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## Leibniz on Usucaption, Presumption, and International Justice\*

By

ANDREAS BLANK (PADERBORN)

### 1. Usucaption and Prescription: From Civil Law to the Law of Nations

Usucaption – the acquisition of ownership through long-standing possession – was widely discussed in Roman civil law and in early modern civil law<sup>1</sup>. Usucaption has much in common with a more familiar Roman law concept, prescription, i. e., the exclusion of legal action after a certain period of time<sup>2</sup>. As in prescription, in usucaption ownership rights cannot be legally contested after a period specified by law. Nevertheless usucaption differs from prescription. In prescription, time plays a merely negative role, i. e., the role of excluding legal action<sup>3</sup>. In usucaption, time also plays a positive role, i. e., a role in the acquisition of ownership. In usucaption, ownership is acquired through possession over a period specified by law (the relevant periods were originally as short as one or two years, but were later extended to 20 years for cases involving immobile goods and absent persons)<sup>4</sup>.

Jacques Cujas (1522-1590), one of the central figures in the French historical school of law, notes that the origin of ownership in the case of usucaption is quite different from the origin of ownership in legal transactions such as purchasing an article or receiving a gift. The latter transactions involve *traditio*, the delivery of possession from one person to another. If ownership is transferred through *traditio*, the change in ownership has its origin in a private person: the authority of the transaction is the will of the one who gives the thing to someone else<sup>5</sup>. By contrast, in usucaption the change in ownership does not have its origin in a private person. Rather, it has its origin in law. The authority of usucaption is the

\* An earlier version of this essay has been presented at the Philosophy Department of Ben-Gurion University of the Negev, Be'er-Sheva, Israel, in March 2010. I am grateful to Yakir Levin and Yanni Nevo for their kind invitation and helpful comments.

1 On usucaption in Roman law, see H. F. Jolowicz and B. Nicholas: *Historical Introduction to the Study of Roman Law*, 3rd ed., Cambridge 1972, pp. 151-153.

2 On prescription in Roman law, see H. F. Jolowicz: *Roman Foundations of Modern Law*, Oxford 1957, pp. 24-26.

3 See J. Cujas: *Opera omnia* [henceforth: OO] Naples 1758, vol. I, cols. 81, 84.

4 OO I, col. 81; IX, col. 101. As Cujas notes, the 20-years rule was still accepted in the sixteenth century; see OO I, col. 1521.

5 OO IX, col. 101.

passing of a legitimate period of time and therefore requires laws that specify the relevant periods<sup>6</sup>. Moreover, according to Roman law mere protracted possession is insufficient for usucaption. At least two further conditions have to be met: (1) The new possessor has to be in good faith when acquiring possession and afterwards – i. e., the new possessor has to believe that he or she is legally entitled to acquire and to continue holding possession of the object in question. On the contrary, if good faith is absent in the person acquiring possession, usucaption does not take place<sup>7</sup>. (2) The rightfulness of possession must not have been challenged in court in the meantime. If it has been challenged, usucaption takes place only if the accused has been acquitted<sup>8</sup>. Only if these conditions are met, usucaption could constitute a justified claim in ownership.

Cujas was aware of the fact that, although usucaption constitutes an advantage for one person at the expense of another person, Roman law sought a justification for this legal institution: If there were no usucaption, there would be no security in ownership rights, and there would be no end to the risk of legal disputes. But still, one might object that security in ownership rights and the advantage of the previous owner in such cases are incompatible. Cujas uses a specifically Stoic argument to dispel the impression that there is a tension between usucaption and the demands of natural law. According to Stoic theories of duty, as outlined most prominently in Cicero's *De officiis*, there never is a real clash between what is morally valuable (*honestum*) and what is useful (*utile*) because everything that is useful for the community is at the same time privately useful. Cujas applies such an argumentative strategy to the case of usucaption: Because usucaption serves the common good, and because private utility can never be contrary to the common good, usucaption does not constitute a real detriment to any party involved<sup>9</sup>.

A further development took place when, at the turn of the seventeenth century, the question began to be debated whether the concepts also could be applied to relations between nations. Alberico Gentili (1552-1608) and Hugo Grotius (1583-1645) pioneered in applying the concept of usucaption to international relations. The connection between usucaption and the common good is in view here, too: As Gentili suggests, if the function of usucaption in civil law is to avoid endless legal disputes, why shouldn't usucaption be a suitable tool for avoiding endless political disputes over territorial matters?<sup>10</sup> And as Grotius points out, protracting wars and international conflicts to infinity would be contrary to the "common sense" of nations<sup>11</sup>. But in order to provide an end to international conflicts, usucaption had to respect in some way the rights of the previous holder of a territory. How could this be done in the absence of an international legisla-

6 Ibid.

7 OO II, col. 467. On *bona fides* and prescription in Roman law, see J. Partsch: *Die longi temporis praescriptio im klassischen römischen Rechte*, Leipzig 1906, pp. 7-19.

8 OO II, 475.

9 OO II, 467.

10 A. Gentili: *De iure belli libri III*, Hanau 1598, p. 171.

11 H. Grotius: *De iure belli ac pacis libri tres*, Paris 1625 [henceforth: IBP], p. 165.

tion? Gentili's solution, which was later taken up by Grotius, was to demand that there be a justified presumption that the previous owner of the territory had given up ownership rights. Gentili and Grotius called this presumption the "presumption of abandonment" (*praesumptio derelictionis*). In their view, once there is a justified presumption of abandonment, the new holder of a territory can be presumed to be in good faith even in cases (such as occupation in war) in which good faith was initially lacking<sup>12</sup>.

