ponnambalam, “Adverse Possession”, 71.

<sup>95</sup> See C G van der Merwe, *Sakereg*, 2<sup>nd</sup> 1989, 280 explaining these concepts in the context of South African Roman-Dutch law.

<sup>96</sup> Ponnambalam, “Adverse Possession”, 70.

<sup>97</sup> *Property*, 110.

<sup>98</sup> *Selenchi Apphamy v Livinia* (1905) 9 NLR 59; see Peiris, *Property*, 362.

<sup>99</sup> Ponnambalam, “Adverse Possession”, 72-73.

<sup>100</sup> *Corea v Iseris Appuhamy* (1911) 15 NLR 65.

<sup>101</sup> *Thomas v Thomas* 2 K & I, 83.

<sup>102</sup> See *Marshall Appuhamy and Ano v Punchi Banda* 1986(1) SLR 399 regarding the distinction between a claim to acquisition by a co-owner and that by a stranger.

In certain circumstances of protracted possession ouster may be presumed. In broad terms this usually involves circumstances of likelihood combined with difficulty of proof. The perceptive journal article already referred to argues for certain guidelines to determine the application of the presumption in the prerequisite circumstances of long possession.<sup>103</sup> This analysis may have been influential in a dictum of Senanayake J in a 1996 decision:<sup>104</sup>

In considering whether or not a presumption of ouster should be drawn by reason of long continued possession alone of the property owned in common, it is relevant to consider (a) the income derived from the property (b) the value of the property (c) the relationship of the co-owners and where they reside in relation to the situation of the corpus.

From the point of view of comparison with Scotland and South Africa, the interesting aspect of the adverse possession requirement is its apparently instrumental widening from the classic *possessio civilis* concept for the pragmatic purpose of increasing the role of prescription as a means of enhancing security of title. But, of course, nothing turns on this because the role of positive prescription differs so widely between the three systems.

*v. Ten year period/disability factor*

The clause “or by those under whom he claims” which appears twice in section 3 – in the initial negative and subsequent positive contexts – follows the common law in allowing the period of possession of a predecessor in title to be added to make up the total period. The link may be by derivative acquisition or succession, testate or intestate.<sup>105</sup> But there must, of course, be a link and there can be no question of linking the “possession of two or more independent trespassers adverse to one another”.<sup>106</sup> The open formulation has led to judicial recognition of variations from the straightforward cases to allow far-reaching scope to what may be “tacked on”.<sup>107</sup> In a usufruct arrangement created by gift the benefit of a donor’s possession was held to avail to the donee – not yet in actual possession – as from the date of the gift for the purpose of acquisition of a prescriptive title to the land concerned.<sup>108</sup>

Prescription does not run against persons who have contingent rather than vested interests in the land concerned. This rule is stated in a proviso to section 3:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

While stated in terms of English law, case law has had no difficulty applying the provision in the context of a civilian common law.<sup>109</sup> A Supreme Court dictum in is illustrative:

---

<sup>103</sup> Ponnambalam, “Adverse Possession”, 74-75.

<sup>104</sup> *Karunawathie and 2 others v Gunadasa* (1996) 2 SLR 406, 411.

<sup>105</sup> *Carolus Appu v Anagihamy* (1949) 51 NLR 355.

<sup>106</sup> *Charles v Nonohamy* (1923) 25 NLR 233, 240, per Jayewardene AJ.

<sup>107</sup> See the cases surveyed in Peiris, *Property*, 120-123.

<sup>108</sup> *Gunersekera v Lewis Appahamy* (1966) 69 NLR 414; see Peiris, *Property*, 121.

<sup>109</sup> See the cases referred to in Peiris, *Property*, 127-130.

However long the period of possession during the lifetime of the fiduciary may be...the rights of the fideicommissary are unaffected, unless there has been ten years' possession after his rights accrued.<sup>110</sup>

This rule that prescription does not run against unvested interests could be seen as a matter of the superfluous statement of what is rationally obvious. Be that as it may, the policy based various disability factor limitations provided for in section 13 are distinguishable.

