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PROPERTY LAW I

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Introduction to the Module

This course (Property Law I) starts with short discussion of private property and the things that can be put under private control as well as property rights that can be exercised over the things individually.

The provisions of Civil Code (1126 – 1256) which deal with property Law I proceeds with the general assumption that all the rights or powers which can be exercised over things are vested in single individual. When we talk about powers or rights which can be exercised over things, we are referring to such powers or rights as the right to use, collect fruit, possess and manage the thing, give privileges to other individuals, create rights in rem like pledge, mortgage, usufruct, servitude and most importantly the right to alienate (transfer) the thing to another person or the right to put an end to the commercial use of the thing.

The course raises so many questions and addresses the issues in different ways. In the first part of the course some theoretical issues about private property are raised. The justification for property as well as the basic difference between patrimony and property is briefly discussed in this part. In the next part of the course you get some articles (1126 – 1139), which raises some basic issues about things which can be the subject matter of individual property rights. In these articles you get the classification of things as movables and immovable as well as intrinsic elements and accessories. The articles also provide for some basic legal consequence of such classifications.

In the other part of the course you get articles 1140 – 1150. These provisions focus on the first and the important property rights, i.e. the right of possession. The provisions mainly deal with issues like: how is possession (actual control) over a thing is created and what are the basic criteria to be fulfilled by an individual to be considered as possessor, how a person can exercise his right of possession, some basic defects in possession & loss of possession as well as the legal remedies available to person whose possession is impaired by other person.

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The next to come is the provisions which deal with the widest property right, i.e. the right of ownership. The regulation of different aspects of possession is followed by Arts. 1151 – 1187. All of these articles provide for different mode of acquisition of ownership. Arts.1151 – 1160 give answer to the question: how a person can acquire full right of ownership over movable properties which are master less? In these provisions you get also some properties which are exceptions to acquisition of ownership by occupation, such as things lost and found, treasure and antique. These things are not subject to acquisition of ownership by occupation. Arts 1161 – 1167 provide for another mode of acquisition, i.e. acquisition by possession in good faith. The provisions deal with the case where a person can acquire ownership over a thing sold to him by a person who does not have a right to transfer the thing. The provisions provide also for essential elements to be fulfilled by a person who acquires ownership by possession in good faith.

Before proceeding with those provisions which deal with accession, you have couple of articles providing for acquisition of ownership on immovable property through passage of time. The concept of accession is provided under Arts. 1170 – 1183. In this articles the legal principles as regards ownership of fruits, crops sown and building constructed over the land of others with or without the consent of the owner/ possessor of the land as well as issues of transformation, adjunction and merger are provided. Under Arts. 1184 – 1187 you get some legal conditions which are important fulfilled by an owner of a thing who wants to transfer his right/power over thing to the other party. More importantly it is not only acquisition of ownership, but also loss of ownership has been regulated by law (Art. 1188 – 1197). In these articles you have necessary preconditions for the loss of right of ownership in case of movables and also immovable. For any one to enforce his right of ownership specially in case of dispute over the thing, the court need to have guiding principles. Arts 1193 – 1203 carry out this function of providing basic principles applicable in proof of ownership.

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The next couple of articles (1204 – 1206) provide for the general attribute of ownership and its essential elements. Articles 1207 – 1227 basically provide two important ideas about ownership. The first is that an owner has exclusive say over his property except the limitations imposed by law for the protection of rights of other owners and generally for public good. The second is that ownership of thing (specially immovables) is not absolute and that there are some obligations imposed on the owner.

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UNIT ONE

CHAPTER ONE

INTRODUCTION TO AND JUSTIFICATION OF PRIVATE PROPERTY



Objectives:-

In the Introductory part students should know the following:

- general introduction to the concept of property
- the basic distinction between terms like '*property*' and '*patrimony*'
- the basic theories for justification of property (private)
- the basic premises of each theory
- the contribution of and the short coming in each theory.

Introduction to the concept of property

The term "*property*" is not a term which can be used in a single or uniform sense. It has been used in a variety of senses for a long period of time.

In its widest, which is the oldest, sense property refers to all legal rights of a person whatever the description of that right may be. In other words, the property of a man is all that belongs to him in the eyes of the law. In this respect, Hobbes considers as property of a man all his life, limbs, conjugal (marital) affection, any means of living etc. Another writer, Locke also says every man has a property in his own person. However, in the present time this widest sense of the term property is becoming out of fashion.

In a relatively narrower sense, property includes the proprietary rights of a person rather than his personal rights. Proprietary rights refers to estate or property of a person or those rights which can be expressed in monetary terms. Personal rights refers to a person's status, personal conditions like life, liberty and reputation, etc

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which don't have financial expressions/value. In this sense, the term property refers to Land, chattels, shares, debts or claims etc.

In other sense, some scholars states that the term property excludes those rights which are exercised against specific persons like money debts, benefit of contract etc. The term includes only rights which are exercised against things (*right in rem or real rights*), like rights in land, copy rights, patent etc. Still there are others who say that the term refers to rights which are exercised against corporeal things (material things - things which have physical existence).

? How do you distinguish between property and the concept of patrimony?

In whatever sense the term *property* is used, it seems to refer to rights. It is not all the rights that a person can claim, but only those that can be expressed in monetary terms or those rights which have definite financial value. The totality of all the rights and duties (liabilities) of a person is referred to as '*patrimony*". However, among these rights and duties, the term property refers to those, which can be assessed in terms of money. A person may not have a property at a given time, but every one has patrimony at any time because patrimony is directly related to personality and includes every form of rights and liabilities. An important point is that, the term property does not seem to refer to things. Things are objects of property rights and property refers to those rights which are claim and exercised against things.

The major theories for justification of property (private)

Although the term property refers to various forms of rights, the theories of property to be discussed under this section focus on the right of ownership or individual property. Many theories have been put forward to explain the origin of property and its justification. Among these, there are four major theories for justification of property. These are: The Occupation (Natural Law) Theory, The Labour (Positive) Theory, The Personality (Metaphysical) Theory and The Economic (Sociological) Theory.

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The Occupation (Natural Law) Theory

This is the oldest defense of private property. It is based on the assumed right of the original discover or occupant to dispose what thus becomes his own. More precisely, this theory is based on the principle of natural reason derived from the nature of things. That is, all things are originally ownerless and private property is acquired by occupation of these ownerless objects. Here, the main idea is that, he who discovers and occupies things of economic value for the first time should be an owner of the same for he is the one and the first person to recognize the economic utility of such things. However, now a days, this theory seems to be out of function for there are different defects in it. Firstly, it is difficult, if not impossible, to simply find accumulations of wealth. Rather, wealth is accumulated and found through labor of many, business manipulation etc. Secondly, in the present situation, there are no as such many things which are ownerless and uncontrolled. Most of economic things have been put under individual control or government regulations and even in a few class of things where occupation is possible, writers are apt to think of the labour invested for the occupation itself.

? Can you identify specific provisions of the Civil Code dealing with acquisition of ownership by occupation? Can you identify what specific forms of occupations are recognized?

Clue :- Read Arts. 1151- 1153 of the Civil Code of Ethiopia.

The Labour (Positive) Theory:

This theory seems to be one step further in occupation theory. That is, under this theory the focus is on ‘labor’ for it is the basis of private property, even in case of occupation. The premise of this theory is that: property is the result of individual labor. Under this theory no man has a right to property which he has not acquired by his personal effort. The essential rule in this theory is that labor has to be encouraged and this will be achieved by guarantying everyone to be an owner of what he

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produces by his own labor. However, there are some situations where a person may be an owner of property without directly investing any labor.

? Is there any labor invested where a person acquires property either through succession or donation of various types?

The Personality (Metaphysical) Theory*:*

Under this theory, property rights are deduced from an individual's natural right to act as a free personality. Property is considered as objective manifestation of an individual liberty. We can say a person has a liberty or freedom only when he has a sphere of influence or area of self- assertion in the external world. Hence, recognizing private property is inevitable to recognize a personality of an entity. An individual is said to be free and able to express his will only if he has an exclusive sphere i.e. *thing* over which he can assert the concept of thine and mine. Under this theory, a person should be able to freely create rights for others for dispose (transfer gratuitously or for consideration at any time and in favor of a person of his choice) without seeking authorization from any other individual or organ. This is the only way to recognize the true nature of personality - *expression of its will*.

The Economic (Sociological) Theory

The economic justifications of private property, under this theory, are based on the idea that property is the means of securing and promoting maximum productivity. Productivity will be secured only if property is put under individual control. This is because, human history has evidenced that collective or communal control and use of property eventually results in unrestricted manner of use, neglect or misuse of property or often times results in war against each other. In short private property is an efficient way of utilizing resource. In this way, property is considered, not simply in terms of private rights; but most importantly in terms of social functions.

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Conclusion

Generally, whatever the justification of private property may be, in the political society it is well-established conception that property, law, and state are inseparable. If there is no law, property can't exist, and if there is no state, law can't be enforced. As stated by a great writer, Rousseau, it was to convert possession in to property and usurpation in to right that law and state were founded. The law of property is the systematic expression of the degree and forms of control, use and enjoyment of things by persons that are recognized and protected by law. Although property rights are justified and protected in this manner, we are bound to restrict it for unrestricted exercise of rights degenerate in to public nuisance. Permitting a person to do what ever he fills like doing with his property would result in nuisance or danger to life and eventually end up in making property itself valueless. Hence, the essence of property law is to recognize right of property as wide as possible together with all reasonable restrictions.

Activity One

1. How do you understand the term 'property'?

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2. Explain the basic distinction between the terms 'property' and 'patrimony'. Do you agree if a person asserts that property is an element of patrimony? Why or why not?

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3. Summarize, in your own language, the basic premises of occupation and labor theories as a justification for private property.

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4. Identify the main defects in the major theories explained above and discuss which of the major theories is more convincing to you.

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5. Unrestricted exercise of rights results in an evil to the society." Comment on this statement in light of property rights.

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CHAPTER TWO

CLASSIFICATION OF THINGS



Objectives:-

From the part dealing with classification of things, students should know the following:

- the major classification of things and the basic criteria for such classification
- the basic criteria to make distinction between: movables & immovable, intrinsic elements & accessories.
- the main legal consequences of classifying goods as: movables, immovable, intrinsic elements and accessories.
- the right and duties of the parties, as well as the nature of relations between two or more persons as regards: The principal thing and its intrinsic elements; the principal thing and its accessories.

2.1. Basic Classification of Things – Movables and Immovables

Our Civil Code deals with classification of goods. But before considering the classification under the Civil Code, it is better to make distinction between the terms ‘things’ and ‘goods’.

2.1.1. Definition of the terms ‘things’ and ‘goods’

The term ‘thing’ refers to every thing that has economic value to human beings. All things which are useful to human beings can be encompassed by the term ‘thing’ . In other words, it doesn’t matter whether a thing can be appropriated (controlled and put under individual ownership) or not, if it gives economic utility, then it can be considered as a thing. But the term ‘goods’ seems to have a bit narrower scope of application. This term refers to things; however, it doesn’t refer to all things which are useful to mean; but it refers to the class of things which are appropriable or appropriated by human beings. It refers only to those things which are under actual

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control of individuals, group of individuals or institutions etc. Here it seems necessary to make a statement or two about general classification of things. Hence, things can be classified as appropriable and non- appropriable. Appropriable things are those, which can be controlled by individuals. Non- appropriable things refer to just the opposite, i.e. things like sun, moon, air etc that cannot be put under individual control at all. Thus, things become goods and subject of property right only if they are actually appropriated to the benefit of private persons, government units, or collectively etc.

As the subject matter of property rights is goods, our Civil Code deals with classification of goods. The major class of goods that is directly addressed under the Civil Code is corporeal goods (goods which have physical or material existence). However, goods can be also incorporeal; for example, copy rights, trade marks, patent rights, in short all intellectual properties are incorporeal goods which can be a definite subject of property right.

Classification of things as movables and immovables

Under this section students should learn:

- *how to classify things as movables and immovables,*
- *the criteria used to reach at this classification,*
- *the gap in the classification adopted by the Civil Code,*
- *the solution to such gaps.*

The major classification which is recognized under the Civil Code is movables and immovable. From the cumulative reading of Articles 1126, 1127 and 1130 of the Civil Code one can understand that the basis for such classification is the physical nature of goods. The physical nature which is used in our law is the fact of mobility. If in any way a thing can move from one place to another, then this fact of mobility will make it movable. More over, the opposite of mobility, i.e. fixity is also another basis for classification. Things which have fixed situation and can't be displaced or which are not expected to be displaced are considered as immovable.

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The exclusive classifications of goods adopted by Civil Code are movables and immovables. When we read Article 1126, it seems that, if a given goods is not movable, then it will automatically be immovable (because Article 1126 provides: *All goods are movable or immovable*).
Let us consider the definition for movables things:

Art. 1127- Corporeal Chattels.-1. Principle
Corporeal chattels are things which have a material existence and can move themselves or be moved by man without losing their individual character.

Under this article the main elements of the definition are:

- that the thing should have material existence (Corporeality) .
- that the thing should be able to move by itself or be moved by external force
- that the thing should not lose its individual or physical character while moving or being moved by external factor.

These elements of movability are cumulative and if one is missing then the thing is not movable. For example, if a thing cannot be moved at all or if it cannot be moved without losing its individual character, then it doesn't full fill the elements of Article 1127 and hence it is not movable. But, does this mean that such a thing is automatically immovable? It does not seem to be so since the only immovable under our law are land and buildings (because article 1130 provides that: Lands and buildings shall be deemed to be immovables). In other words, although the definition of movables under Article 1127 and stipulative definition of immovable under 1130 depend on the physical nature of things, still there are certain things, which are neither movable by definition (Art. 1127) nor immovable by provision of Article 1130. Consider various rights that exercised on intellectual properties, like copyright, all industrial rights, trade marks, patent rights etc. The subject matter of all these rights are incorporeal things. These incorporeal things are neither movables, for they don't fulfill the element of Article 1127, nor immovables, for the provision of Art. 1130 is very much clear.

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Moreover, to appreciate areas left unregulated by provisions of Articles 1127 and 1130, consider, for example iron sheets fixed to a roof of a house, doors fixed to a house, bricks used to build a house, ditches for sewerage, water wells and dams, bridges etc. All of these things are not movable. Can we say these things are immovable with due regard to the provisions of Article 1130? This shows that there are other classes of things than movables or immovable by nature although the classification under article 1126 seems to be exclusive. So what is the status of the above things under the classification adopted of the Civil Code?
To get solution for the above problem, one may resort to Articles 1128 & 1129 and the wide interpretation of 1130 of the Civil Code. First read the articles

Art. 1128 – 2. Securities to bearer.
Unless otherwise provided by law, claims and other incorporeal rights embodied in securities to bearer shall be deemed to be corporeal chattels.

Art. 1129 – 3. Natural forces.
Unless otherwise provided by law, natural forces of an economic value, such as electricity, shall be deemed to be corporeal chattels where they have been mastered by man and put to his use.

Art. 1130 – Immovables.
Lands and buildings shall be deemed to be immovables.

These articles provide for movables by presumption as opposed to movables by nature or by definition under Art 1127. Things which is considered as movable by presumption under Art.1128 are claims. Claims are rights which are embodied in securities to bearer like check, bills of exchange and others. Hence the objects of claims are incorporeal things, however, this presumption also doesn't provide for incorporeal things stated above. Hence, the only solutions seems to be wide interpretation of Article 1128 to include different types of incorporeal things. The content of article 1129 is pretty clear and it provides for second presumption of movables. The elements of Art. 1129 are fulfilled (*natural forces*, that is things

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which do not have material existence; *controlled by human beings*; *put in to economic use*), it is possible to presume various such types of natural forces as movables.

The other solution for the above problem is wide interpretation of article 1130. In the first place, the second major class of things recognized under the Civil Code is immovable. In this regard Article 1130 clearly provides that land and buildings are deemed to be immovable.

This classification depends on the physical fact of fixity or immovability. This things are expected to remain at one place without possibility of movement. This nature is inevitable even to serve the purpose for which they are destined or for their economic utility. However, there are certain things which fulfills the element of fixity but not expressly included under Article 1130. Consider, for example, bridges, ditches, dams, wells etc. Are these things immovable in light of Article 1130? For one thing, Article 1130 itself uses the term '*deemed*' which indicates that the listing of land and buildings as immovable is not an exhaustive list rather an exemplary presumption. This is true because the word '*deemed*' connotes presumption. For another thing, although the term '*building'* under article 1130, in strict sense of the term, refers to house, it is possible to understand the term as it refers to different kinds of constructions. Therefore, if we say that the word '*deemed*' indicates exemplary presumptions, it is possible to add other things of similar nature and economic utility. Moreover we can say that since the word '*building*' is not limited to dwelling houses, stores etc, it is possible to extend it to every kind of artistic constructions like bridges, dams, wells, ditches etc,

? Read the above explanation and Articles 1126, 1127, 1128 and 1130 of the Civil Code together with *Art. 124* of the *commercial code* to identify what kind of good a business is.

