Common Core of European Private Law
Acquisition of immovables through long-term use

CASES – NORWEGIAN LAW

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Case 1.1: Living on another's land without permission

Nelson is the registered owner of a parcel of land at the outskirts of Joanna Town. He has built a house on the land and laid out a garden. While on vacation, Nelson meets the love of his life. To live together with his partner, he decides to leave Joanna Town. However, he would like to keep the parcel of land for his adult children and does not sell or transfer it to anyone. A few weeks later, Jacob and Mpumi, who have been living in the streets for a couple of months, notice that the house on Nelson's parcel is uninhabited. Jacob and Mpumi move into the house with all their belongings. After a year, their lives have normalised. They work, maintain the house, take care of the garden, and put up a fence around the house and the garden. 21 years later and after a traumatising divorce, Nelson, who has been paying the rates and taxes pertaining to the land, comes back to Joanna Town and discovers Jacob, Mpumi, and their family living in the house. Nelson approaches a court to obtain an order to evict them and, subsidiary to that, sues them and the state for compensation. Jacob and Mpumi are now wondering what formalities to observe in order for their presence not to be challenged and to be recognised by others.

Response: The case raises the question of whether Jacob and Mpumi have acquired the parcel of land, thereby extinguishing Nelson's right of ownership.

The most common way of extinguishing somebody else's right of ownership through long-term use in Norwegian law is by acquisitive prescription, which is regulated by the 'Act on Acquisitive Prescription' (*'Lov om hevd'* or *'Hevdslova'*, hereafter HL) of 1966. Next to acquisitive prescription, there are several bordering - and sometimes even overlapping - legal institutions that lead to extinction of an original owner's right in favour of a long-term user, usually in good faith.[2] These doctrines were all developed through case law prior to the adoption of HL and have retained a role in the Norwegian legal system even after the adoption of HL, mostly by supplementing its rules in specific areas. As is most common, the present case is regulated by HL.

HL § 2 states that '[w]hoever has a thing as their own for 20 years without interruption, acquires ownership through acquisitive prescription'. The provision lays down a **requirement of usage** and a

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[2] The doctrines of "long-term use" - *"alders tids bruk"*, "settled use"/ "settled rights" - *"festnet bruk"/"festnede rettsforhold"* and "passivity" - *"passivitet"*, will be discussed only to the extent that they apply to the cases. It should still be mentioned that of all alternative legal institutions leading to acquisition of ownership by long-term use, only "passivity" does not hold good faith as a strict requirement, see T. Falkanger & A.T. Falkanger, *Tingsrett* (8th ed, Universitetsforlaget 2016), p. 348. However, is should be noted that this is a narrow exception and that the contrours of this legal institution are unclear. The clear main rule is therefore that good faith is necessary. The circumstances under which ownership can be acquired by "passivity" are elaborated in case 9.

prescription period of 20 years. Furthermore, HL § 4 determines that prescription can only happen in **"good faith"**.

According to the requirement of usage, the claimant must have used the land "as their own". This entails a rather open norm, which has been developed specifically for this rule. It does not build on a general doctrine of possession, as a unitary doctrine of "possession" does not exist in Norwegian law.[3]

Falkanger & Falkanger state that the claimant must use the property in a way that is natural for an owner, considering the time, type of asset, and place where the asset is situated.[4] Two sub-criteria have been developed in case law, namely that the usage must be *adequate* and *exclusive*.

According to the requirement of *adequacy* the claimant's usage must have been of an intensity and extent that is natural for an owner. The claimant's dispositions over the property may be positive (physical usage), negative (exclusion of others) or legal (such as selling or otherwise legally disposing over the property). Furthermore, there is a certain requirement for visibility in order to allow the original owner to react. The intensity of the usage is relative to the time that has passed and the knowledge of the original owner. If the claimant has been in possession of the property for a long time, less intense usage is accepted.[5] The same applies if the claimant's use was known to the owner.

Pursuant to the requirement of *exclusivity,* the claimant must - *in principle* - have used the property to the exclusion of others, including the original owner. Acquisitive prescription is not automatically impossible if the owner has made some use of the property, but the requirements for usage by the real owner in order to hinder prescription are not high. In Rt. 1972 s. 643 (*Bottenvollen*), the Supreme Court stated that, even though the claimants' use was more intense than that of the original owner, the owner's use hindered acquisitive prescription. Similarly, use by third parties may hinder acquisitive prescription since the claimant had not had the property as "their own".[6]

In this case, we are informed that Jacob and Mpumi have lived on the land for 21 years. As Jacob and Mpumi have used the parcel as their home and taken care of the house and the garden, we can safely assume that they have had the land "as their own" and that the requirement for usage is thus fulfilled.

The second requirement, namely the prescription period of 20 years, is also fulfilled. The legislator considered introducing an exception by which the prescription period would not run against somebody travelling abroad, but the suggestion was discarded.[7]

The circumstances under which Jacob and Mpumi came to inhabit the property justify an investigation as to whether the requirement of good faith in HL § 4 is satisfied.

In order to win right to the property Jacob and Mpumi must be in good faith regarding their right to ownership.[8] The notion of good faith includes not only positive knowledge, but also situations in which the claimant is not as diligent as she ought to have been in the given situation. According to

[3] Falkanger & Falkanger 2016, p. 357-358.
[4] Falkanger & Falkanger 2016, p. 358.
[5] Rt. 1968 s. 1202.
[6] B. Høgetveit Berg, *Hevd* (Oslo 2005) p. 188-189.
[7] This follows from the preparatory works of HL, *Sivillovbokutvalget "Rådsegn 6. Om hevd"*, Oslo 1961, p. 18. See also Høgetveit Berg 2005, p. 120.
[8] HL § 4.

the preparatory works, the standard is set by whether or not an ordinary person would have understood that something was wrong in a similar situation.[9] There is a presumption of good faith, meaning that the original owner must prove that the claimant was in bad faith.[10] Still, the claimant must be able to demonstrate that they build their acquisition on a belief to hold a legal right in the land.[11]

It is clear that Jacob and Mpumi were not initially in good faith when they occupied Nelson's house. The fact that Nelson's house has been uninhabited for a few weeks does not provide justified cause to believe that it has been abandoned. Furthermore, it is not clear whether a conviction that a property has been abandoned could entail good faith according to Norwegian law.

Squatting is not permitted in Norwegian law and neither has it been a prominent issue in Norwegian case law, legal scholarship, nor political debate. Since Jacob and Mpumi were in bad faith regarding their right to the property, and "bad faith acquisitive prescription" is not allowed in Norwegian law,[12] Jacob and Mpumi do not have a right to the property and Nelson may vindicate it. Nelson could obtain an order for eviction,[13] and the fact that Jacob and Mpumi were homeless and in a state of necessity when they occupied the parcel does not alter this.

If Jacob and Mpumi are unsuccessful in their acquisition due to bad faith, Nelson will have a right to compensation for their use pursuant to a general principle of compensation for unlawful use.[14] At the same time, we are informed that Jacob and Mpumi have maintained the house and the garden, as well as put up a fence around the parcel. If Jabob and Mpumi have made additions to the property, which cannot be easily separated from it, they will have a right to compensation from Nelson up to value that has been added to the property.[15] This right to compensation applies even if Jacob and Mpumi were in bad faith, i.e. if they understood that their additions to the property would be incorporated in a property that did not belong to them. However, bad faith can lead to a reduction of the compensation.[16]

Alternatively, if Jacob and Mpumi had been found to fulfil the requirement of good faith after all, acquisition by acquisitive prescription would occur spontaneously. Upon the fulfilment of all requirements for acquisitive prescription the claimant acquires ownership of the property.[17] The ownership of the original owner would conversely be extinguished.[18] This means that the Jacob and Mpumi would not have to register their right in the land registry to achieve third party protection, as the Act on Registration of Real Rights prescribes that protection follows automatically.[19] They would have acquired co-ownership in the property.