Section 13 provides that the disability factors of “(a) infancy,<sup>111</sup> (b) idiocy, (c) unsoundness of mind, (d) lunacy, or (e) absence beyond the seas”<sup>112</sup> are a bar to prescription. The section can be broken down as follows:

- i. the condition of disability of a party with a right to sue for recovery of immoveable property, shall bar the running of prescription, by another's possession, against the party under disability, or persons claiming under him or her;
- ii. the ten year period shall commence only on the death of the party under disability or on termination of the disability;
- iii. no additional time shall be allowed in respect of the disabilities of any other person.<sup>113</sup>

The opening wording of the section “if at the time when the right of any person to sue for the recovery of any immoveable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned” has been the subject of controversy as regards supervening minority. However, in an early 20<sup>th</sup> century case the Supreme Court determined that prescription which had already commenced was not interrupted by supervening minority,<sup>114</sup> if only on the basis that there was no justification for “disturbing the settled interpretation of the law upon the ground of a strictly literal construction”.<sup>115</sup> This decision appears to be another instance of the Supreme Court allowing maximum scope to prescription. Arguably, this tendency can be explained in the perceived role of prescription in remedying the generally prevailing insecurity of title.

The special circumstances of disability of a party in prescriptive possession who had no alternative but to leave the property concerned as a result of the December 2004 Tsunami was specifically provided for in a 2005 statute.<sup>116</sup>

*vi. Comment regarding mixed character*

The Sri Lankan Prescription Ordinance of 1871 reflects a development directed towards replacement of the Roman-Dutch law. Professor Peiris surveys the legislative history and cites judicial dicta in support of his statement that “the Roman-Dutch legal system has been altogether superseded”<sup>117</sup> by the statutory provisions.<sup>118</sup> The part relevant to acquisitive

---

<sup>110</sup> *Abul Cader v Habibu Umma* (1926) 28 NLR 92, 95-96, per Jayewardene AJ.

<sup>111</sup> Interpreted to include minority; see Peiris, *Property*, 125.

<sup>112</sup> Interpreted as outwith Sri Lanka without presupposing any former presence in Sri Lanka; see Peiris, *Property*, 124.

<sup>113</sup> Peiris, *Property*, 126.

<sup>114</sup> The typical circumstances being a minor succeeding to the right of a deceased party against whom the prescription was running.

<sup>115</sup> *Pathumma v Sinna Lebbe et al* (1915) 18 NLR 330, 332, per Wood Renton CJ.

<sup>116</sup> Tsunami (Special Provisions) Act, No 16 of 2005, ss. 28 & 29.

<sup>117</sup> Peiris, *Property*, 77.

prescription of land has the character of ‘adverse possession’. Professor C G van der Merwe’s description of the essence of English limitation of actions, in the context of a consideration of its influence on South African law, could easily serve as a precis of the Sri Lankan law:

This period only begins to run in the case of ‘adverse user’, that is, from the time the transgressor starts acting adversely to the rights of the owner. Thus continuous adverse possession for the statutory period bars the owner from instituting an action to reclaim his property. As a result, the former owner loses his right and the adverse possessor becomes the new owner.<sup>119</sup>

The scope for influence by English adverse possession was a consequence of the not unfamiliar position, potentially damaging to civilian structural integrity, of functional affinity despite distinct difference in underlying principle. A quotation from Buckland and McNair’s conclusion on comparing Roman law and English common law on acquisition by long possession is apposite:

Although the principles on which Roman and English law proceed are so different, there is some danger in overestimating the difference in operation. We may say that the Roman acquirer usucapes on his own merits, whereas the English loser loses on his own demerits.

Despite the unequivocal orientation of the Sri Lankan legislation towards English law, the critical development through judicial interpretation reflects the influence of civilian concepts. Moreover, Sri Lankan law engages with differences, or perceived differences, between English and Roman-Dutch law. A dictum of Samerawickrame J in a decision concerned with the concept of possession in a lease context demonstrates this. Observing that “it would appear that the English Law places greater stress on the aspect of the custody of property rather than the mental element” the learned judge quotes from a little known work by an early twentieth century Aberdeen born South African judge:

Although in English Law possession is said to consist of two elements – physical contact and intention to possess – the latter element does not assume the same prominence as in the shape of the *animus domini* (intention of an owner) it has assumed in Roman and Roman-Dutch Law. In English Law the intention to possess is implied from the act which evidences physical control and even in circumstances where the intention to possess does not in fact exist, as in the case of concealed treasure, legal possession is still acquired. In general, it may be said in English Law physical control gives legal possession, unless the apparent possessor holds only as agent or servant of another.”<sup>120</sup>

---

<sup>118</sup> In *Wijesundera and Others v Constantine Disa and Another* 1987(2) SLR 66 the Court upheld the proposition that “*Justa titulus* or *justa causa* of the Roman and Roman-Dutch Law is no longer necessary for prescriptive possession. Our Prescriptive Ordinance is a complete Code and the principles of the common law need not be taken into account.”