This is why the methodological concept of presumption played a crucial role in the debate over the applicability of usucaption and prescription in international law. Early modern thinkers took the concept of presumption from Roman law, as they had the concepts of usucaption and prescription. While some kinds of presumptions were encoded in written law (the so-called *praesumptiones iuris* and *praesumptiones iuris et de iure*)<sup>13</sup>, a third kind of presumptions are presumptions that are formed by real people, the so-called *praesumptiones hominis*. Such presumptions were understood as conjectures based on available signs (*signa*) or indications (*indicia*) and were taken to be true unless and until contrary evidence became available<sup>14</sup>. The presumption of abandonment was regarded as being itself capable of evidential support. For example when there were indications that the previous owner of the territory had neglected to reclaim ownership rights in a culpable way. Thus, while the issue of usucaption was an issue of central importance to early modern theories of international relations, it was pervaded with methodological considerations involving notions such as presumption and evidence.

Gentili and Grotius had applied the notions of usucaption and prescription to historical issues, such as the question of whether usucaption and prescription were recognized as institutions of the law of nations in biblical times or whether usucaption took place during the Roman occupation of the Holy Land<sup>15</sup>. Other political thinkers subsequently applied these concepts to more contemporary issues in international relations, such as the question of whether usucaption and prescription can settle some of the most pressing territorial disputes in Europe. One prominent controversy in which usucaption and prescription were invoked concerned the countship of Burgundy, and it is this controversy that led to an

12 For an overview of Grotius' views on the abandonment of ownership rights, see C. A. Stumpf: *The Grotian Theology of International Law. Hugo Grotius and the Moral Foundations of International Relations*, Berlin – New York 2006, pp. 186-189.

13 An example for the first kind is the presumption that someone missing for several years is dead. Obviously, this presumption can be revised when reliable news about the missing person's being alive becomes available. An example for the second kind is the presumption that an accused is innocent until proven guilty. Here, the law obliges us to use this presumption in legal procedures even when we strongly believe in the guilt of the accused already at an early stage in the trial. Presumptions of this kind were usually taken to be non-revisable in the light of new evidence. See, e. g., Alciato: *Opera* (see note 9), vol. IV, cols. 579-584.

14 See G. Menochio: *De praesumptionibus, coniecturis, signis, et indicibus*, 3 vols., Lyon 1608, vol. I, p. 8.

15 See Gentili: *De iure belli* (see note 10), p. 172; IBP, p. 165.

illuminating correspondence between Leibniz and his protégé Johannes Werlhof (1660-1711). In a long essay, Werlhof defended Grotius's stance on usucaption in international relations against criticism by the French historian Pierre du Puy (1582-1651). Du Puy defended the ownership rights of the King of France over the countship of Burgundy against allegations of usucaption on the side of the Empire<sup>16</sup>. In response to a letter from Werlhof, Leibniz sent Werlhof a shorter essay on the role of usucaption and prescription in international relations that he had written some time between 1687 and 1696, and the ensuing correspondence discussed many points touched upon in the two essays<sup>17</sup>. Some of the most interesting points in this exchange concern the role of presumption in applying the concepts of usucaption and prescription to international relations, and it is with them that the present essay will be concerned.

## 2. Usucaption and *praesumptiones iuris et de iure*

Like Grotius, Werlhof believes that the basis for usucaption in international relations is the presumption of abandonment, and it is exactly the view according to which usucaption in international relations can be based on presumption in such manner that seems problematic to Leibniz. At the heart of Leibniz's qualms lies the intuition that the presumption of dereliction contains something fictional. Legal fictions, according to a view generally accepted in early modern legal thought, have to be laid down in positive law<sup>18</sup>. Hence, legal fictions do not belong to the realm of natural law and, for this reason, cannot be applied to international relations that, in Leibniz's time, were not regulated by positive law. The outlines of this argument are clear enough. And given the prevailing theory of legal fiction, it seems evident enough that *if* the presumption of abandonment should be characterized as a legal fiction, it would not be applicable to the law of nations. But why should we think that the presumption of abandonment contains something fictional? Certainly neither Gentili nor Grotius thought this about presumption, nor did most of their contemporaries. So, how does Leibniz's view relate to the juridical tradition? And how could Leibniz's view be justified?

In this and in the next section, I will try to find an answer to these questions. As it turns out, Leibniz gives two distinct arguments for why the presumption of abandonment should be regarded as fictional. Moreover, for the reasons why

16 P. du Puy: *Traitez touchant les droits du roy tres chrestien sur plusieurs estats et seigneuries, possedees par divers princes voisins* (Paris, 1655), pp. 356-361.

17 For a useful, but mostly paraphrasing, overview of this text and the ensuing correspondence between Leibniz and Werlhof, see G. Grua: *La justice humaine selon Leibniz*, Paris 1956, pp. 291-296.

18 On legal fictions in sixteenth century thought, see I. Maclean: *Interpretation and Meaning in the Renaissance. The Case of Law*, Cambridge 1992, pp. 101-103. On Leibniz's typology of legal fictions, see P. König: "Das System des Rechts und die Lehre von den Fiktionen bei Leibniz", in: J. Schröder (ed.): *Entwicklung der Methodenlehre in Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert*, Stuttgart 1998, pp. 137-161, especially pp. 144-155.

the presumption of abandonment should be regarded as fictional Leibniz refers the reader to his early juridical notes from his Paris years, and there one finds, in addition to an earlier version of these two arguments, an additional hint, which will be examined in section 4. Proceeding in this piecemeal way will be necessary. Indeed, there is some confusion in Leibniz's arguments. It will pay to clear away what seems to be confused first, in order to get finally some grasp of a genuine insight that Leibniz may have had.

So let us begin with the first confusion. It is characteristically expressed in the following passage:

"An omission may be punished, but it does not seem to me to be compatible with natural law to form the fiction that what someone ought to have wanted can be said to be what he wanted or rather that it can be believed that he did not want some belonging of his because he did not display enough prudence in pursuing his right. Every presumption of what is false (which is ordinarily called a *praesumptio iuris et de iure* and usually believed not to admit contrary proof) is a fiction"<sup>19</sup>.