Furthermore, there is the question of whether Nelson has a claim for compensation in case his right to ownership is extinguished. There are no provisions on compensation dealing specifically with

[9] Ot.prp. nr. 30 (1965-66), pp. 28-29.
[10] This presumption is not laid down in HL, but follows from the preparatory works of HL, *Sivillovbokutvalget "Rådsegn 6. Om hevd"*, Oslo 1961 p.17, on p. 25.
[11] Høgetveit Berg 2005, p. 251 and the Court of Appeal in LH-2003-12681.
[12] With the narrow exception of extinction of rights due to "passivity", see footnote 2 and case 9.
[13] Persuant to *Tvangsfullbyrdelsesloven* of 1992 § 13-2 (e).
[14] This principle was applied among others by the Supreme Court in Rt. 1981 p. 1215. See also Høgetveit Berg 2005, p. 204 and following.
[15] §§ 10, cf. 8 of *Lov om hendelege eigedomshøve* of 1969.
[16] Høgetveit Berg 2005, p. 209 and the Court of Appeal in the case in RG 2002 p. 1546.
[17] HL § 2.
[18] Falkanger and Falkanger 2016, p. 373.
[19] *Tinglysningsloven* of 1935 § 21.

loss of rights due to acquisitive prescription in Norwegian law. An owner who has lost his property through acquisitive prescription may, however, receive compensation through the general rules on compensation in tort law.[20] The requirements for receiving compensation in tort are that there must be damage, negligence on the side of the perpetrator and a causal connection between the negligent behaviour and the damage. However, due to the requirement of good faith it is unlikely that the person who succeeds with a claim of ownership through acquisitive prescription will be held to have acted negligently.[21]

In case Jacob and Mpumi would have successfully acquired Nelson's property, the question would be if the acquisition was consistent with human rights and international law. To my knowledge there are no examples of case law problematising acquisitive prescription in the light of the protection of property in Art. 1 of the First Protocol to the ECHR, or the constitutional rule stipulating that compensation should be given in the case of expropriation in § 105 of the Norwegian Constitution. The opinion in legal doctrine seems to be that the rules on acquisitive prescription steer clear of these overarching norms.[22]

Case 1.2: Living on another's land without permission and a transfer to a third party by the original owner

See case 1.1. Jacob and Mpumi have been living in Nelson's house for 31 years. Instead of getting divorced and returning to Joanna Town, Nelson decides to sell his house. Natalia buys the house. Natalia and Nelson observe all formalities for the transfer of the land. Natalia approaches a court to obtain an order to evict Jacob, Mpumi, and their family.

Response: The change of facts from 21 to 31 years is inconsequential in Norwegian law, as Jacob and Mpumi have already fulfilled the prescription period of 20 years. Provided that Jacob and Mpumi have fulfilled the requirements of good faith - which we assumed that they were not in Case 1.1 - acquisition through prescriptive acquisition would occur automatically. Acquisitive prescription does not need be registered in order to be effective against third parties.[23] This means that, even if Jacob and Mpumi have omitted to register their ownership right in the land registry (*grunnboken*), it is effective against Natalia. Natalia would consequently not be able to obtain a court order for eviction.

If Jacob and Mpumi, after fulfilling the requirements for acquisitive prescription, wanted to sell the property they should get their right of ownership registered in the land registry. Without registered ownership they would likely have trouble re-selling.[24] To do so they would need to either register a court decision recognising their right to ownership in the land registry or go through the procedure described in § 38 a of the Act on Registration of Real Rights (*tinglysningsloven*).[25] This procedure is described in case 2.1.

Case 1.3: Living on another's land without permission and the fate of security rights in land

[20] Høgetveit Berg 2005, p. 203-211.
[21] Høgetveit Berg 2005, pp. 210-11.
[22] Høgtveit Berg 2005, pp. 35-37.
[23] This follows from HL § 2, cf. § 21 of the Act on Registration of Real Rights of 1935 (*tinglysningsloven*).
[24] See case 2.1, and in particular footnote 45, where it is expalined that re-sale without registration would not formally be hindered, but would nonetheless be difficult in practice.
[25] Falkanger & Falkanger 2016, p. 373.

See case 1.1. The National Bank has held a security right in Nelson's land for 25 years. Jacob and Mpumi have been living in Nelson's house for 22 years. As Nelson defaults on the secured loan he has from the National Bank, the Bank wishes to exercise its security right.

Response: Again, the altered time period is not relevant as Jacob and Mpumi have lived on the property longer than the required 20 years. As in the previous case, we will assume that Jacob and Mpumi were in good faith and have thereby fulfilled the requirements for prescriptive acquisition although case 1.1. concluded otherwise.[26]

The question here is whether the security right of the National Bank has been extinguished due to Jacob and Mpumi's acquisition. When a claimant acquires property through acquisitive prescription the rights of the original owner are extinguished, but third party rights may also rest on the property. The consequences of acquisitive prescription on existing non-possessory security rights are regulated in HL §§ 10 a and 10 b.

§ 10 a (1) lays down the requirements for extinction of unregistered security rights, while § 10 a (2) applies to registered security rights. Security rights in immovable property must be registered in order to achieve third party effectiveness and are thus regulated by the second option.[27]

According to § 10 a (2), registered security rights resting on the property are extinguished on the condition that the claimant has been in possession of the property for the full duration of the prescription period at any point after the security right was established, i.e. 20 after establishment the right.[28] This does not pose a hinder for Jacob and Mpumi, as they have lived in Nelson's house for 22 years after the security right was established. Security rights that are held by the claimant, or that the claimant is bound by, may not be extinguished. The latter limitations do not pose a hinder for Jacob and Mpumi since there are neither holders of the right, nor bound by it.

A more challenging requirement is that of good faith.[29] To extinguish the National Bank's security right, Jacob and Mpumi cannot have been - or ought to have been - aware of it. Since the security right is registered it will be difficult, although not impossible, to fulfil the requirement for good faith.[30]

If the requirements in HL § 10a (2) are fulfilled the security right is extinguished and unenforceable against Jacob and Mpumi.

Finally, there are no limitations within housing law or constitutional law, preventing the bank from enforcing their security right and thereby evicting Jacob and Mpumi.

Case 1.4: Living on rented land without permission

See case 1.1. Nelson is not the owner of the land and the building, but only has a right to use the land. The owner of the land is a private investment company. Nelson sues. Jacob and Mpumi are now

[26] The procedure is discussed in case 2.1.
[27] The Act on Secured Transactions (*Panteloven*) § 2-5 regulates security rights in immovable property. Such rights are registered in the land registry, *tinglysningsloven* § 4 (1) nr. 2.
[28] This type of extinction of limited rights is referred to as "*aksessorisk frihevd*".
[29] HL § 11, which refers to the requirement of good faith in HL § 4.
[30] See case 2.1, where the requirement of good faith and omission to control what rights are registered is discussed. Good faith is not automatically hindered by the omission to check e.g. the land registry. See also Høgetveit Berg 2005, p. 449 with further references.

wondering what formalities to observe in order for their presence not to be challenged and to be recognised by others.

The fact that the land is owned by a private investment company and not by Nelson does not alter Jacob and Mpumi's chances to acquire the land by acquisitive prescription. Ownership can be acquired from anyone, including natural and legal persons, the municipality and the state through acquisitive prescription.[31] Given that Jacob and Mpumi had fulfilled the requirements in regards to Nelson - which we concluded in case 1.1 that they had not - they would also succeed in extinguishing the private investment company's ownership.

