


ADVANCE SOCIAL SCIENCE ARCHIVE JOURNAL

 Available Online: <https://assajournal.com>

Vol. 03 No. 02. April-June 2025. Page# 96-114

 Print ISSN: [3006-2497](#) Online ISSN: [3006-2500](#)

 Platform & Workflow by: [Open Journal Systems](#)

Criminal Squatting: Evaluating the Application of ‘Ex Turpi Causa Non Oritur Actio’ on Adverse Possession Claims under LRA 2002
Bushra Nawaz

Lecturer, Mirpur University of Science and Technology (MUST)

Bushra.Law@must.edu.pk
Arooj Aziz

Lecturer, Mirpur University of Science and Technology (MUST)

arooj.law@must.edu.pk
Muhammad Usman Subhani

Lecturer, Mirpur University of Science and Technology (MUST)

Abstract

The article focus on the law of adverse possession (AP) under Land Registration Act (LRA) 2002 which has transformed the fundamental basis of entitlement of land from possession to registration. A detail analysis of the law of adverse possession will follow, concentrating on a comparison between the former and the current adverse possession scheme governed by the LRA 2002. This article will evaluate the protection of registered proprietors by reviewing the statutory and case law. The LRA 2002 has made it difficult for adverse possessors to have a successful claim. The position of legal proprietor is further strengthened by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, which has created a new offence of criminal. With the incorporation of LAPSPO 2012, the maxim ‘ex turpi causa non oritur actio’ will be appraised in light of the recent case law including Rashid v Nasrullah [2018] and R (Best) v The Chief Land Registrar [2015]. In light of the findings, the issues detailed, this article will argue that the holistic interpretation of ‘ex turpi causa’ maxim ensures a balance between the goals of adverse possession claims. The true owners have a more favorable position under the new regime, as it provides more cohesive rules for protection by focusing on the registered title compared to mere possession; thereby bring law in conformity with the policy considerations of the current era.

Keywords: Adverse Possession, Land Registration Act 2002 (LRA 2002), Ex Turpi Causa Non Oritur Actio, Registered Proprietors, Legal Ownership, Criminal Squatting, Land Law, Property Rights

Introduction

This article centers on the use of civil and criminal law with respect to the doctrine of adverse possession in England. It aims to determine court’s approach towards the doctrine of public policy and illegality of adverse possession in modern society.

The first half of the article will focus on the civil law including LPA 1925¹ and the transfer of the property by express consent under LRA 1925² and its successor LRA 2002³. This will be followed by exploring the alternative means of acquiring property without express consent such as adverse possession.

¹ Law of Property Act 1925

² Land Registration Act 1925

³ Land Registration Act 2002

The doctrine of Adverse Possession will be evaluated in detail and how this principle was imported into English property law. The incorporation of adverse possession into legislation and its subsequent reforms has surfaced the question whether this law is adequately justifying its purpose. By exploring the operation of adverse possession following LRA 2002, it will be presented that the law has fairly addressed the policy considerations of the 21st century, thereby, making the law more relevant to the modern times.

The second half of the article will evaluate the use of criminal law under LPSO 2012⁴. It will discuss the altered nature of adverse possession post LRA 2002, which has come under further scrutiny after criminalization of squatting⁵. Although this change only applies to residential properties, critics have called this an unwelcomed development. However case law shows that the interpretation of criminal squatting by the courts counters this argument. The contextual interpretation of *ex turpi causa non oritur actio*⁶ in cases like *Rashid*⁷ and *Best*⁸ and will be discussed to clarify that criminal squatting is assessed according to the circumstances of each case. Furthermore, it is evident that the case law post new regime has highlighted the holistic approach taken by the courts.

The final section of the article will conclude that the rigged-fenced approach taken by the new regime of adverse possession rightly balances the position of registered proprietors and adverse possessors. An approach that takes into account all facets of an adverse possession claim, thereby, making human rights and equity the central tenants in each case.

Possession, Relative Title, and Ownership in English Law

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property⁹"

English land law is largely based on acquiring proprietary rights which take priority over personal rights in property. The ownership of private property in England is a product of centuries-old development. The acquisition of real estate is subject to the rules of common law, equity, formalities including deed,¹⁰ registration of title and time¹¹. This right can be traced back to Norman Conquest in 1066 which introduced common law system. Feudalism was prevalent at that time and the land belonged to monarch. The estates were granted to lords and tenants, who in return served the monarch. Nevertheless, change was witnessed in the coming centuries which lead to the abolishment of feudal system by the passage of Statute of Tenures.¹² The court of equity also emerged during this period and covered the gaps created by the common law system. This resulted in the creation of trusts which meant that property could be held on both, legal and beneficial entitlement. Additional progress could be traced back to the 19th century with the elimination of strict settlement.¹³ This part shall discuss how Property law was further streamlined in the wake of 20th century with the enactment of some important statutory acts.¹⁴

⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012

⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 144

⁶ Lord Mansfield laid down the principle that no action arises from a dishonourable cause

⁷ *Rashid v Nasrullah* [2018] EWCA Civ 2685

⁸ *R(Best) v The Chief Land Registrar and the Secretary of State for Justice* [2015] EWCA Civ 17

⁹ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press at Oxford, 1765–1770) 2

¹⁰ Law of Property (Miscellaneous Provisions) Act 1989

¹¹ Fee simple absolute in possession, leasehold

¹² The Tenures Abolition Act 1660

¹³ Settled Land Acts of 1882–1925

¹⁴ Law of Property Act 1925 c 20,
Land Registration Act 1925 c. 21
The Settled Land Act 1925 c 18 ,

Consequently, the current system of acquiring property law is largely based on the Land Registration Act 2002. It will also discuss other modes of acquiring property without consent.

- **Law of Property Act 1925**

‘The LPA 1925 made significant substantive changes to the law of real property...it remains the governing statute for modern land law.¹⁵’

1.1.1 Unregistered Land

LPA 1925 was an important statutory reform which aimed at simplifying conveyancing of property. The act reduced the number of estates that were capable of existing under the law to freehold and lease hold estates. These two estates could only be transferred by a deed. This is known as unregistered land scheme. At the same time, LRA 1925 introduced the process of land registration which became compulsory in 1985. Consequently, 87 percent¹⁶ of the land in England and Wales is registered. However, the remaining land is not registered on HM Land Register and has distinct title deeds and charges registered under LCA 1972. One reason for this is that the property was not leased, mortgaged or sold after 1925 or 1985. Thus, it did not trigger compulsory registration. Consequently, it is important for any perspective buyer to have actual, imputed and constructive notice of such property. It helps the potential purchaser to discover third party interests that can have an overriding interest in the party. Such rights can be located in the root of title to the unregistered land and third party interests including easements and covenants, which require an inspection of bundle of deeds going back to 15 years¹⁷. Other charges such as puisne mortgages, estate contracts¹⁸ and equitable easements are discovered on inspection of the land charges register. Other third party rights require physical inspection of the property in order to discover equitable interests such as actual occupation.¹⁹The cumbersome process of doctrine of notice has resulted in many discrepancies in the unregistered land scheme. Case law has also attracted further criticisms and highlighted the vulnerable position of the bona fide purchaser.

Resultantly, LRA (1925-2002) has reformed majority property law issues. Nevertheless around 15 percent of the land still follows the old scheme and thus makes it crucial to understand rules and regulation of unregistered land.

