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The Owner's Right to Damages from the One Who Acquired Title to Land by Prescription

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INTRODUCTION

The right of the owner of a land to claim damages from another who acquired title to such land by prescription may be said to arise from the old maxim, "No one shall enrich himself at the expense of another".

The stand that the writer takes, therefore, is that the owner of a land should be given the right to claim damages from the person who has acquired title to such land by prescription. It is submitted that title by prescription as given by the Philippine Code of Civil Procedure is not such a title that goes even to the extent of depriving the true owner of all remedies other than the right to recover possession. A right to damages or compensation for a deprivation of land is not a right *in rem* but one *in personam*. It attaches to the person but not to the land. The right of the owner to possess the land as owner is what the other acquired by prescription and nothing more.

What right is lost is only a right in rem and no action is lost but one in rem. The question is whether upon the loss of the action in rem the action in personam is lost with it. The writer gives a negative answer.The writer, therefore, will proceed on the theory that upon the losing of the owner's right to recover the possession of the land (a right *in rem*) through its proper action (action *in rem*) the owner shall substitute thereto his right to recover damages (right *in personam*) against the acquired through its proper action (action *in personam*) which right was not acquired by and action not lost to the one who acquired title by prescription. Liability in rem is entirely independant of the liability n personam (Homer Ramsdell Co. vs. La Compagnie Generalé Transatlantique, 182 U. S. 406).

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There is another phase of the question. This is the kind of defense the prescriptioner could successfully interpose if action is brought to recover the possession or title or any interest in the land. There are two of them: (1) The special defense of limitation of action as a bar to the action permitted under the provisions of section 40 of the Code of Civil Procedure, and (2) the one that is pleaded in a general denial under section 41 of the same code. It must be remembered that the former is as good in its consequences as the latter yet it is founded on a very different juridical concept. The former recognizes the existence of the true owner's ownership while the latter does not. These modes of acquiring ownership are known in the Civil Law and in our jurisprudence as prescripción extintiva and adquisitiva respectively. (Recoletos vs. Crisostomo, 32 Phil. 427). They will be analized in their proper place to show that the first is a good ground for claiming damages from the prescriptioner.

By analogy damages could be recovered as is also allowed by the provisions that govern land registration in the Philippine Islands under Act No. 496.

THE OWNER'S RIGHT FOR DAMAGES FROM THE ONE WHO ACQUIRED TITLE TO LAND BY PRESCRIPTION

The Sanctity of Private Property

The maxim of equity is, "Equity will not suffer a wrong to be done without remedy". The Civil Law makes it the duty of the courts to protect the owner of property who may be deprived of it unless it be by some competent authority for some purposes of proven public utility and after payment of the proper compensation. (Art. 349, Civil Code) As the title to land may not be assailed the only possible way to rectify the situation is by giving compensation to the claimant to be paid by the holder of the property (Estrellado vs. Martinez, 48 Phil. 256.).

There is no provision in our laws that deprives a person of his property without returning a just compensation except as for his punishment for crime or other wrong civil or criminal. Section 3 of the Jones Law (Act of Congress of August 29, 1916) provides "That no law shall be enacted in said Islands which shall deprive any person of.....property without due process of law.....Private property shall not be taken for public use without compensation." This organic provisions are but an evidence of the sanctity of property and property rights.

That this right is to be respected is shown by the giving of compensation to whom the right is due. It should be remembered that this compensation is verily predicated on the existence of a right without which no compensation could be legally granted. Art. 609 of the Civil Code provides that "Ownership is acquired by occupancy. The ownership of property and other rights therein are acquired and transmitted by law, by gift, by testate or intestate succession, and in consequence of certain contracts, by tradition; *they may also be acquired by prescription*" Art. 610, Civil Code, deals with ownership by occupancy of things not belonging to any one or without owner. The other modes dealt with by Art. 609, Civil Code, are those concerning property already under the ownership of somebody. Except by and thru prescription a property or its ownership once owned and acquired by someone could not be acquired and transmitted without its owner's consent and free will. So that a person who dispossesses of himself property by his own engagements, acts or deeds could not complain of undue deprivation of it. But who could not but complain of a loss or deprivation if some other will take his property against his consent without any right by law, by gift, by testate or intestate succession, and in consequence of certain contract, by tradition? On the other hand, does he suffer a prejudice if the loss or deprivation of property is with his consent? Certainly not, for he could even reduced them to ashes, without prejudice to others, had he wanted to without getting any thing but the satisfaction of foolish caprices. There is physically a loss but never is there in the eye of the law.

But there is PRESCRIPTION that despite the absence of consent of the owner of a property passes his ownership in the property to another. Is he deprived and has he suffered a loss thereby? Did he lose his ownership over the thing so that the other was free to take it by occupancy? Not by any means. It still exists as a fact and recognized by prescription. Prescription is a contradiction in itself if it does not recognize, the legal existence of ownership. Why then that ownership which factually and legally exists could not be protected? Why is it that prescription which regards and recognizes it as a right in fact and in law does not protect it? Why, if the thing is abandoned its acquisition should not be by prescription but by pure occupancy. Then, if the thing is not abandoned but belongs to someone, is pescription invented as an absolute instrument of legalized robbery? Prescription could not have been instituted among men to squander of them and despoil their

lawful possessions but is with them to protect every individual's right existing in fact and in law. This is the lawful mission of prescription for the benefit of men; for theirs to promote good order and their individual property from lazy hands to more industrious ones. Only in this way could prescription be viewed as not a sanction to civil or criminal wrong, otherwise it is.