Leibniz's argument rests on two problematic assumptions: (1) the assumption that the presumption of abandonment should be regarded as a type of presumption that is laid down in law in such a way that it does not allow contrary proof; and (2) the assumption that for this reason the presumption of abandonment should be regarded as a legal fiction. The first of these two assumptions uses the category of *praesumptiones iuris et de iure*. Like *praesumptiones iuris*, such presumptions are laid down in written law. But unlike *praesumptiones iuris*, they were taken to be not capable of being revised in the light of new evidence<sup>20</sup>. However, Leibniz cannot base the claim that the presumption of abandonment is a *praesumptio iuris et de iure* on a broad consensus in early modern legal thought. Giovanni Francesco Balbi (ca. 1479-after 1518), the author of one of the most influential early modern works on prescription, notes that the fifteenth century jurist Felino Maria Sandeo (1444-1503) suggested such an analysis of the presumption of abandonment based on "immemorial time", i. e., a time after which memory of any contrary facts has ceased: "Felino as the only one holds [...] that the presumption resulting from such a stretch of time [...] is called *iuris et de iure*, in such a way that it does not allow contrary proof, even though it allows the proof that not so much time has passed"<sup>21</sup>. To judge from Balbi's assessment, in the sixteenth century Felino's view was considered a minority

19 Leibniz to Werlhof, 17/07/1696, in: G. W. Leibniz: *The Art of Controversies*, ed. and trans. by M. Dascal (with A. Cardoso and Q. Racionero), Dordrecht 2007 [henceforth: AC], p. 350; A I, 12, 740-741. See also AC, 345; A I, 12, 694; and Leibniz to Werlhof, 07/08/1696, AC, 352-353; A I, 13, 210-211. Occasionally, I modify the translations from AC. Other translations are my own.

20 See Alciato: *Opera* (see note 9), vol. III, col. 584.

21 G. F. Balbi: *Tractatus de praescriptionibus*, Cologne 1590, p. 125: "[S]ingulariter dicit Felinus [...] quod praesumptio resultans ex spacio tanti temporis [...] dicitur iuris & de iure: adeo quod non recipit probationem ad oppositum, licet admittatur probatio, quod non sit lapsum tantum tempus".

opinion. Accordingly, Balbi's own analysis of the presumption of abandonment based on immemorial time understands it to be a kind of revisable belief:

"[N]ote that this negative claim, that memory does not exist, cannot be proved by a document [...] But its contrary, namely that memory exists, and thus the affirmative claim, can very well be proved by a document [...]"<sup>22</sup>.

Likewise, Aimone de Cravetta (1504-1569), the author of another influential early modern treatment of prescription, writes: "The old age of time induces in these matters only a presumption, but the presumption has to give way where evidence concerning the truth appears"<sup>23</sup>. And Grotius maintains that time exceeding the memory of man ordinarily suffices for such a presumption "unless there are very strong reasons to the contrary"<sup>24</sup>.

Thus, Leibniz seems to have been quite wrong to believe that the presumption of abandonment was generally believed to be incapable of contrary proof. But even if he had been right about the analysis of the presumption of abandonment as a *praesumptio iuris et de iure*, this would not have implied anything concerning the fictional nature of this presumption, as expressed in Leibniz's second assumption. Already in his notes from the Paris years, Leibniz characterizes *presumptions iuris et de iure* as fictions<sup>25</sup>. But such a characterization departs from the traditional view of *praesumptiones iuris et de iure* as articulated, e. g., by Alciato. In his *De praesumptionibus* (1542), Alciato maintains that *praesumptiones iuris et de iure* differ from legal fictions. In his view, a legal fiction is "a disposition of the law that goes against the truth in a possible situation and is introduced for a just cause"<sup>26</sup>. By contrast, all presumptions, in his view, are "based on the truth" (*fundantur in veritate*)<sup>27</sup> or, more precisely, because presumptions still are conjectures, every presumption is "based on what is likely to be true" (*fundata super verisimili*)<sup>28</sup>. Werlhof makes a similar point in response to Leibniz:

"The rule is: no one is presumed to abandon what belongs to him. But rules have exceptions, and I don't know whether a mere fiction can account for the exceptions here. One thing is a fiction that springs arbitrarily from the human will; another, a presumption that arises from natural conjectures"<sup>29</sup>.

22 Ibid., p. 128: "Et nota quod ista negativa, Memoriam non extare, non potest probari per instrumentum [...] Sed eius contrarium, videlicet memoriam extare, & sic affirmativa, bene potest probari per instrumentum [...]"

23 A. de Cravetta: *Tractatus de antiquitate temporis*, Venice, 1576, fol. 166r-v: "[A]ntiquitas temporis in hac materia solum inducit praesumptionem, sed cessat praesumptio, ubi de veritate adparet in contrarium".

24 IBP, p. 168.

25 "Definitionum juris specimen, 1676?"; A VI, 3, 631, note 152.

26 Alciato: *Opera* (see note 9), vol. IV, col. 575: "Fictio est legis adversus veritatem in re possibili ex iusta causa dispositio".

27 Ibid., col. 576.

28 Ibid., col. 584.

29 Werlhof to Leibniz, 14/07/1696; AC, 348; A I, 12, 714. See Werlhof to Leibniz, 04/08/1696; AC, 351; A I, 13, 208.

Thus, Leibniz has not given us sufficient grounds for regarding the presumption of abandonment as a *praesumptio iuris et de iure*, nor would such a characterization give us sufficient grounds for regarding the presumption of abandonment as something fictional. This, then, is the first confusion on Leibniz's part that we should set aside.