1.1.2 Registration of Title under Land Registration Act (LRA) 1925

LRA 1925 is the predecessor of LRA 2002. This Act was based on the 19th century²⁰ initiatives which sought to introduce the system of land registration. LRA 1925 consolidated 3rd party proprietary rights by their entry into HM Land Register which binds future purchasers of the property. Furthermore three governing principles introduced by Ruoff²¹ were incorporated by the land registration system: the mirror principle, the curtain principle and the insurance principle²². “The mirror principle involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are

The Land Charges Act 1972 c. 61,

The Trusts of Land and Appointment of Trustees Act 1996 c 47

¹⁵ Martin Dixon, *Modern Land Law* (8 edn, Routledge 2012) 18

¹⁶ Maggie Telfer, ‘Why HM Land Registry wants to achieve comprehensive registration’ (*HM Land Registry*, 27 April 2018) < <https://hmlandregistry.blog.gov.uk>> accessed 16 January 2022

¹⁷ Land Registration Act 1969 s 23, formerly 30 years

¹⁸ *Midland Bank v Green* [1981] 2 WLR 28

¹⁹ *Kingsnorth Finance v Tizard* [1986] 1 WLR 783

²⁰ Land Registry Act 1862 (25 & 26 Vict c 53)

²¹ Theodore Ruoff, *An Englishman looks at the Torrens System* (Law Book Compagny of Australasia, 1957)

²² Gerald Dworkin, *Registered Land Reform* (1961) < <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1961.tb00658.x>> accessed 20th January 2022

material to a man's title.²³ The curtain principle embodies the familiar idea of keeping trusts off the title (i.e., the Register)²⁴. The insurance principle provides the state-guaranteed title and the consequent indemnity to any person who suffers loss if any mistakes occur²⁵.

The registration of title under LRA 1925 revolutionised land law and majority of the real property was registered in the 20th century. Nonetheless, the Act identified to key issues that needed attention. Firstly, overriding interests under section 70 in particular section 70 (1) (g) (actual occupation) were still governed by doctrine of notice. This meant that the occupant would have priority over new purchaser.²⁶ Critics such as Hayton²⁷ describe overriding interest as a deep "crack in the mirror. Secondly, the registration of title intended to supersede the ordinary method of conveyance by execution of deed.²⁸ This meant that the register just recorded all the legal rights. However, it did not mirror all the rights in the property such as overriding interests and adverse possession. Moreover, if the legal right was obtained fraudulently or through some mistake could get recorded in the register. Consequently, the register might remove such invalid title; however, this meant that the register did not completely reflect an accurate image of the property.

1.1.3 Title by Registration under Land Registration Act (LRA) 2002

The Land Registration Act 2002 has been received with much critical acclaim, and rightly so. It is a work of monumental importance and monumental effort²⁹. Based on the Law Commission Report No. 271, LRA 2002 is inspired by the mirror principle is an "evolution not revolution"³⁰ of the law. The Act introduced title of registration as a planned move to make the register the basis of title. This act confers the title to the proprietor. Title by registration marks a shift from the previous role of the register as mere record keeper because the title is not complete until registration takes place. Consequently, LRA removes the ambiguities of true owner and registered owner. The register proprietor is the only owner.³¹ Therefore, a title guaranteed is a title indefeasible and it gives security to the persons dealing with the title.

The mirror principle thus has become the cornerstone of the reformed statutory regime. However, the register is still not the mirror image of the real property because of the overriding interests. Even though, majority overriding interests under section 70 (1) LRA 1925 have been reduced to minor interests. There are overriding interests that survive the initial registration under schedule 1. However such overriding interests are easily discoverable. Additionally, among the 15 types of overriding interests contained in schedule 3; only three are important and include implied legal easements, legal leases less than 7 years and actual occupation. It is worth noting that actual occupation is easily discoverable. Factors such as "the degree of permanence and

²³ *ibid*

²⁴ *ibid*

²⁵ *ibid*

²⁶ *Chhokar v Chhokar* [1984] FLR 313

Williams & Glyn's Bank v Boland [1981] AC 487

Abbey National Building Society v Cann [1991] 1 AC 56

Lloyds Bank v Rosset [1989] Ch 350

²⁷ David Hayton, *Registered Land* (3rd edn, Sweet & Maxwell Ltd 1981) 76

²⁸ James Edward Hogg, Registration of Title to Land (The Yale Law Journal Vol. 28, No. 1 (Nov., 1918)) <
<https://www.jstor.org/stable/787804?seq=1>> accessed 16th January 2022

²⁹ Martin Dixon, The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment (2003) <
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=911326> accessed 15 January 2022

³⁰ Edward Hector Burn, John Cartwright, *Maudsley & Burn's Land Law: Cases & Materials* (9th edn, OUP 2009) 120

³¹ *Swift 1st Ltd v Chief Land Registrar* [2015] Ch 602

continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it and the nature of the property and personal circumstances of the person"³² shall be taken into account. Therefore, any claimant will only succeed "so far as relating to land of which he is in actual occupation"³³ as appose to the entire property.

Although, experts are of the opinion that overriding interests should be placed on a separate register, so 'prospective purchaser of registered land should always be able to verify, by simple examination of the register, the exact nature of all interests existing in or over the land which he or she proposes to buy'³⁴. Such a change is yet to be seen.

- **Other modes of acquisition of Property**

LPA1925 and LRA (1925-2002) mostly deal with legal acquisition of property. However, the case law surrounding beneficial entitlement of land and TLATA 1996 has highlighted the role of implied trusts; which don't require formalities in the acquisition of property. The holistic approach taken by Lady Hale in *Stack v Dowden*³⁵ highlighted the role of common intention constructive trust in modern society. Similarly, resulting trust also plays a significant role in quantification of proprietary shares.

The doctrine of Proprietary Estoppel is also an equitable remedy that entails entitlement of property without formalities. The similarities between the early days of constructive trusts and the present role of estoppel are striking. Families, just like couples, do not put things in writing; the land is more than just a pot of money and it has a heritage and a complex history. Families, like couples, make, and break, promises. They fallout, they take each other for granted and they fight. And for many families the wealth is in the land, not the business on it. So, no surprise then that just as constructive trusts came to the aid of disappointed lovers, now estoppel comes to the aid of disappointed family members³⁶. According to the doctrine, if a claimant has suffered detriment in reliance to a promise regarding a proprietary interest in land, then it will unconscionable for the promiser to revert back on his promise. Resultantly, equity will arise in favor of the claimant and it can be crystalized as a conveyance of freehold³⁷ leasehold³⁸ easement³⁹ or compensation.⁴⁰

Another method for acquiring property without consent is adverse possession. Not only is this method different from trust and proprietary estoppel, it is also the most controversial method. Under this doctrine, a mere trespasser gets the opportunity to acquire a better title to land than the person who 'legally' owns it, through sustained actual possession, as well as the requisite intention to possess the land.⁴¹ The basic idea behind adverse possession of land is that a person who takes possession of land, albeit wrongfully to begin with, acquires a possessory title to the

³² *Link Lending Ltd v Bustard* [2010] EWCA Civ 424

³³ Land Registration Act 2002, sch 3(2).

³⁴ Gray and Gray, *Elements of Land Law* (5th edn OUP, London 2008) 190

³⁵ *Stack v Dowden* [2007] UKHL 17

³⁶ Martin Dixon, 'Proprietary Estoppel: The Law of Farms and Families' [2019] Conv 89

³⁷ *Gillet v Holt* [2000] 2 All ER 289

³⁸ *Yaxley v Gotts* [2000] Ch 162

³⁹ *ER Ives Investment v High* [1967] 2 QB 379

⁴⁰ *Gillet v Holt* [2000] 2 All ER 289

⁴¹ Victoria Boruta, 'The position of the estate owner and the adverse possessor: A comparison between England and Wales, Scotland and the republic of Ireland' (2018) <
<https://www.plymouthlawreview.org/vol10/Victoria%20Boruta%20final.pdf> > accessed 19th January 2022

land which, after the expiration of the relevant time period, is good against the whole world.⁴² LRA 2002 determines basis for a successful adverse possession, however, unregistered land is still governed by the Limitation Act 1980.⁴³ Adverse possession shall be discussed in detail in the next part.

