INTRODUCTION

Property refers to rights such as ownership, possession, usufruct, use, and rights of servitude, recovery, preemption and promise of sale.

The branch of law that specifies the objects or things in relation to which property rights may be exercised and their classification, the types of rights which are considered as property, how property rights are acquired, transferred, extinguished, the specific rights and obligations of the property right holder, the obligations of other persons towards the holder is known as property law. In general, property law may be defined as a branch of private law regulating relations between persons with respect to things or objects.

UNIT ONE- GENERAL OVERVIEV OF PATRIMONY, PROPERTY AND PROPERTY LAW

1.1 RIGHTS PROTECTED UNDER THE CIVIL LAW AND THE CONCEPT OF PATRIMONY

Rights of a person that are recognized and protected by the civil law may be patrimonial rights, i.e., those that have a pecuniary value such as property rights over things and rights arising out of contractual relations or those arising out of extra-contractual relations. They may also be extra patrimonial rights, those that cannot be assessed in terms money such as family, political and civil rights.

Patrimonial rights that arise out of contractual or extra-contractual relations are generally governed and protected by the law of obligations, i.e., by the law of contracts when they arise out of contractual relations and by the law of torts when they arise out of extra-contractual relations. These categories of patrimonial rights are also referred to as rights in-personam / personal rights/ because they can be exercised against a specific person or persons. On the other hand, patrimonial rights over things/ property rights/ are governed by the law of property and they are also called rights in-rem/ real rights/

since they can be exercised against any person who may interfere with the right-holder's enjoyment.

The totality or unity of patrimonial rights and obligations of a person constitutes his patrimony.

The concept of patrimony is essential to explain the rules of universal succession. For instance, an heir or legatee by universal title shall succeed all patrimonial rights and obligations of the deceased person, in other words, such an heir or legatee cannot succeed the rights only since the elements of patrimony are transferred to him as unit. /See Arts 826, 898 & 942 of the Civil Code./

Accordingly, the characteristics of patrimony are to be sought in the nature of personality. Hence, it follows that:

1. Every patrimony presupposes a person who is its holder
2. Every person has a patrimony
3. A person can have only one patrimony
4. Patrimony is inseparable from the person of its holder.

1.2 THE CONCEPT OF PROPERTY

In its narrower and proper legal sense, property may be defined as an exclusive right to control, use, transfer… an object or a thing of economic importance and its fruits, exclude all other persons from its use and enjoyment and to follow the thing and its fruits in the hands of any person who might have unlawfully taken it. It is a name for a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of persons with respect to things having economic or financial value. Hence, accurate legal terminology ought to reserve the use of the word property for designation of rights of persons with respect to things.
(Art. 40(1) of FDRE consn, 1206, 1148 & 1149 of civil code)

1.3 DEFINITION AND SCOPE OF PROPERTY LAW

Property law, then, deals with the allocation, use, and transfer of wealth and objects of wealth. As such, it reflects the economy of the society in which it is found. In this regard Art 89/1/ of the FDRE Constitution imposes, on the government, to formulate and implement policies /and laws/ that ensure equal and fair allocation of the country's intellectual and material resources.

Property law does not deal with the rights, privileges in the abstract; it deals with relationships between and among persons.

With this in mind, one may define property law as the complex of legal relationships between and among persons with respect to things. It is a branch of law which deals with and regulates the property rights i.e. the real rights /rights in-rem/ a person exercises over a certain object which include rights to use, to collect and enjoy the fruits of, to transfer (by sale, donation or inheritance) and even abandon the object and exclude others.

1.4 THEORIES OF PROPERTY

There are two main groups of theories of property; the first group attempts to explain how private property came to existence, i.e. it describes the facts, which purports to show the origin of private property. It attempts to explain how things came to be owned privately. On the other hand, the other group of theories is concerned with passing a judgment on the institution of private property and attempts to justify or condemn the institution. In other words, it tries to explain the economic and social reasons behind the recognition and protection or condemnation of private property. Sometimes, however, those two aims are combined; for example a writer may argue that property arose to reward private enterprise and that therefore it is ethically justifiable.

