Phd/book reports

J.E. Jansen

Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law

Dr. J.E. Jansen: Associate Professor, Department of Legal History. Radboud University Nijmegen, e-mail: j.jansen@jur.ru.nl.

1 Introduction

What should be done when someone who is in bad faith is in possession of immovable property (real property: a house or a piece of land) or a movable good (chattel) for a substantial period of time? Should somebody who simply occupies a house or a piece of land – I use the term squatter here – receive any kind of protection after a certain period of time? And what about the thief of a painting? This is the central issue in my dissertation.¹ In general, three solutions are possible. The mala fide possessor could A) eventually acquire ownership through acquisitive prescription; he could B) receive protection resulting from the fact that the owner loses his claim to recover possession through extinctive prescription; or C) he could receive neither. The advantage of the first two solutions lies in the fact that legal certainty is achieved through acquisitive (A) or extinctive prescription (B). The advantage of the third solution (C) lies in the fact that it would seem to be unfair to ‘help’ thieves and squatters in any way.

In 1992 the Dutch legislator opted for the first solution. In Dutch law the possessor in bad faith acquires ownership at the moment the owner loses the claim to recover possession.² In systems based on Roman law this claim is the *rei vindicatio*, which is lost through extinctive prescription. In common law it is a

¹ Dr. J.E. Jansen, *Bezit te kwader trouw, verkrijgende en bevrijdende verjaring (Mala fide possession, acquisitive and extinctive prescription)*, Boom Juridische Uitgeverij Den Haag 2011, 346 p. In my thesis I also pay attention to the possibility of acquiring an easement (servitude) through acquisitive prescription; in this brief article I confine myself to immovables (real property) and movables (chattels).

² Art. 3:105 Dutch Civil Code.

tort based possessory remedy, which is lost through limitation. For reasons of uniformity I here use the terms revindication and extinctive prescription also when writing about the common law. Soon after its implementation, article 3:105 of the new Dutch Civil Code was criticized in legal literature. Why should a patient thief acquire ownership of a stolen jewel? Did the Dutch legislator overrate the importance of legal certainty? Article 3:105 Dutch Civil Code raises the question whether a better balance might be struck between the possessor in bad faith and the owner.

The result of the balancing of the interests of the owner against those of the possessor in bad faith depends largely on the effect and the role played by acquisitive and extinctive prescription. Roman law did not consider a possessor in bad faith worthy of acquisitive prescription. A possessor in bad faith did, however, benefit from extinctive prescription. As a result of the technicalities of Roman procedural law and the historical development of Roman prescription law, Roman lawyers confused the two forms of prescription. It can be said that Roman law treated extinctive prescription as a special form of acquisitive prescription. This confusion has been and still is influential in European private law, most notably in the German Civil Code. I shall therefore pay significant attention to the Roman law of prescription (no. 2) before turning to modern civil codes (no.s 3 et seq.).

2 Extinctive and acquisitive prescription: Confusion originating in Roman law³

In what way did Roman law confuse extinctive and acquisitive prescription? There are of course similarities between the two forms of prescription: both require a certain amount of time to elapse. The difference between the two forms of prescription lies in their effect. Acquisitive prescription has a positive result promoting an existing position to a right. Extinctive prescription has a negative result ending somebody's right or the action with which this right can be upheld.⁴

³ In my thesis I 'used' Roman law as the dogmatic foundation of European private law, as the supplier of European legal grammar. As a consequence of this method the treatment of Roman law is unhistorical; I follow the methods of the 19th century 'Pandektists' or adherents of the Historical School. They tried to build a dogmatically correct, logical system from the case law materials in the Codex and the Digest. See, J.E. Jansen, *Mala fide possession*, p. 5–6.

⁴ A.F.J. Thibaut, *Üeber Besitz und Verjährung*, Jena 1802 p. 66 see also F.C. Savigny, *System des heutigen Römischen Rechts*, 8 volumes, Berlin 1840–1849, Volume IV, paragraph 178.