Ato Seid built, in his farm place, a temporary *container-like* house for the storage of cotton product from his farm. While building the store, he put a number of big stones

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orderly on the surface of land. Making use of these stones as the basis, he built the store. There is no direct connection between the store and the land. It seems that it is possible to move the store to another place, if need arises. How do you classify this good? If dispute arises over this store, do you solve it in accordance with rules for movable things or immovable things? Why?

Clue:- If you say it is movable, in effect you are saying that various contracts relating to such a house can be made orally without complying with the requirement of Art. 1723, 1727 and others; you are saying that if such a house is given as a security, such contract of security is pledge etc. But is that our purpose to classify things?

Intrinsic Elements and Accessories

Under this section students should understand:-

- the definition of intrinsic elements and accessories,
- the basic distinction between the two,
- the legal consequence of this distinction,
- the application to practical cases.

The classification of things does not end by classifying things as movables and immovables by nature or presumption. There are other classes of things, which are considered as movables or immovables because of their purpose or condition. These are intrinsic elements and Accessories.

Read the following articles of the Civil Code dealing with intrinsic elements and accessories.

Art. 1131. - Intrinsic elements of goods. - 1. Principle.

Unless otherwise provided, rights on, or dealings relating to, goods shall apply to all intrinsic elements thereof.

Art. 1132. – 2. Definition,

(1). Anything which by custom is regarded as forming part of a thing shall be deemed to be an intrinsic element thereof.

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(2). Anything which is materially united to a thing and cannot be detached there from without destroying or damaging such thing shall be deemed to be an intrinsic element thereof.

Art. 1133. – 3. Trees and crops.

(1).Trees and crops shall be an intrinsic element of the land until they are separated therefrom.

(2). They shall be deemed to be distinct corporal chattels where they are subject to contracts made for their separation from the land or implying such separation.

Art. 1134. – 4. Rights of third parties.

(1). A thing which becomes an intrinsic element of a movable or immovable shall cease to constitute a distinct thing.

(2).All the rights which third parties previously had on such thing shall be extinguished.

(3). Nothing shall affect the right of such third parties to make claims based on liability for damages or unlawful enrichment.

Art. 1135. – Accessories. – 1. Principle.

In doubtful ceases, rights on, or dealings relating to, things shall apply to the accessories thereof.

Art. 1136. – 2. Definition.

Anything which the possessor or owner of a thing has permanently destined for the use of such thing shall be deemed to be an accessory thereof.

Art. 1137. – 3. Temporary separation from the thing.

No accessory shall lose its character of accessory where it is temporarily detached from the thing to which it is destined.

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Art. 1138. – 4. Rights of third parties.

(1). The right which third parties may have on a thing shall not be affected by such thing being destined to the use of a movable or immovable.

(2). Such rights may not be set up against a third party in good faith unless they are embodied in a written document dated prior to the thing having been so destined.

Art. 1139. – 5. Cessation of character of accessory.

(1). The owner of a thing may put an end to the character of accessory of such thing.

(2).Nothing shall affect the rights of third parties having had dealings with the owner o the faith of such character.

2.1.3 (a) Intrinsic Elements: -

First read the first four articles from the above enumerated articles.

These are, in principle, the building elements of things that we have classified above as movables or immovables. That is, whether a given thing is regarded as movable or immovable by its nature or presumption, it may have intrinsic elements.

? What kinds of things are considered as intrinsic elements?

A thing may be considered as intrinsic element in accordance with one of the following two basic principles. The two principles are: *Custom or usage*, and *Material unity*

Custom or Usage

This is the first principle in accordance with which a thing may be considered as intrinsic element. Under this principle, the determining element is the attitude of the individuals or the society which makes a thing an intrinsic element. Under this principle it is not the physical relation between the two things which makes one thing an intrinsic element of the other. It is just a mutual understanding of the society

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where the things concerned are put in to use. Although one thing may be detached from the other without any damage to both of them, a thing may be considered as an intrinsic elements of the other if there is an established custom to that effect.

However, under this criterion because of the nature of the criterion, i.e. custom, problem may arise as two how to identify what is intrinsic element and what is not. This is because, custom may vary from one area to another; or even in the same area the understanding of the members of that society may not be sufficiently uniform. What will happen if dispute arises between two individuals?

Example:-

Mr. A and B, living in different custom, had a dispute. Mr. A claims a saddle to be an intrinsic element of a horse in accordance with his own custom. Mr. B also may consider the horse and the saddle as separate things to be considered separately in accordance with his own custom. How are you going to settle the dispute by making use of custom as a criterion to determine whether the saddle is an intrinsic element or not? Which custom are you going to apply? Mr. A's custom or Mr. B's custom? Why?

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Whatever your answer may be, when the criterion is custom, the nature of the relation between the two things, like detachability from the principal thing, is not considered. It is only the attitude of the people in the area where the thing is used. (Read Article 1132 (1) of the 1960 Ethiopian Civil Code).

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Material unity

This second criterion to consider a thing as an intrinsic element is pretty clear to understanding and easy to apply. Here, the main thing is the nature of the relation between the things to be considered as intrinsic element and the principal thing. The material unity between the two things is very important. The two things should be united in such a way that they cannot be separated or detached from each other without any material damage to any of them. These types of intrinsic elements are things without which any principal thing can't be complete.

Example

A house is unthinkable without building materials like bricks, iron- sheets, cements, woods, etc. At the same time, once these things are used as building materials, they are no ore detachable and cease to exists as an independent thing; rather they will be considered as part parcel of the house, which is made out of these things.

? Can you give three examples of intrinsic elements under each of the above two criteria (custom and material unity)? Can you explain how your examples fit in to the respective criterion?

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? Assume that some door and windows are fixed to a house by bolts and can be detached without causing any physical damage to the house. Do you think that such doors and windows can be considered as intrinsic elements? Why or why not?

Clue:- Read article 1132 (2) and think of completeness or incompleteness of the house without doors , windows etc.

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2.1.3.(b) Accessories

First read Arts. 1135- Art.1139 as enumerated above.

Still there are other classes of things referred to as accessories. These are things which can't be considered as intrinsic elements. In order to determine whether a thing is an accessory or not, we have to consider a number of elements (points) together.

The first element which makes basic distinction between accessories and intrinsic elements is that accessories are detachable by their nature; i.e. there is no material unity between the accessory and the principal thing. If a thing is an accessory, it can be subjected to a separate dealing; it can be, temporarily or permanently, detached and taken away from the principal thing without causing physical damage to the principal thing.

Another important point about accessory is that if a thing is accessory, most probably, it is a service giving thing and it is destined or dedicated to the service of the principal thing. In other words it can't be considered as a major thing; but the principal thing, although complete, can not give its full service without assistance of a thing considered as an accessory.

The third point to be considered is that accessory thing is subordinate to the principal thing but it is not a material element (the building block) of the principal thing. The subordination is, most of the time, in terms of purpose and value of the two things, that is, the principal things will serve greater purpose and have greater value than accessories.

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The last important point to be considered is an attitude of the individuals having an interest on the thing. That is, if the involved individuals have mutual understanding that a thing is an accessory to another thing, then it can be considered as an accessory, although such thing may not be subordinate and service giving to the principal thing in terms of purpose and value the intention of the parties is one of important determining factors.

Generally, Permanent destination; dedication to the service of another thing; or subordination to another thing; intention of the parties as well as detachability of the thing, are the major factors to be considered in order to say that a thing is an accessory.

Read Articles, 1132, 1136, and 1137 of the Ethiopian Civil Code and explain the basic points of distinction between intrinsic elements and accessories?

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The above classification of things as movables and immovable depends on the nature of the things. However, there are certain things which are considered as movable although they are immovable intrinsic elements by nature or things which are considered as immovable (accessories) although they are movable by nature. These are things which are referred to as movables by anticipation intrinsic elements or immovable by destination (accessories). Movable by anticipation are those things which are immovable by their nature or which are intrinsic elements of immovable but they are considered as movables when they are subjected to a dealing providing for their separation in the near future. On the other hand, immovable by destination (accessories) are not immovable by their nature, but because of their permanent

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destination to assist the purpose of an immovable thing, they are considered as immovable. Hence movables by immovable by destination; immovable by nature movable by anticipating.).

? Read Articles 1133 and 1136 as well as Art 2268 of the Civil Code and try to identify, as many examples as possible, of movables by anticipation and immovable by destination?

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2.1.4. The legal consequences of classification of things

The last important point about classification of things is the legal consequences of such classification. The logic for classification is that if a thing is immovable, there will be a definite legal consequence which is different from when the thing is movables. The same principle applies to intrinsic elements and accessories. Leaving aside a clear legal consequence of classifying things as movables and immovable, let us consider what legal consequence is there in classifying things as intrinsic elements and accessories.

The first case is when a thing is considered as intrinsic element. In this case, when a thing is considered as intrinsic element in accordance with our discussion above, then the legal consequence is that what ever relationship is created between individuals as regards the principal thing; the same relation applies to the intrinsic elements of that principal thing. In other words, unless the parties to the dealing expressly excludes some of intrinsic elements, if they reach at a general agreement about the principal thing, that general agreement shall apply to the specific intrinsic elements of the principal thing.

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Example:-

A person who enters in to contract of sale, lease, etc of a house cannot exclude the application of the contract to certain intrinsic elements of the house, unless this is expressly stipulated in the contract. (Read Art. 1131 of the 1960 Ethiopian Civil Code.)

This legal consequence is very strong that even if some of the intrinsic elements belong not to the owner of the principal thing but to the third parties, the third party shall lose his original rights on such intrinsic element save for the entitlement to compensation for the value of the thing.

? Mr. A is about to finish the construction of his house. Because of the recent shortage of building material (bricks), he takes some bricks from his neighbor in the absence of the later. The neighbor returned home after Mr. A has completed the house. Can the neighbor claim his bricks? Why or Why not?

Clue:- Read Art 1134 of the Civil Code.

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Why the right of the neighbor in the above case should be addressed through compensation? The reason is:

- because, we have to attach much importance or give priority to the protection of the principal thing rather than its intrinsic elements. In other words, we have to give much value to the finished house than the right of the owner of the bricks.

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- because the right of the neighbor in the above case can be settled by compensation more easily and perfectly than destroying the house and entitling him to take back his bricks.

? Read Article 1134 of the Civil Code together with Article 1181 of the Civil Code and explain the relation between the two articles.

Clue:- Art. 1181 provides for circumstance in which a person may use material of another to construct a build.

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The second case is where a thing is considered as an accessory. The first consequence of classifying a thing as an accessory is similar to the legal consequence of considering a thing as intrinsic element. That is, if a thing is considered as an accessory to another principal thing, whatever form of relation is created with regard to the principal thing, it applies to the accessories of that principal thing. In other words, unless they are expressly excluded, any type of dealing on the principal thing shall extend to its accessories; It doesn't matter whether the owner of the accessory is the owner of the principal or not, a person who claims a right on the principal thing can claim the same right on the accessories of that principal thing.

Example:-

Mr. A, an owner of a car, rents a jack from Mr. B to use in the car. After using the jack with the car for six months, Mr. A sales his car to Mr. C. In this case, Mr. C has a right to claim the jack together with the car since the contract of sale of the car (principal thing) applies to the jack (accessory) also. Read Art. 1135 of the Ethiopian Civil Code.

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In the above case, what is their right of (remedy for) Mr. B, the owner of the jack?
Clue:- read Arts 1137 and 1138 of the Civil Code.

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Mr. B can make use of his contractual relation with Mr. A and proceed against Mr. A, at least for the payment of the value of the jack. But, he can't proceed against Mr. C, a third party in good faith. However, the owner of the accessory thing can claim back his thing in three circumstances:

The first is, as far as the accessory is in the hands of the owner of the principal thing and not subject to any dealing with third party. Here, he can claim his accessory because accessories are detachable by nature and the owner of accessory can take it back without causing any physical damage to the principal thing unlike the case of intrinsic elements.

The second is, where third party at the time of dealing with the owner of the principal thing had a full knowledge or expected to have acknowledged about the fact that the accessory thing belongs to another person than the owner of the principal thing. Here, the owner of accessory can claim it back from the third party because the third party is not in good faith.

The third is where the owner of the accessory has put his right in a document written before the date of permanent destination of thing.

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Activity Two

1. Explain the basic purpose as well as the legal consequences of classifying things as:-

a. Movables and Immovables

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b. Intrinsic elements and accessories

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2. Ato Redwan, a resident of Hara, leased a house from W/ro Aster for five months. Immediately possession of the house, Redwan noticed that the house does not have ventilator, lump, and curtain- holder, accordingly, he bought and fixed all of them to the house. Two months after he took possession of the house, Ato Redwan came to know that the roof of the house is leaking and he bought ten iron sheets and changed the leaking ones. Just 10 days before the end of the five months of lease w/ro old the house to third party buyer Ato Samatar. Assueme that you are assigned to give judgment on the case and the following specific issues are raised.

How do you classify the ventilator, lump, curtain- holder, and iron-sheets? What is the basis of your classification?

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3. Do you think that Redwan can claim back any of the above items? If you say yes, which ones can he claim and which ones he can't? what is your basic reasons?

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4.Is there any other for Redwan regarding those items which he can't claim from the buyer? What are these remedies and what do you think is the justification for law to adopt these remedies?

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5. Under Art. 1723 and 1727 of the Civil Code, the law provides that creation, transfer, assignment, etc of rights on immovables shall be of no effect unless made in writing, signed by the concerned parties and witnesses and recorded in the registry of immovables. Now, assume that Ato Jalata and Ato Barako concluded, orally, a contract of sale of quarries (building materials like stones, and etc) extracted from the land under possession of Barako.

How do you classify these things?

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6. Do you refuse to enforce their contract since it is made orally? Why or why not?

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7. Assume that you publish a book with a title ‘ Teme Kebraraw’ and you register your copy right. What is considered a s a thing object of your right? How do you classify it?

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CHAPTER THREE

POSSESSION AND ITS VARIOUS ASPECTS



Objectives:-

In the part which deals with possession and its various aspects, the focus of the students should be on the following points:

- The definition of possession and its essential elements
- The modes of transfer, acquisition or loss of possession
- Defects in possession and the legal consequences of the defects
- The basic rights available to the possessor:
- The right to use legal force in protecting possession
- The right to bring legal action in protecting possession
- The right to benefit from period of limitation (prescription)

3.1 The Definition and purposes of protecting possession

Possession is one of the most important concepts in law. In fact it is the first of property rights. It is a right that one exercise on things even without having right of ownership. When we come to its definition, it is easy to comprehend the essential nature of possession from factual situations rather than attempting to define it. Yet, we have to discuss about possession; we need to understand its essential elements; we have to know the modalities of acquisition, exercise and loss of possession. This is because, possession is prima facie, i.e. first hand evidence of ownership; a person can transfer his right of ownership to another simply by transferring possession (this is true in cases of ordinary movables); moreover, the first time possession of things without owner entitles the first possessor to the right of ownership: In such cases, possession is the first step towards ownership. Generally, protecting a possessor is indirectly protecting an owner because of the above reasons. Protecting possessor is an effective way of assuring the continuity of peace and security in the day to day function of the society.

As a general understanding, although the concept, possession, refers to control over a thing, the type/nature of control may take different forms. For example, an owner is

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considered as a possessor [even if he does not have an immediate physical control] of the thing since the owner has the right to control and administer or manage the thing; a lease or pledge is considered as possessor since they have an interests in controlling the thing; even a thief may be considered as a possessor against all other third parties except the owner because of the factual control. Because of the above and other reasons, we need to have clear ideas of elements to be fulfilled in order to consider a person as a possessor.

It is not all forms of possession which is recognized and protected by law. Generally, possession may be of two types. Possession in fact or possession in law. Possession in fact is the factual situation. It refers to an actual and immediate physical control of a thing. Possession in law is of a type which is recognized and protected by law. It is a type of possession which is exercised by persons who have legal interest in the thing; like the possession exercised by an owner.

The basic component of both types of possession is the possibility to exclude every person other than the person from use or control of the thing.

3.2. Elements of Possession

Whatever, the type and nature of possession may be, different legal systems give protection to possession only if the following two elements are fulfilled:

- Corpus possessionis (Physical control)
- Animus posseidendi (Intention to control)

The following is a short explanation of the above two elements.

3.2(a). Corpus possessionis- it refers to a close contact between the thing and the person. In other words, it refers to a reasonable physical power that a person exercise on the thing possessed. This physical control should create in others that the person is a rightful person to administer or manage the thing and give appropriate order as regards the usage of the thing.

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Physical control can be expressed in two different relations. The first is the relation between the person and the thing. Here the point it that, the possessor should have a reasonable power/ control over the thing. It is not about immediate and uninterrupted possession of the thing or immediate and actual control like the pen in your pocket. If the person has a reasonable power to exercise, like lessee of a house, he who closes the door and is thousands of kilometers away from the house can be considered as a possessor. The second is the relation between the possessor and third parties. Here, the idea is that, the way the person exercise his power over thing should create a reasonable belief in the mind of third party that he is a possessor. The third parties should have such understanding that the person is entitled to be free from any kind of interference without his permission.

3.2(b).Animus possidendi – This is an intention to possess; not mere physical control. You need to have a lawful interest in controlling the thing. Otherwise, a simple physical control will give a person only a status of mere holder. Hence, the physical control should be justified by protection of either direct or indirect interest.