1.4.1 THEORIES REGARDING ORIGIN OF PROPERTY

A. THE POSITIVIST THEORY

According to the positivist theory, law is nothing but the command of the sovereign, that is, the rules promulgated by government officials for reasons of public policy, protection of individual rights, promote the general welfare, increase social wealth or maximize social utility. According to Jeremy Bentham, one of the prominent utilitarian political philosophers, property is the basis of expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand to wards it.

It is law alone that permits me to forget my natural weaknesses. It is only through the protections of law that I am able to enclose a field, and to give my self up to its

cultivation with the sure though distant of harvest.

Property and law are born together and die together. Before laws were made, there was no! property; take a way laws, and property ceases.

However, this theory is criticized on the ground that the state and private property are the results of the same social and economic forces and we can hardly say one is the creation of the other. John Locke argues that the state is the result of a social contract in which the society transferred some of their rights to the state for the purpose of protection their rights including the right to property.

B. THE HEGELIAN THEORY

According to George Wilhelm Friedrich Hegel, a human person is merely an abstract unit of free will or autonomy that does not have a concrete existence until that will acts on the external word. The person must give its freedom an external sphere in order to live as an idea. This external sphere, capable of embodying the person's freedom, consists of the rest of the word, every thing that is distinct from the person. From the need to embody the person's free will from the abstract realm to the actual, Hegel concludes that the person becomes a real self only by engaging in a property relationship with something external. Such a relationship is the goal of the person.

Hence, private property originated in the person's attempt to actualize his/her free will, i.e., when someone extends his will to external things he makes that thing a part of himself.

Locke says that "every man has a property in his own person," from which it immediately follows that "the labor of his body, and the work of his hands… are properly his." Though Locke elsewhere considers the person as reflective consciousness and memory, he may well mean here that one literally owns one's limbs and hence must won their product. If not, perhaps property in one's person should be understood to mean simply that an individual has an entitlement to be a person or to be treated as a person. This would probably include the right to self-preservation on which Locke bases the right to appropriate.

C. THE OCCUPATION/ FIRST POSSESSION/ THEORY

The land was in common, and no part of it was the permanent property of any man in particular, yet whoever was in occupation of a determined spot, for rest, shade or the like acquired for the time being a sort of ownership, from which no one can derive him by force, for this would have been unjust and contrary to the law of nature.

As observed earlier, occupancy gave the right to the temporary use of the soil. So it is agreed up on all hands, that occupancy also gave to the original right to the permanent property in the substance of the earth itself, which excludes every one else but the owner from the use of it. There is of course some difference among the writers on natural law concerning the reason why occupancy should convey this right, and invest some one with this absolute property; Grotious and Puffendorff insisted that this right of occupancy was based on the tacit/ implied assent of all mankind that the first occupant should become the owner; and Barbeyrac, Titius and Locke argued that there is no such implied assent; nor was necessary that there should be; since the very act of occupancy alone being a degree of bodily labor, is from a principle of natural justice, with out any consent or compact, sufficient of itself to gain a title.

Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to declaration that he intends to appropriate the thing to his own use, it remains in him, by the principle of naturals law, till such time as he does some other act which shows his intention to abandon it; for then it becomes, naturally speaking, publici juris once more, and is liable to be appropriated by the next occupant.

However, what become inconvenient or useless to one man was highly convenient and useful to another person, who is ready to give some thing in exchange that was equally desirable to the former. This natural convenience introduced commercial traffic and the reciprocal transfer of property b y sale, grant or conveyance; which may be considered as the continuation of the original possession of the first occupier or as an abandonment of the thing by the present occupant/owner and an immediate successive occupancy of the same by the new proprietor.