It is timely here to note that keeping land idle is less harmful to society than destroying it which legally is not wrongful. It will be shown later here that lands in lazy hands could not be acquired by prescription under the operative provisions of the Land Registration Law, Act No. 496.

THE LEGAL EVOLUTION OF PRESCRIPTION

In The Common Law

What is acquired by the mere lapse of the period fixed by law in the statute of limitations? The statute of James I of England (Limitation of Action) provides: "A possession of land for twenty years took away the right of entry of the true owner, but it did not destroy his title nor vest in the possessor a fee simple. He might assert his claim by a writ of right". (20 James I c. 16) A similar provision seemingly of the same effect is found in Tennessee Statutes: "No person or persons, or their heirs, shall have, sue, or maintain any action or suit, either in law or equity, for any land, tenements, or hereditaments, but within seven years next after his, her, or their right to commence have, or maintained such suit shall have come, fallen or accrued; and that all suits, either in law or equity, for the recovery of any lands, tenements, or hereditaments, shall be commenced, had and sued, within seven years next, after title or cause of action or suit, has accrued or fallen; and at no time after the said seven years shall have passed" (Act of Limitation of 1819, Sec. 2, c. 28, Tenn. Statutes). The first section of this Tennessee Statute of Limitation of Actions provided in Substance that, any person having had seven years possession of any land, which have been granted by this State or by North Carolina, holding the same by virtue of a deed of conveyance, devise, grant, or other assurance purporting to convery an estate in fee simple, and no claim by suit, in law or in equity, effectually prosecuted, shall have been set up or made to said lands within time, then the person so holding possession, shall be entitled to keep and hold in possession, such quantity of land as

shall be specified and described in such conveyance or other assurance; and any person who shall neglect to avail themselves, for said terms of seven years of any title, legal or equitable, which they may have to lands, by suit, in law or equity, against the persons thus in possession, shall be forever barred; and the person so holding for the said term shall have a good and indefeasible title in fee simple, to such lands."

The Tennessee Court had occasion to examine the above two sections of the statute in the case of Hopkin's Heirs vs. Calloway, 7 Coldw. 37, saying that under the first section of the Statute of Limitation of 1819, and adverse possession of seven years under a deed, grant, or other assurance of title purporting to convey a fee, not only bars the remedy of the party out of possession but vest the possessor with the absolute estate in fee simple. The second section bars the remedy only, but does not take away the right, nor confer a title upon the person in possession. The remedy may be barred under section two when the possession has not been held under such assurance of title as to vest the absolute estate in the possessor under the provisions of the first section: Wallance vs. Hannum, 1 Hum. 448; Norris vs. Ellis, 7 Hum. 463; and Brown vs. Johnson, 1 Hum. 262. Title or a free simple does not vest in the mere possessor for the whole period of limitation fixed by law but that such title remains in the true owner. There are no words that take away the right or confer title on the mere possessor. It does only under conditions given by section one of the same Act of 1819 which provides that party who may have possession for the requisite period of land which have been granted, "claiming the same by virtue of a deed, devise, grant or assurance purporting to convey an estate in fee simple, shall be entitled to hold the same against all other persons" and should "have a good and an indefeasible title in fee simple in such lands".

This provision was drawn with much precision and care and as an acclaratory statute to former ones, Act of 1715, c. 38 and Act of 1797, Tennessee Statutes. Act of 1715 did not require of the possessor any paper title in for his protection, but c. 38 of the same Act declared that no conveyance for land should be good in law unless proved and registered, and that all deeds so done should be valid to pass estates in land without livery of seisin, attornment, or other ceremony in the law. It is clear, therefore, that some "color of title" must there be in the possessor to vest title in him. Much debate and difficulty arose in the courts as to what would be sufficient to

constitute color of title. To remove the doubt Act of 1797 was passed which declares that a party who should hold possession of land for the fixed period by virtue of a grant or deed of conveyance founded on a grant, should be entitled to hold the same against all persons whatever. A dispute arose in the construction of this Act as to the meaning of the words " deed of conveyance founded upon a grant". This produced the Act of 1819, sec. 1, c. 28, we have quoted above.

So that we see that for the possessor to be vested with title by the mere fact of possession must have possessed it by virtue of a grant or a deed of conveyance founded on a grant, without which title remains with the true owner. (McLain vs. Ferrel, 1 Swan. 53, Tenn.) A possession without being *based on a grant or deed of conveyance founded on a grant bars the remedy only, but does not* VEST TITLE nor CONFER TITLE upon the adverse holder (Hopkin's Heirs vs. Calloway, 7 Coldw. 37, Tenn.).

It is clearly shown that section of 2 of Act of 1819, Tennessee Statutes is the exact equivalent of the provisions of the Statutes of Limitations of James I of England. These statutes clearly represent the basis of the law on limitations of actions. That no title to realty could be acquired derivatively by mere possession except upon proof of any of the modes prescribed by law for the acquisition of ownership is evident. According to what is exposed above the elapsing of the period fixed by law does not confer title but simply declares that what was previously called a color of title or grant or deed of conveyance founded on a grant is really and indisputably a good title. The elapsing of the period clarifies the title previously held under a grant or dead of conveyance founded on a grant and not that it vest or grants title. It confirms but does not create.