In this case there is also the question of what happens to Nelson's right to use the land. HL § 9 regulates the fate of limited rights in when faced with acquisitive prescription. When a limited right resting on a parcel of land is extinguished at the same time as ownership of this land is acquired through acquisitive prescription, this is called *aksessorisk mothevd*. According to § 9 a limited right (*"særleg rett"*) is extinguished if the thing (here: land) has been used in a manner that is irreconcilable with this right.

Assuming that Nelson has a rental contract with the private investment company, of which rental of the house on the property is the main element, Nelson's right to use the land would likely be a right of tenancy, regulated by the Tenancy Act of 1999 (*husleieloven*). Such total rights of usage can be extinguished according to § 9.[32] The requirement of *irreconcilable usage* sets the same threshold that is applicable for acquisition of ownership by acquisitive prescription, i.e. the usage must have had the same intensity.[33] The vital element is, however, that the limited right collides with the use of the claimant. In this case it is clear that Jacob and Mpumi's residence on the land would have blocked Nelson from using his right of tenancy. Their usage would be *irreconcilable* with his right.

If also the requirements for acquisitive prescription of the investment company's right of ownership were fulfilled[34] - i.e. the requirement of usage, good faith and that the prescription period of 20 years had passed - Nelson's right to use the land would be extinguished upon completion of this period. It is not necessary for the irreconcilable use itself to have lasted for any specific length of time.[35] This means that it could in theory be extinguished a day or a week after it was created.[36]

Due to Jacob and Mpumi's lacking good faith they would be hindered also from acquiring the land from the private investment company.[37] Assuming the they were in good faith after all, however, they would succeed in their claim against the private investment company at the same time as Nelson's right to use the land would be extinguished.

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[31] See e.g. Høgetveit Berg 2005, p. 119. An exception is made in the territory of Svalbard, where § 22 of the Svalbard Act of 1925 (*Svalbardloven*) prescribes that it is not possible to acquire state owned property through acquisitive prescription on Svalbard. Furthermore, there are stricter requirements in order to acquire publicly owned property (commons). The Supreme Court case in Rt. 1986 p. 583 shows that the requirements of usage are higher in cases concerning acquisition from common property. The justification is that it is difficult for the State to control such vast amounts of property and that the claimant's usage must therefore be more manifest in order to allow the State to oppose the claimant's usage. See Høgetveit Berg 2005, pp. 122-123.
[32] Falkanger & Falkanger 2016, p. 379.
[33] i.e. the same requirements of usage that are stipulated in HL § 2. See e.g. Høgetveit Berg 2005, p. 414.
[34] HL § 11 prescribed that there requirements apply also in case of extinction of limited rights by acquisitive prescription.
[35] HL § 9.
[36] Høgetveit Berg 2005, p. 415.
[37] See case 1.1.

Case 2.1: Unknown owner

As her mother's sole heir Hannah obtains control over a piece of land from her late mother, who lived on the land all her life, for 70 years. The land has been passed on for (at least) five generations. It is unknown how her ancestors obtained access to the land. Hannah lives on the land for another 20 years. The registered owner (a private entrepreneur) is long dead. Nobody knows whether there are heirs and, if so, who and where they are. Hannah is wondering what formalities have to be observed in order for her presence not to be challenged and her right(s) with regard to the land to be recognised by others.

Response: In this case, Hannah has lived on the land for 20 years, prior to which it was in her family for many generations. However, the property is registered on somebody else.

The question is whether Hannah in some way has acquired the property from the registered owner. In this case, there are two alternative ways in which a Norwegian court might approach the question. The first is by asking whether Hannah - or one of her ancestors - has acquired the property through acquisitive prescription.

Firstly, since Hannah's family has resided on the land for at least seven generations it is undisputable that they have used the land "as their own" thereby fulfilling the requirement of usage. The temporal requirement of 20 years is also fulfilled.

We are given no information regarding the circumstances in which the land ended up with Hannah's family and what knowledge her ancestors have had about their lack of right. The mere fact that there is a registered owner and that Hannah's family members could find this out by checking the land registry does not hinder good faith. There is no objective requirement to check the deed or the land registry in order to be in good faith in Norwegian law.[38] Furthermore, the bad faith of the predecessor does not hinder the successor's acquisition. In other words, the fact that someone in the family originally knew that they had no right to the land does not mean that their ancestors cannot acquire the property by acquisitive prescription. Since the property has been in the family for at least seven generations we can reasonably assume that (at least some of) Hannah's family members were in good faith regarding their right to the land. Also the fact that the property has been in the family for so long establishes a presumption that they have a right to it.[39] It is therefore likely that the requirement of good faith would be fulfilled in this case.

If one of her ancestors were found to have acquired the land by acquisitive prescription, Hannah would have acquired it by inheritance, which would be a derivative acquisition. If this were not the case, Hannah could also acquire the land by acquisitive prescription herself.

In cases like this, in which somebody has used a thing (here: land) for such a long period of time without objection from the owner, another approach is sometimes chosen by Norwegian courts. The court could resort to a legal institution called *"alders tids bruk"* which can be translated to "long-term use", or alternatively *"festnet bruk"/"festnede rettsforhold"*, which means "settled use"/ "settled rights" -.[40] These legal doctrines are difficult separate and are often referred to interchangeably. Both

[38] E. Stavang and G. Stenseth, *Fast eiendoms tingsrett* (Gyldendal Akademisk 2016), pp. 110-111; Høgtveit Berg 2005, p. 266.
[39] Høgetveit Berg 2005, p. 54.
[40] See case 1.1 regarding these doctrines.

are developed through case law and have become customary law, which is applied as a supplement to HL.

In an attempt to separate the two, the doctrine of "long-term use" requires a certain use for a long duration of time in good faith. However, the requirements are not considered independently, meaning that if e.g. a claimant has used a parcel of land for a very long time the intensity of usage may be lower.[41] The doctrine of "settled use" is usually applied where it is difficult to prove that the requirements for acquisitive prescription are fulfilled - especially good faith of the individual claimants - but where the land has been with the claimant for an extended period of time without objection from the owner.[42] The justification is that it would be wrong to "rip up" a situation that has been settled between the parties for a long time period.[43]

In this case, Hannah may succeed with a claim based on the doctrine of "long term use" or "settled use", as well as acquisitive prescription. These are alternative grounds for recognizing a right and are often seen in conjunction.[44] It does not matter if a court chooses to rely on the one or the other. In all cases Hannah would have gained a right of ownership in the land.

The facts further inform us that the owner is dead and that it is unknown whether there are any heirs. This could pose a practical hindrance for Hanna to get her rights in the property acknowledged, which would keep her from being able to re-sell or otherwise dispose over it legally.[45] For Hannah's right to be recognised it must be registered in the land registry (*grunnboken*). If Hannah were able to track down the registered owner's heir - which the facts seem to imply that she would not - the heir could in theory transfer the deed to the land to Hannah if they recognize Hannah's acquisition.

Alternatively, Hannah could follow two different paths in order to have her right registered: she could either go to court to have her right acknowledged and register the verdict in the land registry, or she could take an easier route by following a procedure of publication which is laid down in § 38 a of the Act on Registration of Real Rights.[46]

According to this procedure, someone who has fulfilled the requirements for acquisitive prescription may have their rights registered even if the previous owner refuses to transfer the deed, or if the previous owner is unknown. If Hannah can prove that she has acquired ownership - i.e. that the requirements for acquisitive prescription of "long term use" are fulfilled - the judge will issue a call for possible owners to respond within a set deadline of minimum a month. If nobody can prove ownership within the deadline Hannah's right will be registered in the land registry.