Initially, Roman law did not acknowledge any form of extinctive prescription: legal actions could be brought in perpetuity. Roman law did acknowledge acquisitive prescription (*usucapio*). To acquire ownership through acquisitive prescription it was first of all required that someone was in possession of the good: the *usucapiens* had to exert factual control over the good (*corpus*) with the intention of doing so for himself (*animus rem sibi habendi*). In this way someone who did exert factual control, but did so for somebody else (e.g. as a hirer or as a borrower; that is, in those situations where there is *detentio*, or in the language of the common law, bailment) could not acquire ownership through *usucapio*. The *usucapiens* had to be of good faith (*bona fides*): he had to believe that he had acquired ownership at the moment he took possession of the movable or immovable. The time needed to complete *usucapio* was initially (very) short: for movables it was one year and for immovables two years. To calculate the time needed to complete the *usucapio* the Romans developed the so-called *accessio possessionis* rule, which stated that the possessor did not need to fulfil the required period of continuous possession all by himself. When a *bona fide* possessor transferred possession to a second *bona fide* possessor the second possessor could add the amount of time his predecessor had been in possession to his own. The possession of the second possessor was treated as a continuation of the possession of the first possessor.

The *usucapio* had many shortcomings: for instance, it did not apply to provincial land. A new institution, the *praescriptio longi temporis*, was applied to provincial land. Seen from a modern perspective, this is where the confusion between extinctive and acquisitive prescription begins. As we have seen, Roman law did not have a general rule of extinctive prescription. Roman lawyers borrowed the idea that a legal action could not be brought in perpetuity from Greek law. In some cases the debtor could protect himself against the creditor's *actio* by invoking (writing down, *prae scribere*) the *exceptio temporis* (exception of time). An *exceptio temporis* is a somewhat confusing figure for a modern lawyer. On the one hand it can be seen as extinctive prescription in the sense that the creditor's claim is barred by the exception. On the other hand, an *exceptio temporis* can also be seen as acquisitive prescription: the debtor 'acquires' an exception against the claim of the creditor. So seen, *exceptiones* are negative rights; the pandektist Dernburg indeed describes *exceptiones* in this sense as 'Anti-rights'.⁵ From a dogmatic point of view, *exceptiones* have extinctive and acquisitive traits.

5 H. Dernburg, *Pandekten, Bd I Allgemeiner Theil und Sachenrecht*, 5th print, Berlin 1896, p. 321 'Gegenrechte', F.C. von Savigny, *System V*, p. 169 par. 227 writes of an autonomous right of the debtor, 'selbständigen Recht des Beklagten'.

Since the *praescriptio longi temporis* was built on the doctrine of the *exceptio-nes*, the *praescriptio* also had a hybrid structure: it had both extinctive and acquisitive traits. The *praescriptio* initially gave the long-time possessor only an *exceptio* with which he could repel the claim that the owner of provincial ground could bring against him. Here the effect of time is negative: the owner's claim is blocked. The reason for this lies in the fact that the owner had been inactive for a period of 10 or 20 years. As a result of his inactivity his claim was barred by an *exceptio*. From a modern perspective, the effect of the *praescriptio* is somewhat strange: the owner did not lose his claim all together but only in relation to the possessor and his successors. The *exceptio* was treated as a right that the possessor could transfer to his successors but was lost when the possessor involuntarily lost possession. The fact that the *exceptio* is treated as a negative right can be seen as an acquisitive trait of the *praescriptio*. The *praescriptio* gradually developed into a second form of acquisitive prescription besides *usuca-pio*, which – as we saw – did not apply to provincial land. The long-time possessor of a piece of provincial land was thus only granted the *exceptio* when he was of good faith.⁶ The *accessio possessionis* rule applied when calculating the required 10 or 20 years. Eventually, the possessor who fulfilled the requirements of the *praescriptio* was not only granted an *exceptio* but also an action with which he could reclaim possession had he lost it after the completion of the *praescriptio*. By granting the *praescribens* more than just a negative right, the *praescriptio* functioned positively and can thus be seen as a second form of acquisitive prescription.