The English common law of real property, as S.F.C. Milsom has argued took shape between 1153 and 1215. The common law gave royal protect to free tenements, replacing feudal relationships as the primary structuring society. The law thus constituted the institution English state.⁴⁴ Modern English law is thus a byproduct of Norman feudalism, medieval land laws and the subsequent liberal land reforms. Under the current system, two parallel schemes of registered and unregistered land are regulating real property. Title to property is acquired by a deed under LPA 1925 or via registration under LRA 2002. However, there other modes of property acquisition that are largely based on possession of the property and its surrounding facts. In the absence of legal formalities, property can be acquired through an implied trust, proprietary estoppel and adverse possession.

Adverse possession of land

‘Possession as such deserves protection...He who possess has by the mere fact of his possession more right in a thing than the non-possessor has⁴⁵.’

Historically, dating back to Roman law, the concept of physical possession was synonymous to ownership, whereby, physical control (copus) and intention to exclude others (animus) formed the basis of proprietorship. Thus, the traditional role of possession in concepts of landownership appeared in an instinctive awareness that the value of an item of property represents to the possessor is greater than the value that the property holds for a non-possessor, because of the material fact of the possession⁴⁶. This thesis indicates that the possessor has priority over the legal/beneficial title holder of the property. Since, the degree of harm caused to a possessor (for example, the home occupier) by losing the property would be greater than the harm suffered by the non-possessor (for example, the creditor or the landlord) of the property.⁴⁷ Resultantly, doctrine of adverse possession has undeniably epitomized under this principle. Evidence of endowment effect provides a modern basis for that possessors have a natural interest in retaining property, and supports the argument that possessors of property tend to value the property more highly than non-possessors.⁴⁸ This section shall assess how the possession of the land is the central tenant in the ownership of land. It will further discuss how doctrine of adverse possession has become an important part of property law in modern times.

English law on adverse possession

‘Much of the genius of the common law derives from a rough-and-ready grasp of the empirical realities of life. According to this perspective, the identification of property in land is an earthly pragmatic affair ... On this view property in land is more about fact than about right; it derives

⁴² Panesar, S. ‘The importance of possession in the common law tradition.’ (2003) < <http://www.coventry.ac.uk/bes/law/about%20the%20school/Pages/LawJournal.aspx>> accessed 19th January 2022

⁴³ Limitation Act 1980 c. 58

⁴⁴ Robert C. Palmer, ‘The Origins of Property in England’ (1985) < <https://www.jstor.org/stable/pdf/743696>> accessed 19th January 2022

⁴⁵ F Pollock and F Maitland’s ‘legal classic *The History of English Law before the Time of Edward I*’ (2nd edn, Cambridge university press, 1898) 42-43

⁴⁶ David Cowan, Lorna Fox O’Mahony, Neil Cobb ‘*Great Debates in Land Law*’ (2nd edn, Macmillan international, 2016) 101

⁴⁷ Nestor M. Davidson ‘*Affordable Housing and Public-Private Partnerships*’ (1st edn, Routledge, 2009)

⁴⁸ Ibid

ultimately not from 'words upon parchment' but from the elemental primacy of sustained possession⁴⁹.'

The doctrine of adverse possession dates back to the medieval times when differences regarding the property ownership were resolved through the evidence of possession. This was largely due to the poor record keeping property titles. Moreover, under the principle of seisin⁵⁰, the English common law did not subscribe to a notion of absolute ownership of property⁵¹. A person could only claim seisin if he or she possessed the land or was in a position to possess the land.⁵² Therefore, the doctrine of adverse possession helped in ascertaining property titles. Over the course of this time common law refined the principles and 17th century saw the first legislation⁵³ on the doctrine of adverse possession, the Limitation Act⁵⁴ that has been reformed and updated. It barred the owners from recovering their land after a passage of 12 years. Under the limitation statute true owners of the property had to active steps to evict the adverse possessor as time would start running against their title once the property was in possession of a squatter. If, however, the true owner did not stop the clock from running, their title was ousted by the adverse possessor. Consequently, the doctrine of adverse possession was elucidated by the Limitation statute. However, the law on adverse possession went through many changes and it is currently governed by LRA 2002.

- **Requirements of the adverse possession**

Acquiring property by adverse possession has to fulfill requirements prescribed by the:

1. Statutory law
2. Common law

Statutory requirements were covered by the Limitation Act 1980⁵⁵ and now by the LRA 2002. The Limitation Act 1980 contained three important statutory principles on the limitation of actions. First, no action can be brought by a landowner to recover his land after the expiration of twelve years from the date on which the right of action accrued to him.⁵⁶ Secondly, the right of action to recover land is deemed to have accrued to the landowner when the landowner has either been dispossessed of his land or has discontinued use of his land.⁵⁷ Finally, no right of action is deemed to have accrued unless the land is in possession of some person in whose favor the limitation period can run and where any such right of action is deemed to have accrued on a certain date and no person is in adverse possession.⁵⁸ In modern times, only unregistered Land is governed by the Limitation Act 1980. However, when the paper owner's title will be ousted by the adverse possessor, he will have to get his title registered under LRA 2002. Under LRA 2002,

⁴⁹ Kevin Gray and Susan Francis Gray, *The Idea of Property in Land* in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15, 18-19.

⁵⁰ The principle of seisin dominated English law for many centuries. It made an important distinction between freehold interests and leasehold interests. A person was seised of an estate if he held the freehold estate, the land was of freehold tenure, and the person had possession of the land (or a party such as a lessee held the land from him). A leaseholder could not have seisin - such a person merely had possession of the land. For a helpful description of the doctrine, see Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 8 th ed, 2012) 45-6 [3-018]-[3-021].

⁵¹ Fiona Burns, 'Adverse Possession and Title-by-Registration Systems in Australia and England' (2011) 35 *Melb U L Rev* 773

⁵² *Ibid*

⁵³ The Limitation Act 1623 (21 Jac.1 c.16)

⁵⁴ The Limitation Act 1980 (c.58)

⁵⁵ The Limitation Act 1980 (c.58)

⁵⁶ Panesar, S. (n 42)

⁵⁷ *Ibid*

⁵⁸ *Ibid*

the limitation period has been reduced to 10 years. Furthermore, LRA 2002 has introduced a host of new statutory requirements which will be discussed in the next section.

Other conditions such as possession and the intention required to establish possessions (hereinafter referred as *animus possidendi*) have been more thoroughly covered by the common law. Earlier case law⁵⁹ suggests that a trespasser was merely considered a licensee, if he did not interfere with the legal owners forthcoming plans regarding the property. The situation is different now as there has to be an intention to exclude the whole world, including the registered proprietor of the land, from the land.⁶⁰ Resultantly, the adverse possession has to prove “*animus possidendi*” without its absolute control.⁶¹ Nevertheless, the courts have made it clear that factual possession of the land with “a sufficient degree of occupation or physical control,”⁶² is an essential condition. Moreover the squatter should have an intention to exercise such custody and control on one's own behalf and for one's own benefit.⁶³ Additionally, the possession has to be 'adverse' therefore, if the acknowledgement of the true owner by the squatter will defeat his claim.

Consequently, possession must require the intention to adversely possessing the property and sufficient degree of control for a specified period of time covered by Limitation Act 1980 and LRA 2002.

2.1.2 J A Pye (Oxford) Ltd v Graham

Until the case of *Pye*,⁶⁴ the doctrine of adverse possession had an important role in property disputes. For instance, Stephen Jourdan also observed that adverse possession was an 'enormously profitable' exercise, particularly when large areas of valuable land were involved.⁶⁵ However, adverse possession was not popular with all segments of the English population⁶⁶. Individual landowners who were supplanted as owners of the land, public authorities that lost land (or were in danger of losing land) due to poor record-keeping or insufficient supervision ...did not consider adverse possession as either appropriate or profitable.⁶⁷ Therefore, some important litigation including the case of *Pye* raised several questions, including reforming the current legal adverse protection rules.

