

General Property law short note for second year Law Students

Dear my students, you need to read this note critically & thoroughly and to try to provide answers for the questions therein. Furthermore, I have created a Facebook group named as **PROPERTY LAW DISCUSSION FORUM** and you are highly recommended to join it and we can have a discussion on different issues concerning general property law.

Class Six and Seven

Concepts and Theories of possession

In the ancient time, possession was related with actual exercise of control over the thing. It was perceived as a relation between a person and the thing. But, in the later time, another conception of possession emerged. This conception states that the person called the possessor should also be an owner of the thing he possessed. A person is not deemed to be a possessor unless he has been owner of the thing. Simply exercising physical control over a thing is not sufficient to be a possessor. But, this conception of possession prejudiced certain groups of people.

For instance, even if creditors hold the property of the debtor as security, they can do nothing with such property since they had neither possessory nor ownership right on such property. The fact that these third parties were prejudiced due to this conception triggered the change on such conception with the development of the economy. For example, banks may lend money for investors; but, they need securities as a pledge or mortgage. So, in this case, they need to be considered at least as a possessor. Then, the Roman writers started to interpret possession in a broader manner so as to include creditors or third parties having interest on a thing. So, there appeared two types of conceptions. The first is that to be said a possessor; it needs to be an owner. The second is that persons having various interests on a thing can be possessor of such thing. This conception was not also free from defects. Thus, different theories of possession were emerged later on.

General Property law short note for second year Law Students

1. Theory of possession

Subjective theory/ school of thought –

The first proponent of this theory is Savigny. This is why the theory is named as Savigny's school of thought. It consists of the corpus element (physical control over a thing) and animus element (the mental element).

- A. Physical element - This direct and indirect possession is called immediate and mediate possession respectively.
- B. Mental element –to be possessor, the person has to hold the thing with the intention of exercising ownership right over the thing. It suggests that a person is said to be a possessor only if he has an intention to be owner (animus domini). This school of thought recognizes direct and indirect physical control or corpus element over a thing. Hence, if a person has no animus domini, he is deemed to be detainer/a mere holder. Animus domini is recognized under article 1151 and 1168 of the CC.

Salmond, another proponent of theory of possession added animus posedendi which is another mental element. By animus posedendi, he means that the person holds the thing with the intention of being the possessor of such thing. In this case, pledge can be taken as an example.

2. The Objective Theory/ Ihering's theory of possession)

Proponents of this theory believed that physical control of a person over a thing is a sufficient requirement to consider such person as a possessor. Thus, it sticks to the requirement of corpus only for a person to be considered as a possessor for the fact that animus is that which cannot be proved. Their theory is justified by the fact that no one is able to prove the person's intention. So, they prefer to depend objectively on such things that are observable. This school of thought also recognizes both mediate and immediate possession. It believes that the protection of possession aims at preventing social disorder and keeping status-quo of the society. The legal protection extends up to robbers since they meet the requirement of corpus and any person who claims right on such robbed property should obtain his property through due process of law. In the case of objective school of thought, more than a person may become possessor of a thing at a time. The

General Property law short note for second year Law Students

pledge and the owner of the pledged thing can be good examples. When there appear more than a persons claiming possessory right over a thing, the mechanism of determining the possessor will be to search the cause of the possession. **##what are the possible justifications of possession?**

Which theory is recognized under the Ethiopian property law?

To begin with the definition, possession consists in the actual control which a person exercises over a thing. See art 1140(1). According to this article, it can be said that corpus is the most important element for the concept of possession under the Ethiopian property law regime. However, another legal provision of the civil code shows that even if this person has lost physical control temporarily over a thing, this person is still recognized as a possessor. This seems to lead us to the belief of what matters is the intent of the person. (Art 1142 of CC). Article 1147(1) of the CC also shows the mental element of possession.

What are the subject-matters of possession? Do you think the term **object** under art 1140 includes incorporeal things? Hint: possession has to do with objects of property.

What is actual control? - By actual control we do not mean that the possessor adheres or attaches himself to the thing intact. For example, in case of land, a person is deemed to be possessor of land if he uses or enjoys the land such as by ploughing and fencing.

How possessors actually control a thing? - The possessor may exercise his control over a thing directly or through a third party who holds such thing (art 1141). If a person having gone to a jangle hunts some beasts and puts them fencing a certain place, then such possessor is exercising immediate possessory right. But, if the same person paid someone and made him to possess and put such beasts fencing a certain area on his behalf, then he is exercising indirect or mediate possession over such beasts. The person who is acting to the interest of the actual possessor as an agent is called a mare holder or detainer (1147/1).

NB: the corpus element is alternatively called physical possession”, “de facto/actual possession”, “custody”, and “natural possession”. The Ethiopian property law opts to use **actual** control among the alternative naming.