It was only in the fifth century that Emperor Theodosian introduced a general rule of extinctive prescription of legal actions. This rule was based on the *praescriptio longi temporis*. A century later Justinian attempted to streamline the law of prescription. Acquisitive prescription was only possible for possessors in good faith. A possessor in bad faith did benefit from the extinctive prescription of legal actions that Justinian copied from Theodosian. As we have seen, Theodosian was inspired for his general rule of extinctive prescription by the *praescriptio*. The *praescriptio* exerts a dual influence on the extinctive prescription of the revindication. First, the *accessio possessionis* rule applied when calculating the necessary 30 years. This rule was developed to calculate the time needed for *acquisitive* prescription. It is somewhat strange to apply this rule to extinctive prescription when extinctive prescription is seen as a sanction for inactivity. Applying the rule to the extinctive prescription does not tally with

⁶ See CJ 7.33.2. J.E. Jansen, *Mala fide possession*, p. 39–42.

extinctive prescription as a sanction for inactivity, as perhaps might appear at first sight. To give an example:

A steals B's ring. After five years C steals the ring from A, ten years later D steals the ring from C etc.

The period for extinctive prescription as a mere sanction for inactivity should continue to run as long as the owner does nothing to reclaim possession. As a result of the *accessio possessionis* rule, the extinctive prescription period ends when the second thief comes into possession: C's possession is not a continuation of A's possession. A new period of 30 years begins. The same happens when D steals the ring from C. In this way, application of the *accessio possessionis* rule prolongs the prescription of the revindication, even though the owner does nothing to reclaim possession. Application of the rule is a consequence of the exemplary role played by the *praescriptio longi temporis*, which had, as we have seen, developed into a second form of *acquisitive* prescription.

Secondly, the completion of the extinctive prescription of the revindication did not bring the end of the revindication all together; rather, it resulted – just as the *praescriptio longi temporis* – in an *exceptio* which enabled the possessor and his successors to neutralize the revindication. In other words, the possessor acquires an exception that is considered as a negative right that transfers to his successors. The owner only loses his revindication in relation to the possessor and his successors. The revindication of the owner can thus revive in full strength. To give an example:

A steals B's golden ring. B loses his revindication when A is in possession for a period of more than thirty years. After thirty-one years C steals the ring from A's house.

At the moment of the second theft, B's revindication revives from its *stupor*. Since C is not a successor of A he cannot make use of the *exceptio* A could invoke to bar B's revindication. A few questions now arise: why did Roman law grant the possessor in bad faith the benefit of an *exceptio* as a result of extinctive prescription but not the benefits of the acquisition of more than a negative right? In doing so, the possessor in bad faith could hold off the owner but would never acquire an absolute right. Seen from the perspective of the owner, one could ask why Roman law blocked his revindication in relation to the possessor and his successors and so made his ownership rather illusory, while still stating that he remained owner. The German romanist H.J. Wieling is critical of this separation between ownership and possession, which he calls *nuda proprietas* or *dominium sine re*. He argues that it would make much more sense to link acquisitive prescription to extinctive

prescription: the person who is in possession at the moment the owner loses his revindication should acquire ownership.⁷ Roman law never took this step.

3 German law

With regard to movables, German law is an exact copy of the Roman system. The German legislator saw the disadvantages of a system that allows the possessor in bad faith to benefit from extinctive prescription but does not allow any form of acquisitive prescription. Possession and ownership can then be separated. The legislator speaks of a ‘half-hearted situation contrary to the goals of prescription’.⁸ It is therefore remarkable that the legislator did prevent these kinds of situations for immovables and easements, but failed to do so for movables. For immovables and easements, acquisitive prescription that does not require good faith prevents the undesirable separation of ownership and possession in bad faith. No such form of acquisitive prescription exists for movables. The German legislator decided to follow in the footsteps of Roman law. When the extinctive prescription of the revindication is fulfilled, the possessor in bad faith acquires an exception (‘Einrede’) which is treated as a right: it transfers to successors of the possessor, but does not transfer to somebody who, for example, steals the movable from him. As was the case in Roman law, the loss of the revindication is relative. The revindication can revive, for example, when the thief is the victim of theft more than 30 years after he acquired possession by theft. In this regard the recent reform of the law of prescription did not change anything. The owner loses his revindication after a period of 30 years.⁹ The *dominium sine re*, in German legal literature described among other things as ‘a nice miscarriage’¹⁰, a ‘totally untenable situation’¹¹ and a ‘curiosity’,¹² is still possible in German law.