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[41] Falkanger & Falkanger 2016, pp. 387-388.
[42] Falkanger & Falkanger 2016, pp. 389-390 and Høgetveit Berg 2005, p. 74.
[43] See e.g the Supreme Court case in Rt. 1939. p. 603; Høgetveit Berg 2005, pp. 71-74.
[44] Høgetveit Berg 2005, p. 71.
[45] Formally, the fact that the land is not registered on Hannah does not hinder her form selling. As long as Hannah owns the property she may dispose of it, even if the land registry does not reflect her ownership. Registration is not a reguirement for ownership (or sale) of the property, it only has consequences in terms of third party protection, i.e. protection against creditors or competing acquirers. This is in line with the functional approach to transfer of ownership taken in the Norwegian legal system, see e.g. Falkanger & Falkanger 2016, p. 74 ff. However, Hannah may in practice have trouble selling the land without having it registered bacause potential buyers can be assumed to check the land registry and find that the deed in not registered in her name. Hannah will also not be able to transfer the deed to a potential buyer, which could pose a problem for the buyer who will be unprotected against third party claimants in the land. Even through Hannah formally *could* re-sell the land without registration, there are good reasons why she would still want to do so.
[46] Høgetveit Berg 2005, p. 221.

Importantly, this procedure only applied to "obvious" cases and not to cases in which it is unclear if the requirements for acquisitive prescription are fulfilled.[47] Provided that Hannah had acquired ownership in the land, she would be able to have her right registered according to Norwegian law.

Case 2.2: Unknown owner (II)

See Case 2.1. Hannah's family did not reside on the land for generations. Hannah's mother obtained control of land 8 years before her death. Hannah has since used the land for 19 years. Hannah is wondering what formalities have to be observed in order for her presence not to be challenged and her right(s) with regard to the land to be recognised by others.

In case 2.2, the facts from case 2.1 have been altered so that Hannah has only lived on the land for 19 years and her mother for 8 years before that. This means that Hannah's ancestors could not have acquired the property through acquisitive prescription, meaning that Hannah would be able to acquire the property through inheritance (derivative acquisition).

Instead, Hannah would herself have to fulfil the requirements of acquisitive prescription. The period of 19 years does not satisfy the temporal requirement of 20 years in HL § 2. However, it should be noted here that prescription periods can be cumulated if two or more claimants are in good faith and there is a valid transfer between the two.[48] If both Hannah and her mother had the land in good faith their prescription periods could be cumulated to satisfy the 20 year period.

We know little about the circumstances of Hannah's stay on the land. Assuming that the requirement of usage is satisfied, Hannah and her mother would also have to be in good faith regarding her right to the land.

The facts do not specify how Hanna's mother acquired the land, nor what knowledge Hanna and her mother had of the registered owner. However, we are informed that Hannah took over control of the property from her mother. This indicates that she may have reasonably believed that she had a right to the property. Even if she would have been able to discover that the property was registered in somebody else's name, there is no objective requirement to check the deed or the land registry in order to be in good faith in Norwegian law.[49]

Since the temporal requirement of 20 years is not fulfilled, also Hannah's mother would need to be in good faith in order for Hannah to succeed in her claim. We do not know how Hannah's mother obtained the land. Nonetheless, her good faith appears more doubtful as she - assumedly - did not receive the property by inheritance, as her daughter did. Due to the sparse information provided in the facts it is difficult to establish whether the requirement of good faith is fulfilled. If Hannah and her mother were found to be in good faith, Hannah would acquire the property through acquisitive prescription. In the opposite case, her claim would fail.

Case 2.3: Unknown owner of unregistered land

[47] Høgetveit Berg 2005, p. 222.
[48] HL § 3.
[49] Stavang and Stenseth 2016, pp. 110-111; Borgar Høgtveit Berg, *Hevd* (Oslo 2005) p. 266.

See Case 2.1. The land is unregistered and there is no evidence as to who the owner is. Hannah is wondering what formalities have to be observed in order for her presence not to be challenged and her right(s) with regard to the land to be recognised by others.

Response: As in case 2.1, Hannah would have to either register a court verdict recognizing her right of ownership or follow the procedure set in § 38 a of the Act on Registration of Real Rights. Since there is no registered owner and no evidence of who the owner is it is likely that she would succeed to have her right of ownership registered in the land registry.

Case 3: Extending boundaries of residential land onto land owned by a municipality

Babylon, a municipality, is the registered owner of 3,000 parcels of land in its area. In a residential area, Babylon owns a plot of grass between the fence of Gugu's residential land and a pavement. Gugu knows that Babylon is the owner, but extends her garden onto that piece of land and onto the pavement and puts up a new fence that includes both the state land and the pavement as part of her land. She grows potatoes and strawberries on the soil between the fence and the pavement, and uses the pavement for barbecuing and sunbathing. Babylon is unable to monitor the use of all its properties. After a period of 31 years has elapsed since Gugu extended her garden, Babylon notices the extension. Babylon wants the fence demolished and the garden removed. Babylon sues Gugu by demanding that she return the land and, subsidiary to that, that she compensate Babylon.

Response: According to the facts of the case, Gugu extends her garden onto Babylon's property knowing that Babylon is the owner. Norwegian law lays down a strict requirement of good faith. It is clear that Gugu is in bad faith since she is aware that she is not the owner of the disputed piece of land. It is therefore not possible for her to acquire ownership in the land through acquisitive prescription.

Assuming that Gugu were in good faith after all, her possession of 31 years would fulfil the prescription period of 20 years.[50]

Concerning usage of the land, Gugu must have used it "as her own". Here, we should distinguish between the piece of land between Gugu's property and the pavement, and the pavement. While Babylon's piece of land is owned by a public body, the pavement is not only property of the state, but is publicly owned property.

According to Norwegian law, ownership can in principle be acquired from anyone through acquisitive prescription, including natural and legal persons, the municipality and the state. There are, however, stricter requirements in order to acquire publicly owned property.[51] The Supreme Court case in Rt. 1986 p. 583 shows that the requirements of usage are higher in cases concerning acquisition from common property (*almenninger*). The justification is that it is difficult for the State to control such vast amounts of property and that the claimant's usage must therefore be more manifest in order to allow the State to oppose the claimant's usage.[52] This justification reaches further than the state, however. An owner who has vast lands will have difficulties noticing and objecting to unjustified usage.[53] The stricter standards are therefore not reserved for the State in *almenninger,* but arguably have wider application. In this case, however, the property seems to be

[50] HL § 2.
[51] Høgtveit Berg 2005, pp. 122-123.
[52] Høgtveit Berg 2005, pp. 122-123.
[53] Høgtveit Berg 2005, p. 168. See also the Supreme Court case in RG 1950 p. 241 (*Salten*).

located in a central area and the Babylon and the State should therefore not have problems monitoring their property.

Furthermore, the question is if Babylon has a claim for compensation if Gugu succeeds with her claim. As explained in case 1.1, it is unlikely that the requirements for compensation in tort law are fulfilled when somebody successfully claims acquisitive prescription. The reason is that Gugu's good faith is difficult to reconcile with the requirement of negligent behaviour. In case Gugu's claim is successful it is unlikely that Babylon has a claim for compensation in tort.

Case 4.1: Impugned transfer (I)

André sells and transfers the ownership of his parcel of land to Carla. The transaction complies with all formalities pertaining to transfers of land and is, in any case, registered in the land information system. However, Carla has blackmailed André into selling the land to her. Carla starts to live on the land. After 10 years, André has recovered from the blackmailing, lets Carla know that he regards the contract as null and void, and sues Carla, seeking to regain control of the land.