In conclusion, the two above elements should be combined together to constitute possession. The possessor, who fulfills the two elements together, can exercise his right either directly by himself or through other intermediary. In other words, it is possible to exercise right of possession personally or through representative. It is not as such necessary to be physically present and exercise right of possession personally. More over even if a person is temporarily hindered from possessing the thing, for example, when he gives his thing to his friend for some time or when somebody usurps his possession forcefully, it doesn't mean that he loses his possession.

Read the following articles of the Civil Code: Arts. 1140 an 1141

Art. 1140. – Definition.

Possession consists in the actual control which a person exercises over a thing.

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Art. 1141.- Direct or indirect possession.
The Possessor may exercise his control over a thing directly or through a third party who holds such thing.

? After reading the above articles of the Civil Code, discuss the essential element(s) of possession and the modes of exercise of possession recognized under our law.

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3.3. Modes of Acquisition, Transfer or Loss of Possession.

Possession, as any other property right, is transferable from one person to another. 'Transfer; 'acquisition', and 'loss' of possession can be used interchangeably. This is because, if a possessor transfers his possession to a new possessor, the act is referred to as transfer of possession; for the new possessor it is acquisition of possession; for the previous possessor it is loss of possession. However, in some exceptional cases the previous possessor may lose his possession even if his possession is not acquired by anyone. Like when Mr. A loses his cell phone on a road and it is found by no one.

3.3.1 Transfer or acquisition of possession.

Possession can be transferred or acquired through one of the following mechanisms:

- Taking
- Delivery
- Operation of law

3.3.1. (a) Taking :- this is not as such prevalent in recent days . A person may take the possession of a thing belonging to another person without consent of the

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possessor. This act may be justified to some extent by the exercise of lawful right against the possessor. However, since the law doesn't encourage forceful taking of another's possession, even if justified by exercise of rights, taking is not directly recognized as a means of transfer acquisition of possession. This, of course, encourages individuals to take laws in to their hands.

3.3.1.(b) Delivery:- This is the prominent means to transfer of possession. One of the essential nature of delivery is that it is based on consent. It is a consensual way of transferring/ acquiring possession. Delivery may be of two types-*actual delivery*, and *constructive delivery*.

Actual delivery is a delivery where by the possessor directly hands over the thing to the new possessor. In such cases both the elements of possession (corpus and animus) will be transferred together.

Constructive delivery is where the possession is transferred without physically handing over the thing to the new possessor. This may be of two forms; the first is the case where the thing is already with the new possessor and the previous possessor simply transfers the animus (intention to control). Example, you land your book to one of your friends for a week time and at the end of the week you sell the book to him while the book is in his land. In this case there is not actually handing of over the book to the buyer because the book is already with the buyer. Such kind of constructive delivery is referred to as '*delivery brevimanu'*. The second is the case where the new possessor simply acquires an intention (interest) to control and the thing remains with the previous possessor.

Example

You buy something from a neighboring shop, you pay the price and tell to the seller that you will take the delivery afterwards; or you think of an owner who sells his house to a buyer but the previous owner remains in the house as a lessee. Such type of constructive delivery is referred as '*constitum possessorium*'.

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An important point about constructive possession is that there is a transfer of intention only. In other words, in both cases of constructive delivery the thing remains to be where it was previously.

3.3.1. (c) By operation of law: - this is the case where there is or there is no direct consent of the previous possessor. In this case, there may/may not be actual delivery of the thing to the new possessor. However, certain provisions of the law may provide for transfer of property rights from one person to another. A good example may be the previous in the law of successions which provides for transfer of right from the deceased to heirs. In such case the deceased may or may not be willing (which may be expressed through the document of will)

To understand how the transfer or acquisition of possession is regulated under our law, read the following pairs of articles of the Civil Code, cumulatively.

- Articles 1143 and 2274
- Articles 1144 and 2831
- Articles 1145 and 2325 (2)
- Articles 826 and 1186 (1)

Art. 1143.- Transfer of possession.

Any transfer of possession made by virtue of a contract shall be effective at the time when the thing is delivered.

Arts. 2274. - Essence of obligation.

Delivery consists in the handing over of a thing and its accessories in accordance with the contract.

Arts. 1144. – Documents representing the thing.

(1). Possession may be transferred to a new possessor by the delivery of the documents representing the thing and enabling him to dispose thereof.

(2). Where a dispute arises between the holder of the documents and the person who has the actual possession of the thing, the latter shall be preferred unless his bad faith can be proved.

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Art. 2831. - Possession by an agreed third party.

(1).The parties may agree that the pledge be delivered to a third party acceptable to them both.

(2). The rights and duties of such third party shall be as prescribed by the previsions relating to the bailment of goods or warehousing.

Arts. 1145. – Constructive possession.

(1). The possession of things which are certain and 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.

(2). Noting in this article shall affect the rights of the creditors of the person exercising actual control over the thing in the event of his bankruptcy.

Arts. 2325(2) where the sale relates to fungible things, the delay of the buyer shall not transfer the risks to him unless the thing, clearly designated for the performance of the contract, has been especially allocated to the buyer and the seller has sent notice to the buyer to that effect.

Arts. 826. – Opening of succession.

(1). Where a person dies, the succession of such person, called the deceased, shall open at the place where he had his principal residence at the time of his death.

(2). The rights and obligations of the deceased which form the inheritance shall pass to his heirs and legatees, in accordance with the provisions of this Title, unless such rights and obligations terminate by the death deceased.

Arts. 1186. - Corporeal chattels.

(1). The ownership of corporeal chattels shall be transferred to the purchaser or legatee at the time when he takes possession thereof.

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After reading these articles try to identify the type of transfer/acquisition of possession adopted (envisaged) under our law.

- The first group of articles deals with the case of actual delivery where the thing and its accessories are actually/physically handed over to a new possessor based on the agreement of the parties.
- The second group of articles also deals with actual delivery but in this case the actual delivery is not of the thing itself but documents without which the thing cannot be disposed. If the content of a document is the representative of the thing itself then delivery of such document is not very much different from physical delivery of the thing itself.
- The third group of articles seems to deal with constrictive delivery where there is no actual handing over of the thing to a new possessor. If the elements of Art. 1145 are fulfilled then there will be transfer of possession although the thing designated to the new possessor remains under physical detention of the previous possessor. In such case, because of the transfer of possession, which indicates transfer of ownership, there is a presumed transfer of risk in coordinate with Art. 2325(2).
- The last group of articles indicates the possibility for transfer of possession by operation of the law. That is, even in case a person dies without making a will, the rights (specifically of ownership) of the deceased shall transfer to the heir through transfer of possession in accordance with Art. 1186 of the Civil Code.

? Give three examples for each of the type of transfer of possession and explain how your examples indicate the types of transfer of possession.

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3.3.2. Loss of Possession

Loss of possession results from the disappearance of both or any one of the elements important for existence of possession. If a person losses both animus and corpus or any one of these elements of possession, it results in loss of possession.

The first is loss of both elements of possession at a time which takes place most of the time voluntarily and referred to as absolute loss of possession. This may take one of the following two principal forms.

Alienation - Where the old possessor of the thing transfers it to a new possessor who starts to possess the thing in place of the old possessor.
Abandonment - where the possessor throws away the thing with an intention to give it up and the thing becomes 'res derelicta' (abandoned things).

The second manner of losing possession consists in losing the corpus while preserving the animus. A person may lose physical control over the thing while retaining an intention to control. This is the case where a person becomes unable to perform physical act which constitute possession. This also may take place in one of the following forms:

- Where a third party takes the possession in fact of the thing most of the time with out the consent of the old possessor,
- Where the thing physically gets away from a person without any intent on the part of the person, like when a person misplaces or loses his object etc.

- *The third* is the case where a person loses an intention to control for himself. Although it is some how imaginary, in certain circus stances a person may lose the animus part of possession while retaining the corpus (physical control). This may happen, for example, if the old possessor sells the thing to a third party and agrees to preserve it in the interest and to the account of the third party purchaser. In such case, the status of the old possessor will change to a detainer. This is what writers refers to as 'constitutum possessorium' i.e. constructive possession, where the true possession belongs to the purchaser.

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Read Arts. 1143, 1145 and 1152(1) or 1153(1) or 1154 of the Civil Code and try to identify which of the above discussed forms of loss of possession is envisaged under each of these articles.

Clue:- *Try to relate Art. 1143 to the first form of loss of possession; Art. 1145 to the third form of loss of possession; and Arts. 1152(1), 1153(1) and 1154 to the second form of loss of possession.*

3.4. Defects in possession

In principle, a person starts to have possession over a thing as soon as the two elements of possession are fulfilled. However, the mere fact of fulfillment of the two elements does not mean the possession will immediately have legal effects. In other words, even if the two elements are fulfilled and even if possession exists, for this possession to have legal effects, it should be free from certain defects. Hence, defects in possession affect its legal effect. Defects in possession are vices or states of affairs which makes possession judicially valueless.

Defects that may affect possession varies from one legal system to another and may take different forms. All the same, the following is short explanation of the major defects that may vitiate possession.

3.4.1. Discontinuity: - The main idea here is that, for a person to be considered as a possessor, there should be a reasonable and inform continuity between the successive acts of possession. In other words, if there is un reasonably long interval between two or more successive acts of possession, the we say the possession is affected by vice of discontinuity. A possessor has to enjoy his possession without unreasonable disruption. There should be a series of acts of possession performed at sufficiently short interval. Here, we are not talking about constant or absolute carrying of the thing with one self. It is all about avoiding unreasonably prolonged sap between successive exercises of acts of possession, which may make the possession

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discontinuous. The reasonability of the interval between the successive acts of possession may be determined based on the nature of the thing possessed.

3.4.2. Violence: - If a person acquires possession making use of force, his possession will be defective. Such a person who acquires possession forcefully may have actual control over the thing for certain period. However, such an actual control does not amount to possession since the actual control is acquired by force and using force is a wrongful act from which a person cannot derive legally protected right of possession. One important point here is that, the force referred above does not include the type of force that a person may lawfully use in order to protect his possession. The type of force which is considered as violence and which vitiates possession is the force used for the first time acquisition of possession; not for the protection or immediately retaking of possession.

3.4.3. Clandestine/ Secrecy

This vice refers to concealment of possession as status. A possessor should be able to exercise his right, as a possessor, publicly. His possession will be useless if he hide himself from those who are interested in knowing whether he is a possessor or not. He should exercise his possession freely and with a reasonable publicity. An important point is that clandestine is not about absolutely unknown type of possession or the possession which is known to every body. It is about sufficiently unreasonable concealment for unreasonably long period of time. Another important point is that secrecy is not only about the manner of exercise of possession, but also about the nature of it acquisition. If a person acquires possession through secret means (e.g. stealing), he is not entitled to any right available to a possessor.

3.4.4. Equivocality /Uncertainty

This is all about clarity of possession as a status. A possessor is entitled to legal protection only if his possession is free from doubt. If, from circumstances of a case, it is ambiguous to understand the possessor of a thing, such possession remains ineffective in every aspect. Think of two or more individuals who have equal rights (either ownership, usufructor other forms of property rights). If a thing is jointly

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owned by two individuals, one can't exercise acts of possession against the other. Because it is difficult or ambiguous to ascertain who is the possessor from the two

? What do you think is the position of our law as regards defects in possession?
Clue: - Read articles 1146 and 1148 to identify what kinds of vices of or defects in possession are recognize under our law and the legal consequence of the defects.

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3.5. Rights Available to a possessor

The last, but not the least, point to be discussed is concerning the rights that a possessor can enjoy under framework provided by law. The basic rights to which a possessor is entitled are: - The right to use force in protecting possession, the right to bring legal action (possessor action) and the right to benefit from prescription.

3.5.1. Use of force

As it is addressed at the out set protecting possession is an immediate way to maintain peace and stability in the day to day relations. Moreover, protection of possession results from an intention to afford the thing with an effective protection as far as the thing is in the hands of the possessor or in case the owner of the thing is not in a condition to protect his thing. On top of this purposes the basic justification to allow use of force is to provide the possessor with an opportunity to take part in protection of the right (possession) recognized by law. More importantly, it does not seem reasonable to require the possessor to take all the cases to court of law while he can restore his possession by applying a force proportionate and sufficient to recover (protect) his possession. This is important both for the possessor (saving his time) and the court (reduction of burden) which expected to deal with more complicated cases. Read the following articles Art 1148.

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? What are the basic limitations on the right to use force under Art. 1148?

Clue: - Consider the points like the existence of unlawful act of third party, the immediacy of the force, the proportionality of the force etc.

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3.5.2. Legal Proceeding (possessory action)

Because of various reasons a possessor may not be in a position to apply legal force or may not succeed in protecting his possession through use of force, in fact the possessor is not entitled to apply force where it appears that the application of force will not be effective. In such circumstances, the possessor is provided with alternative right, i.e. the right to bring legal action to protect or restore his possession. By bringing a possessory action, a person may claim either cessation of interference in possession or restoration of a usurped possession or even in certain cases, claim compensation. Since bringing legal action is a right, it is subject to period of limitation. Period of limitation in case of possession is relatively, shorter probably because of one or both of the following reasons:-

- the less importance of the content of possession and the manner of its acquisition and loss when compared to other property rights (specially the rights of ownership or rights in immovables)
- the need to encourage the possessor to exercise, claim, enforce or generally protect his rights actively and in due time.

? Is it the Amharic or English version of Art.1149 (2) which is in accordance with the above statements about purposes of period of limitation in case of possession? Why?

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3.5.3. Benefit from prescription

This is a right that a possessor enjoys because of the passage of time. In fact this is the right to change status from possessor to an owner. This right to avail oneself of period of prescription is available for a possessor who actually controls a thing which belongs to another person. Because of the failure, for any reason, of the owner to exercise or claim and enforce his right for a limited period fixed by law, the possessor is entitled to acquire full right of ownership. Such a possessor is referred to as *adverse possessor* and the situation is referred to as *adverse possession*, i.e. possession which adversely affects the right of the owner.

Most of the time adverse possession is acquired & exercised on things without permission of the owner (like the possession that you exercise on the things lost by others and you find on the roads). However, the most important point here is that the possession should be exercised in adequate continuity and publicity without being tainted by violence and uncertainty. In fact these are important not only to benefit from period of limitation but also to exercise or claim any other rights available to a possessor.

? Do you think that Art. 1150 entitles a possessor to benefit from period of limitation in clear terms? Why or why not? Can you make the basic distention between Arts 1150 and 1192 in light of the right of possessor to benefit from prescription.

Clue: - Art. 1150 seems to provide for acquisitive prescription while Art. 1192 provides for extinctive prescription.

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Explain the last paragraph of the discussion on the rights available to a possession. *Clue: - Re- consider the vices that a possession may be tainted with.*

One last, but not least, important point is about the distinction between possessor and mere holder. The issue is resolved differently in different legal systems. In a legal system where the law recognizes both direct and indirect possession, there is no concept of mere holder. In such legal systems, the one who has actual/ physical control (power) over thing is direct possessor and there may be number of indirect possessors behind the direct possessor. For example, if Mr. O leases out his house for Mr. Ip and Mr. Ip is allowed to sub- lease the house to Mr. Dp, then Mr. O and Ip are indirect possessors and Mr. Dp is direct possessor. The recognition of direct and indirect possessor is justified by the priority given to immediate protection of things. The idea here is that since things have more of social value than value for individual they should be protected in whose ever hand they may be and this is best achieved by giving the status of possession for both the person who physically controls the thing and all others whose interests are protected by direct possessor.

But under some other legal systems clear distinction is made between possessor and mere holder (detainer). Here the distinction is that a person who has an interest in controlling the thing and who has actual power to exercise in respect of the thing will be considered as possessor. However, a person ho simply detains the thing (exercise actual/ physical control) the thing, without having an interest to be protected and intention to control for one self shall not be given the status of possessor and he is a here holder or detainer. This possession is justified by the necessity to reduce the potential number of individuals who claims right of possession. Since the right of possession is sensitive, as it includes the right to use force, it should not be claimed by every body having a negligible form of relation with the thing is the idea.

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? What do you think is the position of our law? Do you think that our law exclusively provides for one of the above to position?

Clue: - *Read Articles 1141, 1145, 1147, 2842 of the Civil Code.*

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Activity Three

1. Can you define possession? Which one do you think is more difficult defining possession or dealing with different aspects of possession?

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2. Do you think the protection afforded to a possessor adds to the stability in the society? Is it not sufficient to protect the owner of a thing? What specific purposes do we achieve by protecting possessor?

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3. Assume that you borrow a lap-top computer from your friend to use it for a week time. Accordingly, he gave you the computer and went to Addis. Do you think that you have right of possession on the computer? What if unknown third party takes away the computer forcefully; can you resort to legal force or bring legal action? Why or why not? Explain.

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4. Qarbato was admitted to Hawassa University. Just 15 (fifteen) days before. . . . he stole a walk- man CD player from his friend with an limitation to use it during his stay at the university. He succeeded in his plan and assume that the CD player is under his physical control even some three months after he stared study at the university. Do you think that his possession is protected by law? Why or why not?

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5. Summarize the basic forms of transfer of possession in your own language or expressions.