7 H.J. Wieling, ‘Nuda Proprietas’, in: *Sodalitas, Scritti in onore di Antonio Guarino*, 10 volumes, V, Naples 1984, p. 2519–2531, p. 2522.

8 B. Mugdan, *Die gesamten Materialien zum bürgerlichen Gesetzbuch für das Deutsche Reich, Bd I, Einführungsgesetz und Allgemeiner Teil*, Berlin 1899, reprint Aalen 1979, p. 340–341: ‘den Zwecken der Verjährung widersprechenden Halbheit.’

9 Paragraph 197 BGB.

10 K. Siehr, ‘Verjährung der Vindikationsklage?’ in: *Zeitschrift für Rechtspolitik* 2001, p. 346–347. (‘hübsche Missgeburt’)

11 B. Mugdan, *Die gesamten Materialien zum bürgerlichen Gesetzbuch für das Deutsche Reich, Bd III, Sachenrecht*, Berlin 1899, reprint Aalen 1979, p. 574. (‘ganz unhaltbare Verhältnis’)

12 O. Bähr, ‘Gutachten über die Frage: Ist der Begriff der Anspruchsverjährung im Sinne des Entwurfs des BGB beizubehalten?’ in: *Verhandlungen des 20. Deutschen Juristentages*, Bd I Gutachten, Berlin 1889, p. 285–305, p. 290. (‘Kuriosität’)

4 Dutch law

The old Dutch civil code of 1838 reserved the acquisition of ownership through prescription to possessors in good faith; possessors in bad faith did benefit from the extinctive prescription, which was set at 30 years. The effect of extinctive prescription was the total or absolute loss of the revindication. The owner's claim was not only barred in relation to the possessor and his successors, it was extinguished. Extinctive prescription of the revindication was not treated as the acquisitive prescription of an *exceptio* (Roman law) or *Einrede* (German law), but as the end of a legal action. The owner lost his revindication when one or more persons had been in possession for a period of 30 years. Situations where ownership and possession could end up in different hands were even more likely under the old Dutch code than under German or Roman law: the revindication could not revive when the possessor in bad faith involuntarily lost possession after more than 30 years.

Meijers, who drafted the *maior pars* of the current Dutch civil code, speaks of the system of the 1838 Code as 'an anomaly'¹³: it is anomalous that the possessor in bad faith on the one hand does benefit from extinctive prescription but on the other hand does not benefit from acquisitive prescription. Meijers implicitly argues that both types of prescription should have the same effect: either the possessor in bad faith should not benefit from acquisitive or extinctive prescription, or he should benefit from both. Meijers opts for the latter, linking acquisitive and extinctive prescription and so maximizing legal certainty. Dutch law does not apply the *accessio possessionis* rule when calculating the extinctive prescription of the revindication. When an owner has not been in possession for 20 years and somebody else has been, he loses his revindication (through extinctive prescription) and the possessor at that same moment acquires ownership (through acquisitive prescription). Most Dutch writers consider that this is too high a price to pay for getting rid of the *dominium sine re* and maximizing legal certainty: thieves and squatters can acquire ownership (only) 20 years after they took possession. French and Anglo-American law offer alternatives.

13 Explanatory memorandum by E.M. Meijers (in Dutch: Toelichting Meijers) art. 3.4.3.8. (current art. 3:105 Dutch CC) Parlementaire Geschiedenis boek 3, p. 416.

