

Book VII.  
Title XXVI.

Concerning prescription (usucapion) in consequence of purchase or compromise.  
(De usucapione pro emptore vel transactione.)

Dig. 41.4.

Headnote.

Prescription.

Prescription, in a general sense, means the extinction of rights by lapse of time. The prescription may be one through which title to property is acquired. In that case it is sometimes called acquisitive prescription; that is to say, title is acquired by adverse possession. There may also be extinctive prescription, which means that an obligation is extinguished through lapse of time, and such prescription is ordinarily referred to as limitation of action, and is particularly referred to in note to C. 7.39.3.

To gain title by prescription was originally called usucapion or usucaption, and required an uninterrupted possession of one year in case of movables and an uninterrupted possession of two years for immovable property. But this principle applied (generally - Partsch 82) only to Italy, and was not applicable in the provinces. In the provinces (see Partsch 83) an uninterrupted possession of ten and twenty years came to be applied. Justinian abolished the difference, and left only the time applicable in the provinces. C. 7.31. This became the ordinary prescription, and was called the prescription of a long time (*longi temporis praescriptio*), which was ten years, if the parties were "present," that is to say, living in the same province (originally district), and twenty years, if the parties were "absent," that is to say, living in different provinces (originally district). C. 7.33.12; C. 7.35.7. Modified to 30 years, if brought in bad faith. Nov. 119, c. 7, appended to C. 7.33.12. These periods were applicable in order to gain title to land. The one year's period formerly applicable to gain title to personal property was lengthened to three years. The term "usucaption" (*usucapio*) is in the Code generally used in connection with the prescription requisite for acquisition of title to personal property. (As to movables *usucapio* applied to provinces after Caracullas' edict, Partsch 83.) Usucaption gave ownership. Prescription possibly at first only a defense - did not give any rise to an action to recover - [illegible] Partsch 87. But this was changed by Justinian in C. 7.39.8 pr, so that prescription gave nearly the same protection as usucaption, and the term will be used interchangeably herein. See 9 Cujacius 954; see, however, note to C. 7.33.1. The main requirements for such ordinary prescription, in addition to the period already stated, may here be mentioned:

1. The party claiming such title must be in possession of the property uninterrupted for the requisite period. The period might be interrupted for example by suit (C. 7.39.7; C. 7.33.2; C. 7.40.2), or by detention (C. 7.39.7.5).

2. The possession must, with few exceptions, be in good faith; it must not commence fraudulently; the adverse possessor must be convinced of the lawfulness of his title. C. 4.51.1; C. 3.32.4. D. 41.3.15.2; D. 41.3.48; D. 41.4.2 pr; D. 41.4.7.4; C. 7.32.7; Buckland 244-245.

3. The possession must have a justus titulus, or causa, which may be translated as "legal ground;"<sup>1</sup> that is to say, the possessor must have acquired the possession in a lawful manner, as by sale, gift or otherwise, authorizing him to consider himself as the owner. C. 7.29.4; C. 7.32.7; C. 7.33.4; Mackeldy § 289.

4. The property must be prescriptible. The following property, for instance, could not be acquired by adverse possession: stolen property; C. 7.26.1 and 7; C. 7.27.2 - unless it came back to the owner so as to be purged of the taint (Inst. 2.6.8; C. 6.1.1; C. 7.26.5 and 7); property taken from the owner by force, C. 7.26.5; C. 7.32.6; C. 7.398.2; property belonging to the fisc; Inst. 2.6.9; C. 7.30.2. Good faith of the possessor of personal property seldom availed him anything, because if disposed of unlawfully, they were generally regarded as stolen. Hunter 269. At times, however, a sale of movables by one in possession in good faith enabled the new owner to acquire title by prescription, though not owned by the seller, as where an heir believed certain property to belong to the estate and sold it; Inst. 2.6.4. So also in C. 4.51.1, (slaves); C. 4.52.1, land could be bought from a possessor in bad faith, by one in good faith - C. 3.32.4- but not if he knew, C. 4. 51. 1.