### 3. Usucaption, Presumption, and Intention

There is a second reason why Leibniz understands the presumption of abandonment as a fiction. This reason, too, contains some confusion but, nevertheless, it will help us get closer to what might be right about the view that the presumption of abandonment contains something fictional. This view strongly departs from Grotius, who argues that the passage of time *is* relevant for forming evidence-based conjectures concerning the intentions of a previous owner. Grotius concedes that an act that is not legitimate at the beginning does not become legitimate through the mere passage of time<sup>30</sup>. But while it is credible that someone might remain silent out of fear for some time, it is less credible that fear could be a sufficient reason for remaining silent for a very long period of time. A long period of time, Grotius argues, would provide enough opportunity to get advice about how to deal with fear<sup>31</sup>. Likewise, while it is credible that someone might remain ignorant of his ownership rights, a long period of time provides many occasions for coming across the missing piece of knowledge<sup>32</sup>. Because the passage of time justifies forming a presumption of abandonment, the passage of a long time alone can function as a cause that creates a new right<sup>33</sup>. Grotius uses a passage from the Roman historian Josephus Flavius to illustrate the relevance of this point for international relations. Josephus puts a speech in the mouth of King Agrippa, which reproaches the Zealots for having decided to fight for liberty too late. Josephus comments that the fact that the Jewish people had accepted Roman ruling for such a long time means that they acted in the way of a people who have given up hope of ever regaining power over its own territory. By contrast, Leibniz argues:

“[I]t is not unusual that the law makes the fiction of an intention to abandon that does not exist, in a way that is neither unjust nor improvident. But the authority of scholars of natural law does not belong to legislation, and hence they should not use fictions but arguments”<sup>34</sup>.

For Leibniz, the presumption of abandonment is something fictional in the sense that it can be contrary to the intention of the previous owner. Here, Leibniz gets much closer to a view that can be found in the early modern literature on prescription. For example, Balbi holds that “[i]n prescription what intervenes

30 IBP, p. 165.

31 Ibid., p. 168.

32 Ibid.

33 Ibid., p. 171.

34 AC, 344; A I, 12, 693.



is not true will, but fictional and presumed will”<sup>35</sup>. Balbi bases this claim on an analysis of a passage from the *Digest*, which runs as follows: “The term ‘alienation’ also covers usucaption; for it hardly happens that someone does not seem to alienate, who allows usucaption to take place”<sup>36</sup>. As Balbi argues, this passage supports his account of the presumption of abandonment, “[f]or the term ‘seem’ implies fiction [...] Also the term ‘hardly’ has the same effect because it is the sign of figurative usage”<sup>37</sup>. Leibniz expresses the possible gap between presumption and actual intention as follows:

“Whoever is knowledgeable about and attentive to his rights and does not take advantage of an opportunity to recover his possessions, can in fact be considered imprudent and negligent; but this does not allow one to think that he wanted to give up his possession, as long as it can be believed that, if asked, he would give an altogether different reply”<sup>38</sup>.

Of course, Leibniz is right that someone who is presumed to have given up ownership may describe his intention in an entirely different way. But is this sufficient to characterize the presumption of abandonment as a fiction? It would be sufficient if the conjecture concerning an intention to give up ownership were the only legitimate reason for forming such a presumption. Yet, it is far from clear that this is the case.

Indeed, it was doubted by the influential Helmstedt-based historian Hermann Conring (1606-1681). In his *De Germanorum imperio Romano* (1644), Conring frequently invoked usucaption and prescription to prove the discontinuity between the Roman Empire and the Holy Roman Empire of German Nation<sup>39</sup>. Moreover, in what he called a “digression in the philosophy of law” in his *De finibus imperii Germanici* (1654), he argued that there are legitimate reasons for forming the presumption of abandonment other than conjectures concerning the *actual* intention of the previous owner, namely, conjectures concerning the intentions that the previous owner *should* have had. Werlhof refers to Conring’s argument when he suggests: “It should be assumed that someone does not want what a good and prudent man does not want, for the contrary would be opposed to natural equity – hence, the latter can neither be presumed nor expected”<sup>40</sup>. Put this way, the suggestion invites an obvious response that is found in one of Leibniz’s subsequent letters. As Leibniz reminds us, each of us knows what it

35 Balbi: *Tractatus de praescriptionibus* (see note 21), p. 16: “[I]n praescriptione non intervenit voluntas vera, sed ficta & praesumpta [...]”.

36 *Digest* 50.16.28pr: “Alienationis verbum etiam usucapionem continent: vix est enim, ut non videatur alienare, qui patitur usucapi”.

37 Balbi: *Tractatus de praescriptionibus* (see note 21), p. 17: “Nam verbum Videtur importat fictionem [...] Facit etiam verbum Vix: quae est nota improphetatis”.

38 AC, 344; AI, 12, 693.

39 On Conring’s use of the concept of prescription in *De Germanorum imperio Romano*, see C. Fasolt: *The Limits of History*, Chicago – London 2004, pp. 113-115, 123-124.

40 Werlhof to Leibniz, 14/07/1696; AC, 348; AI, 12, 714. That Werlhof derives this principle from Conring becomes clear in Werlhof’s *Vindiciae Grotiani dogmatis de praescriptione inter gentes liberas contra illustrem scriptorem Gallicum Petrum Puteanum*, Helmstedt 1696, sec. 32 (no pagination).

means to give up ownership, and we only have to reflect upon our own minds to understand what conditions have to be met for abandonment to take place. Leibniz concedes that if we all were fully rational, the fact that a person lets pass unused an opportunity of regaining hold of some previous belongings would indicate a will of giving up ownership. But, as he is quick to point out, we seldom act in a fully rational way. Rather, we are subject to forgetfulness, error, lack of information, self-deception, and so on. Reflection on our own mind tells us that even when we become aware that we have acted irrationally we do not regard the mere passage of time as indicating that we have given up ownership. Hence, “it is not proper to attempt to judge whether someone wants what a prudent man wants”<sup>41</sup>. As far as it goes, this is certainly a plausible argument. However, if we turn to the details of Conring’s own way of stating the argument, it will soon become clear that Leibniz has overlooked something important.