5 French Law

The Code Civil offers a somewhat different solution than the systems mentioned above. *Dominium sine re* is impossible in French law, which considers ownership an everlasting, perpetual right. As a consequence of the perpetuity of ownership, an owner according to French law cannot lose his claims through extinctive prescription. French lawyers do not distinguish between the claim (revindication) and the underlying absolute right (ownership). French lawyers do not see any possibility of ownership without revindication. They must therefore arrive at the conclusion that ownership is immune from extinctive prescription (art. 2227 CC ‘imprescriptible’). Thieves and squatters therefore cannot benefit from extinctive prescription. They can however acquire ownership through prescription. French law requires possession for a period of 30 years.¹⁴ To protect the owner who loses his right as a consequence of prescription, French law requires the possession to be open, explicit and peaceful.¹⁵ A thief will therefore never acquire ownership: his possession is secretive and often it is not acquired peacefully. A squatter, however, can obtain ownership, provided his possession is open and explicit.

6 Anglo-American law

English law developed in a very different way from European continental private law. The influence of Roman law is less significant. English law does not acknowledge acquisitive prescription for movables (chattels) and immovables (real property).¹⁶ English law does not need acquisitive prescription as well as extinctive prescription (limitation), because English law does not so much protect the absolute right of ownership as the best right to possession. For example, when owner A loses the legal action with which he can reclaim possession taken by B, from that moment on B has the best right to possession. Even when A regains possession by a coincidence, B has better title: A’s right is destroyed.¹⁷ B therefore does not need acquisitive prescription. The time required for legal actions to perish as a result of extinctive prescription is relatively short. For immovables it is

14 Article 2272 (2) CC for immovables. The Code Civil has no specific article for the 30 year prescription of movables.

15 Article 2261 CC.

16 English law, however, does acknowledge acquisitive prescription for easements.

17 For immovables since the Statute of Limitation 1833; for movables since the Statute of Limitation 1939: see J.E. Jansen, *Mala fide possession*, p. 135 and 157.

12 years (on the recent Land Registration Act 2002 see below), while for movables it is only six years. How does English law prevent an owner from losing his land so quickly to a squatter, or his painting to a thief? For immovables the possession has to be adverse. For adverse possession, factual control and the intention to exert this factual control for oneself are required. The English concept of adverse possession sounds very familiar to those familiar with Roman law. The English concept of adverse possession is more or less the same as the Roman concept of possession required for *usucapio*. This might seem strange, but it is in fact logical. Extinctive prescription has the same effect in English law as *usucapio* in Roman law. When the owner loses his legal action through extinctive prescription, the possessor as a consequence thereof has best title. This should not be seen as acquisitive prescription, but the result is the same. For movables English law protects the owner by excluding extinctive prescription in the case of theft. Extinctive prescription cannot run as long as the stolen moveable is in the hands of the thief or someone related to the theft. Extinctive prescription can begin to run when the thief or one of his accomplices sells the stolen good to someone who is in good faith: the prescription period starts when this happens. Six years later, the owner loses his legal action and his right.¹⁸ The law of some American states offers a better protection of the owner's right. In New Jersey, for instance, limitation only starts to run when the owner knows where his moveable is, and who is in possession of it. By way of directive 93/7, this *discovery rule* is part of the legislation of EU member states for so-called cultural goods that have been removed unlawfully from the territory of a member state.¹⁹

Recently, the English legislator improved the protection of the owners of registered land by enacting the Land Registration Act 2002, according to which a squatter can only benefit from extinctive prescription when he files a notice with the registration office of having 'acquired' the best right to possession. The registration office then forwards this application to the registered owner. Only when the registered owner fails to do something about this 'before the end of such a period as rules provide' is the application by the adverse possessor registered.²⁰ Just before the enactment of the 2002 Act J.A. Pye lost some 57 acres of registered land to the farmer Graham.²¹ In 2002 the land was estimated to be

¹⁸ Statute of Limitation 1980, section 4.

¹⁹ See e.g. the famous case *O'Keeffe v Snyder* Supreme Court of New Jersey, 1980, 83 N.J. 478, 416 A.2d 862. For an example of the regime for cultural goods, article 3:310 a and b Dutch Civil Code.

²⁰ Land Registration Act 2002, Schedule 6 paragraph 3. S. Jourdan, *Adverse possession*, London 2003, Chapter 22. The Draft Land Registration Rules give a period of three months.