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UNIT TWO

OWNERSHIP RIGHT

Introduction

In the previous unit, you have studied about a relationship between a person and a thing that is created through possession, which may be direct or indirect, of a thing by a person. In this unit, we are going to discuss about another kind of relationship of a person with a thing that could be created through owning of the thing by the person. As you may have seen in unit one a possessor of a thing may not necessarily be the owner of the thing.

In this unit we are going to see, mainly, what ownership right means and the rights that are incorporated in it and ownership right and use of water particularly. We will also examine the legal grounds for a person to become an owner of a thing. Further, the ways of acquiring, transfer, proof and extinction of ownership will be explained in brief. In addition we will cover the rights and duties of owners against and towards others in this unit.



Objectives

Dear learner, at the end of this unit you will be able to briefly

- Discuss about the meaning of ownership right
- Discuss about the rights that make up/constitute ownership right
- Explain the ways how people get ownership right over things
- Enumerate the different modes of acquisition of ownership
- Identify the different ways and sources of transferring of ownership right
- Discuss about the modes of proof of ownership
- Enumerate the different instances that could lead to the extinction of ownership right
- Clarify the rights and duties of owners and
- Discuss about the ownership and use of water

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CHAPTER I

THE MEANING OF OWNERSHIP RIGHT

OVERVIEW

What is ownership right? What claims are there in ownership right? Does the Ethiopian legal system give meaning to the term? What makes ownership different from possession? Depending on political ideologies and philosophical outlooks that prevail, the concept has been defined differently in different legal system. At this section, we are going to cover such and related questions.



Objectives

At the end of this section you will be able to

- give meaning to ownership right
- give meaning to real rights
- identify the difference between ownership right and other real rights
- explain the rights that are incorporated in ownership right

The Civil Code of Ethiopia tries to give definition to the term ownership under Art. 1204. The Article reads as follows.

Art. 1204 – Definition
Ownership is the widest right that may be had on a corporeal thing.
Such right may neither be divided nor restricted except in accordance with the law.

Some, however, say that Art.1204 of the Civil Code describes the term rather than defining it though it begins with the title 'Definition'. The Article gives meaning to the term by describing it as the widest right that may be had over corporeal things. Because of the word 'widest' that is used in the Article you may quest to know the other rights that are compared with ownership right and which are narrower than it, and you may want to know the reason why ownership right is said to be the widest.

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In here you have to analyze that there are certain rights that could be exercised over corporeal things. This group of rights in general is called as real rights. Therefore, ownership right can be said as the widest of all the other real rights. A real right is defined by the Black's Law Dictionary as – a right that is connected with the thing rather than a person. As an example the dictionary lists out ownership, use, habitation, usufruct, pledge and real mortgages. There is also a definition given by Dunning as 'a right that exists whenever a thing is subject, completely or partially, to the power of a person in virtue of an existing relationship, that can be set off against any other person' (Pg. 39). From the definition given by Dunning the following essential characteristics can be extracted.

- The creation of a power/right of a person over a thing due to a certain relationship between the person and the thing
- The power of the person may be complete or partial
- The person can exercise his/her power against any other person

Ownership right, being a real right, shares the above essential elements. The relationship between the person and the thing is that the person owns the thing and he/she has a complete power over the thing he/she owns. As a result, the person could exercise such power against any person.

? What do you understand by complete or partial power of the person? (*You can use the following free space to answer the question*).

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As it is mentioned above ownership is only one of the real rights. There are other real rights as well which however are narrower than ownership right as ownership right is described as the widest one by Art.1204 of the Civil Code. Then where does the difference between ownership right and other real rights lie? What do we mean by ownership is wider and the others are narrower?

To analyze this question, let me start from the claims that are constituted by ownership right. Article 1205 of the Civil Code shows that ownership right constitutes three kinds of claims. The Article reads as follows

Art.1205 - scope of right

(1).With out prejudice to such restrictions as are prescribed by law, the owner may use his property and exploit it as he thinks fit.

(2).He may dispose of his property for consideration or gratitutiously, inter vivos or mortis causa.

The necessary elements that could be identified from the Article are:

- the right to use the thing(*usus*)
- the right to enjoy the fruits of the thing*(fructus*)
- the right to dispose of/abuse the thing *(abuses*)

The *usus* and the *fructus* rights of an owner are dealt under Sub (1) of Art.1205 while the *abuses* right is mentioned under Sub (2) of the same. Therefore, ownership can be refered as a bundle of rights. Actually, the Article does not clearly put the phrase ‘enjoyment of fruits’. The concept of fructus is understood from the interpretation of the term ‘exploit’. Such interpretation could be justified because of different reasons. The first one is because of the fact that it is only the fructus aspect that is left with out being discussed while the others two, usus and abuses are dealt expressly. Another justification may depend on the concept of usufruct and the same term has been used under Article 1309(1). The Amharic version of this Article uses the equivalent English term “fruits”**.** Disposition or abuses of ownership right includes transferring of the thing whether gratuitously or for consideration, throwing away or destructing the thing.

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Other real rights such as usufruct (Art.1309) and servitude (1359), however, does not constitute all the above-mentioned rights. Real rights, with the exception of ownership right, are in destitute of disposition or abusing of the thing. For instance, a usufructory in case of usufruct relation only has the right to possess, enjoy the thing and its fruits. The usufructory does not have the right to dispose the thing. Disposition is left to the bare owner. For instance, if we take the example of appropriation of land in the Ethiopian legal system, the holder of land has only the right to use the land and not the right to transfer pursuant to Art.40 of the constitution of FDRE. Where as if we take the example of appropriation of a building a person can become owner of the same and as a result can use or dispose it. In case of servitude relation, also the person called as the owner of a dominant tenement only has the right to use or enjoy from the land held by a person called as the owner of servient tenement.

☞ Hence, ownership right is the widest of all real rights because it encompasses all the three rights i.e usus, fructus and abuses, while the other real rights lack the right of abuses or disposition. Therefore, ownership right vests on the owner of the thing a complete power, which may be expressed by using the thing or by enjoying any fruit of the thing or by destroying the thing. Where as other real rights like usufruct and servitude vest on the person partial right as one of the rights that constitute ownership right i.e. the right to dispose is absent.

Dear learner! Read Art. 1205(1) with much focus on the phrase ‘as he thinks fit’ and try to do the following exercise.

? Does the phrase ‘as he thinks fit’ under Art.1205 (1) implies that an owner of a corporeal thing has an absolute right over the thing and that he/she can use, exploit or dispose the thing as his/her wills and wishes? In other words, is ownership right an absolute right? *(You can use the following free space to answer the question)*

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The opening phrase of Art.1205 i.e. *'with out prejudice to such restrictions as are prescribed by law'* is an implication that an owner may exploit his/her thing to the extent of what is allowed by the law. For instance, an owner of a house shall not disturb his/her neighbors while exercising his/her ownership right over the house. You can refer to the provisions of the Civil Code that deal with rights and duties of owners i.e. Art.1204-1227.

Activity One

1. What is a real right? Explain the same by giving examples of such right.

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2. What is the meaning of ownership right? State and explain the rights that constitute ownership right.

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3. What do you understand from the statement 'ownership right is the widest right'?

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4. Explain the difference between ownership right and other real rights.

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CHAPTER TWO
ACQUISITION OF OWNERSHIP RIGHT

OVERVIEW

Have you ever been an owner of a thing? Are you the owner of the pen you are writing with? Where did you get it from? Is it transferred to you from another person or do you acquired it?

There are two general ways through which people could become owners of things or have ownership right over things i.e. by acquiring the thing or by transferring of the thing to them. If we examine the ownership acquiring mode, there are four different ways i.e. occupation, possession in good faith, usucaption and accession.

In this section we will examine differences or similarities between acquiring and transferring of ownership right and particularly between occupation, possession in good faith, usucaption and accession. We are going to focus on the meaning of such terms and the subject matters they could be exercised on.



Objectives

Dear learner, by the time you finish studying this section

- You can list the major ways of owning things
- You can confidently explain similarities and/or differences between ways of gaining ownership
- You can list down the modes of acquiring of ownership
- You can discuss briefly the meanings, and subject matters of occupation, possession in good faith, usucaption and accession
- You can briefly explain similarities and differences among occupation, possession in good faith, usucaption and accession

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As I mentioned to you in the introductory part, there are two general sources to own things. The first is by acquiring of things and the second is through transfer of things to a person from another person. The Civil code of Ethiopia deals with such issues under separate sections as 'Acquisition of Ownership' (Art.1151-1183) and 'Transfer of Ownership' (Art.1184-1187).

The difference between the two as Harrison C. Dunning explains is

'Transfer occurs when one person receives ownership from another person – the transferee takes the place of the transferor in his relationship with the property (… or his relationship with all other persons). It follows that a transferee – for example, a buyer will become the owner by way of transfer only if the transferor- in our example the seller – is in fact the owner of the property …. In the case of acquisition of ownership, however, a person becomes the owner of property independently of anyone else's ownership. His ownership is original rather than derivative'.

In this section, as the title implies, I am gong to discuss about the different modes of acquisition of ownership right. It is in the next section that we will examine about the other mode of gaining ownership right over a thing. Pursuant to the Civil Code, the following are the four ways of gaining of ownership through acquisition.

- Occupation
- Possession in good faith
- Usucaption and
- Accession

1. Occupation

In here we are going to see mainly about what the meaning of occupation is and what the subjects of occupation are. According to Black's Law Dictionary, occupancy means the act of taking possession of some thing that has no owner (such as abandoned property) so as to acquire legal ownership. And the person who acquires title by occupancy is called as occupant. For instance, a person who collects firewood from the bush acquires the ownership of the firewood by occupation.

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From this concept, the necessary elements of occupation are

Possession of a thing

The thing should have no owner

There must exist the intention of acquiring legal ownership

Coming to the Civil Code of Ethiopia, the concept of occupation is dealt under Art.1151. The Article reads as follows:

Art. 1151 – Principle.

> *Whosoever takes possession of a corporeal chattel which has no master with the intention of becoming the owner thereof shall acquire the ownership of such chattel.*

? Do you think that the above mentioned necessary elements for the existence of occupation are reflected under Art. 1151? If yes, explain them. (*Use the following free space to answer the question*).

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The above-mentioned parameters for determining the existence of occupation seemed to be fulfilled by the Article. The element of possession of the thing, the element that the thing should have no owner and the element that the person possesses the thing with the intention of becoming the owner are all fulfilled. The legal requirements of occupation which are provided by the Article do not end here. There is another factor that the thing possessed by the person is limited to be only corporeal chattel i.e. movable things only are susceptible to occupation according to the Civil Code of Ethiopia. The other different idea, if not totally, reflected in the Art. is that the thing has to be ‘with out a master’ rather than ‘with out an owner’ as mentioned by the definition given by the Dictionary. Could the word ‘master’ mean

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'owner'? Or could it mean 'possessor'? Is it sound to say that a thing has no master even when it has owner? Do you think that the law will entitle a person with ownership right of a thing by the mere fact that the person possesses the thing with the intention of becoming owner even if the thing has a previous owner? The law will not entitle the person with such ownership right. This is because ownership right of two or more persons over *a thing cannot co-exist* unless it is in a joint ownership form. Therefore, it will be meaningful and logical to interpret the phrase 'with out master' to mean 'with out owner'.

? How does a thing become with out a master or an owner? *(You can use the following free space to answer the question)*

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There are different instances for things to be claimed to be' with out an owner'. Such instances could be categorized in to three broad classes as: instances of nature, instances that could arise from the interest of the owner and instances that may occur with out the interest of the owner. The things may exist as such in nature (res nullius, like in the case of wild animals), or the thing may be abandoned voluntarily by its owner (res derelict), or it may be separated from its owner in different ways and a period of limitation which the law provides for retaking back of the thing by the owner may expire (e.g. escaping of animals from their owners, or losing of things.

At this point, a question may come to your mind as to how a person - a finder of a thing- could know that the owner of the thing has abandoned the thing or the thing is lost from its owner. If the thing as we have said above is a *res nullius,* then it will be meaningless to check whether it has an owner or not for it is vivid from the nature of the thing that it has no owner. The best example we have for *res nullius* is wild

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animals. Possession will automatically confer ownership right to the person who possess the thing only if the thing is a *res nullis*, provided that the person takes possession of the thing with the intention of becoming the owner. There is a maxim in the Roman law system which goes in line with the above explanation. It reads as '*Qui prior est tempore potior est jure'* and has the following meaning 'who is first in point of time is stronger in right'. So if we consider all the rights that could exist in relation to things, ownership, which is said as the widest, is also the strongest.

However, there is a special law that governs about ownership, hunting and other related matters of wild animals and it is only after we fulfill the requirements of this special law that we can turn to the Civil Code provisions. Had it not been for such special law, the mere fact that a person possesses *res nullis* for *the first time* will entitle him/her with ownership right of such *res nullis*. Yet because of the special law wild animals will be out of the scope of the Civil Code provisions regarding matters that are covered by the special law. One of the spheres that is governed by the said special law is that special permit is required for acquisition of wild animals. There is a limitation on the general public as to the original acquisition of wild animals. Consequently, private individuals, with certain exceptions, are not allowed to acquire ownership of wild animals as such animals are left under the authority of the government.

? If the thing you come across is not a *res nullis*, are you going to be the owner at the moment you find it? Then what is your position/status regarding the thing? (*Try to answer the question in the free space provided*)

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Before concluding that a thing has no owner, the finder of the thing has to check out whether the thing has owner or not. This is because at the time of the finding of the thing there may be no clue which tells the finder whether the thing has owner or not, in other words whether the thing is an abandoned one (*res derelicat*) or whether it is a lost thing. Therefore, if it is not clear at the moment of finding the thing whether it has owner or not, then the finder has to check out the same, has to find out if he/she is the first in time to possess the thing.

Articles 1154-1158 of the Civil Code govern this issue and list down the rights and duties of a finder of a thing. Pursuant to these Articles, there are certain procedures which a finder of a movable thing should comply with before being declared as owner. These procedures include informing about his find to an appropriate organ, retaining the thing in his possession, taking all the reasonable cares to preserve the thing and to sell the thing in auction and keep the proceed of the sell when the thing is perishable or when he/she feels that preserving the thing is difficult. Some of the things mentioned as duties of the finder could also be understood to be the rights of the finder. For instance, it is provided under Art.1155 (1) that the finder shall retain the thing in his possession. This could also mean that nobody, but the owner in accordance with the law, can dispossess the thing from the finder. Again what is provided under Art.1156 (1) could also be interpreted to relieve the finder from his/her duty of preserving the thing for the Article allows the finder to sell the thing where preserving is onerous. For instance, if the thing found is a cow, then it will be difficult for the finder to keep the cow for he/she is required to feed the cow or to take the cow out to a field. So since this will be difficult for the finder then the law allows him/her to sell the thing.

The finder may comply with what is required of him/her, but the owner of the thing (if there is any) may not come to the scene. Then, is the finder going to be the owner of the thing or the proceed from the sell of the thing for he/she fulfils what the law requires of him/her? Does an owner (if there is any) have the right to take back the thing at all? When?

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If the thing is found out to be one whose previous owner has relinquished it, then at the moment such is ascertained, the finder will be the owner of the thing. This is because at the time the previous owner relinquished his right over the thing, the thing has already become a thing with out an owner/a master.

On the other hand, after the finder informs about his/her find to the appropriate bodies, the owner may come and claim the ownership of the thing saying that he /she has lost the thing. However, the mere fact of coming into the picture does not presuppose recovery of the thing by the owner. According to Art. 1157, the owner can recover the object from the finder '…so long as he/she has not lost the ownership…'

? When is the day for the owner to lose ownership right over his/her lost thing? *(Answer the question in the following free space)*

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The issue may differ from case to case, but all what it revolves around is on the principle of prescription and on the case whether the owner has already relinquished ownership right voluntarily. The concept of prescription is dealt under Art.1192 of the Civil Code. It refers to losing of one's right due to lapse of a period of limitation provided by the law (refer the section which deals with usucaption for more information on prescription). Art. 1192 provides that an owner of a corporeal chattel will lose his right of ownership where he failed to exercise them for a period of ten years by reason of his not knowing where such chattel was or that he was the owner thereof. The period of limitation to loss ownership right over corporeal chattels is ten years. Therefore, at the end of the 10^{th} year the ownership right of the previous owner

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will extinct and the finder will be the owner of the thing and his/her ownership is original.

Besides this general principle there are special provisions which provide a lesser limitation period for things to be declared as 'with out a master'. For instance, according to Art. 1152 in cases of captive or tamed animals if the owner does not attempt to recapture them with in the following month from their missing or the owner ceases for one month to attempt to recapture them, then the animals will legally be with out a master. The ownership of the previous owner will come to an end at such a moment and if the animal is found and possessed by another person, then the possessor will become the owner of the animals, and his/her ownership is original rather than derivative.

If you consider the case of bees that is provided by Art. 1153, the owner will lose ownership right over the swarm when they left their hive for it is provided under Sub(1) of the same Article that bee swarms which have left their hive shall be deemed to be things with out a master. And pursuant to Sub (2) of the same, it is provided that the person in whose hive they settle down shall become the owner of such swarms by virtue of occupation. Sub(3), however, seems to give one more chance to the previous owner by allowing the owner to take back his/her swarms if he/she chases them and arrives where they have settled immediately afterwards.