Conring argues that for usucaption in international relations, differences in the forms of government matter. In his view, this is so because the nature of different forms of government gives different weight to the interests of the citizens. In republican forms of government, the utility of the citizens is to be preferred over the utility of the officials, while in despotic forms of government the utility of the officials is to be preferred over the utility of the citizens<sup>42</sup>. But even in despotic states, the utility of the citizens cannot be entirely neglected:

“By natural law, every sovereign must, as far as possible, care [...] for his state [...] Because even the single masters owe some care to their slaves [...] and commit some injustice to their slaves if they do not provide this; even more so are masters with sovereign power bound to show regard towards their subjects [...]”<sup>43</sup>.

Take this insight together with the principle that “[i]n doubtful cases one has to assume that everyone would want or not reject what a good and prudent person would want”<sup>44</sup> (where the will of the good and prudent person is understood as being “in accordance with natural law”<sup>45</sup>), and you get some interesting consequences:

“From these premises it follows, *first*, that the sovereignty of those communities that were founded for the sake of the public well-being of all, cannot recover the sovereignty, once it is lost, if this cannot happen without the highest damage to these communities [...] For otherwise

41 Leibniz to Werlhof, 17/07/1696; AC, 350; A I, 12, 740.

42 H. Conring: *Opera*, vol. I, Braunschweig 1730, p. 271.

43 Ibid.: “Jure naturae obstrictus est imperans omnis, quoad licet, curare [...] rempublicam suam [...] Cum singuli domini etiam debeant suis servis aliquam curam [...] quam nisi praestent iniurii in servos sunt; multo magis tenentur imperantes domini subditorum rationem habere [...]”.

44 Ibid.: “In re dubia existimandum est, quemlibet id velle aut non nolle, quod vir bonus & prudens velit”.

45 Ibid.: “[V]iri [...] boni & prudenti voluntas naturae est juri consentanea”.

the commodity of the ruler would be preferred over the advantage of the people: which is against the nature of these communities, and also not approved by a good person”<sup>46</sup>.

Thus, in the case of civil governments the question of whether sovereignty has been given up is not so much a question of the actual intention of the officials; rather, the criterion that tells us what a good and prudent person should want to tell us something about the conditions under which the officials lose their sovereignty over the entire community – namely, when they act in such a way that they prefer their own interests over the well-being of the community. What matters for the presumption of abandonment, thus, is not what the officials would say if they were asked; rather, what matters is the nature of civil states itself.

Conring modifies this conclusion with respect to despotic states:

“But the same conclusion does not apply when abandonment has taken place in despotic communities. For in them it is permissible to protect the rights of the rulers at the expense of the incommmodity of the subjects [...] However, if this damage is connected with the evident danger of extreme damage for all subjects, this sovereignty has legitimately to be given up: for this is also not what a good and prudent person would do”<sup>47</sup>.

Thus, the relation between the interests of the rulers and the interests of the citizens is different in the case of despotic governments; but nevertheless, there are limits to how far the interests of the citizens can be neglected. Again, the criterion of what a good and prudent person should do does not tell us anything about the actual frame of mind of despots; rather, it is the nature of despotic states itself that determines cases in which it is justified to form the presumption of abandonment of sovereignty. Referring to Conring, Werlhof nicely wraps up this insight:

“In order to presume knowledge and will to the extent sufficient for abandonment, other conjectures are also valid, and a long possession is not always required as an indication of abandoned sovereignty, because states – in particular those that are governed democratically – demand almost instant and diligent care; and if this care is neglected by the ruler, their own nature itself in some way seems to hand them over to another ruler”<sup>48</sup>.

46 Ibid.: “Hisce positis consequens est *principio* quidem, imperium illarum civitatum, quae salutis publicae omnium causa coierunt, quando amissum fuerit, recuperari jure non posse, si id fieri nequeat absque civitatum illarum summo detrimento [...] Alioquin enim commodum dominantis praeferretur usui populi: quod est contra naturam illarum civitatum, nec a viro bono probatum”.

47 Ibid.: “At non licet ita colligere, factam derelictionem in civitatibus herilibus. In iis enim etiam cum incommodo subditorum licet dominantium jura tueri [...] Si noxa tamen illa conjuncta fuerit cum manifesto periculo extremi damni omnium subditorum merito derelinquendum est imperium illud: nec enim hoc vir bonus ac prudens egerit”.

48 Werlhof: *Vindiciae* (see note 40), sec. 17: “Ut igitur cum scientiae, tum voluntatis, quantum ad derelictionem satis est, adfuisse praesumatur, valent quidem & aliae conjecturae, neque semper ad indicium derelicti imperii longaeva aliqua possessio requiretur, cum Republicae, imprimis quae civiliter gubernantur, citam fere, sedulamque curam flagitant; quae si ab imperante negligatur, ipsa illarum natura eas ad alium quoddammodo devolvere videtur”.

Thus, a presumption of abandonment need not contain anything fictional because it is contrary to the intention of the previous owner. This, then, is the second confusion on Leibniz's part that we should set aside.

#### 4. Usucaption, Presumption, and Good Faith

Is there any sense in which Leibniz can be understood to have seen something illuminating when he claimed that the presumption of abandonment is closely similar to legal fiction? I think there is. The presumption of abandonment might contain something fictional for other reasons than those considered so far. This will become clear when we turn to another remark from Leibniz's early juridical writings. Recall that, according to the standard view, usucaption requires good faith. Leibniz points out that good faith is connected with presumption, too:

"Good faith is presumed from a title for a period shorter than 30 years; in a time of 30 and more years it is presumed from the passage of time, which is a *praesumptio iuris*. In immemorial time it is a *praesumptio iuris et de iure*, and the fiction of good faith is upheld even if the contrary is proven"<sup>49</sup>.