²¹ *Pye v Graham* [2002] UKHL 30.

worth ten million pounds Sterling. Lord Hope of Craighead, one of the judges who reached the verdict in *Pye v Graham*, obviously felt sorry for Pye and made a rather gratuitous reference to the Registration Act of 2002, which would have helped Pye had it been in force in his case:

'The unfairness in the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.'²²

Perhaps it was Lord Hope's *obiter dictum* that brought the idea to Pye and his solicitors to make an appeal to the European Court of Human Rights in Strasbourg. Pye argued that his loss of ownership conflicted with the protection of property in article 1 of the first protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (protection of ownership). He argued that the United Kingdom was liable for his loss. The ECHR eventually decided that English law was not contrary to the first protocol since:

'It is in any event the case that very little action on the part of the applicant companies (i.e. Pye) would have stopped time running. The evidence was that if the applicant companies had asked for rent, or some other form of payment, in respect of the Grahams' occupation of the land, it would have been forthcoming, and the possession would no longer have been "adverse". Even in the unlikely event that the Grahams had refused to leave and refused to agree to conditions for their occupation, the applicant companies need only have commenced an action for recovery, and time would have stopped running against them.'²³

7 The consequences of *Pye v UK*

What lessons can be learnt from *Pye v UK*?²⁴ My conclusion is that the loss of ownership that is beneficial to a possessor in bad faith cannot be justified merely by referring to legal certainty. The loss of ownership that benefits a possessor in bad faith can only be justified when the owner could have prevented his loss, but failed to do so. His loss is then considered his own fault, his acquiescence justifies his loss. So what are the consequences for the various European legisla-

²² *Pye v Graham* [2002] UKHL 30, 128, 150 *per* Hope.

²³ ECRM 30 august 2007, nr. 78, see also nr. 80.

²⁴ See for the possible consequences for Scots land law, D. Johnston 'JA Pye (Oxford) Limited v United Kingdom: Deprivation of Property Rights and Prescription' in: *Edinburgh Law Review*, 10, 2006, p. 277–282.

tors? One simple solution to make a legal system ‘Pye-proof’ would be to abolish any form of acquisitive prescription that benefits possessors in bad faith. The next question, then, would be whether the possessor in bad faith would have to benefit from extinctive prescription, and if so, what the exact effect of extinctive prescription is. Roman law treated extinctive prescription as the acquisition of an *exceptio*. German law takes the same approach. Would the ECRM consider the relative loss of the revindication as contrary to article 1 EP when the owner could not have prevented his loss? This could well be the case. In an English case on the German law of prescription the German State itself (!) claimed that if the judge were to decide that the revindication of the German State against Cobert was barred by an *exceptio* as a result of extinctive prescription, then invoking the resulting Einrede (*exceptio*) should not be accepted as contrary to English ordre public.²⁵ The ECRM might hold a similar opinion.

Does this then lead to the conclusion that the possessor in bad faith should not benefit from acquisitive prescription nor from extinctive prescription? In my view it would go too far to deny the possessor in bad faith any kind of protection. It would go too far to do so because it would lead to unnecessary legal uncertainty. The decision in *Pye v UK* shows that the loss of ownership that benefits a possessor in bad faith cannot be justified by referring *only* to legal certainty. The decision shows that the loss of ownership that benefits a possessor in bad faith can be justified when the owner could prevent his loss but did not do so. The decision shows that the acquisition of ownership or, for a common lawyer, the quasi-acquisition of the best right to possession by a possessor in bad faith, of a piece of land is ‘Pye-proof’. Land is fixed, it cannot be hidden. The owner of a piece of land can take action when somebody occupies his land. When he does not take action his eventual loss is justified. But matters are rather different when it comes to moveables. In my opinion, the so-called discovery rule meets the standard of *Pye v UK* perfectly. The owner of a stolen painting who does not take action when he knows where his painting is and knows the identity of the possessor is negligent. This negligence justifies the loss of ownership even when this benefits a thief. The various European legislators would as a consequence of *Pye v UK* be well advised to implement the discovery rule not only for cultural goods,²⁶ but for all moveables.