5. The possession must not merely be permissible. Thus a tenant could not acquire title by adverse possession. His possession was deemed to be that of his landlord. C. 7.30.1; C. 7.39.2; C. 7.39.7.7.

An extraordinary prescriptive period of thirty and forty years was also provided for, perhaps even before the time of Diocletian, under which good color of title was unnecessary. Even good faith in taking possession was in such case unnecessary, except for the purpose of recovering possession that had been lost. C. 7.39.8. Other matter relating to prescription will sufficiently clearly appear in the laws of the following titles.

#### 7.26.1. Emperor Antoninus to Flavianus.

If your slaves were sold by those who had no right to sell, you may reclaim (vindicare) them. Nor could the purchasers acquire ownership by prescription, since the unlawful sale constituted a theft.  
Promulgated August 13 (213).

#### Note.

The sale must have been made by the seller with knowledge that he had no right to sell, making him a thief; otherwise the law would be contrary to law 7 h.t. and C. 4.51.1.

#### 7.26.2. Emperor Alexander to Marcellinus.

If guardians sold slaves contrary to the wish of the deceased, who in his testament directed them to be kept for his heirs because of their special skill, title to them could not be acquired by prescription.<sup>2</sup>  
Given March 3 (224).

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<sup>1</sup> Blume's type written original read "...may be translated as 'color of title...'"

<sup>2</sup> [Blume] See C. 4.51.7 note.

7.26.3. The same to Nepotilla.

If you purchased and commenced to possess in good faith the mother of the boy, on whose account a suit is brought against you, you could thereafter acquire title by prescription to the child thereafter conceived by and born of such mother, although she herself was stolen.<sup>3</sup>

7.26.4. The same to Achilleus.

If you prove that your opponent gave his consent to the sale of the female slave, he will not be heard to re-open an agreement which he ratified. If that proof is lacking but you bought, and the seller sold, her in good faith, and you had her in your possession during the usual time for prescription, the claim of ownership on the part of your opponent is not good.  
Promulgated April 11.

7.26.5. Emperor Gordian to Marinus.

If a possessor in bad faith has sold part of his possession, the portion retained by him, together with its fruits, may indeed be recovered, but the portion sold by him may be reclaimed from the possessor only if he purchased it, knowing that it belonged to another than the seller, or it, though a purchaser in good faith, the period for prescription has not run. 1. But if possession is lost by force, prescription can not apply until after the property has come back into the power of the owner, though it may be purchased in good faith.

Promulgated March 21 (238).

Note.

According to c. 7, Nov. 119, the prescriptive period of ten and twenty years (applicable to real estate) did not apply if the transferor of the property held it in bad faith, unless the owner knew of the transfer. If he did not know of it, only the prescriptive period of thirty years applied.

7.26.6. Emperor Philip, speaking in counsel, said:

When it is shown that a thing was pledged and was thereafter sold by the debtor, it is plain that it, like stolen property, could not thereafter be acquired by prescription.<sup>4</sup>  
Without day or consul.

7.26.7. Emperors Diocletian and Maximian and the Caesars to Pecudes.

One who knowingly sells another's slave without the consent of the owner, commits theft. That defect prevents, until after possession had been returned to the owner, acquisition of ownership by prescription, even though possessed in good faith.  
Given February 9 (294).

7.26.8. The same to Severus.

Persons who have possession under color of title obtained pursuant to a compromise may acquire ownership by prescription.

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<sup>3</sup> [Blume] This was an exception to the general rule. Buckland 248.

<sup>4</sup> [Blume] C. 6.1.1.

7.26.9. The same to Gaius.

No lapse of time protects a man in his purchase from a minor below the age of puberty without the guardian's consent. But if the minor, enriched by the money of the purchaser makes the occasion of (asserting) his right, one for unjust enrichment, he will be defeated by the defense of fraud.

Subscribed December 6 (294).