So, here we have one more sense in which prescription could be understood as containing something fictional: it involves the fiction of good faith. Again, the connection between *praesumptio iuris et de iure* and fiction might be problematic here, but the fictional nature of the presumption of good faith, in this case, does not seem to depend on the thesis that it is a *praesumptio iuris et de iure*. In fact, Werlhof takes a somewhat softer stance towards the presumption of good faith connected with immemorial time:

"The proof of bad faith has its place in the possession that [...] we noted is called 'immemorial'; nevertheless, confidence should be placed only in clear, full, & certain proofs, not at all, where as most often doubts occur, in histories, and, if others make objections, in documents and argument; for the most ponderous presumption of such a long time is in favor of the possessor, and when it nevertheless is overruled by the most valid contrary reasons, it can be counted among the cases that Grotius regards as exceptions"<sup>50</sup>.

So, for Werlhof it is, in principle, possible to overturn the presumption of good faith connected with immemorial possession; but for actually overturning this presumption, full proof is necessary – something that, due to the very nature of historical evidence concerning the distant past, will hardly ever be available.

49 "Elementa juris civilis, 1670-1672?"; A VI, 2, 89: "Bona fides praesumitur in minore Tricennali ex Titulo; in Tricennali et majori ex Lapsu temporis, quae est praesumptio Juris. In immemoriali est praesumptio Juris, et de Jure, et fingitur bona fides etsi contrarium probetur".

50 Werlhof: *Vindiciae* (see note 40), sec. 22: "[M]alae fidei quidem probationi contra eam utique possessionem, quam [...] immemoriam vocari diximus [...] omnino locum esse, neque alii tamen quam clarae, plenae, & certae, minime vero ubi dubia, ut persaepe, historiarum, & si qua alia opponuntur, documentorum & argumentorum fides est, cum gravissima sane pro possessione tanti temporis praesumptio militet, quae si validissimis nihilominus in contrarium rationibus enervetur, id ad casus a Grotio exceptos referri poterit".

Even if, according to Werlhof, the presumption of good faith allows what it, according to Leibniz, excludes – contrary proof – the practical consequences of both views seem to be quite similar: usually, the presumption of good faith connected with immemorial possession will not be capable of being overturned. But why would this fact make this presumption a fiction, as Leibniz claims?

As it turns out, Leibniz's claim makes explicit a highly problematic implication of some aspects of early modern conceptions of prescription. Let us start with a widely accepted view that the Spanish jurist Diego de Covarruvias y Leyva (1512-1567) puts as follows: "Bad faith is presumed if someone appropriated something in the beginning on his own authority, even if this thing had been vacant [...]"<sup>51</sup>. So, in cases where some foreign territory has been occupied, the natural thing is to assume that the new possessors are holding this territory in good faith and, hence, cannot invoke prescription and usucaption. As Covarruvias' contemporary, Fernando Vazquez de Menchaca (1512-1569) makes it clear, however, that time can lead to a revision of the presumption of good faith:

"[T]his is no good inference: I know that something belongs to someone else, hence I have bad faith; for I could think that the owner will permit it. And if you should say that the owner is presumed to forbid it [...] I answer: This is true for some time, but not perpetually; for he is presumed to want this up to a time of 30 years; but afterwards, he is presumed to want his belongings to be considered abandoned"<sup>52</sup>.

So, there is a close connection between the presumption of abandonment and the presumption of good faith: the presumption of abandonment justifies the presumption of good faith. This seems to be fair enough where the new owner can be reasonably sure that abandonment has actually taken place. The deeply problematic aspect of the connection between the presumption of abandonment and the presumption of good faith, however, becomes clear when we consider the case of error. The consequences of error are particularly relevant in immemorial prescription. In contrast to prescription of 30 or 100 years, this type of prescription was held to be independent from a legal title. As Covarruvias puts it, immemorial prescription "has the force of a title and supplements its absence"<sup>53</sup> (where a title is understood as "a cause that is by itself suitable for the transfer of ownership")<sup>54</sup>. Moreover, the conditions of immemorial prescription already contain the absence of any contrary legal action for immemorial time (otherwise, there would be contrary memory, and then immemorial prescription would not

51 D. de Covarruvias y Leyva: *Opera omnia*, 2 vols., Frankfurt 1608, vol. I, p. 434: "[...] malam fidem praesumi, si quis a principio rem aliquam etiam vacantem propria autoritate apprehendit".

52 F. Vazquez de Menchaca: *Controversiarum usu frequentium [...] libri tres*, Frankfurt 1594, pp. 72-73: "[N]on bene sequitur: habeo scientiam rei alienae, ergo habeo malam fidem, potui enim cogitare dominum permissurum. Quod si dixeris, quod dominus praesumitur vetare [...] replicabo, id verum esse ad tempus, sed non perpetuo; nam ita praesumitur usque ad annos triginta: sed postea praesumitur rem sua pro derelicto haberi velle [...]"

53 D. de Covarruvias y Leyva: *Opera omnia* (see note 51), vol. I, p. 419: "quae vim habet tituli, & eius defectum supplet".

54 *Ibid.*, p. 423: "[T]itulus est causa ex se habilis ad translationem domini".

get off the ground in the first instance). Hence, what matters in such cases is *only* good faith. And certain kinds of error were regarded as sufficient grounds for creating good faith.