D. LABOR OR ENTITLEMENT THEORY

Where a person appropriates a land or any one of its fruits, he has mixed his labor with, and joined to it, such thing is his own and there by makes it his property.

However, this theory has certain problems, first, in the absence of prior theory of ownership, it is not self evident that one owns even his/her own labor that is mixed with something, second, the labor theory does not provide guidance in determining the scope o f the right that one establishes by mixing one's labor with something else.

1.4.2. THEORIES REGARDING THE JUSTIFICATION OF PRIVATE PROPERTY

The theories discussed above in connection with the origin of private property are also used to justify or condemn the existence of the institution.

A) Occupation theory tries to justify the existence of private property on the ground that the first occupier should be rewarded and property acquired in such a manner is ethically justifiable He who first reduces in to possession of a piece of property has the best of justifications for remaining in control, and hence the institution.

B) Labor theory -private property is the result of individual labor because industry (hard work) should be encouraged by granting to a worker the ownership of the res, which is created by his labor so that even greater productivity is achieved. Society needs labor and the occupations are still few where the intrinsic interest is so great that men will labor for the love of it. It enables the acquisition of means of production by those who can use them efficiently and achieve maximum productivity; it encourages independent and specialized risk taking. It encourages saving and reinvestment. The whole effect of these ensures economic growth.

C) The Utilitarian theory the function of the legislator/ state is to maximize the sum of human felicity (Utility) or happiness, and private property, which is the expectation of protection provided by the state, is justifiable because it increases human felicity/ happiness.

D) Hegelian Theory- Property is a part of the personality of the owner and the protections provided for property of the

person are protections for the person. This, thus, the existence of the person and hence his/her property is just. Furthermore, some control of property is essential for the proper development of personality. The community has slowly evolved from status to contract, from group holding to individual property freedom liberty has grown in the process and it is the control of property that makes men free. However, the theory does not justify the present system, which allows the concentration of property in a minority of the community.

E) Marxist Theory- According to the communists, the history of all societies in the world is the history of class struggles between the slaves and freemen, feudal lords and serfs or vassals, the bourgeoisie and the proletariat. These struggles are always between those who control the means of production and those who do not and hence that have to depend on the former for their livelihoods by selling their labor. These relations were not always based on equal or even fair exchange of labor and wages or other form of payments. The slave's labor was freely exploited, the serf /vassal was forced to toil for a meager reward and the products of his labor taken away by the feudal lord and the proletariat receives a wage that does not cover the bare minimum of his needs. In effect private property served and is serving as a means of exploitation of the slave by the slave owner, of the serf/vassal by the landowner of the proletariat by the bourgeoisie. Hence, private property is the evil that has to be abolished. Please read the following excerpt from the Communist Manifesto.

"The theoretical conclusions of the Communists are in no way based on ideas or principles that have been invented, or discovered, by this or that would-be universal reformer. They merely express, in general terms, actual relations springing from an existing class struggle, from a historical movement going on under our very eyes. The abolition of existing property relations is not at all a distinctive feature of Communism.

1.5 OBJECTS OF PROPERTY

1.5.1 DEFINITION

The phrase 'objects of property' may be defined as the goods or things over which a right of property may be exercised.

In its legal usage, the term thing refers to some possible or potential mater of rights

and duties which, conceived as a whole and apart from all others, can be separately perceived by the senses.

According to this definition, the term may refer to;

1) A thing, which is corporeal and tangible matter, which has an organic or physical unity, for example a horse, block of marble.
2) A thing, which is corporeal and tangible, but consists of specific things, for example, a flock of sheep, a house.
3) A thing, which is neither material/ corporeal/, nor tangible but which is an element of wealth, for example a copyright or a patent right, a claim for payment of sum of money…etc.

Hence, the phrase objects of property refer to things in the sense of any possible matter over which legal right of property may be exercised.