²⁵ *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance S.A.* Queens bench Division Case no. 1993, C 3428 and Case no. 1997 G 185, 1 WLR 114. The argumentation by the German government was understandably met with some criticism in German legal literature, see J.E. Jansen, *Mala fide possession*, p. 118.

²⁶ See no. 6, footnote 19.

8 Draft Common Frame of Reference (DCFR)

It is perhaps interesting to end this review of European law of prescription by taking a short look at the DCFR. The DCFR stresses the difference between extinctive and acquisitive prescription by avoiding the term acquisitive prescription. The DCFR uses the term acquisition of ownership by continuous possession. It stresses the differences in calculating the required time. Continuous possession is needed for the acquisition through prescription: the *accessio possessionis* rule therefore applies. This rule does not apply for extinctive prescription: if the owner is out of possession for a certain period of time he may lose his revindication. The period for extinctive prescription runs regardless of whether various possessors are each other's successors.²⁷ In this way, the DCFR does away with a great deal of the confusion between acquisitive and extinctive prescription, which dates back to the development of the various institutions in Roman law. Acquisition of ownership through continuous possession is open to a *bona fide* possessor after ten years.²⁸

What should be done when the possessor is not of good faith? The draughtsmen of the DCFR are very critical of the separation between formal ownership and protected *mala fide* possession that is possible in Roman and German law.²⁹ One way to prevent the separation between naked ownership and protected possession can be found in Dutch law, which, as we have seen, declares that whoever is in possession becomes the owner at the moment the revindication perishes through extinctive prescription. The DCFR disapproves of this solution since in Dutch law it is possible that someone who has only been in possession for a (very) short period acquire ownership. To give an example:

B steals A's golden ring. Eighteen years later C steals the ring from B. Only two years later C acquires ownership.

The fact that C is not a successor to B is irrelevant according to current Dutch law: extinctive prescription sanctions inactivity, the *accessio possessionis* rule does not apply. The owner is inactive when successive thieves are in possession

²⁷ *Principles, definitions and model rules of European Private Law, Draft common frame of reference*, C. von Bar, E. Clive (ed.), Munich 2010, Volume V, p. 4898.

²⁸ DCFR VIII 4:101.

²⁹ The owner only has a 'naked right', while the possessor has a 'protected nothing'. *Principles, definitions and model rules of European Private Law, Draft common frame of reference*, C. von Bar, E. Clive (ed.), Munich 2010, Volume V, p. 4887–4888.

of his moveable as long as he does not reclaim possession.³⁰ The DCFR does not follow German or Dutch law but takes the (French) view that absolute rights cannot be influenced by extinctive prescription:

‘Here we are often dealing with the protection of absolute rights (such as the right of ownership). If they were subject to prescription, this would entail a considerable, and arguably unjustifiable, qualification of the absolute right. Thus, it may be maintained that rights arising from absolute rights should only perish with the absolute right itself. Also, within the law of property there has to be a careful co-ordination with the law of acquisitive prescription, or usucaption.’³¹

Ownership only perishes through time when someone acquires ownership through acquisitive prescription. For a possessor who is not of good faith the DCFR requires a period of 30 years of continuous possession.³² To protect the owner of moveables, somebody who obtained possession through theft does not benefit from the 30-year acquisitive prescription. The thief’s successors do, though.³³ The draughtsmen of the DCFR wanted to keep this exception to the 30-year acquisitive prescription ‘as narrow as possible in order not to detract too far from the goal of legal certainty.’³⁴ It is a highly academic matter whether the solution the DCFR provides is ‘Pye-proof’. Since it is not inconceivable that somebody can lose ownership without having been able to prevent it, I doubt it.

30 Ibidem.

31 DCFR III-7:101, *Principles, definitions and model rules of European Private Law, Draft common frame of reference*, C. von Bar, E. Clive (ed.), Munich 2010, Volume II, p. 1140–1141.

32 DCFR VIII 4:101 1 (b)

33 DCFR VIII 4:101 (3).

34 *Principles, definitions and model rules of European Private Law, Draft common frame of reference*, C. von Bar, E. Clive (ed.), Munich 2010, Volume V, p. 4903.