Response: In this case Carla has a registered right of ownership, which she has obtained by blackmailing André into selling the land to her. This case does not concern acquisitive prescription, but derivative transfer of immovables.

In contrast to most European legal systems, where questions of ownership and transfer thereof, are proprietary per definition, property rights are not seen as rights against the world per definition in Norwegian law.[54] Instead, ownership and other property rights have both *inter partes* and *erga omnes* effects in Norwegian law. Whether or not Carla has an enforceable right in the land towards André is an *inter partes* question as it concerns the parties to the contract exclusively.

In this case Carla has no right in the property because the sales contract between André and Carla is void and therefore non-binding. The Contracts Act §§ 28 and 29 regulates coercion.[55] § 28 concerns coercion by violence or threat of violence and § 29 concerns "other forms" of "unlawful" coercion, referring to milder forms. Blackmail falls within the category "other forms" of coercion in § 29.[56] It is "unlawful" as it involves the threat of an illegal act.[57] The sale is therefore void and Carla has no rights in the land.

The fact that the transfer is registered according to formal procedures has no consequence for the validity of the agreement between André and Carla.[58] As will be seen in sub-question 4.3 the significance of the registration concerns only the third party effects of the transfer.

It should also be mentioned that André's vindication claim based on avoidance of the contract will not be subject to prescription and will thus hold even after 10 years have passed. In Norwegian law, vindication claims, in contrast to obligatory claims, are not subject to prescription.[59] The characterisation of claims as vindication claims or obligatory claims in unclear and has sparked

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[54] In Norwegian law, there is no real distinction between rights *in rem* and rights *in personam*. See e.g K. Lilleholt, *Allmenn formuerett: Fleire rettar til same formuesgode* (Universitetsforlaget 2012), p. 37.
[55] The Act on Contracts of 1918, § 29.
[56] J. Giertsen, *Avtaler* (3rd ed. Universitetsforlaget 2014), pp. 164-165.
[57] Giertsen 2014, pp.164-165.
[58] K. Lilleholt, *Godtruerverv og kreditorvern* (5th edn, Universitetsforlaget 2010).
[59] Høgetveit Berg 2005, pp. 77-79.

debate in legal doctrine, arguably as a consequence of the unclear division between rights *in rem* and rights *in personam* in general.[60] Nonetheless, there seems to be agreement as to the fact that the right to avoid a contract due to e.g. coercion is seen as a right of vindication, which does not prescribe.[61] André may consequently evict Carla.

Finally, acquisition by acquisitive prescription is out of the question since Carla is clearly in bad faith regarding her right to ownership.[62]

Case 4.2: Impugned transfer and transfer to third party by the user

See case 4.1. Immediately after the transfer Carla sells the land to Bob, who does not know anything about the transaction between André and Carla. The transaction is registered in the land information system and Carla and Bob observe all formalities pertaining to transfers of land. Bob starts to live on the land. 10 years after the registration of the transaction, André has recovered from the blackmailing, lets Bob and Carla know that he regards the contract of sale between Carla him as null and void, and sues Bob, seeking to eject Bob.

Response: As in case 4.1, the agreement between André and Carla is invalid. In this case, however, there is a third party element as Carla has sold the property to Bob. The formal requirements of registration are observed both in the transaction between André and Carla and Carla and Bob.

The main rule concerning third party effectiveness (*rettsvern*) in Norwegian law follows the principle of *nemo dat* - one cannot transfer greater rights than one has oneself. This means that Carla, seeing as how the sales agreement between her and André was invalid, could not transfer ownership to Bob. The question is whether Bob, who did not know of the circumstances of the previous sale, has a protected right even though the initial sale was invalid.

This situation is regulated in § 27 of the Act on Registration of Real Rights.[63] The provision states that if someone has acquired a right from the person who is registered as owner in the land registry, his acquisition is not hindered by the fact that the transferor's registration builds on an "invalid document", provided he was in "good faith" when his acquisition was registered. In such cases the claimant in good faith may trust the information provided in the register and his acquisition stands.

The facts do not cause doubt as to whether Bob was in good faith regarding Carla's right in the property. Bob will therefore have extinguished André's right and has become the owner.

Case 5.1: Boundary disputes

Gregory inquires about the legal status of his parcel of land with the land information system. From the information that Gregory obtains from that system, Gregory has the impression that the fence between his parcel and the parcel of Angela should be one metre closer the house of Angela. The fence is broken and therefore has to be replaced. Gregory places the new fence according to his

[60] Again, this is a feature of the Scandinavian functional approach to property, which is mentioned in case 8 and in footnotes 45 and 99. See J. Ørjasæter, "Foreldelse, ugyldighet og vindikasjon", Jussens venner (3) 2015.
[61] See M.E. Kjørven, H. Bruserud, H.H. Holdø, J.V. Lervåg, M. Nygård og E. Nyland, *Foreldelse av fordringer* (Universitetsforlaget 2007) p. 77, with further references.
[62] See case 1.1. in which it is explained that good faith is an absolute requirement for acquisitive prescription in Norwegian law.
[63] *Lov om tinglysning* of 1935.

impression of information from the land information system without informing Angela. His impression, however, was not correct. After 20 years, after Angela has made an inquiry of her own, Angela sues Gregory, demanding that the fence be moved to where it used to be.

Response: Gregory mistakenly thought that the boundary between his and Angela's house was one meter further towards Angela's house than where the fence was placed. He moved the fence and after 20 years it turns out that the fence was correctly placed in the first place.

The facts of the case make it clear that Gregory has used the additional land for 20 years, thereby fulfilling the prescription period in Norwegian law.[64] There is, furthermore, no cause to doubt whether he has used the property "as his own". The question here is whether Gregory was in good faith regarding his right to ownership.[65]

The notion of good faith in HL § 4 includes not only positive knowledge, but also situations in which the claimant is not as diligent as she ought to have been in the given situation. According to the preparatory works of HL the standard is set at whether an ordinary person would have understood that something was wrong in a similar situation.[66]

Although errors of law (more precisely: errors in ascertaining, interpreting, or applying the law) are usually not excusable in Norwegian law, a review of case law concerning acquisitive prescription shows that good faith is not necessarily hindered by an error of law.[67] However, such errors can naturally not pertain to the rules on acquisitive prescription themselves.[68]

In this case, Gregory's mistaken perception derived from his perception of documents that he has obtained from the land registry. The facts do not provide much information about what investigations Gregory has made and what information was provided by the registry. If there were other documents, which he could have inspected, he should likely have done so. He may also have needed to check the underlying documents, if these were available.[69]

If Gregory did receive the relevant documents from the authorities and has misinterpreted them, this may have been negligent of him. We are not informed whether he received a deed, contract or a map. In any case, Gregory may have acted negligently, but this will depend on the specific information he was provided and whether these gave cause for misunderstanding. If Gregory were found to be in good faith he would have succeeded in acquiring Angela's land by acquisitive prescription. In the opposite case, he would fail and Angela would have a right to have the fence moved.

Case 5.2: Boundary disputes and a transfer to a third party by the user

See case 5.1. Gregory sells and transfers his parcel of land, including the additional land, to Michael, who does not know anything about the moving of the fence and has not checked the land information

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[64] HL § 2.
[65] HL § 4.
[66] Ot.prp. nr. 30 (1965-66), pp. 28-29.
[67] Falkanger and Falkanger 2016, p. 367, with further references to case law.
[68] A claimant will e.g. not be helped by the fact that she believes that the prescription period is 10 years instead of 20. See Falkanger and Falkanger 2016, p. 367.
[69] Høgetveit Berg 2005, p. 267.

system. Michael has lived on the land for 20 years. Angela finds out about the changed boundary and sues Michael, demanding that fence be moved to where it used to be.