This is why error has consequences for types of prescription that require a title that are profoundly different from the consequences that error has for types of prescription that do not require a title. Covarruvias describes the first case as follows:

“An error of law does not produce good faith sufficient for prescription, as long as a title is necessary for this prescription [...] For when a just title is necessary for prescription, the unjust title of an error of law, which does not help anyone in acquiring ownership, does not at the same time give a cause of usucaption and produce good faith”<sup>55</sup>.

By contrast, according to Covarruvias the following holds for the case of immemorial prescription:

“An error of law produces good faith sufficient for this kind of prescription that does not require a title but takes place by good faith alone. This conclusion is proved by the argument that if prescription requires only good faith, and true good faith is given, even under the condition of an error of law, it plainly follows that this good faith is sufficient”<sup>56</sup>.

Stated so bluntly, this view seems to be highly counterintuitive. Should any sort of legal error be an excuse for taking control of foreign belongings in good faith? Should there not be moral obligations to avoid such errors? In fact, other late Scholastic thinkers discuss this problem in more detail. Take as an example Johannes Medina (1492-1572), who was a widely cited authority on the theory of ownership. Medina concludes his discussion of good faith in prescription with the following remarks:

“As a corollary it follows that it is irrelevant for the prescription of the thing possessed out of which kind of error someone possesses it: for usually the distinction between an error of fact and an error of law is made, and again the distinction between an error of obscure law and an error of clear law. And it is said that the error of fact, but not the error of clear law excuses the possessor and makes prescription valid. However, if we stand by what we have said, whether someone possesses some foreign belonging out of an error of fact or an error of clear or obscure law, it is a fact that he has good faith if the error was unavoidable, which is why he believes that it is legitimate for him to possess the thing. But those who claim that the error of clear law does not exonerate the possessor, argue from a presumption: because it is presumed that he does not know the law only out of guilt or negligence, because anyone who asks could easily know the

55 Ibid., p. 430: “Error iuris non producit bonam fidem sufficientem ad praescribendum, quoties titulus est huic praescriptioni necessarius [...] Etenim cum titulus iustus ad praescriptionem iure requiritur: non potest titulus iniustus iuris errore, qui minime suffragatur cuiquam in acquirendis, & simul causam dare usucapioni, & bonam fidem producere”.

56 Ibid.: “Error iuris bonam fidem inducit sufficientem ad eam praescriptionem, quae titulum minime requirit, sed sola bona fide procedit. Haec conclusio probatur ea ratione, quia si praescriptio tantum bonam fidem exigit, & bona fides vera detur, etiam praemissio iuris errore, palam consequitur, hanc bonam fidem sufficere”.

law. Nevertheless, it is a fact that the truth can be opposed to presumption, and then one has to stand by truth and not presumption in matters of conscience<sup>57</sup>.

Here, one encounters some restrictions on which kinds of error justify good faith. Certainly, Medina's discussion excludes some frivolous and immoral kinds of error from the acceptable grounds of good faith. Still, he accepts errors – both of fact and of clear and obscure law – that are not the outcome of culpable negligence on the side of the person who makes the judgement. As Medina puts it: "It follows [...] that for good faith it does not suffice to believe that one owns what one possesses, unless this belief is probable and unavoidable"<sup>58</sup>. Hence, there is a wide field of error that, in Medina's and Covarruvias's view alike, is perfectly acceptable as grounds for good faith. Certainly, many of the situations discussed by Grotius and Conring would fall under the category of such acceptable errors: Longstanding silence of a well-informed previous owner living in secure conditions certainly gives some probability to the belief that the previous owner wants to give up ownership; acting contrary to the duties of a good and prudent person certainly gives some probability to the belief that an abandonment of legitimate sovereignty has taken place. The point is not that such beliefs cannot be mistaken and therefore be revisable; on the contrary, if such beliefs have been formed erroneously, they are revisable. The point is that, at the time when prescription takes place, these errors are sufficient to create good faith. And in cases of prescription that require good faith only, such errors are sufficient grounds for prescription, as well. If these errors are revised later, this revision is irrelevant for prescription. The legal consequences of prescription are definitive, and, as Balbi puts it, "prescription is taken for the truth"<sup>59</sup>. So, whether or not the new owners become aware of their previous error, and whether or not they feel comfortable or uncomfortable about their previous error, they are legally entitled to continue in their ownership in good faith. So, here there can be a real discrepancy between the actual state of mind of the new owners – from their personal perspective, revising their erroneous beliefs might create bad faith (the view that they should not be the owners of their new possessions); while the

57 J. Medina: *De rerum dominio, earum restitutione, & reliquis contractibus*, Cologne 1607, p. 145: "Corollarie sequitur, impertinens esse ad rem possessam praescribendam ex quo errore qui eam possideat: nam distinguunt communiter de errore facti aut iuris: & iterum de errore iuris obscuri, vel clari. Et dicunt, quod error facti, non error iuris, saltem clari, excuset possidentem, & faciat valere praescriptionem: videtur tamen stando in dictis, quod sive possideat quis rem alienam ex errore facti, sive iuris clari, sive obscuri, stat, quod habet bonam fidem, si error sit invincibilis, unde se putet sibi licitum esse rem illam possidere. Qui autem dicunt, quod error iuris, saltem clari, non relevet possidentem, procedunt ex praesumptione: quia praesumitur quod ius illud non nisi ex culpa, seu negligentia ignoretur, cum facile posset homo, si inquireret, illud scire. Stat tamen huic praesumptioni veritatem opponi, & tunc stabitur veritati, non praesumptioni in foro conscientiae".

58 Ibid.: "Sequitur [...] ad bonam fidem non sufficere, credere suum esse, quod quis possidet, nisi credulitas sit probabilis, & invincibilis".