Accordingly, under Ethiopian law, objects of property, herein after called thing /good may refer to;

1. Things /goods which have material existence such as a car, an ox a house/ corporeal things/ (Art 1127), as well as claims and rights contained in securities to bearer which are incorporeal or intangible by nature but which are assimilated to corporeal things (Art 1128) and
2. Things which have no physical or material nature but which are perceptible by senses for example natural forces of economic value such as solar and wind powers which are mastered and put to use by man kind (Art 1129)

Note that the terms goods and things are used interchangeably in the code to refer to the same concept (Articles 1126_1140).

It may be concluded that the phrase 'object of property' refers to the things/goods over which a potential right of property may be exercised and it may be a thing which have material or physical existence, i.e., a corporeal thing or a thing which does not have such material or physical existence, i.e., an incorporeal thing. As to which things may be appropriated and which are not, depends on the existing laws, for example land which was appropriable i.e., capable of

private ownership during the time of the enactment of the civil code is now the common property of the peoples of the country. Art 40 of the FDRE Constitution provides that land belongs to the people of Ethiopia and cannot be privately owned or appropriated and all Ethiopians have the right to use land.

1.5.2 INTRINSIC ELEMENTS OF THINGS

Art 1132 of the Civil Code defines intrinsic elements of goods as things, movable or immovable, which are regarded by custom as forming part of a thing, or which is materially united to a thing and cannot be detached there from without destroying or damaging such thing.

The treatment of things as intrinsic elements other things will have the following effects.

1. Rights on or dealings relating to the principal thing shall include the intrinsic elements unless the parties have agreed expressly that such right or dealings shall not apply to them. For instance, a contract of sale of a land rights or mortgage of a land shall include the houses and trees that are considered as its intrinsic elements, unless the parties have expressly agreed that the sale or mortgage relates only to the principal and not to the intrinsic elements. Art 1132/1/
2. A thing that becomes an intrinsic element of another thing ceases to exist as a distinct movable thing. For instance, a water pipe fitted in a building or a newly bought windshield glass fitted to a vehicle ceases to exist as a separate thing or object of property. Hence, the right, which third parties previously had on such thing, shall be extinguished; and an owner or a person who has any other right in relation to such thing cannot recover the object from the owner of the principal thing. However, such person may claim reimbursement of the value of such thing and compensation for damages based on the rules of unlawful enrichment. See Arts 1134 and 2162-2163 of the Civil Code.

1.5.3 ACCESSORIES OF THINGS

Art. 1136 of the Civil Code defines an accessory as anything, movable or immovable, which the owner or the possessor / the Amharic version limits to

the usufructuary and not other possessors/ of the thing has permanently destined for the use of another thing.

The treatment of things as accessories of another thing shall have the following effects.

1. In the absence of an express provision to the contrary, rights on and dealings relating to the principal thing shall apply to the accessory. See the examples given in relation to intrinsic elements above. See Art 1135 of the Civil Code.
2. Temporary separation of the thing shall not, in any way, terminate the character of accessories. See Art 1137.
3. Rights of an owner or possessor of a thing, which is considered as an accessory of another thing shall not be affected by its treatment as such. Hence, the owner of the principal may not raise the treatment of a thing as an accessory to another thing against the owner or possessor of the accessory. See Art 1138/1/. Note that this provision governs the relationship between the owner/possessor of the principal thing and the owner or other right holder of the thing treated as an accessory.
4. However, the owner or possessor of the accessory may not claim it from third parties in good faith who have acquired the principal together with the accessory unless his rights to the accessory are evidenced by a deed dated prior to date when it is so destined. See Art 1138/2/.

Finally, the owner/possessor of a principal thing may terminate the character of accessory of such thing at any time, but he cannot do so if a third party has already acquired a right in relation to the principal thing with the belief that he will benefit from the accessory. See Art 1139 of the Civil Code.

