

ANSWERS STUDY UNIT 4

Question (no number) Page 90

Distinguish between original and derivative methods of acquisition of ownership. (5)

Original methods of acquiring ownership are used when there is no co-operation (1) from a predecessor in title (this refers to the person who was owner of the thing before the new owner); in other words, where there is no transfer (1) of ownership. This form of acquisition is also not limited ($\frac{1}{2}$) to things belonging to no-one (*res nullius*): in cases of accession, prescription and expropriation the thing is actually owned by another, but no transfer of ownership takes place.

Derivative methods of acquiring ownership occur with the co-operation (1) of a predecessor in title. The right which the transferee obtains is derived from the former owner. ($\frac{1}{2}$) This implies that the predecessor in title should himself/herself have been the owner and entitled to transfer ownership. (1) This principle is expressed in the maxim: no-one can transfer more rights to another person than he has himself (*nemo plus iuris in alium transferre potest quam ipse habet*). ($\frac{1}{2}$) Furthermore, the right is transferred to the new owner with the advantages and the disadvantages attached to that right. ($\frac{1}{2}$)

Question 3 Page 93

Name and discuss the requirements of appropriation (*occupatio*). (10)

Appropriation or occupation (*occupatio*) is defined as the unilateral taking of physical control of a thing which does not belong to anyone (*res nullius*), but which is within the sphere of law (*res in commercio*) with the intention of becoming its owner.

The requirements for acquiring ownership through appropriation, is therefore: (i) unilateral taking (1) of (ii) physical control of (1) (iii) a thing that does not belong to anyone (1) and (iv) but which is within the legal sphere (1) and (v) the person in control should have the intention of becoming owner (1).

The following elements need some further enlightenment:

(i) Control

Physical (1) control is essential for the acquisition of ownership by means of appropriation (*occupatio*). The acquirer must obtain physical control with the necessary intention (that is, the intention of becoming the owner).

One should note that the control need not be lawful (1). If, for example, a person has no right to hunt, either because he has no license to shoot certain animals or where certain wild animals are protected by legislation, he commits a crime if he shoots such animals, but he nevertheless becomes the owner of the dead animals by means of appropriation (*S v Frost*; *S v Noah* 1974 (3) SA 466 (C)).

Where wild animals are wounded, but actual physical control is not taken (1), appropriation (*occupatio*) does not take place. Therefore, if one person wounds a wild animal, but another person catches it or discovers the carcass, the latter obtains ownership (*R v Mafohla* 1958 (2) SA 373 (SR) 374C).

(ii) Thing which does not belong to anyone

Res nullius are things that belong to no-one. All creatures that are wild by nature (animals, birds, fish and insects) either in their natural state (before someone has taken control of them) or when they have reverted to their former wild state (after having been controlled by a person) are regarded as *res nullius*. (½) An exception occurs in the case of wild animals which have been tamed (domesticated). These remain the property of the owner until they lose the habit of returning, when, once again, they become *res nullius*, and capable of being acquired by appropriation. (½) Domesticated animals must be distinguished from domestic animals (such as cats and dogs). Domestic animals are not *res nullius*.(½)

Domesticated animals or wild animals regulated by the *Game Theft Act* 105 of 1991 (1) are not *res nullius* and therefore cannot be acquired in ownership by means of appropriation. Products of the sea (1) (for example, seaweed, shells, stones, sand, fish and shellfish) are, in principle, open to acquisition by appropriation. Abandoned things (1) (*res derelictae*) are things which a former owner has abandoned with the intention of ceasing to be their owner. Such things are then *res nullius* and may become the property of any person taking control of them (*Reck v Mills* 1990 (1) SA 751 (A)). A lost thing (1) (*res deperditae*) is not a *res nullius*, but remains the property of the owner as long as it is his/her intention to retain ownership.

(iii) Intention of becoming owner

In *Underwater Construction and Salvage Co (Pty) Ltd v Bell* (1968 (4) SA 190 (C) 193E) Banks J stated that "... ownership is acquired as soon as there is a seizure with the intention of becoming owner". Although theoretically there should be an intention to

acquire ownership, other elements, particularly, the physical control element, can be indications (1) of such an intention.