But the requirement "grant or deed of conveyance founded on a grant" or color of title has been the object of varied interpretation in the United in the different States of the Union. But according to the Tennessee statute no title is passed if there is no color of title, i. e., if there is no grant or deed or conveyance founded on a grant. But this is purely statutory in Tennessee. We have seen that by the Limitations of Action of James I prescription does not vest title but bars only the remedy. And when the remedy is barred (remedy to recover possession) the owner is given the writ of right to assert his claim. But this writ of right has not been preserved in the United States so that an American in the position of an Eng-

lishman under the law of England (James I) will be out of remedy. Here is a good chance for a change in the effect of prescription. The true owner was, therefore, sworn of his title so that under the two circumstances mentioned complete title must vest and transferred in the prescriptioner. It does not appear, however, that a substituted remedy for the true owner is given him by the change. The justice of the change is, however, supported by eminent authorities, following:

> Possession for Statutory Period as Vesting Title: It is conceded by all the authorities that adverse possession of land, maintained for the statutory period, vests the possessor with title thereto (Jasperson vs. Scharnikow, 150 Fed. 571) not only as against strangers, but also as against the former owner thereof (Tennessee Coal, etc. vs. Linn, 123 Ala. 112, 26 So. 245), as effectively as if there had been formal conveyance (Hodges vs. Eddy, 41 Vt. 485, 98 Ame. Dec. 612). The law presumes a conveyance (Shahan vs. Alabama Co., 115 Ala. 181, 22 So. 449; Conger vs. Weaver, 6 Cal. 548, 65 Ame. Dec. 528) on the ground of public policy (Casey vs. Inloes, 1 Gill—Md.—430, 39 Ame. Dec. 658), and this includes the presumption of all that is essential to give a conveyance effect; as for instance, registration. (1 R. C. L. 690).
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> It has been claimed, however, that it is unnecessary to resort to presumption, because the mere fact that adverse possession has been maintained for the statutory period is, in itself, sufficient to meet every legal requirement for the protection of the new owner. (1 R. C. L. 690).
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> The title thus acquired is indefeasible which can only be divested by his own conveyance of the land to another or by subsequent adverse possession of another (Tennessee Coal vs. Linn, supra, and Cannon vs. Stockmon, 36 Cal. 535, 18 Ame. Dec. 205).
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> Adverse possession, generally speaking, is a possession of another's land which, when accompanied by certain acts and circumstances, will vest title in the possessor (Cited by Corpus Juris from Black L. D. and Bouvier's L. D.). The consent of the person disseized is of course unnecessary to the acquisition of title by adverse possession (Middlesex County vs. Lane, 149 Mass. 101; 21 N. E. 228. It is a possession, not under the legal proprietor, but entered into without his consent, either directly or indirectly given.

It is possession by which he is disseized and ousted of the lands as possessed" Bryan vs. Atwater, 5 Day—Conn.—181, 5 Ame. Dec. 136—that vest title).

Clearly, therefore, that the remedy was taken out by statute. The injustice of the change will be shown later.

In The Civil Law

The Roman Law on *praescriptiones* is the basis of the Civil Law on prescription. There are two kinds: The *prae scriptiones or ex parte actoris* (for the plaintiff) and the *praescriptiones ex parte rei* (for the defendant). The latter is a defense in the form of an exception to the plaintiff's action. One of its kinds is the *praescriptio longi temporis* which is precisely called in French Law "La prescription". This is distinguished from *usucapio* in that *usucapio* is the acquisition of ownership by possession continued for a time fixed by law (one year for movables, two years for immovables, according to the law of the XII Tables); in that it was applicable, consequently, only to objects susceptible of quiritary ownership, and for the benefit of those who could become quiritary owners; it did not protect the acquisition of things not susceptible of Roman ownership, as provincial lands. The "jus honorarium" provided for this deficiency by establishing the possessio or praescriptio longi temporis, *which is not a civil mode of acquiring ownership, which is not even strictly speaking a mode of acquiring ownership,* but of which we here treat on account of the comparison which obtrudes between it and "usucapio". Usucapio engenders an actio and an exceptio; praescriptio longi temporis engenders only an exceptio which means that the possession is only a bar to the action of revindication of a third person, *for he cannot set up his ownership, there being none as a defense.* (The First Year of Roman Law, pp. 216-219, F. Bernard).

Sanchez Roman, a civilist, has observed the same thing. He said that usucapio was a mode of acquiring ownership (dominio) while prescription properly so called did not create the proper quiritary ownership (el proprio dominio quiritario) but simply an approximate right to civil possession that both of this juridical concepts were in the Derecho novisimo confounded under the common name of PRESCRIPTION divided into long, very long, and from time immemorial prescription (3 Sanchez Roman 253).

Since the Civil Law has confounded the two Roman Law terms prescription has given to law another meaning—a transition. This new meaning is the basis of the law on prescription now found in Spain's Civil Code, 1889, as ordinary prescription (Art. 1957) and extraordinary prescription (Art. 1959) for real properties. These provisions of the Civil Code of Spain were the provisions enforced in the Philippine Islands on December 8, 1889, until the coming into effect of the Code of Civil Procedure of the Philippine Islands on October 1, 1901.

The Code of Civil Procedure (Act 190) repealed Art. 1957 and Art. 1959 of the Civil Code so that finally the ordinary and extraordinary prescriptions were since then not in force; and sections 40 and 41 of Act 190 is now the law on prescription. (Seone vs. Franco, 24 Phil. 309; Pelaez vs. Abreu, 26 Phil. 415).

As our law now stands prescription is a means by which ownership to real property may be *acquired* by the mere lapse of the time fixed by law (Sec. 41, Act 190); and as a means to bar an action for the recovery of the real property under section 40 of the same Act (Act 190). It must be noted here that the effect of section 40 or Act 190 has just the same effect as that of the Roman Law, "praescriptio longi temporis".