Acquisition of possession

1. **Taking** – This is the acquisition of possession without the consent of the previous owner. It may be **rightful taking** (If the person takes Res nullius/ masterless object) or **Wrongful taking** (A person is taking the thing which is already possessed by another person).
2. **Delivery**- the new possessor has acquired his possessory status with the consent of the previous possessor. It is of two types.
 - A. **Actual delivery**- involves transfer of an object from the hands of one possessor to another. For instance, actual delivery of an object on sale, or on loan or deposit
 - B. **Constructive delivery**- In constructive delivery there is no change in the position of immediate possession; there is only transfer of mediate possession. **What** are the three categories of acquisition of possession as constructive delivery?
3. **Acquisition by law**- It is when the property of a deceased is acquired by the heirs of the deceased by operation of the law (art 826).

In fact, the Ethiopian property law fails to directly deal with acquisition of possession. However, it can be inferred from the legal provisions governing transfer of possession. If possession is transferred from the transferor to the transferee in either of the modes recognized under Articles 1143, 1144, and 1147, there will be acquisition of possession to the transferee.

Transfer of Possession (1143, 1144, 1145 and 1147)

Transfer of possession is the mechanism whereby the possessor right flows from one person to another person. Three ways of transfer of possession is recognized in the Ethiopian Civil Code.

A. The Common Form of Transfer of Ownership

General Property law short note for second year Law Students

Any transfer of possession made by virtue of a contract shall be affected at the time when the thing is delivered. See art 1143 of CC

Elements:

1. Contract- there should be existence of any type of contract (a sale contract, donation, loan, usufruct and pledge). But, the contract should relate to a corporeal good.
2. Delivery- means the actual handing over of a corporeal thing together with its accessories and intrinsic elements. Note should be taken that when one of them loses possession the other gets possession.

B. Goods Represented by Special Documents

Possession may be transferred to a new possessor by the delivery of the documents representing the thing and enabling him to dispose thereof. See Article 1144 of CC. Here, there is no actual delivery of the goods; rather there is the flow of the document representing a certain corporeal good from one person to another. Note should be taken that the documents mentioned in this article are not any types of documents; they must be specially printed documents. For example, a bill of lading.

NB: the word “dispose” appearing in article 1144(1) must be a wrong translation or a slip of the pen since possession does not always go hand in hand with ownership which brings the power or privilege of disposition (Art. 1204 & 1205).

Illustration:

Assume you are ordering **Toshiba core i3 Lap top** from China. Your friend from china ships the good through the Ethiopian Shipping Lines. You receive the bill of lading three weeks before you actually get the computers. It is said that you become the possessor of the computers your friend sends when you receive the document called bill of lading.

Who will be the winner conflict arises between the holder of the document and the other having an actual control over the thing? See art 1144(2) of CC

C. Constructive Transfer of Possession

General Property law short note for second year Law Students

The possession of things which are certain and the things pertaining to a generic species which have been individualized shall be deemed to be transferred to the new possessor where the person who exercises actual control over the thing declares that he shall henceforth detain it on behalf of the new possessor. See 1145(1) of CC

What the phrase “**certain things pertain to a generic species**” in art 1145(1) of the CC indicates? Does it refer that things must be easily identifiable in kind, with no contemplation of substituting any other thing which may be equivalent or approximate to the other thing?

Suppose you go to a shop owner and you buy a tape player. You ask the shop owner to keep the tape player you select for you for a week. The shop owner agrees to keep the item on your behalf. The shop owner isolates the tape player you identify from others and separately puts it. Here, the possessor is transferred from the shop owner to you and you are possessor of the tape player from the moment a tape player is isolated.

However, if the shop owner goes to bankrupt before you take the tape player, the law considers that possession is not yet transferred to you and creditors of the shop owner may take your tap player to settle his debt.(1145/2 +1988/2 of CC and 969-971 of the commercial code)

*Unless the contrary is proved, he who began to [possess] on behalf of another shall be regarded as a mere holder. (Art 1147). In this article the term **possess** is slip of pen and should be corrected as **holds**.*

The two legal provisions (Articles 1145 and 1147) provide that delivery can take place in directly.

For better understanding of the above legal provisions, look the following illustrations:

Ato ``X`` is a shop owner. He/she sells a quintal of sugar to you. You tell him/her to keep the sugar for you for a week. When you ask the shop owner to keep the sugar for you and he/she agrees, the shop owner converts himself/herself to a mere holder. Now the shop owner is holding the quintal of sugar for you. Here, a possessor right is transferred from the shop owner to Ato ``X``

General Property law short note for second year Law Students

Protection of Possession (1148&1149 of CC +685 and 686 FDRE criminal code

Protection is any measures and remedies that are available for the maintenance and uninterrupted enjoyment of one part of property right, possession. We think of protection where there is dispossession.

What is dispossession?

Although the Ethiopian property law fails to define what dispossession is, the definition can be deduced from the cumulative reading of articles 1148& 1149 of the cc. Thus, dispossession is a material act of interference or disturbance committed against a possession or detention of another or the attempt to commit such acts; a deprivation or usurpation of a thing which was under the possession or detention of another.

When your possession is interfered with, you have three modalities of protecting a possessor.

A. Use of Force

Where the thing had been taken away from him either by violence or secretly, he may take it back forthwith, either by expelling the usurper or by seizing the thing from the hands of a usurper caught in the act or when running away. Here, the possessor /holder shall refrain from any act of violence, which is not justified in the circumstances. What is reasonable force?