(Maximum 10 marks)

Question 2 Page 107

Name the criteria which are applied to determine whether a movable thing has become part of an immovable thing, through building. (3)

The three criteria applied by the courts to determine whether a movable thing is attached to an immovable thing by means of accession in such a fashion that it subsequently becomes part of the immovable thing are:-

- (i) nature ($\frac{1}{2}$) and purpose ($\frac{1}{2}$) of the attached thing
- (ii) manner ($\frac{1}{2}$) and degree ($\frac{1}{2}$) of attachment
- (iii) intention of the person annexing it or the intention of the owner of the movable (1)

Question 10 Page 112

Name the criteria which are applied in case law to determine whether a movable thing has lost its independence and become part of an immovable thing by industrial accession. Distinguish the different approaches followed with regard to these criteria in the following cases:

- (a) *MacDonald Ltd v Radin NO and the Potchefstroom Dairies and Industries Co Ltd* (1915 AD 454) (5)
- (b) *Van Wezel v Van Wezel's Trustees* (1924 AD 409) (5)
- (c) *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* (1961 (2) SA 669 (A)) (5)
- (d) *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* (1978 (3) SA 682 (A)) (5)
- (e) *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (Wp) Bpk* (1996 (3) SA 273 (A)) (5)

(a) In *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* (1915 AD 454) the court pointed out that each case depends on its own facts. The court, however, stated three criteria that must be applied to determine whether the movable has lost its independence and became part of the principal thing:

- the nature ($\frac{1}{2}$) and purpose ($\frac{1}{2}$) of the particular article,

- the degree (½) and manner (½) of its annexation, and
- the intention of the person annexing it or the intention of the owner of the movable (1)

The first two criteria can give an indication of permanency, but if they are inconclusive (1), one has to look at the intention of the person annexing it (1).

(b) In *Van Wezel v Van Wezel's Trustee* (1924 AD 409) the owner of the movables was the annexor and not the owner of the land (1). One has to look at the intention of the annexor and not merely the intention of the owner of the movables. Before (1) the termination of the lease the lessee has the right to remove (1) improvements, other than necessary improvements (1), which can be dismantled without damage (1) to the property. The criteria as explained in MacDonald's case were applied.

(c) In *Standard-Vacuum Refining Co v Durban City Council* 1961 (2) SA 669 (A) 678 the annexor was the owner of the land and of the attached movables. It was said that the manner and degree of attachment relate to the mode (1) in which the movable thing is attached to the immovable thing. As long as a sufficient linking exists, it does not matter whether this has been brought about by the weight of the thing or by a physical attachment. The attachment may be actually incorporated into the immovable thing or it may be so secure that separation will cause substantial injury to either the immovable or the movable thing. The key words here are "substantial injury" (1). If separation causes substantial injury, either to the movable or to the land or immovable to which it is attached, then the movable was attached with the intention of permanency and have become part of the immovable thing (1). If, it is not possible to determine whether there was an intention of permanency, the intention of the annexor may be decisive. (1)

In this case Van Winsen AJA distinguished between an objective (1) intention and a subjective (1) intention of the annexor.

(d) *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* (1978 (3) SA 682 (A)) followed a somewhat different approach. In this case the annexor was the owner of the attached movables, but its lease with the owner of the land made provision for acquisition of ownership of all attachments by the lessor on termination of the lease. (1)

In *the Theatre Investments* case Van Winsen AJA remarked (at 688) that all the direct and inferential evidence (1) as to the intention (1) would have to be considered together and that in the light of that evidence (1) it would have to be decided on a balance of probabilities (1) whether the annexor intended a permanent attachment.

(e) In *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (Wp) Bpk* (1996 (3) SA 273 (A)) the court applied the three requirements as set out in the *MacDonald* case. (1) Nienaber JA held that the third requirement was decisive. (1) Although he expressed uneasiness about the correctness (1) of the approach, he applied the intention requirement as referring to the intention of the owner of the movable things (1) that were attached to the

land. He held that in the specific circumstances of the case the subjective intention (1) of the owner of the movables attached was decisive.