But we will go back to the state of our law on prescription before the Civil Code provisions were repealed by sections 40 and 41 of Act 190. What prescription under the Civil Code of 1889 purported to do is to vest title in whom the indicia of ownership is seen, and will presume that the ownership was legally obtained through and by the means prescribed by law for the legal transfer of ownership. That the law will not inquire into the sufficiency of the possessor's title (Art. 448, Civil Code) just because his title is presumed to be just. (Art. 434, Civil Code). That his title will ripen to the modes presented by Art. 609, Civil Code. This is the prescription spoken of in the Civil Code—a civil law rule. Prescription in the Civil Law, therefore, merely rectifies that the possessor for a fixed period is the real and true owner. Prescription is solely based on possession understood as much in the Civil Law, to ripen (acquire) his title, by the passing of time, into ownership must believe that he has title to the thing possessed. (Art. 447). It, therefore, merely confirms the title as good, full and complete. It does not create title, nor vest title in whom none previously existed. Under this system no amount of possession though how long if title vest in somebody and kown to the possessor and known

further that he has no title, prescription will not confirm his title for he has none, nor vest title for prescription does not create.

Such is the nature of prescription before the Code of Civil Procedure (Act 190) took effect on October 1, 1901.

OBSERVATIONS

From what we have seen on the legal evolution of prescription both in the Common Law and in the Civil Law (Roman Law included) prescription at first does not vest, nor create title to or ownership on the real property in favor of the prescriptioner; that title and ownership remained with the true owner; that the true owner in the Common Law at first had his remedy by the writ at best in the Roman Law, i. e. once the true owner has regained his lost possession the prescriptioner cannot avail of his right acquired under the *possessio* or *prescriptio longi temporis.*

As conditions and social relations among members of the community present new aspects of social order the old juridical concept and consequently the legal effects of prescription was changed by strictly legal enactments. Prescription now, therefore, is a means or mode of acquiring ownership to real property under two aspects, one under the Common Law another under the Civil Law. Under the Common Law, prescription creates and vests title to mere possessor for a fixed period; the Civil Law regards prescription to confirm an existing title.

(1. Common Law provisions: England, the Law of England, Vol. 19 p. 155. pars. 315 and 316:

2. Civil Law provisions: Civil Code, Philippines and Spain, Art. 609; French Civil Code by Cachard, par. 2265 and 2262; Bazil Civil Code, Arts. 550 and 551; Uruguay, Codigo Civil, Art. 693; Argentine Civil Code, pars 4033 and 4049; Codigo Civil Colombiano, Art 2512; German Civil Code, Art. 927.) Germany does not provide for prescription the way her sister civil law countries frame their codes. The codal article, Art. 927, provides that a judgment after proceedings of public citation in favor of one in possession of a land for thirty years to be the owner thereof will bar recovery of a former owner. This proceeding of public citation is a judgment rendered in open court very much like in nature to our land registration system under the Land Registration Law, Act 496. The basis of

the claimant is his possession for thirty years and the effect of the judgment is to bar recovery of land, and vest title in him only by virtue of the judgment in the proceeding of public citation. It is to be concluded here, therefore, that the mere lapse of time does not vest title to the possessor).

Admitting that title is divested of the true owner yet the law of prescription has not gone so far as to deprive the true owner of compensation, altho the rule is silent on this point. But a seeming good ground for recovery of damages or compensation may be found in The Law of England, Vol. 19, p. 104, par. 190 which says that all remedies for recovering land or rent which formerly existed in cases where the right of entry is gone are done away with by the abolition of real action; which provision means that the abolition of the real action carries away with it only those real rights and not personal ones.

I do not at this point attempt to show that the olden juridical concept is more respectable to property and property rights than what it now precepts for I am convinced also of the necessity of such a change. But it is fit at this juncture to note that whatever change there is to law especially to the transmission of property and property rights, the sanctity of property rights and acquired property should be protected and respected and the more so to expect that the change is for the better protection against invasions of property and property rights.

Great legal luminaries in both the world legal systems of law gave reasons for the change.

In the Civil Law

Sanchez Roman and Manresa are authoritive of the whole expositions of the reasons for the change. Other commentators' and civilists' opinions were accounted for by them so that this paper will only condensed the reasons therefor.

Sanchez Roman said that prescription as a mode of acquiring and losing the ownership of things is an institution of a just and moral right in itself and convenient and even necessary for a well ordered society. It is just because if prescription dispossesses the owner it is by virtue of the undeniable acts of the owner of abandonment deduced from his acquiesence by the exercise of other's possession contrary to the owner's right. It is moral because it requires certain pure motives of good faith

and just title from the beginning of the possession. It is convenient and necessary to social order to give certainty and security to ownership of property acquired by the mere lapse of the period fixed by law; that it discourages litigations; that it makes the owner watchful over his rights otherwise it will punish him for his negligence and will give price to diligent hands in good faith possessing the property; and above all the public peace and economic stability that it produces. (3 Sanchez Roman 250).

Legal Reason of Prescription: According to Law la. tit. 29 Part. III, prescription is established: 1. to give conditions of security and certainty to the ownership of things; 2. to put to an end endless litigations over the same; 3. to encourage men to improve their properties under the guarantee that they shall not be disturbed of their rights; and, 4. to punish negligent owners in not claiming their property against the possession of others.

