ACQUISITION OF OWNERSHIP

In SA law, we make a distinction between original and derivative acquisition of ownership but it all boils down to how one can become owner of property. The two are really simple, with the one group of acquisition, you become owner regardless of the lawfulness of the ownership of the previous owner but with the other you cannot. The difference can also be taken further to say that with the one mode of acquisition, the co-operation of previous owners is not necessary but with the other, it is a fundamental key concept.

Now that you have a basic overview, here is the flesh of the distinction. The type of acquisition that does not depend on the co-operation of the previous owner and the lawfulness of such a previous owner’s ownership is called ORIGINAL acquisition. The type of acquisition that depends on the lawfulness of the previous owner’s ownership and his co-operation thereof, is DERIVATIVE acquisition.

ORIGINAl ACQUISITION

There are 7 different sub-groups of Original Acquisition and they fall into this group because every one of them does not depend on the lawfulness of the ownership held by the previous owner nor do they require his/her co-operation in effecting ownership.

- Appropriation
- Accession
- Manufacture
- Mixing and Fusing
- Prescription
- Acquisition of fruits
- Expropriation

LET’S START BY LOOKING AT PRESCRIPTION

Prescription is way by which a real right is acquired over a movable or immovable thing through the open and undisturbed possession or by exercising rights over the same but over a time period of 30 years.
There are two reasons why we have this form of acquisition- to ensure legal certainty but most commonly, to punish previous owners who just neglect their property for years and expect that they will have reserved a place regardless of the time they spend outside the country. This would make sense in a country where there are still housing problems and destitute people. "How dare they just up and leave for over 30 years, take their land!", the law says.

Prescription here works for both the person who knows that they are not the owner of the property and the person who does not. Prescription is governed by the Prescriptions Acts of 1943 and 1969. For our purposes, it is important to note that any prescription after 1 December 1970 is dealt with by the Prescription Act of 1969 which is what we will deal with. For more on the 1943 Act, read Van der Walt’s work on this.

Section 1 of the Act places 4 requirements that need to be met before prescription takes place and these are that the owner becomes the owner of property:

1. Which he openly and
2. As if he were the owner
3. Has possessed
4. For an uninterrupted period of thirty years

Before we go further, you need to understand that someone can be the owner of property belonging to Mr X if, that someone had open possession as if he was Mr X and possessed Mr. X’s property for an uninterrupted period of thirty years.

Let’s break it down a little bit for you to understand how each requirement works:

**Possession** - here we look at the physical element (corpus) and the intention to be owner. The person must possess the thing as if he is the owner.

**Openly** - there must be no secrecy around the possession. This is judged objectively i.e. would the objective person think that the person is the owner from the way that he acts with the property.

**As if he were the owner** – the physical control and the intention must be clear from the possessor’s conduct and viewed objectively, the possessor must be seen to be the owner. Van der Walt gives the example of a possessor who then makes permanent improvements to the house as good instance of this.

**For thirty years** – can also be calculated through a continuous uninterrupted thirty year count, or suspension and interruption calculations. Interruptions take place when an event terminates the run of prescription with the effect that the thirty years must start afresh. There are two types of interruptions : civil and natural. Natural interruptions take place where the possessor loses such possession of the property voluntarily or forcibly by the owner, a third party or a superior power in the case of war. The owner would have to do more than protest for this to happen so if Mr X comes back in the 5th years and wants to interrupt prescription, he cannot just send a message saying he is unhappy about it, he has to physically remove possession for interruption to take place. It is found in s 2 of the Act. There are three exceptions where possession may be lost and then regained but it will not interrupt prescription.
1. Institution of the *mandament van spoile* (the possessory interdict) within 6 months of loss of possession
2. If within 12 months of first losing possession, the thing is returned to the possessor
3. If the superior power situation changes

Civil interruption takes place when the possessor is served with legal processes i.e. notice of motion, interdicts and this is covered in s 4.

Suspension is set out in s 3 of the Act and refers to a period where the prescription is suspended for some time due to an event or situation and after this event, the count continues for the rest of the 30 year period. Prescription will be stopped for a. minors, the insane or people under curatorship b. people outside the country c. Members of governing bodies of juristic persons for an additional three years on top of the thirty years before it can be said to have prescribed.