In this case, the Grahams relying on the Limitation Act 1980, claimed rights to 25 hectares of agricultural land belonging to *Pye* as they had established successful adverse possession.⁶⁸ At first instance the judge held that the Grahams had established a successful possessory title to *Pye's* land and that time began to run against *Pye* since 1984 after the expiration of the licence agreement.⁶⁹ The court of Appeal reversed this finding because the Grahams had not dispossessed *Pye* from the land. The decision of the Court of Appeal begged the question whether a successful claim to adverse possession rested on the subjective intentions of both the

⁵⁹ *Leigh v Jack* [1879], 5 Ex D 264 ,

Wallis's Cayton Bay Holiday Camp Ltd. V Shell-Mex and B.P. Ltd. (1975) Q.B. 94 C.A

⁶⁰ Peter Butt, *Land Law*, (4th ed, 2001) 740.

⁶¹ *Ofulue v Bossert* [2008] EWCA Civ 7; [(2009) Ch. 1 (CA (Civ Div))

Thorpe v Frank and another [2019] EWCA Civ 150

⁶² *Powell v McFarlane* [1979] 38 P. & CR 452

Buckinghamshire County Council v Moran [1989]EWCA Civ 11

⁶³ *JA Pye (Oxford) Ltd v United Kingdom* [2000] Ch. 676 (HC); [2001] Ch. 804 (CA); [2003] 1 A.C. 419 (HL)

⁶⁴ *Ibid*

⁶⁵ Fiona Burns (n 51)

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ Panesar, S. (n 42)

⁶⁹ *Ibid*

squatter and the paper owner or rather on the objective intention to possess land for the requisite period of time required by the Limitation Act 1980? Furthermore, were subjective factors such as the willingness of the squatter to pay for the use of land and his subjective belief that he was not the owner relevant?⁷⁰ However, the highest court at that time: House of Lords reversed court of appeals decision and reaffirmed the common law tradition of possession. It does not matter that the adverse possessor does not have an actual subjective belief that he is acting as the owner. Neither does it matter that the possessor is willing to pay for the occupation of the land, providing that there is possession which is inconsistent with the paper owner's title,⁷¹ Consequently, the doctrine of adverse possession was glared at with critical eye by legal scholars and practitioners. At first instance, Neuberger J labelled adverse possession as 'draconian to the owner and a windfall to the squatter', and in the Supreme Court, Lord Bingham observed that adverse possession is 'apparently unjust.'⁷² Similarly, Gray and Gray note⁷³ that 'this view mirrored a growing public perception that it had become "too easy for squatters to acquire title." A criticism which attracted added force where difficulties in the effective policing of vacant premises by cash-strapped local authorities could easily lead to substantial losses for the public purse ... If property is indeed a relationship of socially approved control over a valued resource, it had become quite clear that in the Britain of the 21st century, adverse possession of land is a form of control which is no longer socially approved.'

Resultantly, this case went to the European Court of Human Rights.⁷⁴ It questioned the compatibility of the doctrine of adverse possession with European Convention on Human Rights⁷⁵ It was held that even though the doctrine of adverse possession interfered with the right to reasonable enjoyment of land, this interference was proportionate and thus, acceptable.

Nevertheless, with the passage of LRA 2002, the rules of establishing a successful adverse possession claim come under schedule 6 of this Act. Under the new scheme it is unlikely that case such as *Pye* would have a similar outcome.

The doctrine of adverse possession and the requirements for a successful claim have been clarified gradually by the common law and limitation statutes. The requirements for a successful claim are divided into two aspects. First, the extinction of the paper owner's title⁷⁶. Squatter can oust the title owner after proving the factual possession of the property with *animus possidendi*. Secondly, the acquisition of title by the squatter⁷⁷ which is subject to the limitation Act 1980. Nevertheless, the subjective interpretation of factual possession has attracted criticisms as the one size fits all approach to adverse possession by limitation did not appear to distinguish between different circumstances of squatting, it is clear that the doctrinal definitions of possession, intention to possess and adverse did give the courts some scope to respond to the context of the unlawful occupation.⁷⁸ Consequently, the "heresy"⁷⁹ in *Leigh v Jack*⁸⁰ was

⁷⁰ Ibid

⁷¹ Ibid

⁷² Victoria Boruta (n 41)

⁷³ Gray and Gray (n 34) para 9.1.15

⁷⁴ *JA Pye* (n 63)

⁷⁵ Consolidated Version of the Treaty on European Union [2008] OJ C115/13

⁷⁶ Stephen Jourdan, *Adverse Possession* (LexisNexis Butterworths, 2003) 1,3-4

⁷⁷ Ibid

⁷⁸ Fox O'Mahony, L. and Cobb, N. A. 'Taxonomies of squatting : unlawful occupation in a new legal order.' *Modern law review* 71 (6) (2008) <<https://dro.dur.ac.uk/5088/1/5088.pdf>> accessed 21st April 2022

⁷⁹ Bramwell L.J noted that possession by a squatter is only adverse if his occupation is inconsistent with the paper owner's plans for the land

⁸⁰ *Leigh* (n 50)

resurrected in the case of *Beaulane Properties Ltd v Palmer*.⁸¹ Therefore, inevitably adverse possession law has been modified under schedule 6 LRA 2002.

Adverse possession under LRA 2002

'In a title by registration system, possession is no longer the bedrock of land law. It is not necessary for a person to demonstrate some kind of physical nexus with the land in order to acquire seisin or other interest in the land'⁸².

Title by registration under LRA 2002 has considerably altered the law on adverse possession from its start in medieval times. The scope of doctrine of adverse possession was briefly covered in the first section as means of acquiring property without consent. Section two shed light on the doctrine of adverse possession from its origins to its incorporation in the legal system. Gaps within this area of law were identified following as common law and statutory interpretations progressed in case law. Subsequently, doctrine of adverse possession was reformed. This section will discuss the introduction of Veto System of adverse possession introduced by the Land Registration Act 2002. It will further elaborate on the operation and procedure of adverse possession claims under the new scheme.

The nature of adverse possession

The Land Registration Act 2002 (LRA) has had the most significant effect on the doctrine of adverse possession since the Limitation Act 1833⁸³ It has transformed the fundamental basis of entitlement of land from possession to registration as it put an end to the supremacy of single and exclusive possession as the basis for a successful claim to ownership of land through the principles of adverse possession.⁸⁴ Title by registration reflects the realities of contemporary times and is 'the closest thing in over 900 years to absolute ownership of land.'⁸⁵ It is true the Act has marginalised adverse possession of registered land; notwithstanding this, registration does not impose an absolute title.⁸⁶ Nevertheless, an adverse possessor can still take possession of land and establish a fee simple title, this is implicitly acknowledged in the LRA itself.⁸⁷ However, one of the avowed intentions of the Act was to offer 'much greater security of title for a registered proprietor' than existed and 'would confine the acquisition of land by adverse possession to cases where it was necessary either in the interests of fairness or to ensure the land remained saleable.'⁸⁸ Thus, the present LRA recognises, or at least appears to recognise, that relativity of title still prevails at the heart of English land law⁸⁹.