Manresa, for the reason and purpose of the law of prescription gives the following, quoting him:

> "Asi lo ha reconocido nuestra jurisprudencia al proclamar reitiradamente que la prescripcion tiene por principal objecto de dar fijeza y certidumbre a la propiedad y a toda clase de derecho." (Veanse las sentencias del tribunal supremo de 8 de Mayo de 1903, 2 de Mayo de 1912 y 25 de Mayo de 1915).—12 Manresa 763.
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> "Diversas son las teorias que se han sostenidos acerca de fundamento de la prescripcion, pero no hemos de detenos en el examen de cada una de ellas, bastando indicar tan solo que dicha institucion de nuestro derechos es una necesidad social que funda en una razon de orden publico." then as if to indicate the scope of prescription continues," "Cual es la de dar fijeza y estabilidad *a las relaciones juridicas susceptibles de dudas y contradiccion, reduciendo la inseguridad de las mismas a un periodo de tiempo determinados para que no pueden indefinidamente en lo incierto el dominio o el patrimonio y los derechos de las personas interesadas en ellos.*

Alonso Martinez in his *Estudios de Filosofia del Derecho* says that prescription has for its office to determine who is the real owner of a realty when we could not tell who is the

legal grantee of former owner. And in order to avoid laborious work of looking into who is the rightful owner a period was fixed to elapse to determine ownership. (2 Sanchez Roman 247).

In the Common Law

The reasons in support of the law on prescription are in accord with that of the Civil Law.

Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of real property which has been in the adverse possession of another for a specified time, but also to vest the disseisor with title (Tennessee v. Linn, supra; Weed v. Keenan, 60 Vt. 74, 13 Atl. 804). These enactments rest on a wise public policy, which regards litigations with disfavor, and aims for the repose of condition which the parties have suffered to remain unquestioned long enough to indicate their acquiescence therein (Jasperson v. Scharnikow, supra: Collet v. Vanderburgh County, 119 Ind: 27, 21 N. E. 329). The intention is not to punish one who neglects to assert his rights, but to protect those who have maintained the possession of land, for the time specified by the statute, under claim of right or color of title (Jasperson v. Scharnikow, supra). It has also been said that the doctrine of maturing title by adverse possession, under color of title, is that where one in the exercise of ordinary care, is induced to enter upon and improve land because he has some written evidence of title that would naturally induce a layman to believe it vested in him what it professes to pass, it would be unjust end of the statutory period (Barret v. Brewer, 153 N. C. 547, 69 SE 614).

From the foregoing history of prescription in both the Common Law and Civil Law the following conclusions are observed:

1. That at first prescription does not create nor transfer ownership because the Statutes of James I did not so provide, and the Roman Law praescriptio longi temporis did not have such effect; and, because the Civil Law does not say so for the lapse of time only decides who between conflicting claims is the real owner and it decides in favor of the actual possessor for a fixed period; and

2. That now it vests title as is provided by sections 40 and 41 of Act 190 which is essentially a Common Law rule. This is not entirely in consonance with the provisions of the Civil

Code for the provisions of Act 190 repealed those of the Civil Code (Willard's Notes, 1904). The Common Law therefore vests title by virtue of a legal fiction of transfer or conveyance of land from the true owner to the possessor for a fix period; while the Civil law only decides who is the real owner. This consideration under the Civil Law may be the same as the consideration governing section 41 of Act 190 because of the possessor under section 41 of Act 190 asserts that he is the owner thereof and interpose a general denial; so does the possessor under the Civil Law. Both of them do not recognize the ownership of the claimant and in such case prescription enters to decide who is the owner but does not vest title as of a transfer. While section 40 of Act 190 recognizes the ownership of the claimant but puts up prescription to bar only the action. This is ruled upon in the case of Recoletos vs. Crisostomo, 32 Phil. 427, where Supreme Court said: "Section 40 bars the owner's remedy after ten years, and section 41 vests in the adverse possessor after the same period of time a *full and complete title.* As a defense the adverse possessor may rely upon section 40 which *bars the remedy,* or he may rely upon section 41, which *confers title upon him.*" Evidently the Supreme Court is not of the opinion that section 40 transfers title to adverse possessor, and a legal inference is that the title remains with the true owner and affected by the mere lapse of the period fixed by law. According to the case last cited section 41 transfers title under a presumed conveyance; a legal fiction. It is on this fiction that the possessor under section 41 asserts ownership and does not recognize the ownership of the claimant who was the owner before the presumed conveyance took place. This is essentially a Common Law rule. But the Common Law rule did not only extend the legal fiction of conveyance under circumstances of section 41 but also in effect under that of section 40, for all practical purposes the possessor under section 40 could prevent the true owner from recovering his land yet the law recognizes that the claimant is the real and true owner. Can we not say that in effect the ownership which is recognized in the true owner is one jura in re aliena and as such enforceable? Here is a right, therefore, without remedy for its violation. But the Common Law presumes a transfer or a conveyance. With this concept it must be presumed also that there is a grantor as such in law who accepts something in return for the grant. There must be consideration in order for the grant to be valid. If the true owner cannot recover the property be-

cause public policy forbids, the same public policy forbids that no compensation in allowed the true owner whose ownership is recognized in law and in fact. The law only forbids the recovery of the property after a lapse of the period; it does not forbid the recovery of the compensation, for it could not be denied by the legal fiction that there was transfer of ownership. The land was not res nulius to be acquired by occupancy or an alluvium to be acquired by accession. Sanches Roman said that the property is abandoned by the true owner (3 Sanches Roman 250) but I cannot subscribe to this because the new owner must have acquired by occupancy or accession (Art. 609, Civil Code). It is not a gift or donation that the transfer is without compensation or gratuitious; it is not a penalty for which the public must demand reparation, for the land does not accrue to the public; nor, as damage for a wrong done to the possessor for the owner has not breach any contract with the possessor nor has not complied with any obligation due the possessor. On the other hand, the possessor is a trespasser of the property rights of the owner; who enters the land and executes acts of ownership therein without right whatsoever; who, knowing that he has no right, tries to quiet the owner by threat or deceit thereby depriving the owner of his property by the mere lapse of time (this will be dicussed at length when good faith and color of title will be dealt with).