Suppose Ato ``X`` robs you of a bag. The robber is running away. You can follow the robber. If you catch him, you can recover your bag. You can use force, if necessary, that quantity of force that enables you to get the bag back.

B. Civil Action (1149)

This is the mechanism to protect possession by bringing a court action called possessory action.

Elements:

Who have the right to bring possessory action?

Both the possessor and the holder are given the right to bring possessory action within two years (look the Amharic version) from the day of the usurpation or interference. Thus, to win the litigation one must show the existence of possession (the facts of control directly or indirectly).

What is the time limit to bring a possessory action? See Amharic version of art 1149(2)

General Property law short note for second year Law Students

What if the action is brought after two years? The person who is sued can raise a preliminary objection as per art 244 (2) (f) of the civil procedure code and ask the court to dismiss the action.

What will be the fate of the person who fails to bring his case within two years? After the two years, the possessor, if he/she is an owner, must bring a petitory action. **What** is the difference between possessory action and petitory action?

What is required to bring possessory action? In order to bring a possessory action, you must show that your possession is disturbed.

What is disturbance of possession? Material act need to be targeting, either imminently or actually, against the peaceful use and enjoyment of a thing under someone's possession or detention. For instance, if part of your land is taken, then that is disturbance. If you are evicted from your house, that is a disturbance too. If you are still in your house but the noise from a neighbouring house is so excessive that you cannot sleep or do quietly what you have to, that might lead to disturbance of possession.

Who makes disturbance?

Assume that Ato Belete builds a house on a plot not properly given to him. The city government asks Ato Belete to demolish the house and clear the land. Ato Belete may not have the **right** to bring possessory action. There is a **law** that allows city authorities to make sure that illegally controlled plots are cleared.

The police may undertake a search under a search warrant. The person whose premises are being searched cannot complain so long as the police undertake the search strictly on the basis of the scope of the search warrant.

What are the possible remedies?

If you are successful in your possessory action what are the reliefs you may get? As per article 1149(3) of CC, you may have several remedies depending on the type of relief you ask for. If your house is, for example, taken away, you may get the defendant removed. Compensation may also be ordered. Another possible remedy is ordering the defendant to stop interfering with your quiet enjoyment of your **property**. It all depends on the facts of the case and the remedy you want to obtain.

General Property law short note for second year Law Students

C. Penal Action

Articles 685 and 686 FDRE criminal code which criminalizes acts of interference, disturbance and usurpation of possession is the criminal law remedies available for the possessor to protect its possession.

Note: if your action is based on penal **law**, the defendant may be ordered to pay a certain amount of money, by way of punishment, to the state. The defendant may also be imprisoned.

Defects (Vices) of Possession

Defects of possession refer to an expression that describes the existence of some defect in or relating to a given possession. These are state of affairs which without destroying possession make it juridical valueless when compared with normal cases of possession.

The vice of discontinuity- it arises when the possession of a thing is not continuous. Continuity consists in the regular, successive acts of possession such as use and enjoyment to the exclusion of others at sufficiently short intervals not to form lacuna/or gap). See 1142 of CC

Vice of secrecy- arises when a person attempts to hide his status or his acts relating to possession from the general public or from those who are interested in knowing it. As the name itself suggests it is not public, but secret one. The reasons may vary from case to case. See art 1146(2) of CC

Vice of equivocality-/dubious possession- on the other hand arises when a person is shown to exhibit ambiguity as to his proper status with regard to a given object. It is whether he is actually holding a thing on his own account or on behalf of other remains vague or confused for external observer. See art 1146(3) of CC

Vice of violence- expresses the manner of acquisition of a thing which is now under the possessor's hand. If the possessor acquired it through act of violence, or sobbery, or theft or misrepresentation (fraudulent act) it is said to have the vice of violence. See arts 1148 of CC

What is the effect of Defective Possession?

General Property law short note for second year Law Students

Regarding the two defects (defects of dubious and secrecy), article e1146 (1) of the civil code states gives the effect. Thus, secret or dubious possession shall give rise to no right. However, for the effect of these two remaining vices (vice of violence and discontinuity), Art. 1146 (1) shall be applicable by analogy.

Effects of legally obtained possession

Under normal circumstances and without those special cases where in possession may be acquired through agreement or any other juridical act that limits, possession has the following and other effects:

- possession is one of the essential conditions (prerequisites) for acquiring ownership;
- it serves as a ground of creates the bridge for, real security such as pledge and lien;
- possession of a thing for a long period of time may lead into the acquisition of ownership (acquisition prescription);
- possession is a prima facie evidence of right of ownership of corporeal movable objects;
- possession lightens or reduces the weight of evidence required by a claimant to assert proprietary interests; It relieves the burden of owners in cases where they cannot produce any or satisfactorily for different reasons;
- Possession is protected and cannot be defeated by an allegation of jus tertii (by arguing that the object belongs to someone other than the plaintiff); etc.

HAVE A JOYFUL READING!!