<sup>119</sup> C G van der Merwe “Original Acquisition of Ownership” in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa*, 703.

<sup>120</sup> G T Morice, *English and Roman-Dutch Law*, 1903, 70.

### **Scottish Positive Prescription**

In terms of section 1 of the Prescription and Limitation (Scotland) Act 1973 the recording of a deed or the registration of a title, reflecting a real right, followed by possession “for a continuous period of ten years openly, peaceable and without any judicial interruption” will constitute the real right as “exempt from challenge”.

Positive prescription has had a highly significant historical role in the context of Scottish land law. In a way which could be seen as a typical mark of the distinctiveness of the development of Scots law by reference to the general *ius commune* pattern, the development of positive prescription has been not through the common law but by legislation, commencing in the sixteenth century.<sup>121</sup> The role of prescription is historically one in the context of the system of conveyancing rather than as a self-standing means of acquisition which may trump the apparent position as per the relevant registered deed – as in Sri Lanka and South Africa. As David Johnston explains the effect of the initial Act of 1594 “was the limited one of restricting the right to call on a possessor to produce his full progress of titles.”<sup>122</sup> In other words completion of the period of prescriptive possession – reduced over the centuries from the initial 40 to the present 10 years – acted to confirm the possessor’s title without the need to establish a complete progress of derivative titles.

Whether “exempt from challenge” signifies original acquisition or something less is a matter for debate<sup>123</sup> but in terms of security of title the effect is to trump competing claims.

The approach of positive prescription acting to make a title absolutely secure remains its *modus operandi* in modern law; in this regard one need only note recent Scottish Law Commission thinking in the context of the possible reform of the system of land registration introduced in 1979. “A positive system of registration of title is no substitute for positive prescription. Prescription makes a void title good beyond challenge. Registration of title makes it good but challengeable.”<sup>124</sup>

### **South African Positive Prescription**

In terms of section 1 of the Prescription Act 68 of 1969 “a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner...for an uninterrupted period of thirty years...” This legislative formulation of requirements replaced, from 1 December 1970, the earlier one providing for acquisition by possession “continuously for thirty years, *nec vi, nec clam, nec precario*”.<sup>125</sup> Neither the present statute, nor its predecessor<sup>126</sup> operates as a code and common law, not departed from, is still potentially applicable.<sup>127</sup> That said the identifying basis of modern law is undoubtedly encapsulated in the formula “open possession as owner for thirty years”.

---

<sup>121</sup> See Johnston, *Prescription and Limitation*, paras 1.24-1.27.

<sup>122</sup> Para 1.26.

<sup>123</sup> Johnston, *Prescription and Limitation*, para 14.06; Kenneth G C Reid (with George L Gretton, A G M Duncan, William M Gordon and Alan J Gamble), *The Law of Property in Scotland*, 1996, para 674.

<sup>124</sup> Scottish Law Commission, Discussion paper No 125, “Land Registration: Void and Voidable Titles”, 2004, para 3.8.

<sup>125</sup> Prescription Act 18 of 1943, s 2(1).

<sup>126</sup> Still potentially operative in respect of any part of a thirty year period prior to 1 December 1970

<sup>127</sup> See P J Badenhorst, Juanita M Pienaar and Hanri Mostert, Silberberg and Schoeman’s, *The Law of Property*, 5<sup>th</sup> edn 2006, 161.