This is enough ground—recognized ownership—for claiming damages or compensation.

There is another ground for a rightful demand for damages. Section 40 and also 41 of the Code of Civil Procedure prevents recovery of property and may we include as their effect non-recovery of damages even though the possessor is guilty of bad faith and without just title in his entry into the land or that he is guilty of deceit or fraud. To illustrate: A duly qualified trustees successor, without authority from court, conveyed a portion of the trust estate, the grantee having knowledge of the breach of trust, bought it. By the law of prescription now if the length of time has elapsed the cestui que trust shall be barred from recovering the realty, despite the bad faith and lack of just title of the grantee under the deed. (Maynard v. Green, 59 SE 798). In the case of Government of the Philippine Islands vs. Abadilla (46 Phil. 642) the same rule is obtained. In this case a lot was acquired in disregard to the disposition

of a will duly protocolized. The Court granted title to the acquirer due to the lapse of the period required by the law of prescription. The acquirer had knowledge of the provision of the protocolized will but still asserts title thereto. The amount to bad faith on the part of the acquirer and renders his claim devoid of just title.

Will usurpers, squaters, unlawful detainers after the mere lapse of the period fixed by law be protected by the Law of prescription and acquires title to the land? Unless the law is amended title will vest in them.

The weight of authority, however, is that to acquire title to land actually occupied, good faith is not necessary. (U.S.—Alexander vs. Pendleton, 8 Cranch 462, 3 L. Ed. 624; Alabama—Vandiveer vs. Stickney, 75 Ala. 225; Indiana—May vs. Dobbin, 166 Ind. 331, 77 N. E. 353; Mass.—Warren vs. Bowdran, 156 Mass. 280, 31 N. E. 300; No—Wilkerson vs. Eilers 114 mo. 245, 21 SW 514; New York—Humbert vs. Trinity Church 24 Wend. 587 limiting Livingston vs. Peru Iron Co., 9 Wend. 511, to cases in which constructive possession is in question; South Carolina—Strange vs. Durham, 3 S. C. L. 83, where it is held that where the possession is in fact adverse a person is entitled to the protection of the statute of limitations, although he may have tried to deceive the proprietor of the land into the belief that he did not intend to claim adversely;

Texas—Kenney vs. Vinson, 32 Tex. 125; West Virginia—Jones vs. Lemon, 26 W. Va. 629;

Wisconsin—Pitman vs. Hill, 117 Wis. 318 NW. 40; Chicago etc. R. Co. Groh, 85 Wis. 55 NW 714—It is a sufficient claim of title that the entry of the disseisor is hostile to all the world and that he intend to hold the land as his own and thus so hold it for the statutory period of limitation.

This case law of the United States is now being invoked in our local jurisprudence by virtue principally of the provisions of the Code of Civil Procedure (Act No. 190) which is a common law statute taken from Ohio and Mississippi: section 40, Code of Civil Procedure from the former and section 41 of the same code from the latter State.

Comparing the rule that obtained in the Common Law with that in the Civil Law as seen also from the cases we find an uncompromising situation.

Decisions under the Civil Law: (1) According to the law in force in Mobile while under the dominion of Spain prescription must rest on "good faith and just title" (Kennedy vs. Townsley, 16 Ala. 239. Also Salledit Lajoye vs. Primm, 3 Mo. 529 which is apparently decided under a civil law statute to the same effect.

(2) In Louisiana good faith is necessary to acquire title by the ten years' statute of prescription. Abshire vs. Lege, 123 La. 254, 62 S. 667.

(3) In Porto Rico, good faith is an element of adverse possession under Porto Rico Civil Code, Article 1957. Ochoa vs. Hernandez, 230 U. S. 139, 57 L. Ed. 1427 affirming 5 Porto Rico Fed. 463; Dexter vs. Arsuaga, 4 Porto Rico Fed. 344.

(4) In the Philippine Islands there is a great conflict of authorities because of the innovation of the rule obtaining in the Common Law (as secs. 40 and 41, Act 190). But it is a recognized principle of the Civil Law which constitutes the principal law of the Philippine Islands that good faith and just title is necessary. Whatever is the rule elsewhere, in civil law jurisdiction including the Philippines, it is settled that to perfect title by adverse possession, such possesion must have been held in good faith on the part of the claimant. (Ariola vs. Gomez de la Serna, 1909, 14 Phil. 627;

> Santiago vs. Cruz, 1911, 19 Phil. 145;
> Cuaycong vs. Benedicto, 1918, 37 Phil. 781;
> Tolentino vs. Vitug, 1918, 39 Phil. 126;
> Ochoa vs. Hernandez, 1913, 230 U. S. 139;
> Kennedy vs. Townsley, 1849, 16 Ala. 239; and
> Obshire vs. Lege, 1913, 133 La. 254, 2 C. J. 199).

In the case of Villanueva vs. Roque, 10 Phil. 270, the Supreme Court said: "To acquire property (land) by prescription it is necessary that the alleged title be just and true, considering as just such title as may be legally sufficient to transmit the dominion or *jus in re*, the prescription of which is at issue, such as a title by purchase and sale; if however, it is shown by documents presented by the agents that their principal had not carried out the purchase and sale invoked as basis of title, the ordinary prescription alleged as defense is lacking in an essential requisite to constitute a method of acquisition.