The Procedure of adverse possession

The new rules on adverse possession are contained in the schedule 6 of the LRA 2002. Even though adverse possession is not defined by the new LRA, the act states that it is necessary to provide evidence for adverse possession. Therefore, under the rules of new LRA a squatting can only be taken over from an earlier adverse possessor in exception circumstances where the successor has bought or inherited the land. Moreover, adverse possession for a trust of land cannot be successful if the interest of beneficiaries is in the possession. There is no equivalent of

⁸¹ *Beaulane Properties Ltd v Palmer* (2005) EWHC 817 (Ch)

⁸² Fiona Burns "The Future of Prescriptive Easements in Australia and England" (2007) 31(1) *Melb U L Rev* 3

⁸³ Michael Nicol, 'The Fiction of Adverse Possession.' (2017)

<[https://eprints.lancs.ac.uk/id/eprint/129803/1/The Fiction of Adverse Possession corrections complete .pdf](https://eprints.lancs.ac.uk/id/eprint/129803/1/The_Fiction_of_Adverse_Possession_corrections_complete_.pdf)> accessed 27th February 2022

⁸⁴ Panesar, S. (n 42)

⁸⁵ Martin Dixon, *Modern Land Law*, (7th edn, Routledge 2010) 428

⁸⁶ Michael Nicol (n 83)

⁸⁷ *Ibid*

⁸⁸ *Ibid*

⁸⁹ *Ibid*

s 70(1) (f)⁹⁰ under LRA 2002. Therefore, the squatter cannot claim an overriding interest in the property. Additionally, there is no limitation for a mortgage charge⁹¹ and the lender in possession will never bar the borrower.

Subject to aforementioned conditions, a squatter is allowed to register their title as a proprietor of the state after the competition of ten years.⁹² Consequently, the Registry must serve the registered proprietor of the estate, any charge and any superior registered estate (if the estate is leasehold) with notice of the application and any person who receives such a notice is entitled to veto the application.⁹³ This "veto" system gives registered proprietor two years' time to bring proceedings to retrieve their position after receiving the squatters notice. Conversely, the adverse possession claim will succeed if registered proprietor does not object the basis of such claim or serve a counter notice or takes the necessary steps to evict the squatter from the land.⁹⁴ Furthermore, there are three exceptional situations in Sch.6 of the LRA 2002 whereby the squatter can be registered with title despite the objection of the registered proprietor... this reflect a public interest that outweighs the "deprivation" of the registered proprietor.⁹⁵

Among the three situations the first one is proprietary estoppel whereby it would be unconscionable to dispossess the squatter. This exception appears to provide an equitable defence to possessors and has, in recent cases such as *King*⁹⁶ and *Best*⁹⁷, been upheld fairly in practice.⁹⁸

The second situation is known as independent right to the estate whereby the squatter can assert that the legal owner is holding the land on trust for the squatter. This exception allows possessors to acquire title if they are entitled to the land. Although this exception clearly includes scenarios such as receiving land through inheritance, it still appears vague and is only likely to apply in rare circumstances⁹⁹.

The final exception is the boundary dispute exception whereby the squatter has reasonable grounds to believe that the land adjacent to his property's boundary belongs to him. It protects possessors who have used land adjacent to their own property, believing that such property belongs to them due to physical barriers being erected in the incorrect location along the boundary line. This exception appears to be the most applicable, as detailed and specific guidance is given as to when this exception will be engaged.¹⁰⁰ Even though *Thrope*¹⁰¹ illustrates a successful claim of factual possession on an adjacent land, *Dowse*¹⁰² however, paints a different picture. Here, the judge rejected the claim as the adjacent land did not cover substantial area. Therefore, the case law has confirmed that lenient statutory protection is no longer afforded to the possessors.

⁹⁰ Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts; LRA 1925 c. 21

⁹¹ LRA 2002, s 96 (2)

⁹² LRA 2002 has reduced the limitation period of action to 10 years from 12 years under LA 1980.

⁹³ Una Woods, 'The English Law on Adverse Possession: A Tale of Two Systems' (2009) 38 *Comm L World Rev* 27

⁹⁴ *Ibid*

⁹⁵ Martin J. Dixon, 'Case Comment Adverse possession in three jurisdictions.' (2006) *Conveyancer & Property Lawyer* 179

⁹⁶ *King v Suffolk CC* (2015) UKFTT 0867 (PC), (2017) *PLSCS* 19

⁹⁷ *Best* (n 8)

⁹⁸ Yui Nga Natalie Tsang, 'The Role of Adverse Possession in Modern Land Law' (2019) *LSE LAW REVIEW*

⁹⁹ *Ibid*

¹⁰⁰ *Ibid*

¹⁰¹ *Thrope* (n 61)

¹⁰² *Dowse & Another v City of Bradford Metropolitan District Council* [2020] UKUT (LC)

'A person may apply to the registrar to be registered ... if he has been in adverse possession of the estate.' That surely indicates that a person who has not in fact been in adverse possession is simply not entitled to apply.¹⁰³

LRA 2002 has revolutionized the law on adverse possession and alleviated the unpredictability of informal acquisition of title to land. Gray and Gray's land law has welcomed registered record as '...heavily protected phenomenon, leaving little room for the operation 'off the record' of some ancient and pragmatic principle of long possession.'¹⁰⁴ It has indeed addressed 'off the record' imbalances that favoured the principle of long possession of adverse possessors. With the introduction of the veto system in favour of the proprietor and the three exceptions for a successful adverse claim in favour of the squatter, schedule 6 LRA 2002 has addressed the concerns of all parties. This means that genuine adverse possession claims will be successful thereby striking the right balance between possession and ownership.

The scope of criminal Squatting under LRA 2002

"Vigilantibus non dormientibus, jura subveniunt"¹⁰⁵

As discussed earlier, property law ignored the conceptual differences between owner and possessor, treating them both simply as holders of rights to possess of differing strengths.¹⁰⁶ The synonymous status of possession and ownership made it easier for the proponents of adverse possession to justify it.¹⁰⁷ The idea that the owner is blameworthy is based on the traditional rationale which has been advanced for the doctrine of adverse possession known as the 'sleeping theory'.¹⁰⁸ This is because when the sleepy or unaware proprietors fail to exercise their rights as owners of the property, squatters can adversely possess land to ensuring the maximum utility. This gives the squatter the right to earn the title of the land. The 'earner' theory, justifies itself on the basis that it punishes the owner who fails to use the land or develop it and rewards the squatter for doing so and also for bringing it back onto the market once he has acquired title.¹⁰⁹ Such proposition suited the traditional English laws of adverse possession that were governed by the limitation act 1980. However, the same cannot be said about LRA 2002. With the introduction of title by registration, LRA 2002 demands a reassessment the scope of civil and criminal wrongs surrounding adverse possession claims. Therefore, this section will discuss the common law and statutory remedies developed to address trespass, fraud and criminal squatting under LRA 2002.

'ex turpi causa non oritur actio'

"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."¹¹⁰

The defence of illegality has been a long standing common law principle and it bars any claim arising from unlawfulness. However, common law requires possession to be adversely occupied by the possessor. Hence, common law test does not demand subjective good faith belief on the

¹⁰³ Jacob LJ stated in *Baxter v Mannion* (2011) EWCA Civ 120

¹⁰⁴ Gray and Gray (n 34) 123

¹⁰⁵ The law assists only those who are vigilant, and not those who sleep over their rights.