? Will the owner loss ownership right over the swarm of his/her bees if he/she chases them but reached to the place they settled afterwards(not immediately)? What if it happened so due to the pace of the swarm and there is no negligence from the side of the owner?

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If the owner has lost his/her ownership right due to any of the above reasons, then the thing is with out a master and it logically follows that the finder will become the owner(occupant). But if such period of limitations do not lapse and the owner is to recover his/her thing, the finder will be refunded of all the expenses he/she incurred in keeping the thing and also may be rewarded, where appropriate, not more than ¼th of the value of the thing pursuant to Art.1157(3) and Art.1158. It is to the discretion of the court to decide whether the reward ought to be granted or not and to fix the amount of the reward taking into consideration the financial position of the parties and the chances the owner had in finding the object by himself. The right of the finder to be rewarded is not everlasting. He/she may lose such right of reward if he/she did not apply for the same with in the year following restitution of the thing according to Art.1158 (3).

? Do you think that Art.1151 will be applicable where the thing found is a treasure or an antique? What is treasure? What is antique?

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Though it is said that the principle of occupation is applicable to corporeal chattel (Art.1151), it is not applicable on all of them. There are certain movable things that are excluded from being owned by occupation. The things that are covered by Articles 1159 and 1160 are excluded from being owned through occupation. Treasure is the one that is covered by Art.1159 while antique is the other covered by Art. 1160.

The meaning of treasure is given by Sub(3) of the Art as ‘ *things of which no body can be shown to be the owner and which have been hidden or buried for not less than*

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50 years'. If a person finds out something which later on is proven to be a treasure, while digging land, the finder will in no case become the owner of the treasure irrespective of the fact that he/she has taken possession of the treasure with a view of becoming the owner. The law has set in advance that the owner of the treasure should be. Accordingly a treasure shall become the property of the holder of the land or thing in which the treasure is found (Sub (1)) of Art 1159). The finder of the treasure, however, is not left with out any reward. Sub (2) of the same provides that the finder has a right to a reward equal to ½ of the value of the treasure.

Unlike Art. 1159, which gives meaning to the term treasure, Art.1160 does not give meaning to the term antique. The provision only states that provisions that are governed by special laws regarding archaeological excavations and antiques shall not be affected by the provisions that deal with occupation. If we resort to a special law that deals with antique, we found Proc.229/1966. According to this proclamation antique is defined under Art. 2(a) as '… *any construction or any product of or archaeological interest, having its origin prior to 1850 E.C*' Article 3(a) of the proclamation implies that antique could be movable or immovable and they are declared to be owned by state. Antiques have historical and archaeological significance. Therefore, antique is excluded from the set of things that could be appropriated through occupation. A finder of a treasure will pass it to the state.

Activity Two

1 What are the different modes of acquiring ownership?

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2. Explain the idea that 'getting ownership right through acquisition entitles the acquirer with original and not derivative right'.

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3. What is the meaning of occupation and what are the essential requirements for its existence?

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4. What are the things subject to occupation?

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5. Will a person be entitled with the right of ownership of a lion by occupation if he/she possesses the lion with the initiation of becoming the owner of it? Why or why not?

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2. Possession in Good Faith

This also is another mode of acquisition of ownership over corporeal chattels. As far as movable things are concerned, the possessor of the thing is presumed to be the owner according to Art. 1193. If it is so, then it follows that whenever you enter into a contract of sale regarding a movable thing with a possessor of the thing, you are presumed to enter the contract with the owner. The fact, however, is that the possessor may not always be the owner and after you buy the thing the owner may claim the thing and may told you that the person from whom you buy the thing has no legal right to transfer it. When Harrison C. Dunning discuss about this issue he states it as follows " It was felt that the security of transactions was endangered by the possibility that even years after a sale had occurred the purchaser could be deprived of his goods…"(Pg. 56). Then, what remedies are there for the purchaser?

In the old times there was a maxim, which says " *nemo dat quod non habet*" which means that a transferee (a buyer) can take no better title than his transferor (seller) which was common to both the Roman (Civil) Law and the Common Law. In the modern Civil Law, this rule has been completely superseded so far as movable things are concerned. (Harisson C. Dunning, Pg. 55). Therefore, a transferee can have a better title than his transferor in case of movable things.

The Ethiopian Civil Code being adapted from the French law, which is the prominent instance of Civil Law, is designed in such a way to protect persons who enter into a contract for consideration to acquire the ownership of a corporeal chattel and takes possession of such chattel as far as they are in good faith. That is to mean such persons are given right to acquire ownership over the thing by virtue of their good faith. Readers have to put in mind that it is not the ownership right of the owner that is transferred to the purchaser. As we have seen at the beginning of modes of acquiring of ownership, ownership could be gained through acquisition independently of a previous owner. In case of a possession in good faith, which is one mode of acquiring ownership, the purchaser's right exists irrespective of the owner's right and the ownership right of the purchaser is original rather than

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derivative. Articles 1161-1167 are devoted to deal with such matters. Art. 1161 reads as follows:

Art 1161- Principle

(1). Whosoever in good faith enters for consideration into a contract to acquire the ownership of a corporeal chattel shall become the owner thereof by virtue of his good faith when he takes possession of such chattel.

(2). His rights shall not be affected by the fat that the person with whom he contracted had no valid title.

From this Article, the necessary elements for a person to become a possessor in good faith are:

- There must be an *agreement in view of having ownership* by the buyer
- The agreement has to be made *for consideration* and not gratuitously
- The buyer must take *possession* of the thing concerned
- The buyer must be in *good faith*

? What do you understand from the phrase ‘good faith” under this Article? And how are you going to prove that the person was or was not in good faith?

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The definition of the term good faith and its way of proof is dealt under Art. 1162 as whosoever acquires a corporeal chattel shall be deemed to be in good faith where he believes that he is contracting with a person entitled to transfer the thing to him. Accordingly, the good faith of the person who acquires the corporeal chattel fundamentally depends upon the belief of the person i.e. he must believe that he is contracting with a person entitled to transfer the thing to him. Since believing is a mind state of a person it is clear that it will be difficult to proof. Hence the law takes

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it as presumption that, however, could be rebutted if evidence is produced to show that the person knows *at the time of* contracting that the other person was not the owner. Therefore, proof is required to show that the person was not in good faith rather than showing that the person was in good faith. What is your attitude towards a purchaser who could not know that he is contracting with a person who is not the owner of the thing due to his gross negligence? Can you say that such person was in good faith at the time he bought the thing or can you consider him to be in bad faith?

Pursuant to Art. 1163, good faith must exist at the time of taking possession of the thing by the purchaser. And such possession may be directly or indirectly according to Art. 1141. Then is a person going to be presumed to be in good faith if he comes to know, *after* he bought the thing, that he has bought it from a person who does not have a legal right to transfer it? According to Sub (2) of Art. 1163, such fact does not have any effect on the good faith presumption of the purchaser since he does not know the fact at the time he bought the thing, which is the prerequisite by Sub (1) of the same.

Sometimes it may happen that people gave up their ownership right over a thing voluntarily and another person may take it and transfers to another for consideration. Pursuant to Art. 1164 the person who gave up his ownership right cannot reclaim the thing from the person who has become owner thereof in good faith even if he could show that the person into whose hands he gave up the thing acted deceitfully. This is because at the time of relinquishing the ownership right, the owner will lose the ownership right over the thing and the thing will automatically become a *res derlictae*. The previous owner however may raise a personal action against the person into whose hands he relinquished the thing based on the contract and the fraudulent act of the person.

What if a thing is stolen from an owner and sold to another person? Can the owner reclaim it from the buyer, who is a possessor in good faith? At this time, the principle envisaged under Art. 1161 faces limitation and the person who possess the thing, even if he is in good faith, has to give the thing back to the owner. Such right of the

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owner to reclaim the thing, however, will be barred if not claimed with in five years from the time the theft occurred according to Art. 1165(the time is put as three years according to the English version). Is there any relationship between this Article and Art.1192? The person from whom the property is reclaimed i.e. the good faith possessor, on the other hand can require the seller to reimburse him with the price he paid provided that the seller is a tradesman selling similar articles in market, overt or at a public auction.

? What do you think is the logic to make it necessary for the tradesman to deal with similar articles and to deal at public paces like market, overt or at a public auction?

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In cases of currency and securities to bearer (shelling, birr, dollar, check, bill of exchange…), the acquirer can never be dispossessed of them even if they are stolen ones according to Art. 1167. This is because since money does not have identity and currency is a universal means of exchange, the law is trying to protect the free circulation of the same. Moreover, it will be unreasonable to inquire the sources of securities to bearer since they are transferable by mere delivery. (Refer Art. 721 of the Commercial Code of Ethiopia). Is the acquirer of a currency to be considered as a good faith possessor? If so he has to have entered into a contract for consideration, as this is a requirement for a person to acquire a thing in good faith. Then what consideration should be made to acquire currency?

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Activity Three

1. What is possession in good faith?

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2. What are the essential requirements for acquiring ownership through possession in good faith?

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3. What are the instances where by a person cannot acquire ownership by possession in good faith?

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3. Usucaption

Usucaption, which also is referred as acquisitive prescription, as a third mode of acquiring ownership is discussed under Art.1168 and Art.1169 of the Civil Code. The Black' Law Dictionary gives meaning to the term as the acquisition of ownership by prescription. According to Art.1168, it comes into scene where a person possesses an immovable and pays for 15 consecutive years the taxes relating to the ownership of an immovable. The period of limitation provided for the purpose of acquiring ownership through usucaption is 15 years. It has to be remembered that a person will acquire the immovable irrespective of the right of the owner of the immovable and his ownership is original. Unlike in the case of occupation and possession in good faith, the subject matters of usucaption are immovable things only. With the current legal system of Ethiopia, land being owned only by the state is not subject to the issue of usucaption and buildings only will be the subject matters of usucaption.

Dear learner, now it is important to make it clear for you about the effects of limitation period and prescription. For the clarification let us see an excerpt from the book written by Dunning.

In modern systems of law a man's legal position may be affected by lapse of time in two main ways, which are sometimes distinguished in English legal language as limitation and prescription, though the terminology is not fixed. Limitation applies to actions, prescription to rights. Under the system of limitation, if an action is available to me and I fail to bring it with in a certain time, I am debarred from bringing it thereafter. But it is only the action, which is barred; but the right on which the action is based still survives. It is unenforceable or 'imperfect', but not void. (pg 61)

Prescription signifies the acquisition or the extinction of a right by the lapse of time. Prescription is either 'acquisitive' or 'extinctive'. Acquisitive prescription, also called 'usucaption', is the institution whereby a person is permitted to acquire an indefeasible title to a real right, *ad versus emnes*, by prolonged possession. Extinctive prescription bars, by the lapse of time, the action of a creditor, that is to say, of a

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plaintiff whose right is derived not from a right in *rem* but from an obligation –be it contract, quasi contract, or tort.

According to Art. 1169 of the Civil Code, it is mandatory to resort to the provisions of the Civil Code that deal with the application of period of limitation, interruption, enforcement and waiving of period of limitation i.e. Art.1851-Art.1856, in order to deal with the period of limitation for usucaption. For instance, if the owner of a house reminds the possessor to pay the land taxes relating to the land every three year and the latter accepts the same and pays, then at the 15 year of paying the taxes the possessor cannot claim ownership right over the house by usucaption since a new period of limitation starts every time the owner reminds the possessor and the latter accepts the same. This is because according to the *mutatis mutandis* application of Art.1851 and Art.1852 to usucaption, if the possessor of the house admits that he has to pay the taxes on behalf of the owner and he has been doing the same for many years, then it means that the period of limitation has been interrupted every three years (Art.1851 (1)).

In addition, according to Art. 1852 the consequence of interruption of period of limitation is beginning of a new period of limitation. Or the case may be that you are the owner of a house and it is your relative who possesses it. In such cases because of the obedience you owed to, you may not even think about reminding or bringing actions against your relative regarding the land taxes. Having things run like this the time may come to be 15 years and your relative may claim an ownership right over the house by saying that your ownership right is extinguished for he has possessed the house and has been paying the land taxes for the past 15 years with out any interruption. In such cases, is it real that your ownership right comes to an end? Can you raise as a defense your obedience and the special relation you have with the person? Refer Art. 1853.

An owner of an immovable and a possessor of the same may enter into an agreement in advance to waive the 15 years period provided by the law. Such, however, is

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contrary to the law and it is only after the coming into effect of the 15th year period that the possessor may waive it. Refer Art. 1855 and 1856.

Activity Four

1. What does usucaption mean?

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2. What is the subject matter of usucaption?

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3. Can the possessor of land and the bare owner agree to waive in advance the right of the possessor of the land to acquire ownership by usucaption? Why or why not?

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4. Accession

Accession is one of the modes of acquiring of ownership that is dealt by the Civil Code. The subject matters over which ownership could be acquired by accession are both movable and immovable things. The meaning of accession can be understood in two ways for its literal meaning and the meanings that can be understood from the Civil Code are different in scope.

In principle accession is a means of acquiring of ownership of a thing which becomes united with a thing the acquirer already owns. The meaning that is envisaged by the provisions of the Civil Code is broader than this. According to the code, accession is an *increase* that can be resulted either from the union of one object with another or from separation of a thing from another. In short, a person can acquire ownership of a thing either *through the unio*n of a thing with the thing he/she already owns or *through separation* of a thing from the thing he /she already owns.

Acquisition of ownership through accession by union can be manifested when -

- a movable thing is attached to another movable thing
- a movable thing is attached to an immovable or
- an immovable thing is attached to another immovable

Regarding the first mode of accession you can take an example whereby a wheel is attached to a car or where a radio is installed in a car. For the second you may take the case of window attached to a house or the case where a seed is sawn on land. The deposition of soil by a river on the bank is an example for the attachment of immovable to an immovable.

On the other hand acquisition of ownership by accession through separation can be manifested in the case of natural fruits. For instance collecting of orange from an orange tree or getting an offspring during breading where by the offspring is separated from another thing-its mother.

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When accession takes place you may face with one or more owners of the things acceded based on whether the thing is acceded by union or separation. If the accession is an increase due to the union of two or more things, then you may face with two or more persons who claim the ownership of each of the things which are subject to accession. Yet, if the accession is an increase due to separation like in the case of breading, there is only one person i.e. the owner of the thing from which another is separated.

In the former case i.e. when two things owned by different persons are united the problem arises in determining as to who should be the owner or benefit from the result of the union of the things. In general the owner of the 'principal' thing acquires by accession the ownership of the 'accessory' thing –that is, the owner of the thing of a greater permanence acquires ownership of the thing of lesser permanence and not vice versa. In here another problem may arise in determining which one of the things is considered as principal and which one as accessory. What is believed by many writers in this area is that immovable things are considered as principal when compared to movable things. Hence when a movable thing is attached to or separated from an immovable it will belong to the owner of the immovable for the immovable has a greater permanence. For instance if you consider a house and a door or widow the house is considered as principal and with a greater permanence. As a result if a door which is the owner of another person is attached on the house of another, then the owner of the house will be the owner of the door. You may extend this principle to special movables like aircrafts, ships and vehicles. By the same talken, a car is considered as principal and with more permanency when compared to a tire.

Now let me take you to the provisions of the civil code that are devoted to deal with accession. The provisions start from Art. 1170 and end at Art. 1183. The provisions deal with accession that may result from increase from natural fruits(Art.1170), increase from breading(Art.1171), accession of crops on land(Art.1172-1174), accession of plantations(particularly of trees) on land(Art.1175-1177), accession of buildings on land (Art. 1178-1180), accession of materials on buildings, plantations,

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or other works(Art.1181), accession by specification(transformation of a substance)(Art.1182) and accession through merger and embodiment(Art.1183).

As I have tried to mention it above a dilemma may arise in identifying the owner of a thing that is resulted from the union of two or more things. There are certain other methods that are used by the Civil Code to determine as to who is the owner of a thing over which another thing is acceded to, besides the method of identifying the principal thing. Art. 1181 and Art.1183 (2) are left to cover the criteria of identifying the principal thing. According to the former article, a land owner (currently a land holder) who makes buildings, plantations or works with material the property of another shall become the owner of such material. According to the later article where two things are mixed together or embodied but one of them must be regarded as an accessory to the other, the new thing shall belong to the owner of the principal thing.

Another method implemented by the Code depends on the mind state of the persons who are the owners of the things that are acceded. For instance according to Art.1172, whosoever sows seeds in land the property of another against the clearly expressed will of the land owner(in the current case the holder of a land) may neither till nor reap what he has sawn. And where the harvest is reaped the whole crop shall be the property of the land owner. However if the person saws seeds without the objection of the landowner, he may till and reap what he has sawn pursuant to Art.1173. The same principle applies to plantations and buildings. Accordingly, a land holder may acquire ownership of crops that are sawn on his/her land by another when the sawing is undertaken against his/her express will. The fact that the person sawed the crops in disregard of the objection of the holder of the land implies that the person is acting to the prejudice of the holder. So, the bad faith of the sawer will entitle the holder of the land with the ownership of the crops of the sawer. This is the instance of acquiring ownership of movable thing which is attached to an immovable. However, when the person saws crops on the land of another with the will of the holder of the land, then the holder of the immovable will not acquire ownership of the movable i.e. the holder of the land will not get ownership right over the crops.