But section 40 and 41, Act 190, must not be construed in the light of rules obtaining in the Civil Law jurisdiction. That is against statutory construction. It is here at this point that I propose a remedy, a happy meeting place for the Common Law rule and that of the Civil Law.

PROPOSITION: The law must be amended to give the real and true owner the right of compensation or damages where the possession is not predicated on good faith and just title on the ground that he has his ownership recognized, a kind of jura in re aliena.

REASONS: 1. If possession is predicated on good faith and just title, no damages could be claimed because according to the theory of the Civil Law there is a valid transfer based upon a valid title, and the more so in the Common Law because it does not need a legal fiction to support the presumed conveyance.

2. If the possession is without good faith and just title, the deprivation is clear and damages or compensation arises though the title is consolidated in the possessor by virtue of the public policy that property ownership must be stable and that improvement made be protected and at the same time promoted.

3. Prescription is stricti juris and must be taken advantage of only to settle ownership where doubt exist as to who of several claimants is the owner.

4. If prescription operates to deprive a person of his ownership because it is promotive of social order or that the return of the property to its owner will work a greater disorder and more detriment to the possessor for the requisite period, the law must also give reparation for the deprivation suffered by the owner.

5. Because section 40 of Act 190 recognizes the ownership of the claimant, unlike section 41 (Act 190) which decide who of the claimants is the true owner. If one proves that he is the owner, the other will not have any reason to demand for compensation, he having no right to the land as basis for the claim.

The remedy proposed will be more promotive of good social order, eliminating land grabbing, squating usurping, and the perpetration of deceit and fraud. Conveyances of realty will be cleaner and less promotive of disorder, and litigations over ownership of land less.

There is another reason why prescription is not a good means of acquiring ownership. It must be shown that it is more of a protection of ownership rather than a means of acquisition. The reason at the back of this institution is protection pure and simple of rights which society regards to belong to one and not to the other. If its purposes could be accomplished by other means without it then prescription has no reason for us. It must be remembered, therefore that section 46 of the The Land Registration Law, Act No. 496, provides: "No title to registered land in derogation to that of the registered owner shall be acquired by *prescription or adverse possession.*" (Legarda vs. Saleeby, 31 Phil. 590). Under the Land Registration Law every conceivable interest in land are very well protected so that the law will not allow prescription to enter when it has nothing to protect, nothing to transmit.

Under the law (Act 496) now in force, there will be time when prescription will be a dead legal institution or practically useless for the purposes it was created. All lands will eventually come under the operation of the Land Registration Law so that prescription will be rendered obsolete. Where now is the public policy that land should not be left idle in lazy hands and given to more industrious members of the community? Where now is the transfer of property ownership by the mere lapse of time to protect improvements in the land entered and held with or without good faith and just title? Where now is the reason given by the Civil Law that prescription decides who of the several doubtful owners is the true owner? Where is the endless litigation that it proposes to avoid where ownership to realty is made certain and secure by Act 496? These questions will indicate that prescription under section 40, Act 190, is harsh for it protects not a right but transfer them without compensation. It is for this reason that damages or compensation should be granted without impairing the effect of prescription, if prescription were to continue our law.

The other and only difficulty that may arise now for the recovery of damages or compensation is that it may have already prescribed—i. e. the time for claiming them under our laws. I believe that after the period to recover the property had elapsed, the period for the recovery of damages (actio in personam) shall commence to run for the following reasons: 1. Action in rem is independent and distinct from the action in personam (Homer Ramsdell Co. vs. La Campagnie Generale Transatlantique, 182 U. S. 406).

2. Because an action in personam could be substituted after the action in rem has transpired or elapsed. In the case of Lawrence R. Co. vs. O'Hara, 48 Ohio ST. Rep. 343; 28 NE 175, it is said: "The change in the remedy from a suit to recover the possession to a form of proceeding in which the value, instead of the land, is recovered, should not be held to deprive either party of the mode of trial to which he would have entitled if the suit had been to recover the possession instead of the value of the land."

3. And the third reason is that you cannot institute action for the compensation of the land before the expiration of the prescriptive period for the recovery of the same, because you are not yet in law deprived of it before the period expires. You can yet recover the land if you could show your ownership over the same if the period to recover has not yet transpired.

Under the Land Registration Law you cannot institute an action for the recovery of the value of your land or of the right therein while you are not yet deprived of the land by the lapse of the period within which you could recover it. After the loss of your right to recover the land you have another action (in personam) to recover for damages. This rule must in all respect be applied in the law of prescription. (Sec. 118 Niblack—analysis of the Torrens System.)

The owner of a property has a perfect right to rest securely upon his title in fee simple, once acquired, without fear of being deprived of the ownership thereof by a judicial decree *or otherwise;* and when he has been so deprived, he may feel assured that the courts will afford him an opportunity to recover the value of his property in an action brought for that purpose, unless and until, by the lapse of time under the law of limitations of actions in such case, he has permitted his claim to be lost forever. (Bishop of Nueva Caseres vs. Municipality of Tabacco, 46 Phil. 274-'5).

What is the obligation of the true and real owner after recovering the value, damage or compensation of his property whose title was transferred to the possessor? To legalize the transfer according to law the owner upon payment of his claim shall give a deed or convey the right to the defendant (8 R. C. L. 549.) This completes the whole transaction of the proposed remedy to do justice to all parties.