1.6. CLASSIFICATION OF OBJECTS OF PROPERTY

1.6.1 THE PURPOSE OF CLASSIFICATION

The main reasons for classification of objects of property /things or goods/ into various categories are the following;

Firstly, the economic and social values attached to things are not the same, i.e.,

certain things are more important than others are. (Art. 1195 & 1193 of civil code)

This shows the degree of protection given by the law to the owners of various types objects of property varies depending on their importance or value, i.e., property rights over immovable things are given more protection than property rights over most movable objects.

Secondly, the systematic classification of things in to various categories helps the legislator to enact special rules governing the particular category of things which will in turn enable students, judges and other legal professionals to easily understand the law and apply relevant rules to resolve various disputes involving the particular object of property.

1.6.2. CORPOREAL AND INCORPOREAL THINGS

This classification is based on the physical or material nature of things or objects, i.e., it is a classification of things into those that can be perceived by the senses and those which cannot be so perceived.

Corporeal things are things that have material or physical existence and unity and hence, can occupy space and can be seen or touched. (Art. 1127 of cc)

Corporeal things are divided into movable and immovable things.

Incorporeal things are things that do not have a material or physical existence, that cannot occupy space and hence that cannot be perceived by the senses. This category primarily include rights particularly those that have economic value and can be expressed in terms of money. For example, copyrights and patents, Rights and claims arising from various contracts and contained in negotiable instruments such as checks, promissory notes, bills of exchange, shares, bonds, warehouse goods' deposit certificates and bills of lading, natural forces of an economic value such as solar and wind powers used for generation of electricity are considered as incorporeal things from the moment they are controlled and put to his use (Art. 1128 & 1129 of cc)

1.6.3 MOVABLE AND IMMOVABLE THINGS

The modern distinction is between movable and immovable things. The basis of this classification is physical mobility or

immobility and the value or importance attached to various types of property.

1.6.3.1 MOVABLE THINGS

Movable things are things which can move by themselves or be moved by man without losing their individual character. (Art. 1127 of cc)

A. SPECIAL MOVABLE THINGS

These are movable things by nature but to which the law attaches characteristics of immovable things. The law does so mainly because of the importance attached to these types of things. The rules governing the acquisition, transfer and proof of rights over ordinary movable things/ also called chattels/ shall not apply to special movable things, because they are governed by the rules applicable to immovable.

(Art. 1185 & 1186 of civil code)

This classification includes things such as motor vehicles, ships, airplanes, televisions and businesses. See Art 2267 (2) 3047 (2) of the Civil Code.

B. MOVABLE BY ANTICIPATION

These are immovable things by nature but which the law considers as movable things. According to Art 1133(2), trees and crops which are considered as intrinsic elements of land will be considered as distinct movable things or chattels where they are the subject to contracts for their separation. (Art. 2268 of cc)

1.6.3.2 IMMOVABLE THINGS

Though Art. 1126 classifies all things into movables or immovables, our Civil Code does not define the concept of immovable things. It rather enumerates, under Art 1130, the things which are considered as immovable under Ethiopian law. Accordingly, land and buildings are considered as immovable things. From this enumeration, one may ask as to why other things that are attached to the ground such as trees and crops are not treated as immovable things under the law.

A. IMMOVABLES BY NATURE

One may define immovable things as things that cannot be moved from one place to another at all or that cannot be moved without being divided in to several parts. From the acontrario reading of Art 1127 of the Civil Code, we may define immovable things as things that cannot move by them

selves or be moved by man with out losing their individual character.

Art 463 of the 1870 Civil Code of Louisiana divided immovable things into three categories: immovables by nature, immovables by destination and immovables by the object/ purpose to which they are applied.

(Land & building)

The following are special characters of land that distinguishes it from other properties.

1. Land is more enduring than other properties; hence, future interests in land have definite value.
2. It is important for purposes of security because of the fact that land cannot be moved and it is permanent as opposed to furniture or vehicles that may be easily hidden.
3. A risk of destruction of the land, for example, by storm or fire is minimal.
4. Land can be subdivided with out necessarily losing its value.
5. Land is still very necessary for expansion of industries, large farms and creation of means of transport.