¹⁰⁶ Larissa Katz, "'The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law'" [2010] McGill Law Journal / Revue de droit de McGill, vol. 55 47,80

¹⁰⁷ See Martin Dockray, 'Why Do We Need Adverse Possession?' (1985) Conveyancer and Property Lawyer 272, 274

¹⁰⁸ Una Woods, 'Adverse Possession – Does the owner get his just deserts?' (2012) <

https://ulir.ul.ie/bitstream/handle/10344/4305/Woods_2012_Owner.pdf?sequence=2> accessed 25th February 2022

¹⁰⁹ Ibid

¹¹⁰ *Holman v Johnson* (1775) 1 Cowp 341

part of the possessor that he is entitled to the property.¹¹¹ Therefore, a successful adverse claim will not require the consideration of good faith and bad faith squatting or the defence of illegality. In such circumstances an adverse possessor will benefit from his wrongful conduct by ousting the lawful proprietor from their land. Although such approach could work in ancient times, however, law cannot support such an approach in modern times. This is because the registered proprietor land knows what the best use of land is and leaving the land idle may be a means of using the land in a productive manner, which may be unknown until the 'best use' becomes apparent.¹¹² Furthermore, by virtue of limitation act and poor record keeping, adverse possession could be justified under unregistered land. Nevertheless, as exhibited by the case of *Pye*¹¹³ the doctrine of adverse possession had to correspond with the realities of the 21st century. Thus many argue that, under the system of title by registration, on its face adverse possession is an antithesis to everything an integrated land registration system aims to achieve.¹¹⁴ Therefore, the decision in *Baxter v Mannion*¹¹⁵ can be quite rightly be justified under the new adverse possession scheme. In this judgement, the residual statutory protection safeguarding possessors was creatively 'subverted',¹⁸ as although the landowner, Mr Mannion, failed to challenge the adverse possession claim within the statutory 65-day time limit, he was able to maintain ownership of his land. In reaching this decision, the Court of Appeal held that the Schedule 6 rules protecting possessors are not absolute, as, after the title was acquired by the possessor, it was quickly 'rectified' on the register and returned to Mr Mannion.¹¹⁶

On the contrary, it is still worth noting that 60% of adverse possession applications received by the land registry are successful.¹¹⁷ Therefore, one can argue – in line with Dixon – that it remains best to view adverse possession as a concept of 'incontrovertible logic'. It serves a practical and important function in reducing land neglect, an issue that is not resolved by increasing the incidence of land registration.¹¹⁸ Consequently, case law does suggest that the new adverse possession scheme, which functions on more intelligible grounds, has attempted to achieve a fair balance between the sanctity of title and the possession of land.

- **Rashid v Nasrullah**

The case of *Rashid* holds that the doctrine of illegality as recently recast in *Patel v Mirza* [2016] UKSC 42 has no application in relation to the limitation of actions¹¹⁹. Mohammed Rashid was the registered proprietor of a property in Birmingham. In 1989, by means of a forged transfer and other forged documentation, another Mohammed Rashid was registered as the proprietor of the property in his place. The original owner was in Pakistan at the time. When he returned he tried to take action to recover the property but the Police wouldn't do anything, because it was a civil matter, and he couldn't find a solicitor to take up his case. In 1990 the fraudster's son, who was a party to the fraud, was registered as the proprietor by reason of a gift from his father made in

¹¹¹ Thomas W. Merrill, 'Property Rules, Liability Rules and Adverse Possession' (1985) 79 Northwestern University Law Review 1122

¹¹² Ifeoma Ekeoma, 'The Future of Adverse Possession in Registered Land in England and Wales' (2022) <https://www.academia.edu/35122920/The_Future_of_Adverse_Possession_in_Registered_Land_in_England_and_Wales> accessed 25th March 2022

¹¹³ *JA Pye* (n 63)

¹¹⁴ Ifeoma Ekeoma (n 112)

¹¹⁵ *Baxter* (n 103)

¹¹⁶ Yui Nga Natalie Tsang (n 98)

¹¹⁷ Stephen Jourdan and Oliver Radley-Gardner, *Adverse Possession* (2nd edn, Bloomsbury Professional 2011)

¹¹⁸ Yui Nga Natalie Tsang (n 98)

¹¹⁹ Max Thorowgood, 'Rashid v Nasrullah – Adverse possession when you're the registered proprietor?' (2020) <<https://fieldcourt.co.uk/rashid-v-nasrullah-adverse-possession-when-youre-the-registered-proprietor/>> accessed 2nd April 2022

1989.23 years then passed before the original owner applied to the HM Land Registry to rectify the register. The fraudster's son defended the claim on the basis that he had been in adverse possession since 1989 and had, accordingly, acquired title by adverse possession pursuant to 1925 Act.¹²⁰ Accordingly, the court point out that the real owner should have taken reasonable steps to oust the fraudster in 1990 as that became the basis of their successful claim.

Nevertheless, highlights the importance of the new regime under LRA 2002 especially in cases of fraud. In this case it was held that even if property registration is invalidated due to fraud, possession for the necessary time will suffice for the ownership of property. The court of Appeal concluded that even criminals and scoundrels were entitled to the benefit of limitation periods as the defendant had completed the period of adverse possession before LRA 2002. C=Accordingly M. Dixon stated that the defendant, '...was entitled to the land, which meant that there were exceptional reasons for refusing rectification under Schedule 4 to the LRA 2002.'¹²¹ Clearly, such exceptional circumstances wouldn't be possible if the adverse possessor had completed 10 years under the new regime.

Thus the new regime provides more cohesive rules for protection to the true owner by focusing on the registered title compared to mere possession; thereby bring law in conformity with the policy considerations of the current era. Conversely, the role of adverse possession is modern law has come under further scrutiny after parliament's enactment of LASPO 2012 and in particular the introduction of s.144 on criminal squatting. The next section will explore the compatibility between adverse possession and LAPSPO 2012 in light of the recent decision in the case of Best.¹²²

Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012

Until recently, the doctrine of adverse possession could aptly be justified on the basis of, 'you snooze, you lose.'¹²³ However, the enactment of LAPSPO 2012 has strengthened the view of critics¹²⁴, who question the applicability of adverse possession in modern times. This is because according to s. 144 of LAPSPO under certain situations, squatting is criminal offence in residential buildings. Consequently, trespass is not just civil (tort) wrong but also a criminal offence. Section 144 became the first provision since section 7¹²⁵ of the Criminal Law Act 1977 ('CLA') to have a significant effect on adverse possession¹²⁶. However, the act remains silent on commercial squatting. Importantly, it does not criminalise all residential squatting... Thus, the offence is not committed by a person who was a licensee or tenant when they entered the premises and who subsequently holds over, it applies only to trespass in a "residential building" (and not, for example, to land in the curtilage of a building); and only if the person is "living" in the building or "intends to live there for any period."¹²⁷In other words, simply being on residential property does not mean an offence is committed and that simple fact cannot be taken as evidence that the

¹²⁰ Ibid

¹²¹ Martin Dixon, "Land Registration, Adverse Possession And The Nature Of A Registered Title" (2020) 79 The Cambridge Law Journal 415

¹²² Best (n 8)

¹²³ Stake, 'The Uneasy Case for Adverse Possession' 89 (2000-1) Geo. L.J. 2419, 2434

¹²⁴ inquiring the validity of sleeping and earners theories

¹²⁵ Adverse occupation of residential premises (revised under s.144 LAPSPO 2012)

¹²⁶ Stefania Garlicka, 'Investigating the relationship between criminal trespass under section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the doctrine of adverse possession' (2021)

<<https://pure.qub.ac.uk/en/studentTheses/investigating-the-relationship-between-criminal-trespass-under-se>. accessed 17th April 2022

¹²⁷ Martin Dixon, 'Criminal Squatting and Adverse Possession: The Best Solution?' (2014)

< <https://www.repository.cam.ac.uk/handle/1810/246191>> accessed 27th March 2022

squatting was “criminal.¹²⁸” Therefore, it is important to understand that s. 144 LAPSO is designed to prove deterrence and practical help for homeowners... and was not intended to prove any collateral effect on the law of adverse possession or rebalance the competing interests of registered proprietors and squatters.¹²⁹ The case of *Best*¹³⁰ highlights how the doctrine of adverse possession has been preserved by the courts even after the enactment of s. 144 LAPSO 2012.