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Another technique that is used under Art.1182 for the case of specification (transformation) is to compare the value of the labor supplied to transform the thing with the value of the thing transformed. Specification (transformation) is 'the act of making a new thing with material belonging to someone else'. Accordingly, where a person has worked with or transformed a substance which did not belong to him, the new article shall become the property of the worker where the labor supplied for such work or transformation is of greater value than that of the substance. However, where the worker did not act in good faith, the court may allot the new thing to the owner of the substance even though the value of the labor supplied is greater. In here the mind state of the worker is also a determining factor.

As I have mentioned above Art. 1170 deals with accession through increase and Art. 1171 deals with increase from breading. They read as follows:

Art.1170. - Increase

(1). Whosoever owns a thing shall own the natural fruits there of.

(2). Periodical products of a thing and any thing which may according to usage be derived from a thing in conformity with its purpose shall be deemed to be fruits.

Art1171- Increase from breading

(1).As regards ownership, increase from breeding shall follow the mother.
The owner of the mother shall be the owner of the increase.

? Can you see any difference between Sub (1) and Sub (2) of each Article? What do you understand by natural fruit, a periodical product and a fruit? *(Use the following free space to answer the question)*

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Sub (1) of the first article points out that an owner of a thing is also the owner of a natural fruit of the thing he/she already owns. Sub. (2) on the other hand tries to define the term fruit. According to the meaning given by the sub article, a fruit is a product. However, there has to be a *periodicity* for the product to be called as a fruit. Let me put what is stated by Dunning as it is at page 79 regarding this matter

'In French law a distinction is made between the 'fruits' and the 'products' of a thing. By 'fruits' is meant all that a thing produces at a periodical intervals; without diminution of its own substance. By the side of fruits, properly so called, are found certain products which are not fruits and to which the term product is applied, some because they are not periodical, as exceptional cuttings of wood, the others because they use up the substance of the thing, as substance taken from a quarry.'

As you can see from the above excerpt, besides the issue of periodicity, the issue whether the thing diminishes the substance from which it is originated is another factor to determine whether the thing is a fruit or a product according to the French law. So for a thing to be a fruit it should not diminish the thing from which it is originated. The other point to be raised here is that Sub (1) uses the phrase 'natural fruits' while Sub (2) uses the word 'fruit'. This difference leads one to think of fruits that are not natural or that are artificial.

Fruits are generally classified as *natural* and a*rtificial*. The artificial fruits are further classified as *civil* and *industrial* fruits. The natural ones are those which are the periodical increments of animals or plants. E.g. an offspring of a dog i.e. a puppy or the orange fruit of an orange tree are natural fruits. Civil fruits are fruits which are entitlements either by virtue of law or agreements. Such is the case with interests of sums of money or profits or rents. Fruits that may be obtained by cultivation or workings on the soil are industrial fruits (fruits of labor), but they have some element of natural fruits.

Coming to Art.1171 (1) the Article deals with an important issue regarding increases from breading. Had there not been such provision, a conflict among people regarding

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the ownership right over the young of animals was sure to arise. Is it the owner of the male or the female animal that is going to appropriate the offspring of such animals? So, this Article resolves the matter by entitling the owner of the female animal- the mother with the ownership right of the offspring. Sub (2) of the Article envisages no new idea except elaborating the idea mentioned under Sub (1).

What is left undiscussed still under the accession part is that of merger, adjunction and embodiment which is dealt under Art. 1183. Adjunction is 'the union of two things belonging to different owners, so these things form a single whole, though each of them is a distinct and cognizable part of this whole'. Merger or fusion or commingling is 'the mixing together of dry or liquid matters belonging to different owners'. According to the provision, where things belonging to several owners are mixed together or embodied in such a manner that they cannot be separated without appreciable deterioration or only at the cost of excessive labor or expenses, the parties concerned shall become joint owners of the new thing pro rata to the value of its component parts prior to the mixture or embodiment.

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Activity Five

1. Explain the literal meaning of accession and the legal meaning given by the Civil Code of Ethiopia.

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2. What are the determining factors in order to give ownership right of a thing to which another thing is acceded to, to a person when there are two or more persons claiming for ownership of the thing?

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3. What do you understand by specification, adjunction and merger?

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4. What is a fruit? Explain the types of fruits?

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5. How do you distinguish between fruit and product?

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6. Under which category of fruits will you put an orange tree? Natural or industrial?

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CHAPTER THREE
TRANSFER OF OWNERSHIP

OVERVIEW

As I have tried to show you above, transfer of ownership is one mode of acquiring of ownership. When you come to transfer of ownership right, it is recommended to examine the point from two points of views. One is from the point of view of the transferor (e.g. a seller) for whom the transferring of ownership is just passing of his/her ownership right to another while the other point of view is the person to whom ownership is transferred to or the transferee's(e.g. a buyer). It is from the second point of view that we have examine the issue when we discuss about gaining of ownership right or becoming owner of a thing. In this chapter, however, we are going to look at the issue from the first point of view i.e. transfer of ownership as the mode of just passing ownership right from one person to another.



Objectives

By the end of studying this chapter, you will be able to

- Discuss briefly what transfer of ownership means
- Know the effect of transferring of ownership
- Explain the legal requirements of transferring of ownership in case of movable and immovable things.

Transferring of ownership is a juridical act where by the ownership right of a person will be passed or shifted to another person. By transferring of ownership, all the rights a person has over a thing -usus, fructus and abusus- will be transferred to another person. The transferring may be done by the will of the owner or by law. Accordingly, the person who does so will be denied of any of such rights over the thing. A person to whom ownership is transferred is called transferee while the person who transferred the right is called as transferor.

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As I have tried to show you in the chapter of acquisition of ownership a person acquires ownership of a thing irrespective of the right of a previous owner. Unlike in the case of acquisition of ownership, transfer of ownership presupposes a previous owner. The ownership right of a transferee is derived from the transferor. The title of the transferee is dependent on the title of the transferor.

The Civil Code of Ethiopia has four Articles which deal with transfer of ownership. According to Art. 1184 of the Ethiopian Civil Code transfer of ownership is made possible in two ways i.e.

- By virtue of the law
- By agreement

The Article reads as follows:

Art. 1184. – Causes of transfer.

Ownership may be transferred by virtue of law or in pursuance of agreements entered into by the parties.

? Can you give examples where by ownership is transferred in accordance with the law?*(You can use the following free space to answer the question)*

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The instance where by ownership is transferred by law is the case of intestate succession. According to the Succession Law of Ethiopia if a person dies with out writing a will then it is the law which will regulate the property of the person. So according to the law the ownership of the deceased will be transferred to the heirs.

The Civil Code makes distinction in the transfer of immovable and movable things.

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Art.1185 deals with the transfer of immovable property while Art. 1186 deals with the transfer of movable things (corporeal chattels). In both cases there are certain requirements. Pursuant to Art. 1185, the requirement is that when ownership right over immovable thing is transferred, whether in accordance with the law or by agreement, such has to be entered in the register of immovable property. That means the name of the previous owner has to be cancelled from the registers of immovable property and the name of the person to whom ownership is transferred to has to be entered into.

In case of movable things, the requirement that is put under Art 1186 is mere possession.

Activity Six

1. What do you understand by transfer of ownership?

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2. Explain the idea ‘a transferee’s ownership right is derivative and not original when compared to that of the ownership right of an acquirer’.

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3. Discuss the legal requirements for transferring of ownership right of movable things

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4. Discuss the legal requirements necessary for transferring of ownership right on immovable things.

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CHAPTER FOUR
EXTINCTION OF OWNERSHIP

Overview

So far we have been discussing basic issues related to ownership right. We have studied about how a person can acquire ownership right. Then we have also considered how a person who has once acquired such ownership right can pass the same to another person. After studying such issues you may inquire whether the ownership right of a person is everlasting or it has some ending point. In other words issues like 'will an owner of a thing remain as an owner of the thing forever if he/she does not transfer the right?', is the relationship of the person with the thing everlasting?' may come to ones mind. This section is devoted to deal with such kind of issues, issues related to the extinction of ownership right.



Objectives

Dear learner, by the time you finish studying this section, you will be able to

- Explain about the concept of extinction of ownership right
- Briefly discuss about the different ways of extinction of ownership right

Extinction of ownership is a juridical act by which ownership right comes to an end. Ownership extinguishes where any of the elements which are necessary for the continuous existence of ownership are lacking. In case of immovable and special movable things what is necessary for the continuous existence of ownership is registration of the thing in the registers of immovable things with the name of the owner (Art. 1185 and Art. 1723). So if the thing is stricken from such register, then the person will lose his/her ownership right. Whereas in case of movable things, loss of possession of the thing will lead to loss of ownership right over the thing. This is because mere possession of a movable thing presupposes ownership right of the possessor over the thing.

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The Ethiopian Civil Code deals with extinction of ownership right under Art. 1188-1192. The Articles simply provide for the instances that lead to the coming to the end of ownership right. Accordingly, five instances are provided as a means of losing of ownership right. They are:

- Loss of the thing
- Acquisition of the thing by a third party
- Striking off register
- Waiving of right
- Prescription

Close examination of the above five causes of extinction of ownership right shows that extinction of ownership right could be absolute or relative. By absolute it is to mean that the extinction of the right is forever and there is no subsequent owner of the thing. The best example we can cite for absolute extinction of ownership is extinction through loss (destruction) of a thing that is discussed under art. 1188. Relative extinction of ownership right on the other hand means that even if ownership right of a person is extinguished, the right may be gained by another person like in the case of acquisition by a third party as provided under Art. 1189. Relative extinction of ownership right is a mere change of owner. Dear readers it has to be clear to you that ‘loss of things’ and ‘lost things’ have different legal consequences.

At the beginning, while discussing about the meaning of ownership right we have said that ownership right is a link between a person and a thing. Therefore, for the existence of ownership right we can say that we need to have at least two things i.e. the subject of the right (the person who enjoys the right) and the object of the right (the thing over which the right can be exercised). Hence if the link is broken then it will lead, if not in all cases, to the extinction of the right. The link between the person and the thing may be broken due to different reasons. Among such causes one that is mentioned by Art. 1188 of the Civil Code is the loss of the thing. According to the Article ownership shall be extinguished where the thing to which the right

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extends is destroyed or *loses its individual character*. If for instance your house is burned down or your car is demolished then your relationship with the 'thing' will end there and then.

? What do you understand from the phrase 'the thing to which ownership right extends loses its individual character'? When does a thing lose its individual character? (*You can use the free space below to answer the question*).

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By individual character of the thing what it means is the part of the thing which makes it appropriable and useful. A thing loses its individual character when it is immobilized, has constituted an intrinsic element of a principal thing or accedes to another thing and form part of that thing as in the case of transformation and adjunction. It does not work for merger as the previous owners of the components of the thing continue to be joint owners of the 'new thing'.

Article 1189 of the Code deals with other instances of extinction of ownership right. The causes mentioned by the Article are acquisition by a third party and transfer to a third party in accordance with the law. You can refer the discussions we have made regarding acquisition and transfer of ownership in the previous sections. So the whole idea inhere is since two or more ownership rights cannot co-exist, unless in the form of joint ownership, when a thing is acquired by or transferred to a third party in accordance with law, the right of the previous owner will extinguish. Here you have to read with much focus and investigate whether extinction or acquisition of ownership right comes first. To begin you may refer the fact that in case of acquisition of ownership right the acquirer of the right acquires so irrespective of the right of a previous owner. On the other hand in case of extinction of ownership right, what Article 1189 provides is that when a person acquires ownership right in accordance with law the ownership right of a previous owner will come to an end. So

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in this case, acquisition leads to extinction. Is it not a contradiction for acquisition by itself presupposes extinction?

The other case mentioned by Art.1190 as a cause of extinction of ownership is striking off register. According to the Article, the ownership of an immovable shall be extinguished where the entry relating to such immovable is struck off the register of immovable property. Article 1191 states the waiving of right to be one of the ways that lead to extinction of ownership right. The Article states that the ownership of a corporeal chattel shall be extinguished where the owner expresses in an unequivocal manner his intention to waive his rights as an owner.

? Will the ownership right of a person over an immovable thing come to an end if the person waives his/her right over the immovable in an unequivocal manner? (You can use the following free space to answer the question)

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You have to put in mind that waiving of ownership right over immovable things will not bring any difference unless the ownership is struck off the registers of immovable things.

The last provision that deal with extinction of ownership right is Art.1192. The Article governs the issue of extinction through prescription. Here you have to refer to the section that deals with prescription under the topic usucaption. In here, the owner of a corporeal chattel shall lose his rights as an owner where he failed to exercise them for a period of ten years due to his not knowing where such chattel was or that he was the owner thereof. The prescription that is discussed here is extinctive prescription. An important point to be discussed in here is that the ownership right of the person will come to an end at the end of the 10^{th} year irrespective of whether the

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thing is acquired by another person or not. If in case nobody has found the thing and after the 10th year, the previous owner found it or came to know that he/she was the owner, he/she cannot simply take the thing as an owner. This is because his/her ownership right has come to an end at the end of the 10th year. The only way left for the person and the logical way to take ownership of the thing, to act as a finder of the thing and to acquire it based on the provisions of the Civil Code that deal with acquisition of ownership right.

Activity Seven

Discuss briefly the different instances of extinction of ownership right.

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What are the legal consequences of extinction of ownership?

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CHAPTER FIVE
PROOF OF OWNERSHIP

Overview

At this point, what we are going to discuss is about what is expected of a person to prove that he /she is the owner of a thing. What is required of a person to get a legal remedy against any person who encroached upon his right over a thing? How can a person proof that he/she is the owner of something?



Objectives

Dear student you will come to know the following things at the end of this section.

Explain what proof of ownership means

Explain the legal requirements to prove ownership

Distinguish the differences in the requirement of prove of ownership in case movable and immovable things.

Articles 1193-1203 of the Civil Code are the provisions that are devoted to deal with proof of ownership. Sub (1) of the first Article deals with a presumption that a person who possesses a corporeal chattel is presumed to possess the thing on his behalf and to be the owner. This is because ownership right over ordinary corporeal chattels may be transferred when possession is transferred. As a result, whosoever in possession of ordinary corporeal chattel is presumed to possess it on his own behalf and to be the owner. Such presumption, however, is rebuttable if evidence is proved to the contrary. The burden of the proving that the presumption is incorrect is on the person who alleged so.

Art. 1194 on the other hand deals with immovable things. It provides that immovable things that are situated in Ethiopia, which are vacant and which are with out master shall be the property of the State. In the contemporary world since land is already owned by the state, whether vacant or not, the Art. will be applicable to buildings.

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? A person found a certain house at a rural place and possesses it with the intention of becoming the owner of it. Assume that the house has no owner. Can the person become the owner of the house through occupation? Why or why not?

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With respect to buildings, the issuance of title deeds by concerned administrative body to the effect that a given building belongs to a given person raises the presumption that such person is the owner of such an immovable. Prior to issuing the title deed the concerned authority has to require that the title deed previously issued in relation to the same immovable be returned to him/her so that it may be cancelled. If it is alleged that such previous title deed has been lost or destroyed, the authority has to require the person applying for a new title deed to produce sufficient security to cover such damages as may be caused to third parties by reason of the previous title deed not having been cancelled.

Under Art.1198 it is provided that liability will be on the State for any damage caused to a person who has acquired a right on an immovable on the basis of a title deed that was not issued in accordance with the law or was issued by an authority having no jurisdiction. The liability of the state also extends to the state in case where the authority fails to cancel a previous title deed. The state on the other hand is eligible to claim its rights against the officials at fault on the basis of extra contractual liability.

According to Art.1196, if there is any body to claim against the presumption of ownership established by title deed he/she can base the claim by showing that the title deed was not issued in accordance with the law or was issued by an authority having no jurisdiction, or the title deed was issued on the basis of an invalid act, or the plaintiff acquired the ownership of the immovable after the day on which the title

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deed was issued. To understand what invalid act means it is recommended to refer to the general requirement for the formation of contracts in general.

When we come to proof in case of land, what has to be proven is possession and not ownership as land is not subject to be owned by private persons.

How do you think is it possible to prove possession of land?

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Such matter is discussed under Art. 1199. Accordingly, possession of land can be proven by showing the boundary marks that are made in accordance with the cadastral survey plan and the boundary marks found on the land. When there is disparity between what is appearing in the cadastral survey plan and those pointed out on the land, the former prevails.

Art. 1200 deals with an issue that all buildings, plantations and works on land shall be deemed to have been made by the owner at his own expense and to be his property. In the contemporary situation of Ethiopia, since land is owned by the state, the plantations, buildings and works made on the land are presumed to be that of the holder's of the land. So if there is any dispute on a plantation, a building or any other work, then the person who brings the claim has to show that either the things on which the claim is raised are not found on the land held by the person or the land on which the things are found is hold by a person who is not eligible to hold the same. The holder of the land on the other hand may only be required to show that the things or works are found on the land which he/she holds.