As indicated, the leading relevant modern scholarship<sup>128</sup> has demonstrated a certain influence of the English law concept of adverse possession in the development of the law. The learned writer's conclusion may be quoted:<sup>129</sup>

The Prescription Act of 1969 discarded the requirements of *nec vi* and *nec precario*, which had become redundant as a result of the acceptance of 'adverse user', and confined itself to the true come requirements for prescription, ie open possession 'as if the claimant were the owner', which had finally been worked out in the development of case-law. South African law has thus completed the full circle and realised that nothing more nor less is needed for prescription than *possessio civilis*, ie *corpus* and *animus domini*.

Acquisition of immoveable property by prescriptive title is a relative rarity in the South African context. This, of course, is partly a factor of thirty years as against ten in Scotland and Sri Lanka. Also, significantly, positive prescription does not function in a support role, formalised or otherwise, in the way it does in the other two jurisdictions. It operates rather, in theory and practice, as a pure form of original acquisition. As such it has only exceptional application in a context dominated by the controlling position of a landowner's right of disposal synonymous with title in the context of a clear demarcation between ownership and possession.<sup>130</sup>

## Conclusion

One would expect provision regarding positive prescription to land to fit with the general situation of domestic land law. This is indeed the position in the three jurisdictions concerned. The necessary, and predictable, consequence is that diversity of domestic land law systems means diversity of prescription provision. It is notable that in South Africa, where prescription has the most independent and divorced function of the three, its role is, at the same time, the least significant in general domestic context.

In terms of mixed jurisdiction comparative law, the considerable differences between the three shows the scope for adaptation in domestic development inherent in the range of conceptual material open to application to meet distinct policy agenda. A legal historian might comment that, in respect of the use of prescription, this adaptability was evident before the era of colonial spreading of civilian concepts. It might also be observed that Scots law's distinctive positive prescription is an example of this. The untidy position of prescription law throughout European development only reflects a common position of relative freedom to apply the device to meet policy aims. The evident diversity of substance but essential commonality of language in the three mixed systems is only a reflection of what the wide ranging development of prescription offers.

---

<sup>128</sup> See C G van der Merwe "Original Acquisition of Ownership" in R Zimmermann and D Visser (eds) *Southern Cross: Civillaw and Common Law in South Africa*, 702-717.

<sup>129</sup> At 716.

<sup>130</sup> In view of South Africa's constitutionally mandated land reform agenda, the landowner's position may be less dominant than formerly; nonetheless, it remains secure and, of course, is protected in the premise tenet; see s 25 of the Constitution of the Republic of South Africa, Act 108 of 1996.

In Sri Lanka positive prescription is applied, in a manner which is effectively structural, as a primary device in the provision of secure title to land. This is a far cry from the notion that adverse possession trumping title could be an unconstitutional deprivation of property.<sup>131</sup> But these polarised positions could also be explained by reference to the respective contexts of soft Sri Lankan ownership as against harder forms which, by their nature, are more open to the recognition that a deprivation has occurred. South African ownership is hard to the extent that the 1990s land reform agenda was written in to the 1996 Constitution<sup>132</sup> as a qualification of the protection of property. Acquisitive prescription can survive in this context because it occurs only in extreme circumstances consistent with a conclusion that the title holder has given up on the land. Scots law's hard ownership could be seen to mean that positive prescription is more of a deprivation of property. But this soft/hard ownership thinking does not fit the Scottish model in which prescription has a structural role; indeed, as David Johnston has pointed out, one which "serves the public interest".<sup>133</sup>

I hope this study shows some potential for further exploration of the law of Sri Lanka, South Africa and Scotland as kindred mixed systems.

Cite as: David L. Carey Miller, Three of a Kind? Positive Prescription in Sri Lanka, South Africa and Scotland, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW (May 2008), <<http://www.ejcl.org/121/art121-3.pdf>>.

---

<sup>131</sup> *J A Pye (Oxford) Limited v United Kingdom*, Case 44302/02, judgment dated 15 Nov 2005; decision overturned by Grand Chamber in judgement dated 30 August 2007. It may be noted that 2002 reforms to adverse possession in English law seem to be a concession to greater protection of ownership; see Elizabeth Cooke, *Land Law*, 2006, 215-219.

<sup>132</sup> See above n 130.

<sup>133</sup> "*J A Pye (Oxford) Limited v United Kingdom*: Deprivation of Property Rights and Prescription" (2006) 10 *EdinLR* 277, 281.