There is another reason why damages should be given the true owner, reasoning by:

ANALOGY WITH THE PROVISIONS OF THE LAND REGISTRATION LAW

(Act. No. 496)

It must be recollected what reasons as given above prescription has for its existence and purposes. It must be said here in advance that the Land Registration Law has the same reasons for its existence and has the same purposes.

It must also be remembered here for purposes of analogy that under section 40, Act 190, prescription vests and transfers title to land possessed during the requisite period fixed by law even if the possession was obtained by fraud, deceit, or by force, threat, intimidation, or otherwise (Government vs. Abadilla, 46 Phil. 642; Arnedo Cruz vs. de Leon, 21 Phil. 199) Kincaid vs. Cabanatuan, 35 Phil. 383; and Davis vs. Davis, 68 Miss. 478.)

PURPOSES OF THE TORRENS SYSTEM

"The object of the Land Registration Act is to afford a simple, certain, practical method by which every interested person, the owner of the land and everyone dealing with him, may know at any given time just who owns a particular piece of land, and subject to what conditions limitations, encumbrances or claims;...." (Powel on Land Registration)

REASONS FOR LAW:

1. Because it substitutes security for insecurity.
2. Because it affords protection against fraud.
3. Because it diminishes the number of chancery suits, by removing those conditions that afford ground for them. (Altavas—Land Registration, p. 4, 2nd Ed., quoting Sir Robert Torrens.)

EFFECTS OF THE GRANT OF TITLE UNDER THE LAW

It vests in the grantee absolute and indefeasible title after the lapse of the period fixed by law even tho the title was obtained by fraud (Sec. 38, Act 496; Reyes vs. Paterno 34 Phil. 420; and Cabanos vs. The Register of Deeds, 40 Phil. 620).

Comparing now these two legal institutions we find that they have the same purposes and reasons for their existence and secures the same effect—the vesting of title after a period fixed by law has elapsed within which period a wrong could have been rectified.

There is, however, this great difference; While under the Torrens system damages could be recovered on the ground of fraud by the true owner the same is not true under the law of prescription.

The Torrens system has the following reasons to support the grant of damages: The law in this case provides that the person aggrieved by such decree may pursue his remedy by action for damages against the applicant or any other person for fraud in procuring the decree.

No other reason can be given to such provision of the law, except by the juridical principle which says: "No person shall enrich himself at the cost of others".

In this case, it being impossible for the aggrieved party to recover the ownership of the property of which he has been deprived through fraud, in view of the special feature that characterizes the Torrens System, he must be given some other remedy to recover damages.

Action shall be personal, and not real, because the aggrieved party cannot exercise any action to recover the property.

If the damages could not be collected directly from the perpetrator of the fraud or wrong, damages could be collected from the assurance fund so created by the law for such purpose directly; and in return, for the State to recover it from the defrauder. (Sec. 102, P. I. Land Reg. Act.; Sec. 182 New Zealand Act; Sec. 7, English Act, 1897) In every case where payment has been made by the Treasurer of the Philippine Archipelago in accordance with the provisions of this Act, the Government of the Philippine Islands shall be subrogated to all the rights of the plaintiff against any other parties to the fraud (Sec. 104, Phil. Land Reg. Act).

We see, therefore, that the trespass, wrongful act, fraud, or usurpation could not be justified by the mere lapse of the time within which unlawful act could be rectified, and that his title just acquired is not a defense against claims for damages. It is only a good defense when the action is for the recovery of the property or ownership of the property.

The assurance fund is intended to relieve innocent persons from any injustice which may arise to them by operation under the Act making for the conclusiveness of a certificate, whether such injustice arises from fraud or error (Niblack, Analysis of the Torrens System, p. 312). One can obtain certificate by his fraud or forgery, or by the criminal act of another. It is clear that in such cases somebody has been deprived of his property by virtue of the operative strength of the law, and it is but just and equitable that he be indemnified, either by the defrauder or forger or by the State.

"The reason for the creation of such a fund is obvious. The act of registration is the operative act, and the transfer and vesting of the title is effected, not by the execution of an instrument of transfer, not by the act of the owner of the land, not by the transfer of a valid title from the transferor, but by the State acting through its officers, the register, and because it transfers and vests the title by the issue of a certificate which is declared by statute to be conclusive evidence of an indefeasible title to land, the State creates a fund for the compensation of such persons as may be injured by the the divesting and cutting off of right, interests and estates under this statutory declaration". (Analysis of Torrens System by Niblack, p. 290.)

Now we ask. Under the law of prescription, is the transfer and vesting of title effected by the execution of an instrument of transfer, by the act of the owner of the land, by the transfer of a valid title from the transferor? It is clear that it is not. Is there any difference then in the situation of one standing on his right under the law of prescription from that of the one under the Torrens System? Who vests and transfers then the title? In both cases it is the law, a statute law. If these two institutions have the same reasons supported by the same public policy, the same in purposes, working in parallel lines and not different in nature from each other, why is it that damages could be granted under the one and not under the other?

CONCLUSIONS

From the foregoing study it is recommended that damages be granted the true owner of a land obtained by another through and by means of prescription. Our legislators should see that property and property rights should be well protected and respected. That while the law recognizes an existing right in fact and in law a sufficient remedy must be afforded to protect it or else it is a ghost that could be seen in law yet very illusive to the grasp. There isnoprinciple of justice that sanctions prescription as depriving the owner of his property without giving him due compensation or damages. If fraud or forgery could be basis for indefeasible title to realty conditioned upon the payment of damages or compensation under the Land Registration Law then, even granting that the other reasons given above are of no avail, still this last consideration is enough ground for the claimant to demand damages or compensation under the same conditions tenable under section 40 of Act No. 190.