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When we come to party walls, the law presumes that they are owned jointly by the holders of the lands on which a party wall is found. In this case also evidence may be produced to show that the party wall is solely owned by one of the holders of the land (refer Art.1279-1280). Art.1202 deals with ditches and provides that a ditch shall not be deemed to be joint property where the embankment is to be found on one side of the ditch only. The ditch shall be deemed to be the sole property of the possessor of the land on which the embankment is. So a person who claims that the ditch is his/her own has to prove so by showing that the embankment is found on his/her side.

Regarding the ownership of water, gas and electrical supply are also discussed under Art. 1203. Accordingly, it is provided that water and gas pipes, electrical and other lines shall be deemed to be accessories of the undertaking from which they originate and to be the property of the owner of such undertaking. So if there is a water pipe on a land hold by a person. The pipe is presumed to be the property of the Ministry of Water Resource and not that of the person's on whose land the pipe is found. In all cases, the legal presumption is rebuttable when evidence is produced to the contrary.

Activity Eight

1. Briefly explain the legal modes of proving of ownership right in the case of movable and immovable things.

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CHAPTER SIX
RIGHTS AND DUTIES OF OWNER

Overview

As human beings are social animals, there are many instances where people affect each other when living as a society. Especially in their relations that depend on things that are useful and appropriable, conflicts are inevitable. Unless the society is regulated by a certain legal mechanism, social chaos will prevail. Hence countries have devised legal rules and regulations to govern the relationships of the society where by people are given rights and duties. Rights and duties almost in all cases co-exist together. This is because a person may affect others by exercising his/her rights as he/she wishes and wills. For instance, a person who is entitled with a right to own something may affect people in his/her surrounding by the way he/she utilize his/her right.

So in this section, as our focus is ownership right, we are going to examine the rights and duties that are imposed on owners of things.



Objectives

Dear student, the following points are issues which you can explain about after finishing studying this section.

- Rights of owner
- Duties of owner
- Remedies an owner can have when his/her rights are infringed
- Measures that could be taken on an owner when he/she fails to comply with his/her duties.

The part of the Civil Code that deals with the rights and duties of owner is that provided under Art.1204-1227. Articles 1204-1206 deal with general issues while

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Articles 1207-1227 deal with specific issues. The specificity is that the later group of Articles governs the rights and duties of owner that exist regarding immovable things.

Regarding the definition and scope of ownership that is dealt by Articles 1204, 1205 and 1206, since we have already discussed about the same when we discussed about the meaning of ownership right there is no need to repeat it here. In a nut shell the rights that are dealt under Art. 1205 are the rights to use, exploit and dispose the thing while the right that is dealt under Art. 1206 is the right to claim his/her property from any person who unlawfully possess or holds it or make an act of usurpation. In line with such rights there are also certain duties on an owner. One of the duties mentioned under Art.1204 (2) is that an owner may not divide or restrict his/her right except where the law provides so.

By division of ownership right what it means is that the three rights i.e. use(usus), enjoying the fruits of a thing(fructus) and abuse(abusus), cannot be separated or dismembered except in accordance with the law though each of the rights are capable of being exercised separately. For instance in case of usufruct right, the right to possess a thing and the right to enjoy from the fruits of the thing are transferred to a person legally called as a usufructory while only the right to dispose the thing is left with the owner. Again in case of possession right, the possessor has the right to possess and use the thing while the owner retains the right of enjoying the fruits from the thing and disposing the thing. However, this dismemberment of ownership right into its component rights is made possible only in accordance with the law. This is to mean that it is not the power of the owner to disintegrate the components of ownership right. If you come to the right of possession the law has given the possibility in the previous sections you have study. If you come to the usufructory right the law has given the possibility under Art. 1309ff.

Art. 1205 though it entitles an owner with a right to exercise his/her right as he /she thinks fit, it also imposes duty on the owner. Accordingly the owner has to comply with the restrictions of the law in exercising his/her right. In her the owner has to put

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in consideration the public moral and societal values while enjoying his/her ownership right. For instance if a person is living in a house which he/she owns jointly with others, he/she is required by the law to put into consideration the rights of others in enjoying his ownership right over the house(Refer Art.1263). Again an owner is limited from possessing or enjoying the fruits of the thing once after the thing is given to another person through usufruct. Promise of sale and contract of preemption are also restrictions on the owner's right of disposition (Refer Art.1410ff.). There is also restriction on the collection of fruits. That is to say if for instance a person is using his/her vehicle for transportation service, the owner cannot collect a service fee as he/she thinks fit, the rate cannot be more than that provided by the concerned bodies.

Articles 1207-1215 of the Civil Code discuss the rights and duties of a possessor of land regarding fences, boundary marks, subsoil, and excavations underground, works above and below the land, branches and roots, and buildings and plantations briefly. Art. 1216-1219 deal with the same issue the difference being a matter of principle and exceptions.Art.1216 is a general provision while Articles 1217, 1218 and 1219 are exceptions. Accordingly, pursuant to Art.1216 an owner has a right of prohibiting third parties from entering into his/her land. On the other hand, pursuant to the special articles, such owner has a duty of allowing third parties to trespass his/her land where necessary. Trespass is made necessary in cases where the third party can only escape from an imminent danger by entering into the land of such person or in cases where the neighbor of such person wants to repair his/her wall or building which is set up on adjoining land with such person or in cases where things have been carried away or animals such as cattle, bee swarms or poultry have get lost by the operation of a natural force or in consequence of a fortuitous event and come to happen on the land of such person, he/she has to allow the interested person for the purpose of search and removal. Though the possessor of the land is under the obligation of allowing third parties to enter into his/her land, he/she has a right to claim compensation for any damage that may be caused due to the entering of such persons into his /her land.

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Articles 1220-1224 list out the duties a possessor of land needs to comply with for the benefit of other lands. According to Art.1220, a person shall, against full payment in advance of compensation for the damage thereby caused, allow the installation on his/her land of water, gas, or electrical lines or similar works to the benefit of other lands. Pursuant to Art.1221 a person whose neighbor's land constitutes an enclave (closure) or whose access to public ways is not sufficient to enable him/her to exploit his/her land, shall allow his/her neighbor to exercise a right of way against payment of compensation proportionate to the damage that may be caused. Articles 1222, 1223, and 1224 are accessories to article 1221.

? Against which land do you think a person can require a right of way where his/her land is encumbered by many other lands? *(You can use the following free space to answer the question)*

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To answer this question, looking into Art.1222 is mandatory. The Article provides for a person whose land is encumbered by two or more other lands, an option against which land he/she should demand a right of way. The available option for such person is to demand the right of way from the neighbor from whom it is the more reasonable to demand. For the purpose of identifying the reasonable option, the Article provides that regard shall be had to the position of the lands, the access thereto, the exigencies (necessity) of the enclosed land and the inconvenience occasioned to the encumbered land. Art. 1223 on the other hand deals with the situation where an encumbrance is caused on a land due to a division of land by sale, barter, partition, or any other contract. In such cases the Article provides that right of way shall be demanded from the original owner.

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Article 1225 with the title 'abuse of ownership' is a very important article for it governs daily activities of people, which have a great possibility of leading them into disagreements. The Article imposes on an owner the duty not to cause nuisance (annoyance, pain or trouble) or damage to his/her neighbor under Sub (1). Sub (2) lists the possible ways by which a person could create trouble on his/her neighbor. The list includes causing smoke, soot, unpleasant smells, noise or vibrations in excess of good neighborly behavior. However, a person who claims that he/she is disturbed by one of these actions of his/her neighbor has to put into consideration the local custom, the position and the nature of the lands pursuant to Sub(3) of the same. For instance if one of your neighbor files a suit against you by saying that you are creating problem on him due to the smoke that is created while you make '*injera*' with the traditional stove ('*Metad*'), it may not be sound for preparing '*injera*' with the traditional stove('*Metad*') is the custom of many Ethiopians. You may however be required to minimize the problem by using alternative methods if possible.

Art 1226 deals with a penalty that could be imposed on an owner who abuses his/her right and creates nuisance on his/her neighbor. The Art reads as 'an owner who is caused or threatened with damage by reason of another owner abusing his rights may require such owner to repair the damage caused or prevent the occurrence of damage with out prejudice to any claim for damages'. The last Article for this section is Art. 1227. It is devoted to deal with the issue that all restrictions made on ownership are binding regardless the registration of the immovable. Besides, such restrictions cannot be waived or altered by agreement between the parties.

Activity Nine

1. Is ownership right absolute? Can an owner of a thing exploit it with out any limitation?

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2. Briefly explain the limitations on the rights of an owner that are incorporated in the Civil Code.

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3. What are the measures to be taken against an owner in the case of non-compliance with the restrictions that are imposed on him/her?

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CHAPTER SEVEN

OWNERSHIP AND USE OF WATER.



Objectives:-

After completing this chapter, the student is expected to know

- Policy matters underlying the water use and management,
- The approach to the issues of water use and management,
- Various theories of water use and management at natural as well as international level,
- Various uses given property and possible conflicts
- The laws applicable to the issues in using and managing water

General Introduction

Dealing with water separately and regulating different aspects of water by a separate law is necessitated by scarcity of and multi-purpose served by water. Unlike many other natural resources, water is the basis for survival and perpetuation of life. Moreover, water can be used in various aspects of social life like, domestic use, in hotels and restaurants, watering cattle, irrigation, navigation, mining, running industries, recreation, power production and many more. Therefore, more than its amount, it is the multi- faceted use of water that makes it scare and necessitates its protection and management by an independent water law.

More importantly, almost all of the uses of water enumerated above suggest some inevitable acts like, changing the course of the water, constructing different facilities for its use, damming the water, or sometimes even polluting the water and other acts which need due regulation by law. At the same time all of the above listed uses of water and the users can't be given equal value and protection. Some times we need to give preference to certain uses comparatively.

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Because of the above and many other reasons, various theories have been formulated to be used either at national or international level . Before going to the discussion of the theories, it is better to note the following point.

With respect to certain categories of water bodies, individual may be entitled to right of ownership (e.g. water that falls on his land holding, water that he collects on his land holding); with respect to some other categories of water bodies, an individual may have simply a right to use (e.g. small running water which is not floatable); and with respect to exceptional categories of water bodies an individual may not have any independent right at all (e.g. Navigable water bodies or cross boundary waters)

All of the above statements are made with the view to show to the students that: since scarcity and multi- purpose served by water are at the heart of water theories and regulations, we need to balance between interests. The interests are: 1st the interest (right) of individuals to use water; 2nd the interest to use water economically and prioritize between the interest (rights) of individuals if need arises because of scarcity of water.

In order to maintain the balance between the above stated interests, it is necessary to make use of different water theories and water resources regulations. The following is a short explanation of theories at national and international levels. First, let us deal with the more theoretical ones- International Theories.

International Theories*:-*

These are the theories which are applicable to solve dispute over rivers which are cross boundary or other water bodies to which two or more countries may have adjacent territorial boundary.

The Absolute Territorial Sovereignty

The main idea of this theory is that; since all sovereign countries are equal and have an absolute power to utilize their natural resources, use and management of water is an issue which is internal to every sovereign state. As far as the water is with in the

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territorial boundary of the country, it is an expression of country's sovereignty to use the water without any limitation. In accordance with this theory, any country is not duty bound, by law, to take in to account the interest of another state. The states can do this by agreement or as a moral obligation. However, as far as the water is with in the territorial jurisdiction of a state, it is the power of that state to use the water in every possible manner and that state can utilize the water in its entirety, if possible. The lower states cannot claim the continuous flow of water to their territory (this is a theory which is invoked most of the time by upper countries or countries where the water body originates or crosses their territory in the first place).

Absolute Territorial Integrity

Here, the argument is that if the water in question is determinant for existence of the lower states, the upper state can't utilize the water in its full capacity at the cost of the survival of other countries. Since the lower state also has equal interest or right of survival the upper state can't claim absolute power of utilization. Specially if the water is very much necessary for the survival of the lower state, the upper state is duty bound to consider the equally important territorial integrity of the lower state. Hence, the lower state can claim continuous flow of water to its territory in such circumstances.

Limited Territorial Sovereignty

This theory provides for a kind of compromise. It says that going to the extreme is not good, i.e. the upper state can't claim the absolute utilization of water where the water is a question of survival for the lower state. At the same time, the lower state also can't claim continuous flow of the water at any time if this prejudices the interest of upper state. Hence, the states concerned should sit together; deal with interest, and utilize the water by agreement.

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? Which one of the three theories, do you think, is beneficial to Ethiopia as regards utilization of Nile River? Why?

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? Can you apply these theories to solve dispute between states of a federal government?

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? Assume that a dispute broke out between Oromia state and afar state as regards utilization of Awash River. The authorities in Oromia claims to have absolute power to utilize Awash River since its source is in Oromia state. The authorities in Afar state also claim that since the Awash River is very much determinant for avid areas of Afar state, the Oromia state cannot stop a continuous flow of the river to the Afar state.

Which of the theories support

- the authorities in Oromia state? Why?
- the authorities in Afar state? Why?
- how do you solve the dispute?

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National Theories *(*Doctrines*)*

Here we discuss about doctrines which are applicable to water bodies with in one country. Such waters may cross plots of land under possession of different land

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holders or there may be two or more land holders whose land holding may be adjacent to a given water body. So how to solve a dispute between such land holders?

There are various doctrines which were formulated and applied in various parts of the world. Our Civil Code also provides for some mixed doctrine under Articles 1228 – 1257. However, these provisions although they are not clearly repealed by the new law, we have a new law which clearly adopts the doctrine different from the civil code.

Accordingly, we will deal firstly with the major doctrines applicable all over the world and focuse on the doctrine adopted under the new law- proclamation no. 197/2000.

The Riparian Doctrine

This is the oldest of water theories. Under this theory, the justification for the right to use water is ownership of land. The right of ownership on the land justifies the right to use water. Here, it is not ownership of every plot of land, but it is the ownership of plot of land which is adjacent to or crossed by water body. Such plot of land is referred to as riparian land and the owner is riparian owner. Under this theory, the right to use water is considered as an incidental to ownership of land which adjoins or crossed by a stream.

This right to use water, which depends on the geographical set up of land and the ownership of such land, cannot be lost by mere fact of failure to use the water. The riparian owner can initiate his right to use water at any time and he is not responsible for damages suffered by those who are non- riparian and involved in the water use.

Another important point about Riparian doctrine is that a riparian owner may use water only on the riparian plot of land. He may not use the water for the development of any non-riparian plot of land or transfer the water to non- riparian owners.

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The last point is about the use of water and conflict if interest as between the riparian owners. Firstly, the conflict is between a riparian owner and non- riparian owner, no doubt the priority will be given to the riparian owner. However, where the conflict is between two or more riparian owners, we have two specific versions of riparian doctrine, i.e. Natural flow and Reasonable use. These are allocation theories applicable between riparian owners. The Natural flow (which is some time referred to as classical riparian) holds that all riparian are entitled to have the stream cross their land as it was in the state of nature. It is the nature which entitled them to the right on the water. Hence, no riparian may impair or diminish the flow of water in the way detrimental to other riparian. The only exception may be the priority given to domestic use. The second allocation theory, Reasonable use, holds that each riparian is entitled to and duty bound to make a reasonable use of locater. Each riparian has to take in to account the needs and use of other riparian. The reasonable use concept suggests that: when determining the reasonability of the use by riparian, the nature of competing interests should be taken in to consideration. In other words, the interests should be compatible. You ascertain the capacity of the stream and then prioritize among interests. If one riparian wants to use water for irrigation in excess of the capacity of the stream, while the other riparian demands the water for domestic use, the later should be given priority. This is what we call as reasonable use; reasonable doesn't mean equal use.

Prior Appropriation Doctrine

This theory was formulated in avid areas where extreme of water. There are two basic ideas under this doctrine. The first is: a person who stars to use water earlier than others is entitled to his right to use the water which he created by practically us of the water. In case the water is exhausted and shortage of water occurs, the late comers shall withdraw first. This is because of the maxim first come first served". Under this theory land ownership is not relevant; what is most important is taking water and applying it to a beneficial use at the possible early stage. If you appropriate water prior to others, then you can use the water either for riparian land or for non-riparian land.

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Under this theory, the prior use arises either from actually using the water or filing application to use prior to others.

The second idea under this theory is that if water is free from the claims of others with earlier appropriation, then the right to use such water should be through administrative grant that allows the use of specific quantity of water for a beneficial purpose. In such cases the priority results from prior application to use the others.

The permit system

This doctrine starts with the assumption of water as a natural resource under common ownership of people in a country. In other words, water is one of the natural resources to be utilized in common to the highest level of its purpose. Therefore, anyone who claims the right to use water should the right by securing permission from a relevant organ established for the protection and utilization of water resources for the highest level of social and economic benefit.

As you might have noticed in our discussion on prior appropriation doctrine, the priority may be secured in one of the two ways, i.e. either by substantial act of filling application prior to others or by actually using the water where there is no requirement of application. Hence, prior application is one of the modes of securing priority in right to use water. In permit system also it is by application that you secure permission to use water. Hence there is a kind of similarity between prior appropriation doctrine (especially in case priority is secured by first application) and the permit system.

To say few words about the water use system adopted under our law, the Civil Code of Ethiopia contains articles 1227 up to article 127 dealing with ownership and use of water. The invisible doctrine adopted under the Civil Code seems to be the riparian doctrine. The law tries to give priority to the owner of the land adjacent to or crossed by stream. However, under the code, certain forms of use, like domestic uses have been given priority. There were a number of proclamations issued after the Civil

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Code which provides for changes of policy in water use and management. With due respect to all other early proclamations, one may emphasize on the policy adopted under the current constitution.