- **R (Best) v The Chief Land Registrar**

Mr Best had taken possession of a rundown dwelling in 2000 and applied to be registered as proprietor in November 2012 in pursuance of the scheme in Schedule 6 to the Land Registration Act 2002.¹³¹ However, Best never made it as far as triggering Schedule 6 because the Chief Land Registrar cancelled his application on the basis that title could never be acquired by virtue of a criminal act. This was based on the Land Registry’s own assessment of the effect of LAPSO 2012.¹³² On application for judicial review of the Registrar’s decision, Ouseley J stated that application should be allowed on the basis that parliament had not intended that adverse possession be prevented because it was based on a criminal trespass.¹³³ This decision was appealed by chief land registrar in the Court of Appeal. In this respect, Lord Justice Sales reasoned that what was required was the balancing of the public policies that underlie both the *ex turpi causa* (or illegality) test and that of acquisition of title by adverse possession in registered land.¹³⁴ He observed that “Acceptance of the Registrar’s arguments would have a profoundly disruptive effect in relation to what has been the long established effect of the law of adverse possession for the purposes of acquiring title for both registered and unregistered land.” Thus the decision in *Best* has demonstrated that section 144(7) did not impliedly repeal or circumvent the law on adverse possession¹³⁵. This comes as a relief, as a decision to the contrary decision could have resulted in adverse possession being abolished indirectly.¹³⁶

This Section has highlighted the importance of doctrine of illegality in adverse possession claims. Rashid has emphasized on the need to get the title registered under the new scheme in order to benefit from the veto system introduced under LRA 2002. Whereas, *Best* demonstrates that the veto system along with LAPSO 2012 exercises as balancing act between public policy.

The Conclusive analysis on the relevance of adverse possession in modern society

English land law has given much weightage to possession, which has played an essential role in the creation of title. Therefore, ownership has been derived from possession in the history of property law. Nonetheless, law has always played a dynamic role in order to address societal changes. The LRA 2002 reform on adverse possession is also a consequence of such changes. Although, the new scheme favours registered proprietors, resonating with academicians such as Gray and Gray, who find the relevance of this concept ‘increasingly strange’ in today’s world¹³⁷. Nonetheless, schedule 6 paragraph 5 of LRA 2002 proves that adverse possession is still an essential concept in modern society.

¹²⁸ *Ibid*

¹²⁹ Chris Bevan, ‘*Land Law*’ (3rd edn, OUP 2022) 183

¹³⁰ *Best* (n 8)

¹³¹ *Dixon* (n 127)

¹³² *Ibid*

¹³³ *Ifeoma Ekeoma* (n 112)

¹³⁴ *Ibid*

¹³⁵ *Yui Nga Natalie Tsang* (n 98)

¹³⁶ *Ibid*

¹³⁷ *Gray and Gray* (n 37), 377

It is interesting to note that in a report published by the Law Commission of England and Wales on 24 July 2018¹³⁸, the Commission noted that responses to their consultation on how the adverse possession scheme is operating under the Land Registration Act 2002 did not suggest that fundamental reform to the scheme was desirable. Instead, the Commission made some recommendations to deal with certain procedural or technical issues related to how the law operates¹³⁹. Further key recommendations from Law Commission in 2021 suggested that where a person is registered as the proprietor of previously unregistered land by reason of their adverse possession, time should continue to run in favour of their claim whilst their title is open. This issue has apparently been resolved by the decision of the Court of Appeal in *Rashid*¹⁴⁰. Therefore, at things stand, the procedural and technical irregularities have been resolved to a larger extent by case law including *Rashid*¹⁴¹ and *Best*¹⁴².

The contextual interpretation of ex turpi causa non oritur actio'

Advocates of the doctrine of adverse possession have supported it on the basis of the sleeping theory and earners theory. Moreover, the Limitation Acts complemented these theories to justify the law on adverse possession. Nevertheless, the case of *Pye*¹⁴³ raised an important question on the difference between good faith and bad faith adverse possession. Consequently, title by registration and veto system introduced the new scheme under LRA 2002 has made it difficult for an adverse possession claim to succeed. Further complications were seen after the enactment of LAPS0 2012. However, in case like courts were able to balance the competing interests of adverse possessors under the regime.

Nevertheless, the contextual relevance of the illegality doctrine in adverse possession has raised questions regarding their clarity and scope in any successful claim. Nevertheless, the contextual interpretation resolves the ambiguity to a larger extend. For instance, in the case of *Best*¹⁴⁴ the judge recognised that, in principle, the ex turpi causa maxim should be a convenient "starting point", but not "an absolute rule", "un yielding to any circumstance" (at para. [45]). Rather, the maxim should be disapplied where, on balance, the policies it serves (inter alia, not permitting criminals to profit from their wrongs) are outweighed by the broader policy goals of the relevant conflicting civil law regime. This approach is eminently sensible: it seems disproportionate to apply the ex turpi causa maxim mechanically, regardless of the seriousness of the crime, or the policies served by the conflicting civil law.¹⁴⁵ Thus *Rashid*¹⁴⁶ and *Best*¹⁴⁷ reminds us that "the application of the ex turpi causa maxim depends on context" something which is not new in matters of real property.¹⁴⁸

Balance between public policy value and illegality in the adverse possession claims

¹³⁸ Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380) (The Stationery Ofce, 2018) para 17.4

¹³⁹ Una Woods, 'Protection for Owners under the Law on Adverse Possession: An Inconsistent Use Test or a Qualified Veto System?' (2021) *Osgoode Hall Law Journal* 57.2 (2021) : 342-380

¹⁴⁰ Max Thorowgood, 'The Law Commission's recommendations for updating the Land Registration Act 2002 – thoughts on the government response' (2021) < <https://fieldcourt.co.uk/the-law-commissions-recommendations-for-updating-the-land-registration-act-2002-thoughts-on-the-government-response/>> accessed 16th April 2022

¹⁴¹ *Rashid* (n 7)

¹⁴² *Best* (n 8)

¹⁴³ *JA Pye* (n 63)

¹⁴⁴ *Best* (n 8)

¹⁴⁵ Amy Goymour, 'Squatters And The Criminal Law: Can Two Wrongs Make A Right?' (2014) < <https://www.jstor.org/stable/pdf/24693899>> accessed 12th March 2022

¹⁴⁶ *Rashid* (n 7)

¹⁴⁷ *Best* (n 8)

¹⁴⁸ *Martin Dixon* (n 127)

In the words of Lord Denning ‘...a squatter...is one who, without colour of right, enters on an unoccupied house or land, intending to stay there as long as he can.’¹⁴⁹ However, when this concept is viewed through the lens of modern society, such an entry would be considered illegal once squatter has been asked by the owner to evacuate the property. Nevertheless, the concept of criminal squatting has been revisited by the court on several occasions and it has always been emphasized that “a recognition that the maxim *ex turpi causa* must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest.”¹⁵⁰ Consequently, land registry suggested that this practice of the courts should be legislated by the parliament. This concern was also raised by the land registration during the drafting of LAPS bill. Yet Parliament failed to insert a simple one-line subsection to assuage the concerns of the Land Registry and preserve adverse possession from the forewarned maelstrom.¹⁵¹ Furthermore, as highlighted, by Fox and Cobb, the value of empirical research is a precursor to any law reform project. Therefore it is important to consider how the law on adverse possession currently operates in practice: Who is affected and who benefits from the law on adverse possession?¹⁵² Given the procedural or technical issues related to the operation of adverse possession, parliament should legislate on criminal squatting in order to bring clarity to the scope of successful adverse possession claims.