59 Balbi: *Tractatus de praescriptionibus* (see note 21), p. 27: "praescriptio habetur pro veritate".

legal situation still allows them to continue their ownership in good faith. In this sense, the law allows a belief that is known to be false, and this corresponds exactly to the definition of legal fiction. And in this sense, Leibniz seems to have been right to claim that presumption of good faith contains something fictional.

### 5. Usucaption and Conflict Resolution

If the presumption of good faith is to be understood as a legal fiction, and if legal fictions are bound to positive law, a conception of prescription and usucaption based on the presumption of good faith cannot be part of natural law and, for the same reason, cannot be part of the law of nations. But does not Leibniz's line of argument undermine the central argument in favour of applying usucaption in international relations, namely, its capacity of avoiding endless territorial disputes? In Grotius' view, usucaption has been voluntarily introduced by a consensus of all nations because it serves one of the highest goals of humankind: Matters of power should at one point be solved in a way that gives certainty and thereby does not give rise to further controversy<sup>60</sup>. Such a line of argument might have some plausibility in cases such as the controversy over Burgundy, where sovereignty over the Franche-Comté was neither vital for France nor for the Empire. But would Alciato have convinced colonized nations that the stability of ownership relations that he considered to be so valuable for the colonizers was in their own best interest? And would Grotius have convinced the heads of the Jewish revolt against the Romans that giving up the right of national self-determination for the benefits of living under the *pax Romana* would have been in their own best interest? Evidently, as soon as the material and political existence of a nation are endangered by usucaption and prescription, such arguments have a hollow ring.

Denying that usucaption and prescription can be based on the presumption of abandonment or the presumption of good faith does not imply that presumption and usucaption cannot be part of the law of nations. Rather, Leibniz describes his goal as an attempt at "to perceive by natural light what is just in prescription"<sup>61</sup>. He maintains that the passage of time does play a crucial role for usucaption in international relations (though not the role of sufficient foundation for the presumption of abandonment or the presumption of good faith). For him, as in civil law, the role of time has to do with the nature of the available evidence. In one of his early tables of definitions of juridical and philosophical concepts, he argues that the reason for presuming that someone has given up ownership is the fact that, after a long time, the evidence supporting ancient ownership claims tends to have become uncertain<sup>62</sup>. Likewise, the reason for prescription is that the evidence necessary for initiating legal action becomes less and less easily

60 IBP, p. 170.

61 AC, 344; A I, 12, 694.

62 A VI, 3, 612. The idea is restated in Leibniz's "Notes on Chr. Thomasius, 1696?", Grua 2, 658.



available with the passage of time<sup>63</sup>. In his essay on prescription and usucaption, Leibniz comes back to these ideas: In relations between states, too, the passage of time tends to destroy relevant pieces of evidence<sup>64</sup>.

In this sense, usucaption and prescription have a place in the law of nations. Reckoning usucaption and prescription as such leads Leibniz to a quite novel conception concerning the relation between usucaption and evidence-based decisions:

“[I]f there were no obscurity, I would think that legal action should be no less accorded than if the affair had been concluded the day before yesterday. And I think it is correct to distinguish between immemorial time and the fact that, by force of its antiquity, it suppressed the memory of things or obscured it. In this respect, the assessment of the quantity of time differs significantly in private and public affairs, since in the former knowledge vanishes easily, whereas in the latter it is kept in chronicles and archives”<sup>65</sup>.

In contrast to Werlhof, Leibniz is happy to accept historical records as evidence to decide claims with respect to ancient ownership rights. Still, in public affairs that involve claims made by more than one nation, the question is how the evaluation of the historical evidence should be institutionalised. Leibniz does not say much about the matter, but he gives the following hint:

“[N]ations can be persuaded to decide to repel those who agitate the obscurities of the past [...] No doubt, some other powers must resist the more to those who vindicate obsolete rights by the force of arms and who do not admit arbiters and conciliators, the more they are dangerous because, in addition, the bad fruit of wars are larger wars, which spread out into the neighbouring nations”<sup>66</sup>.

As Leibniz explains in one of his early juridical papers, “[a]n arbiter is someone whom we ourselves have chosen”<sup>67</sup>. Moreover, “[a]n *arbiter* is an arbitrator who is obliged to respect the form of judgement”<sup>68</sup>. And finally, “[a]n *arbitrator* is someone with respect to whose judgement the parties of a controversy have formed a compromise”<sup>69</sup>. What we can gather from these hints is that Leibniz regards the evaluation of the available historical evidence as a matter of a procedure on which several nations have agreed, which fulfils certain demands of juridical form, and in respect of whose outcome the nations have formed a compromise in advance – presumably, an agreement of accepting the arbiter’s judgement and of realizing its practical import. Interestingly, invoking prescription in this way is not characterized as excluding a legal decision procedure; rather, the relation seems to be reversed: a legal decision procedure is needed to evaluate the available historical evidence. If it is found too obscure

63 A VI, 3, 613, note 73.

64 AC, 344; A I, 12, 693.

65 AC, 344; A I, 12, 693-694.

66 AC, 346; A I, 12, 696.

67 *Definitionum juris specimen, 1676?*; A VI, 3, 627, note 130: “Arbiter est quem nos ipsi designavimus”.

68 *Ibid.*, 628: “*Arbiter* est arbitrator cui iudicii forma servanda est”.

69 *Ibid.*: “*Arbitrator* est in cuius sententiam litigantes compromisere”.

to ground any reliable judgement, the natural law basis for prescription and usucaption is established; and due to the prior agreement of the parties to accept this outcome, it has some chances of fulfilling the purpose of usucaption in the law of nations: protecting international stability. If it is found clear enough to ground reliable judgements concerning ancient ownership rights, prescription and usucaption are not needed; rather, territorial disputes are settled on the basis of the arbiter's judgement. In this way, the notions of usucaption and prescription are integrated into the theory of resolving controversies that runs like a red thread through Leibniz's thought.

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