Response: This case problematises the duty to check the land registry. Michael has purchased the land, not knowing of the moving of the fence, and has not checked the land registry.

There is no objective requirement to check the deed or the land registry in order to be in good faith according to Norwegian law. This is especially true if the inquiry would not have rectified the mistaken assumption of ownership. If the inquiry would have been fruitful, the claimant is likely to be found in bad faith, but there are exceptions to this general rule.[70] Where there are circumstances indicating that the claimant's perceived rights do not correspond with her actual rights, the claimant will likely be in bad faith unless she has investigated further.[71]

In Michael's case, there are no circumstances warning him to check the registry. This means that the question is whether failing to investigate involved negligence regardless of this. This is discussed in a Supreme Court case from 2000, in Rt. 2000 p. 604. A had bought property and sold it to B. When A bought the property a fence surrounded it. Some years later it appeared that the fence enclosed about 500 m^2 that did not form part of the property. The question was whether B had acquired this part of the garden through acquisitive prescription. One of the sub-questions before the Supreme Court was whether A had been in good faith when he bought the house. The Supreme Court stated that in a case like this, when B bought a well-established property surrounded by a fence, it is natural to assume that the fence marks the boarders of the property. There is no general requirement for buyers to control the boarders of the property. The outcome of the case was, however, that B did not acquire the property, since A was brought out of his good faith when he had taken part in a sectioning of the property: he must then either have known of, or he should have become aware of, the correct boarders.[72]

It is likely that Michael would be found to be in good faith regarding the boarders of the property and that he would therefore acquire a right by acquisitive prescription. Angela would consequently not be heard with her claim to have the fence moved. If Michael were bad faith he would not be able to acquire the property, as good faith is an absolute requirement for acquisitive prescription in Norwegian law.[73]

Case 5.3: Boundary disputes and the fate of a registered right to cross

See case 5.1. Julia holds a registered right to cross Angela's land within 2 metres from where the fence is originally situated. To the extent that this is possible, the coordinates of where she may cross are registered in the land information system. After the fence has been moved, Julia only crosses the land on Angela's side of the fence. After 20 years since the fence was moved, Angela undertakes construction works on her side of the fence, temporarily blocking Julia's access to Angela's side of the fence. Julia sues Gregory, demanding that he allow her to walk on his side less than one metre away from the fence.

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[70] Høgetveit Berg 2005, p. 266.
[71] See the Supreme Court case in Rt. 2000 p. 604, at p. 607. The case is discussed in the following paragraph.
[72] Rt. 2000 s. 604 (Kjelsberg).
[73] See case 1.1.

Response: As discussed in case 5.1, it is unclear whether Gregory will be heard with his claim to the property based on acquisitive prescription. Assuming that he did succeed in acquiring another meter of land onto Angela's property, the question is what happens to Julia's right to cross the property.

To start with, it should be established that Julia's registered right to cross the property will be understood as a servitude in Norwegian law.[74] The question is then if Julia's servitude has been extinguished as a result of Gregory's acquisition.

The consequences of acquisitive prescription on existing limited real rights are regulated in HL §§ 9 and 10. Limited real rights resting on the property are extinguished under the condition that, the claimant has used the property in a manner which cannot be reconciled with it (*mothevd*),[75] or that the holder of the limited right has not used her right during the duration of the prescription period (*frihevd*).[76]

The former provision builds on the collision of rights with the acquirer and the latter on the passivity of the holder of limited real rights: somebody who does not use her right for 20 years is presumed not to have an interest in it.

According to the facts of the case, Julia hasn't used her right of way in 20 years. She has, however, made use of the part that was unblocked on Angela's side of the fence. § 10 is applicable to the case and Julia's right to cross on Gregory's side of the fence has been extinguished due to passivity. Her right to cross on the other side of the fence remains.

Case 5.4: Boundary disputes with a municipality

See case 5.1. Angela is not the owner of the parcel of land adjacent to Gregory's land. Instead, the owner is the municipality of Urk. Instead of Angela's house, there is only grassland on the municipal land. Gregory moves the fence as per the facts in case 5.1.

Response: This case raises the question of whether it is possible, and under what circumstances one can acquire land from a government body, here the municipality of Urk.

As stated in case 3, ownership can in principle be acquired from anyone through acquisitive prescription in Norwegian law. This is stated in the preparatory works for HL.[77] It was also explained that it might be more difficult in practice to succeed with a claim against the state. The reason is not that it is the state, but that the state has vast lands and may have difficulties in objecting to unjustified usage e.g. in remote mountain areas.[78] In this case there seems to be no reason to apply this higher standard of manifestation of use, as we are not informed that the property is remote or that the municipality otherwise has problems in monitoring their right.

The question is whether Gregory fulfils the requirement of usage laid down in HL § 2. We are given little information regarding Gregory's use of the land, but it is likely that it will suffice to fulfil the requirement of having the land "as [his] own". In a Supreme Court case from 2000,[79] the court found

[74] The Act on Servitudes (*Servituttloven of 1968*).
[75] HL § 9 regarding *"mothevd"*.
[76] HL § 10 regarding *"frihevd"*.
[77] Rådsegn 6, pp. 18 and 23.
[78] Høgtveit Berg 2005, p. 168. See also the Supreme Court case in RG 1950 p. 241 (*Salten*).
[79] Rt. 2000 p. 604 (Kjelsberg).

that it did not matter that the disputed part of a garden was not cultivated. It was sufficient that the garden fence included the disputed area. Gregory would therefore acquire the piece of land, even if the land belonged to the municipality of Urk.

Case 6.1: Creation of security right after beginning of living on another's land without permission

Kouchi owns a parcel of land in Eden, but lives and works abroad as a successful banker. Linlin, who has been living in the streets, builds a small hut on Kouchi's land without Kouchi knowing of it. As her life normalises, Linlin improves the hut, lays out a garden, and puts up a fence around the house. After 5 years since Linlin started to live on the land, Kouchi takes out a loan with a bank and registers a security right on the land in favour of the bank. After 26 years from this date, Kouchi defaults on the loan. The bank seeks to exercise the security right, but Linlin opposes the sale of the land in court.

Response: Although the requirement of usage and the prescription period are fulfilled,[80] Linlin has not acquired ownership in the land according to Norwegian law, as she is not in good faith regarding her right to ownership.[81] This means that the bank may exercise its security right and may obtain a court order to evict Linlin. As squatting is not permitted in Norwegian law, Linlin's tenure on the land does not affect the bank's right or opportunity to evict Linlin.

Assuming that Linlin did acquire ownership, the fate of the bank's security right should be considered. As discussed in case 1.3, the consequences of acquisitive prescription on existing non-possessory security rights are regulated in HL §§ 10 a and 10 b.

According to § 10 a (2), registered security rights resting on the property are extinguished on the condition that the claimant has had the property for the full duration of the prescription period *after the security right was established*, i.e. 20 after establishment the right. In this case Linlin has had the property for 21 years after the bank's security right was established, meaning that the temporal requirement is fulfilled. If the bank had had an unregistered security right instead of a registered security right, the right would be extinguished upon the fulfilment of the prescription period, regardless of whether the right was established after the claimant's tenure.[82] In this case, that would mean that the security right would have been extinguished after 20 years and not after 25 years.