Final Remarks

In conclusion, the evolution of adverse possession under English land law has transitioned from a historically possession-based system to one that emphasizes registration, reflecting the modern legal and social landscape. The enactment of the Land Registration Act 2002 marked a significant shift in protecting the sanctity of registered titles while still accommodating genuine adverse possession claims through a structured procedure. This reform introduced a balanced framework via the “veto system” and Schedule 6 exceptions, ensuring that both the rights of landowners and the interests of long-term possessors are considered. The juxtaposition of adverse possession with the doctrine of ‘*ex turpi causa non oritur actio*’ further challenges the boundaries between legality and equity, as demonstrated in key decisions like *R (Best)* and *Rashid v Nasrullah*. These cases underscore the courts’ evolving interpretative stance moving from rigid applications of illegality to a more contextual, policy-sensitive analysis. The preservation of adverse possession, even in light of LASPO 2012, illustrates the judiciary’s reluctance to entirely eliminate a doctrine rooted in practicality and long-standing precedent. Therefore, adverse possession continues to play a crucial, albeit restricted, role in modern property law. It provides a legal resolution to land disputes, mitigates land neglect, and upholds social utility in property use. As the courts grapple with the tension between maintaining the sanctity of title and preventing unjust enrichment through criminal conduct, their contextual interpretation of legal principles such as *ex turpi causa* ensures that outcomes are just and equitable. Moving forward, legislative clarity on criminal squatting and a continued reliance on evidence-based jurisprudence will help strike a sustainable balance between ownership, possession, and public policy. The legal discourse surrounding adverse possession is not one of obsolescence but of recalibration adjusting ancient doctrines to meet the demands of a contemporary legal system.

References

Bevan, C. (2022). *Land law* (3rd ed.). Oxford University Press.

¹⁴⁹ *McPhail v Persons Unknown* [1973] Ch 447, 456B

¹⁵⁰ *National Coal Board v England* [1954] AC 403, 419

¹⁵¹ Mark Jordan, ‘Illegality And The Law Of Fast-Fish And Loose-Fish’ (2017) *Irish Jurist New Series*, Vol. 57, 33

¹⁵² *Una Woods* (n 139)

- Blackstone, W. (1765–1770). *Commentaries on the laws of England*. Clarendon Press.
- Boruta, V. (2018). The position of the estate owner and the adverse possessor: A comparison between England and Wales, Scotland, and the Republic of Ireland. *Plymouth Law Review*, 10. <https://www.plymouthlawreview.org/vol10/Victoria%20Boruta%20final.pdf>
- Burns, F. (2007). The future of prescriptive easements in Australia and England. *Melbourne University Law Review*, 31(1), 3.
- Burns, F. (2011). Adverse possession and title-by-registration systems in Australia and England. *Melbourne University Law Review*, 35, 773.
- Butt, P. (2001). *Land law* (4th ed.). Lawbook Co.
- Cowan, D., Fox O'Mahony, L., & Cobb, N. (2016). *Great debates in land law* (2nd ed.). Macmillan International.
- Davidson, N. M. (2009). *Affordable housing and public-private partnerships*. Routledge.
- Dixon, M. (2003). The reform of property law and the Land Registration Act 2002: A risk assessment. *Social Science Research Network*.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=911326
- Dixon, M. (2012). *Modern land law* (8th ed.). Routledge.
- Dixon, M. J. (2006). Adverse possession in three jurisdictions. *Conveyancer and Property Lawyer*, 170, 179.
- Dixon, M. (2020). Land registration, adverse possession and the nature of a registered title. *Cambridge Law Journal*, 79(3), 415–439.
<https://doi.org/10.1017/S0008197320000385>
- Dockray, M. (1985). Why do we need adverse possession? *Conveyancer and Property Lawyer*, 49, 272–274.
- Dworkin, G. (1961). Registered land reform. *The Modern Law Review*, 24(2), 135–148. <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1961.tb00658.x>
- Ekeoma, I. (2022). The future of adverse possession in registered land in England and Wales. *Academia.edu*. https://www.academia.edu/35122920/The_Future_of_Adverse_Possession_in_Registered_Land_in_England_and_Wales
- Fox O'Mahony, L., & Cobb, N. (2008). Taxonomies of squatting: Unlawful occupation in a new legal order. *Modern Law Review*, 71(6), 878–911. <https://dro.dur.ac.uk/5088/1/5088.pdf>
- Garlicka, S. (2021). Investigating the relationship between criminal trespass under section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the doctrine of adverse possession [Doctoral dissertation, Queen's University Belfast].
<https://pure.qub.ac.uk/en/studentTheses/investigating-the-relationship-between-criminal-trespass-under-se>
- Goymour, A. (2014). Squatters and the criminal law: Can two wrongs make a right? *Cambridge Law Journal*, 73(1), 33–36. <https://www.jstor.org/stable/24693899>
- Gray, K., & Gray, S. F. (1998). The idea of property in land. In S. Bright & J. Dewar (Eds.), *Land law: Themes and perspectives* (pp. 15–51). Oxford University Press.
- Gray, K., & Gray, S. F. (2008). *Elements of land law* (5th ed.). Oxford University Press.
- Harpum, C., Bridge, S., & Dixon, M. (2012). *Megarry & Wade: The law of real property* (8th ed.). Sweet & Maxwell.
- Hayton, D. (1981). *Registered land* (3rd ed.). Sweet & Maxwell.
- Hogg, J. E. (1918). Registration of title to land. *The Yale Law Journal*, 28(1), 1–22. <https://www.jstor.org/stable/787804>
- Jourdan, S. (2003). *Adverse possession*. LexisNexis Butterworths.
- Jourdan, S., & Radley-Gardner, O. (2011). *Adverse possession* (2nd ed.). Bloomsbury Professional.

- Jordan, M. (2017). Illegality and the law of fast-fish and loose-fish. *Irish Jurist*, 57, 33–52.
- Katz, L. (2010). The moral paradox of adverse possession: Sovereignty and revolution in property law. *McGill Law Journal*, 55(1), 47–80.
- Law Commission. (2018). *Updating the Land Registration Act 2002* (Law Com No. 380).
- Merrill, T. W. (1985). Property rules, liability rules, and adverse possession. *Northwestern University Law Review*, 79(5), 1122–1154.
- Nicol, M. (2017). The fiction of adverse possession. *Lancaster University Law School Working Papers*. <https://eprints.lancs.ac.uk/id/eprint/129803/>
- Panesar, S. (2003). The importance of possession in the common law tradition. *Coventry Law Journal*.
<http://www.coventry.ac.uk/bes/law/about%20the%20school/Pages/LawJournal.aspx>
- Pollock, F., & Maitland, F. W. (1898). *The history of English law before the time of Edward I* (2nd ed., Vol. 1). Cambridge University Press.
- Ruoff, T. (1957). *An Englishman looks at the Torrens system*. Law Book Company of Australasia.
- Stake, J. E. (2001). The uneasy case for adverse possession. *Georgetown Law Journal*, 89, 2419–2434.
- Telfer, M. (2018, April 27). Why HM Land Registry wants to achieve comprehensive registration. *HM Land Registry Blog*. <https://hmlandregistry.blog.gov.uk>
- Thorowgood, M. (2020). *Rashid v Nasrullah* – Adverse possession when you’re the registered proprietor? *Field Court Chambers*.
<https://fieldcourt.co.uk/rashid-v-nasrullah-adverse-possession-when-youre-the-registered-proprietor/>
- Thorowgood, M. (2021). The Law Commission’s recommendations for updating the Land Registration Act 2002 – Thoughts on the government response. *Field Court Chambers*.
<https://fieldcourt.co.uk/the-law-commissions-recommendations-for-updating-the-land-registration-act-2002-thoughts-on-the-government-response/>
- Tsang, Y. N. N. (2019). The role of adverse possession in modern land law. *LSE Law Review*.
- Woods, U. (2009). The English law on adverse possession: A tale of two systems. *Common Law World Review*, 38(1), 27–52.
- Woods, U. (2012). Adverse possession – Does the owner get his just deserts? *University of Limerick Institutional Repository*.
https://ulir.ul.ie/bitstream/handle/10344/4305/Woods_2012_Owner.pdf
- Woods, U. (2021). Protection for owners under the law on adverse possession: An inconsistent use test or a qualified veto system? *Osgoode Hall Law Journal*, 58(2), 1–38.