For a detailed explanation on this see Van der Walt’s work.

**Expropriation**

Ownership here is transferred to the expropriator and the original owner loses ownership. There are many statutes authorising expropriation. Section 25 of the Constitution regulates expropriation by the State. The State must have a legitimate public purpose and must compensate by agreement or bypass this requirement as in s 25 through a s 36 limitation.

**Acquisition of Fruits**

This takes place by means of gathering or separation. Generally the fruits are the property of the owner of the principal thing i.e. the tree that produced the fruit. There are two kinds of fruits, civil and natural (a distinction of both can be found in van der Walt’s work).

There are exceptions to the general principle. The first is that the bona fide possessor becomes the owner of all separated fruits after gathering and so is a usufructuary. The lessee is only entitled to the fruits if he/she gathered them.

**Manufacture- Specificatio**

This is where Person A makes or manufactures something using Person B’s materials without permission and then this results in a completely new thing.

Requirements for ownership to pass:

- Material must produce a new thing – mending will not fall under this type of acquisition and for that accession is more plausible. The test to determine whether a new thing was created is objective and one looks at the function, shape, nature of the thing.
- The newly created product should be one which is impossible to reverse back to its original state. If it can be restored back, ownership will not pass.
- Product must be created without the permission of the owner of materials used.

One ordinarily uses the enrichment principles to recover the money lost by the owner.
Mixing and fusing – commixtio et confusion

This is where property is mixed without the consent of the owners. In the case of mixing it is where solids belonging to different owners are mixed while fusing is were different liquids of different owners are mixed.

- It must be impossible to separate the combined product and determine who the owner is.
- If divisibility can take place then mixing does not take place.
- Must take place without permission of owners.
- If the owners consented to mixing then it becomes co-ownership.
- If money is mixed such that it cannot be identifiable then mixing has taken place.

ACCESSION – ACCESSIO

This is where two corporeal things are combined through human actions or natural processes with the effect that the two become one-literally. In this sense we refer to the principal thing which is the part that remains independent and the accessory thing which 'leaches' onto the principal thing. The owner of the principal part becomes owner of the new thing by operation of law.

This can be seen best in the following description:

As you can see the final product is largely made of the principal part which is why that’s the part labelled as principal-it remains independent while the poor accessory is forced onto the principal. This is in line with one of the requirements, namely that the composite thing must be indivisible (the final product that is). Unlike mixing, the principal and accessory things must be distinguishable and this accession does not amount to a manufacture.

How would you know what the principal part is? You would look at what has lost its independence and what serves merely as a decoration- this would be the accessory part. The
principal thing can be identified by asking what has the greater mass etc. Land is an exception to this because land will always be the principal thing.

For a discussion of accession of immovables to immovables, see Van Der Walt’s work.

**Accession of movables to Immovables**

This takes place when a movable is permanently attached to an immovable and the owner of the immovable becomes the owner of the composite thing.

Here the doctrine *superficies solo cedit* finds application which means that the movable accessory then also becomes immovable

**Building**

This is where a movable thing is attached to the land with the intention that it becomes part of the land and becomes the property of the landowner.

*Mcdonald v Radin* sets out three criteria to determine whether or not a movable has in fact been attached to the land permanently and these are:

- Nature and purpose of the attached thing (objective test)
- Intention of the annexor (subjective test)
- Manner and degree of attachment (objective test)

A detailed set of notes on this is available but further reading must be done on

1. *Theatre Investments v Butcher Brothers*
2. *Melcorp v Joint Municipal Pension Fund*
3. *Standard – Vacuum Refining Co*
4. *Sumatie v Venter*
5. *Khan v Minister of Law and order*

**APPROPRIATION – OCCUPATIO**

This is where one exercises physical control over something that can be owned but is currently not owned by anyone with the intention of becoming owner

Requirements:

- **Physical control**- corpus see *Reck v Mills* which held that control means to place the controller in a position where he can use the thing as he pleases.
- **Intention to be owner**- animus domini
- **Of a thing not belonging to anyone**- must be a res nullius

See van der Walt for a detailed discussion here.