Furthermore, Linlin must have been in good faith regarding the existence of the security right.[83] Since it has been established that Linlin knew that the land belonged to Kouchi and was thus in bad faith regarding her right to the land, a discussion of whether or not she was in good faith regarding the existence of the security right would require an odd understanding of the facts. However, if we presume that Linlin was in good faith regarding the existence of the security right, the bank's right would be extinguished.

Case 6.2: Creation of a registered right to cross after beginning of living on another's land without permission

[80] According to the preparatory works the drafters of HL considered whether to pause acquisitive prescription while people were abroad, but rejected the idea. The justification was that people who go abroad both can and should make sure that their property is looked after in their stead, Rådsegn 6, s. 18; Høgetveit Berg 2005, p. 120.
[81] As explained in case 1.1 good faith is an absolute requirement in Norwegian law.
[82] HL § 10 a (1).
[83] It follows from § 11 that § 4 regarding good faith applies to §§ 9 to 10 b concerning the consequence of acquisition on limited rights.

See case 6.1. After 5 years since Linlin started to live on the land, Kouchi concludes an agreement with Yolanda in terms of which Yolanda may cross Kouchi's land, which right is registered. Yolanda exercises this right daily. Kouchi never returns and never seeks to evict Linlin. After 26 years from this date, Linlin is fed up with Yolanda crossing the land and institutes proceedings to prevent Yolanda from crossing the land.

Response: As in case 6.1, Linlin will not have acquired a right of ownership or any other right to use the land because she was aware that the land did not belong to her. Assuming for the sake of the discussion that she did acquire a right through acquisitive prescription, the question is whether Linlin may prevent Yolanda from crossing the land in accordance with her registered right to do so.

According to HL § 9, limited rights in a property are extinguished if the property is used it in a manner which *cannot be reconciled with the limited right* for the duration of the prescription period, i.e. 20 years.[84] Extinction of limited rights according to this paragraph can either be independent, meaning that the rightful owner of a property extinguishes a limited right resting on the property, or accessory to the acquisition of ownership by acquisitive prescription, meaning that a claimant acquires both a right through acquisitive prescription and - in the same turn - extinguishes a limited right.[85] In our case the second option is relevant.

The question is if Linlin has used the property in a manner which *cannot be reconciled* with Yolanda's registered right to cross the property. The requirement of *colliding* usage should be interpreted widely and includes both positive and negative colliding usage.[86]

According to the facts of the case, Yolanda has used her right to cross the property daily for 21 years. We are not informed of any concrete usage from Linlin's side which blocks Yolanda from crossing the property, such as putting up a fence or farming the land. It is therefore assumed that Linlin has not used the property in a way that hinders Yolanda's use of her right. Linlin has therefore not extinguished Yolanda's right to cross the property. Furthermore, Linlin was not in good faith regarding the existence of Yolanda's right, as Yolanda has crossed the property daily.[87]

If the requirement of colliding usage had been fulfilled, the fact that Yolanda's right was created after Linlin's tenure began would be of no consequence in Norwegian law. Extinction of limited rights after § 9 occurs when the claimant has used the property in the way that (at some point) hinders the holder of the limited right for 20 years. The point is that the claimant's usage must have lasted for 20 years, not that it must have collided with the limited right for the full duration of the period. This follows from HL § 9 (2). If Linlin had put up a fence when her tenure began and Koutchi created Yolanda's right to cross 19 years later, Yolanda's right would be extinguished after one year, i.e. 20 years after Linlin raised the fence which hindered Yolanda from exercising her right.

Case 7.1: Rental agreement (I)

Valla owns a piece of land, which is unfenced. She concludes a rental agreement with Olaf, who starts to live on her land in accordance with the agreement. Olaf stops paying rent to Valla and continues to live on the land. This situation continues for 30 years without Valla objecting to it. Upon her return

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[84] It follows from HL § 11, cf. § 2 that the prescription period of 20 years applies also here.
[85] Høgetveit Berg 2005, pp. 410-411.
[86] Rådsegn 6, p. 27; Høgetveit Berg 2005, pp. 413-414.
[87] HL § 11, cf. § 4.

one week after the completion of this 30-year period Valla institutes proceedings to eject Olaf from her land.

Response: In Norwegian law, persons who have existing rights such as a lease or loan agreement in a property cannot acquire further rights through acquisitive prescription, based on usage according to their right.[88] A person such as Olaf, who has been granted a right of tenancy to the property by the rightful owner, can therefore not acquire the property through acquisitive prescription by using the land in accordance with the rental contract. The justification for this limitation is that the claimant's usage would not give the owner a reason to oppose his use.[89]

However, if the usage of the claimant goes beyond the existing right in such a way that the owner could detect it, the claimant may still acquire a wider right, such as ownership, through acquisitive prescription.[90] In this case, Olaf has stopped paying rent to Valla. It is doubtful whether this constitutes a usage beyond the limits of the rental agreement.

Rather, it seems as though Valla has *tolerated* Olaf's tenure. According to the doctrine of "*precario*" ("*tålt bruk*"), the claimant will not be able to acquire rights through acquisitive prescription if the owner has tolerated the usage.[91] In such cases, the owner is considered to have given the claimant an informal approval to use the property according to HL § 5. Acquisitive prescription is then out of the question. The doctrine of tolerated usage builds on an open norm in which the intention of the owner is important.[92]

The facts do not provide much information on Valla's intentions. Since Valla has not attempted to evict Olaf it may seem as though she has tolerated Olaf's tenure, although it is not clear that this would be the outcome. If Valla has tolerated Olaf's tenure, Olaf will not have acquired a right in the property through acquisitive prescription and Valla may evict Olaf due to his failure to pay rent.

Case 7.2: Rental agreement (II)

See case 7.1. There is no fence between Valla's land and the neighbouring piece of land, which belongs to Sellina. Olaf, who diligently pays rent, starts using a part of Sellina's land just beyond the actual boundary of Valla's land and erects a fence around this part and the rest of Valla's land. After 30 years since the erection of the fence, Sellina institutes proceedings to eject Olaf from the part beyond the boundary of Valla's land.

Response: In this case Olaf, who rents the land from Valla, has put up a fence around Valla's land, which extends just beyond Valla's property and onto Sellina's property. The question is if Sellina can eject Olaf from her property, or if he has acquired some right to it – either on his own or on Valla's behalf.

As seen in case 7.1, the holder of an existing right cannot acquire ownership through acquisitive prescription. Olaf has therefore not acquired Valla's land through acquisitive prescription on his own behalf.

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[88] HL § 5.
[89] Falkanger and Falkanger 2016, pp. 369.
[90] Falkanger and Falkanger 2016, p. 370.
[91] Falkanger and Falkanger 2016, p. 370 ff.; Høgetveit Berg 2005, p. 316 ff.; Stavang and Stenseth 2016, p. 117 ff.
[92] Høgetveit Berg 2005, p. 319.

The next question is whether Olaf has acquired a right of the land on behalf of Valla through his use. More precisely, the question is whether use on behalf of other entails that the claimant - here Valla - has the land "as their own" as is required by HL § 2.[93]

It is not required in Norwegian law for the claimant to use the thing (here: land) themselves in order to have it "as their own". The land can also for instance be lent or rented to somebody else who uses it on their behalf.[94] Valla may thus acquire the land by acquisitive prescription through Olaf's use. It is not required that Valla be aware of his use.[95] However, Olaf must have used the land in the belief that it belongs to Valla and that it was encompassed by his tenancy. Otherwise his use would not be ascribed to Valla and could not form the basis of acquisitive prescription on her behalf.[96] We are not informed of whether Olaf ejects the fence in the belief that land belongs to Valla, but it seems reasonable to assume so.