The FDRE constitution, and Art. 40(3), provides that the right of ownership of land as well as of all natural resources, is exclusively vested in the state and the peoples of Ethiopia. For the implementation of this policy, The Ethiopian Water Resource Management Proclamation no. 197/2000 has been issued. Under this proclamation also water resource is a common property of Ethiopian peoples and the state. (Art. 5 of the proclamation).

Because of the adoption of the permit system, under the proclamation, no body is entitled to use or undertake any activities with respect to water resource except for some specific uses or activities which are clearly allowed by the law (Read Arts. 11 and 12 of the proclamation).

The following are the most relevant articles from the FDRE Constitution and the Water Resource Management Proclamation No. 197/2000.

FDRE Constitution Articles 40 (3)

The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and peoples of Ethiopia and shall not be subject to sale or to other means of exchange.

Articles from the proclamation *:*

Art. 5. Public Ownership of Water Resources
All water resources of the country are the common property of the Ethiopian people and the state.

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Art. 11. Necessity of permits

Without prejudice to the exceptions specified under Article 12 of this proclamation. No person shall perform the following activities without having obtained a permit from the Supervising body.

Construct waterworks:

Supply water, whether for his own use or for others;

Transfer water which he/she abstracted from a water resource or received from another supplier; and release or discharge waste into water resources unless otherwise, provided for in the regulations to be issued for the implementation of this proclamation.

2) Any person shall be required to discuss his/her proposal with the supervising body prior to applying for a permit for the purposes specified in Sub- Article(1) of this Article. The details shall be determined by regulations.

12) Types of Water Uses Not Requiring Permits

Any person shall utilize water resources for the following purposes without holding a permit issued by the supervising body.

- dig water wells by hand or use water from hand-dug wells;

- use water for traditional irrigation, artisanal mining and for traditional animal rearing, as well as for water mills.

The Supervising body may, where necessary, issue directives to prevent inappropriate use and wastage of water regarding the used mentioned in sub- Article (1) (a) and (b) of this Article.

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Activity Ten

1.What do you think is the basic reason to regulate water by a separate body of law?

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2.Which of the above doctrines is more convincing to you as regards the right to use water? Which of the doctrines is adopted under the civil code? Why?

Clue:- read. Art. 1231, 1232, 1233, 1234, 1236, 1237, 1242 of the Civil Code.

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3.Briefly discuss the basic difference between Riparian doctrine and prior appropriation doctrine.

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4.What is the basic distinction between the permit system and other water theories?

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5.How do you summarize Art. 40(3) of the constitution together with Arts. 5 and 11 of Water Resource management Proclamation to elaborate that at present time the Ethiopian water law advocates permit system?

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Answer Keys

Here are the suggested key answers for the exercises and review questions given in this module. The answers are simply sketches the way you have to follow and are not completely the solutions. You are, therefore, required to deal over them exhaustively by raising relevant arguments supported by relevant provisions of the code. You are requested to deal with all questions including the part of questions whose answer key is not given. Just read the whole text of the module and you can easily find their answers.

Answer Key for Exercises

Exercise 3.1

The answer depends on the meaning of the word "dozen" in the bakery business. If the word dozen in the bakery business mean 15 rather than 12 bread, a contract between a bakery and the other person having snack for the sale and purchase of 10 dozen of loaves of bread will be presumed to mean 150 loaves rather than 120. In a nutshell, one needs to inquire in to the meaning of the word "dozen" before rushing to give an answer.

Exercise 3.2

Evidence of intention and insurance contract usage show that the term "never had fires" should be restricted to mean "in the insured house "which is the subject of the insurance contract. And this should not be interpreted and understood to include each and every house "A" might have in the country. Thus, the insured should not be blamed for making any false statement.

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Exercise 3.3

The answer for the question depends on the way we construe the phrase "my properties". Even if "all my property" is a general term, it should be understood to mean the property of A situated in Ethiopia, not all his property in the whole world.

Exercise 3.4

The answer depends on the context. The insurer does not cover the bear liability of the zoo owner: mean that the insurance does not cover the risk generated by these dangerous animals. Where as the sentence which says "the owner of the zoo will not bear liability" mean that he is not responsible".

Exercise 3.5

This should be limited to the thieves who get into the ship from outside and not thefts by the gang. Such an interpretation is supported by the principle that doubts have to be interpreted in favor of the debtor.

Exercise 3.6

1. It is important to "A" that the bailee be B, whom he knows personally or who has a guaranteed solvency, and not "C" or any other person. Thus, "B" cannot give it over to "C" the valuables that he has received by virtue of his contract of bailment with "A".

2. He cannot transfer his obligation of keeping the thing since performance personally by the debtor is essential to the creditor in this case.

Exercise 3.7

Since the payment is not valid, a second payment of 10,000 birr may be demanded by B after he reaches the age of majority or by his legal representative.

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Exercise 3.8

Payments are fetchable by the creditor from the debtor and not portable by the debtor to the creditor. This applies in cases where there is no agreed place of payment in the contract. It is up to the creditor to collect payment by going to the debtor's normal residence at the time of the contract. This relives the debtor from incurring expenses related with transportation.

Exercise 3.9

As a rule, a party must perform his obligations immediately when required by the other party. However, if the parties have agreed on simultaneous performance of their contractual obligations, a party cannot demand the other to perform his obligations without performing his obligations himself.

Exercise 3.10

1 (a). Before denoting any place as the place of payment, it is good to know first the meaning of "payment". In the legal sense of the term, payment refers to performance of an obligation in the contract. In the case at hand, there are two reciprocal obligations – delivering a teff and paying the agreed price. Thus, payment refers to the delivery of the teff by the seller and the payment of the price by the buyer. The question to be answered is, therefore, that the place of delivery of the teff and the place of payment of the price.

In principle, the place of payment is the place designated by the agreement of the parties. In default of any agreement between them, the law provides that payment shall be made at the principal residence of the debtor at the time of the conclusion of the contract (Article 1755 (2)). Where the thing relates to a definite thing, the place of

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payment shall be the place where the definite thing had been at the time of the making of the contract. (Article 1755 (3)).

There is no agreed place of payment and as such we have to ascertain the place of payment by gap-filling provisions. Since teff is not a definite thing (rather it is a fungible), the rule of Article 1755 (3) is not applicable. Since the principal residence of the debtor (the seller) at the time of the making of the contract is Bahir Dar, the same shall be the place of payment (delivery) of the agreed amount of teff.

In addition to the payment of the agreed quantity of teff, there is also another obligation – the obligation to pay the agreed price. The debtor for this obligation is the buyer. Thus, the place of performance (payment of the price) is the principal residence of the buyer at the time of the conclusion of the contract, i.e. Addis Ababa.

1(b). Whether Ali can claim payment or not depends on who bears the risk for the loss of the teff as a result of the wild fire. In principle, before the delivery if the teff, the risk for the loss or deterioration of the teff lies on the seller. Once the sellers delivered the teff as per the agreement and the provisions of the law, risk transfers to the buyer. This holds true even in cases where the buyer is in default for not taking delivery of the goods without having lawful cause. The first question that we have to ask is "did Ali perform his obligation as per the contract and the law?" Ali's obligation is delivering a teff which is a fungible. The specific quality of the teff to be delivered is not also specified by the agreement of the parties. When fungibles are due and where their quality is not specified, the law allows the debtor to deliver a fungible not below an average quality (Article 1747 (2)). In the case at hand, Ali delivered "Sergegna" teff which is commonly designated as having average quality. Thus, he performed his obligation in accordance with the requirements of the law.

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Where the creditor refuses to take delivery of the thing without good cause, risk shall pass to him (Article 1758 (2)). In such a case, the debtor has to deposit the thing in a public warehouse located at the place of payment (Article 1779). Ali deposited the teff in a warehouse. Whether the warehouse is public or not is not specified in the facts of the case. Thus, the warehouse should be a public one or if it is not, he needs to secure an approval from the court. If he did all these before depositing the teff, Ali can successfully claim the payment of the price.

2. The answer for this question is essentially similar with the above one.

3. This is left for your own consideration.

Exercise 3.11

1. The partial performance by the carpenter will be deemed satisfactory. The buyer will of course only be obliged to pay in proportion to the work done and he will not be able ask for the invalidation.

2. The devaluation of the money is an action taken by the government and this brought about substantial loss up on the construction company. In other words, the balance of the contract is upset as a result of the action taken by the government. Since the devaluation affects the balance of the contract, modification may be demanded through court of law.

3. The contract cannot be varied since there has been no act on the part of the government of which A can complain.

Exercise 4.1

Mr. A's argument that he was not given a default notice is not acceptable. The law does not require the giving of default notice in this case since the obligation assumed by Mr. A is that of obligation not to do something i.e. not to construct anything along the passage.

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Exercise 4.2

1. In this case, a specially trained horse is of special interest to Maru. It is not expected that such horses can easily be found elsewhere. In addition to this, compelling Asmare to deliver the horse may not go against his personal liberty. Having regard to these circumstances, therefore, Maru can get an order from the court to compel Asmare to hand over the horse.

2. In the case at hand, the appearance of the famous singer Teddy Afro is of special interest to the Hotel. This is because the public might have been attracted to the concert by the advertisement that revealed the concert is going to be demonstrated by Teddy. No matter how special interest might the hotel have on the appearance of Teddy, he may not be compelled to present his songs at the concert. Compelling him to do so will affect his personal liberty. The only liability of the singer is to pay contractual compensation for the loss sustained by the hotel as a result of the cancellation of the musical concert.

3. If Mekonnen failed to supply the Coca Cola until Sunday morning, it is too late for Lemlem to arrange facilities for her guests. Since Coca Cola is a fungible thing, purchase in replacement from another person should be allowed. Thus, the court should authorize the creditor's self-help performance and Mekonnen will be responsible even for the additional 200 birr.

Exercise 4.3

1. Cancellation shall be ordered where the essence of the contract is affected by the non-performance. This implies that cancellation may not be ordered for minor infractions from the words of the contract. In the case at hand, the only missing parts of the car are the side mirrors. This in no way can be considered as a sufficient ground to cancel the

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contract. Dinberu is not, however, without any remedy. He may reduce the price of the car in proportion to the missing part.

2. Unlike the above case, the essence of the contract is fundamentally affected as in the sense of Article 1785 (3). The agreement of the parties was to tailor a suit from a cloth made of 100% wool. But, in breach of the provision of the contract, Hagos tailored the suit from a cloth made of totally different materials. Deasta can, therefore, get the cancellation of the contract.

Exercise 4.4

Though Jambo has informed Helen that his truck has failed, this statement cannot be taken as refusing performance. Thus, it may not be covered by Article 1789 (1). Even if it may be considered as anticipatory breach, Helen should give him a default notice. On top of this, Jambo's condition cannot be covered by Article 1788 since he is not absolutely prevented from performing his obligations. He could rent some other lorry or he could transport the good by another means. Thus, Helen does not have any valid ground to unilaterally declare the cancellation of the contract.

Exercise 4.5

Although the debtor has performed in accordance with the rules of forced performance, he does it after being served a default notice for the non-performance with in the agreed time. Failure to perform one's obligations within the agreed time may cause an economic loss to the other party. Such loss (damage) must be made good.

Moreover, the creditor may have incurred some cost for the enforcement of the contract (court fee, etc.), or he may have incurred costs over and above the value or price agreed in the contract for the purpose of the creditor's self-help performance.

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Exercise 4.6

It is true that the pastry failed to deliver the cakes due to a flat tyre. But, this cannot be covered under any of the grounds of force majeure. Force majeure has to be unforeseeable and irresistible. Neither of these two conditions exists in the case at hand. Any driver should always expect that there could be a flat tyre. Thus, a wise driver will always keeps in mind the alternative way outs if in case the incident happens. On top of this, flat tyre can hardly be considered as irresistible. Therefore, the pastry should be held accountable for paying contractual damages proportional to the loss sustained by Mikias as a result of the non-performance.

Answer Key for Review Questions

Chapter Three

Answer for question five

This case involves the question of place of performance of an obligation. The relevant rule to the case at hand is Article 1755 of the civil code. The provision states that the payment shall be made at the agreed place. Where there is no such a stipulation in the contract, the law says payment shall be made at the place of the residence of the debtor. The debtor for the delivery of the engines here in our case is Alberto and the place of his residence is Rome. Moreover, the contract relates to specific things, i.e. Engines: therefore, the place of delivery is the place where they situated at the time of the contract. At the time of the contract the engines were in Rome. Therefore, the creditor, Hassen should receive delivery of the engines by going to Rome, not in Addis.

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Answer, for question six

In interpreting the ambiguous term, house, one has to do the following;

- Searching the common intention of the parties
- In searching the common intention of the parties, their conduct before and after the making of contract shall be considered.

Before the making of the contract, A has decided to leave his former residence and want to be an Addis Ababan resident which may ease his work with his business in Sululita. He decided to buy a house in Addis near to his business center. Selling his house, B knows and is expressly told that A has business center at Sululita and searching a house near to the business center.

After the making of the contract the buyer, A, is insisting in taking delivery of B's house in Entoto which is near to Sululita. Thus the intention of the buyer is clear that he wants the house and intended to buy it which is located around Entoto.

Answer for question seven

A will derive no benefit from the contract. And any obligation on A should be interpreted restrictively as in the sense of Article 1738 and 1739.

Answer for question eight

A to refuse to take delivery has to come up with two conditions. The first is that where there is an express agreement to that effect in which case the creditor may refuse payment in case of nonconformity as in the sense of article 1748.

Here, however, it is not stated in the contract that A will not take delivery for delivery of the alcohol for there is little difference in the concentration.

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Then A has to test his second option. This is to prove that he has special interest in the exact conformity through showing that the alcohol is essential for his medical laboratory and that a 1% deficiency in concentration will make essential difference

Answer for question nine

A cannot refuse delivery of the alcohol on the mere fact of the small deficiency. Such reductions and non conformities are tolerable unless they are of special interest. From this we can understand that after a contract has been created, the performance is not required to conform exactly to what has been promised.

If exact performance is of special interest for him he may refuse, if not he accepts performance with compensation.

But the burden of proof that exact conformity is essential for him lies with him and it is very difficult. Here his motive for refusal may be price decline under the cover of nonconformity.

Answer for question ten

"A" cannot refuse to take delivery of the oil. Small deficiencies or non conformities can not suffice to refuse performance. Articles 1748 tends to address the problem of small non conformities or differences with what was promised and is, therefore, very much a question of fact to be determined and decided by the court.

Slight difference in the quality of the thing could not be invoked as non performance unless the creditor can show that there is an express agreement or he has special interest as in the sense of Article 1748 of the civil code.

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Answer for question eleven

This is the case of non identity as in the sense of article 1745. The seller should deliver what he sells or agreed to sell and the buyer has the right to accept only what he buys or wishes to buy by his agreement.

This statement can be reaffirmed by the general principle of ***"contracts lawfully formed are laws for the parties (Article 1731)".***so "A" can refuse performance.

Answer for question twelve

Here in the case at hand the place of performance cannot be inferred from the contract because they did say nothing about it. Therefore the relevant rule for the case will be only consulting the provision of ***Article 1755(2)*** of the code. Hence the debtor shall perform his obligation at his principal residence, and Habtamu has to collect his sum from the college in Harar.

Answer for question thirteen

In principle the place of performance for the contract is the place which the parties have stipulated it to be. For instance the lender, at his place of residence, the insurer may stipulate that premium to be paid at his bank in any of its branches and the like. Here in the case given above the parties have failed to determine the place of performance for the proper discharging of the obligation.

In such cases, it is better to adopt the rule of interpretation in favor of the debtor. Using this, one may decide that payment has to be made at the residence of the debtor usually preserving him from bearing forwarding costs. As it is said those payments are "not portable (by debtor to creditor b)" but "fetch able (by creditor from the debtor)".

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Therefore in the absence of contrary stipulation to the effect of ***Article 1755(2),*** the client cannot be in default for not paying the premium until his insurer calls for it, not merely by phone or letter, but at his residence. Therefore, the Ethiopia Insurance Corporation cannot suspend the contract and it is liable to pay the compensation to Yirgashewa.

Answer for question fourteen

The query to answer the question will lead us to ask the question who should perform the contract?

According to ***Article 1740 of the civil code***, except in the case where there is an express agreement to the effect that the obligation shall be discharged personally or where the qualification of the debtor is of special interest for the creditor because of the nature of the contract, the debtor shall not be obliged to perform it personally.

Turning our face to the case at hand, the obligation is carve sculpture of Abebe's father which requires special profession. Moreover, it can be understood from the case stated above that the reason why Abebe opt for Tebebu is because of the latter is reputed sculptor who won different national continental tittles in relations to his profession. From this one can understand that the personal qualification of Tebebu was the center of the obligation.

If personal qualification of the debtor is important, then the obligation should be personally performed by the debtor himself and delegation of someone is not allowed as in the sense of article 1740.if he actually did the delegation ,it is rather non performance and Abebe will not obliged to make payment of the 200,000birr.

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