In this case, Olaf would be in good faith. Since Olaf has lived on the land for 30 years also the prescription period of 20 years is fulfilled.

All three requirements for acquisitive prescription being fulfilled, Valla would acquire ownership of the land by acquisitive prescription.[97] As mentioned in previous cases, acquisition by acquisitive prescription occurs spontaneously.[98] Registration is not necessary.

Case 8: Sale without registration

Jan is the owner of a piece of land. He sells it to Svetlana and they observe all formalities with respect to a contract of sale. Svetlana pays the full purchase price to Jan and starts living on the land. Jan and Svetlana do not make an effort to register the transaction with respect to the land. Svetlana lives on the land for 30 years. Jan is declared bankrupt. Sean buys the land and the bankruptcy trustee and he observe all formalities required for a transfer. Sean institutes proceedings to eject Svetlana from the land.

Response: Firstly, registration is not necessary between the parties, as it only concerns the third-party effect of the transfer. Jan would therefore not be able to eject Svetlana simply due to lack of registration. Moreover, Svetlana would be seen as the owner of the property, although her right may not be effective towards third parties. This is in line with the so-called Scandinavian functional approach to transfer of ownership, in which one speaks of protection against different parties rather than of rights against the world.[99]

In order for her right to the land to be protected against Sean, Svetlana's right needs to be registered in the land registry, which it is not. The question is then whether the lack of registration has been mended through acquisitive prescription - so-called *"rettsvernshevd"* or *"rettsvernssurrogati"*.[100] In

[93] See case 1.1 regarding the requirement of use - having a thing "as their own".
[94] This is prescribed in the preparatory works of HL, Rådsegn 6 p. 8; see also Høgetveit Berg 2005, p. 166.
[95] Høgetveit Berg 2005, pp. 167-168. This is confirmed in the cases in Rt. 1860 p. 1 (Supreme Court) and RG 1965 p. 39 (Gulating Court of Appeal).
[96] Høgetveit Berg 2005, p. 166.
[97] See case 1.1.
[98] See case 1.1.
[99] K.R. Haug, "The Historical Development of the Scandinavian Functional Approach to Transfer of Ownership: A Tale of Change and Continuity", 2017 European Property Law Journal 6(2), pp. 236-271.
[100] Stavang and Stenseth 2016, p. 128.

the absence of registration it is possible to mend the lack of registration if one fulfils the requirements for acquisitive prescription. The mechanism through which this is done is laid down in § 21 of the Act on Registration of Real Rights (*tinglysningsloven*). According to § 21, rights acquired through acquisitive prescription are effective without registration.

It does not follow directly from § 21 that it also applies to rights which are transferred through derivative acquisition, but which have not been registered. Nonetheless, the preparatory works of HL make it clear that the provision applies also to these cases.[101] This rule is non-statutory and is derived from case law.[102]

In order to achieve perfection through acquisitive prescription the owner must fulfil the requirements of usage,[103] the prescription period of 20 years and he must be in good faith regarding his right to ownership.

According to the facts, Svetlana has lived on the land for 30 years when Sean attempts to eject her. There is no reason to doubt that she has used the property with the intensity, exclusivity and continuity required of an owner, nor that she is in good faith regarding her ownership. The lack of registration will therefore be mended thorough the doctrine of "*rettsvernshevd*", meaning that Svetlana's right will be protected against third parties despite the lack of registration.

It should be mentioned that, although there is agreement upon the existence of this legal institution in Norwegian law, it has sparked much policy debate, among others due to its impact on the credibility of the land registry.[104] It has been held in legal doctrine that "*rettsvernshevd*" should not be allowed in circumstances in which the claimant omitted to register her right due to her own fault. In such cases it seems unfair that the claimant's right should triumph later registered rights. Some have suggested that there is a limitation to "*rettsvernshevd*" if the claimant has shown passivity.[105] This is, however, thus far only a *de lege ferenda* position, meaning that it is not accepted as reflecting the applicable law.[106]

Case 9: Offer to purchase/rent land

Anna starts living on Jo's land without his permission and knowledge. Anna immediately puts up a fence around Jo's land. After 15 years Anna makes an offer to Jo to purchase or rent the land. Jo refuses to conclude any such agreement. After a total period of 30 years has elapsed since Anna started living on Jo's land and erected the fence, Jo institutes proceedings to eject Anna from the land.

Response: In this case Anna was aware of the fact that the land belonged to Jo and the she had no right to it. Acquisitive prescription is not possible, as it requires good faith.[107] After 15 years Anna makes an offer to Jo to purchase or rent the land. Jo refuses to conclude any such agreement, but we are not informed of any steps taken by Jo to evict Anna.

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[101] Rådsegn 6, p. 6.
[102] Høgetveit Berg 2005, p. 215.
[103] This is expressed among others in the case in RG 1958 p. 293 (*Fossbråten*).
[104] Høgetveit Berg 2005, pp. 222-224.
[105] G. Eriksen, "Bortfall av hevdet rett ved passivitet", Lov og Rett 2002, pp. 170-173.
[106] Høgetveit Berg 2005, p. 224.
[107] HL § 4.

The question is if Anna has acquired any rights in the property through Jo's passivity. This doctrine is built on case law and requires that the claimant's usage is manifested through the instalment of a device and that the owner has not reacted.[108] The real owner must have had an incentive to react and omitted to do so in a *blameworthy manner*. In this case it seems as though Jo may lose his right due to passivity, since Anna has put up a fence without Jo reacting in 30 years, 15 of which she was aware of Anna living there.

Another possibility is that Jo has tolerated Anna's tenure according to the doctrine of tolerated usage.[109] The borders between passivity, which may be a cause for acquisition of rights, and tolerated usage, which hinders acquisition, are unclear.[110] In this case it seems more likely that Jo has lost her right due to passivity and that Anna has consequently acquired a right in the property.

Case 10: The missing heir

Francis, a widower, has three children: Thomas, Peter, and Margaret. Francis dies. His children inherit a piece of land together, which acquisition is registered. Margaret emigrates, and the other two have no contact with her. Thomas and Peter start to use the whole land together as agricultural land without any consideration for the interests of Margaret. After 31 years, Margaret returns. She sues her brothers, demanding a payment for the use of her part of the land, a share in the profits that her brothers made, and that she be allowed to use the land.

Response: According to Norwegian law, Thomas and Peter have not acquired Margaret's interest in the land, as they are not in good faith regarding their right to her part.[111] Margaret has a valid, registered right that her brothers knew of. Acquisitive prescription is therefore out of the question.

Based on her brothers' wrongful usage of her share of the property, Margaret would have a claim for compensation in tort.[112] It is clear that the lost profit is a *damage*, that Margaret's brothers have acted *negligently* and that their *negligence caused her loss*.

Assuming that Thomas and Peter did acquire Margaret's right through acquisitive prescription, the question is whether Margaret still has a claim for compensation for the first 20 years before the prescription period was completed, or if the acquisition would have retroactive effect.

Although it is not entirely ruled out that the original owner has a claim for compensation towards somebody who has succeeded in acquiring her property through acquisitive prescription,[113] it would require an odd situation in which the claimants are in good faith regarding their right to the property and have still acted negligently. It is therefore not very practical that Margaret would have a claim in tort while her brothers have acquired her right in the property.[114]

[108] Høgetveit Berg 2005, p. 62 ff.
[109] See the discussion in case 7.1.
[110] Høgetveit Berg 2005 points out the paradoxical relationship between passivity and tolerated use on p. 318.
[111] HL § 4.
[112] Høgetveit Berg 2005, pp. 204-206.
[113] See case 1.1 where this is discussed.
[114] Høgetveit Berg 2005, pp. 210-211.