- Art 1193 and 1195, 1185 and 1186 of cc

B.IMMOVABLES BY DESTINATION

Immovables by destination are movable things that are placed permanently with an immovable thing for the latter's economic exploitation.

In other words, these are movable things by their nature but which the law considers as immovable things because they are placed or attached to a land for its economic exploitation. For example, horses, cattle, tractors and other movable things, which are intended to facilitate the use and exploitation of a land, are considered as immovable things by their destination.

1.6.4 REAL AND PERSONAL PROPERTY

Real rights/ rights in-rem/ refer to either a power to recover a specific thing, or more often a right that may be exercised against any person, while personal rights or /rights in-personam/ are rights that may be exercised against a particular person.

1.6.5 MISCELLANEOUS CLASSIFICATIONS

A. CHOSE IN ACTION AND CHOSE IN POSSESSION

English law divides all personal property into chose /things/ in possession and chose /things/ in action. A chose in action includes all personal right of property, which can only be enforced by action and not by taking physical possession. If A owes B ten pounds, B has a chose in action. An owner of a car has a chose in possession, because, even where another person is unlawfully using it, the owner has a right of retaking it.

(Art. 1148 of cc)

A. FUNGIBLE AND NON-FUNGIBLE THINGS

Fungible things consist of movable things that, in ordinary dealings, are usually determined by number, measurement or weight and hence any unit is, from its nature or by mercantile usage, treated as the equivalent of any other unit.

Non-fungible things, on the other hand, are movable or immovable things, which in ordinary dealings, are determined by their specific identity. A land or a vehicle is a non-fungible thing and contracts involving such a thing shall be performed by delivering that specific thing and not by delivering any vehicle or land.

UNIT TWO-POSSESSION

2.1 TEHORIES AND DEFINITION OF POSSESSION

2.1.1 THEORIES OF POSSESSION

SAVIGNY'S/CLASSICAL/ THEORY OF POSSESSION

Savigny, a German jurist who based his theory on the text of Paulis, argued that possession consisted o f two ingredients, corpus possessions, i.e., effective control and animus domino, i.e., the intention to hold as an owner.

Possession is made up of two elements

a. The corpus or element of physical control and
b. Animus or element of intent with which such control is exercised. Savigny thought that since the detentor and possessor have the same physical control the difference between these terms must be found in the mental element, the intent which distinguishes the possessor is the animals domino the

desire to hold for one self and not on behalf of another.

JEHRING'S THEORY OF POSSESSION

According to this theory a possessor is a man, who in relation to a thing, is in a position in which an owner of such thing ordinarily is, animus being merely an intelligent consciousness of the fact. In other words, a possessor is a man who, in relation to a thing resembles an owner, i.e., who has direct physical control of such thing. This theory explains those cases, which were difficult to Savigny such as the pledgee and the usufructuary that were given possession right. However, it fails to explain the cases where the law denies possessory right to those who are in execlusive physical control of a thing such as a borrower, a tenant and a depositee. The anomaly in this theory is that not every detentor is a possessor and it fails to explain these exceptions.

The special reasons of policy that lay behind the interdicts required that the person in control should be protected.

SALMOND'S THEORY

He started by distinguishing between possession in fact and possession in law. He claims that there is only one conception and that is possession in fact which is possession in truth and in fact, and possession in law is a legal fiction. He then distinguished between possession of physical objects, which he called corporeal possession and possession of rights, which he called incorporeal possession.

Corporeal possession is the continuing exercise of claim to the exclusive use of physical or corporeal things and the extent of this claim involves two ingredients corpus possessionis and animus posidendi. Hence, corporeal possession is animus and corpus the animus possidendi is the intent to exclude others, i.e., to hold for ones own interest. He further classified the corpus possessionis under two headings;

a) The relation of the possessor to the thing, which must allow him to put the thing to the use which accords with its nature. In this connection he said whether the possession of one thing would bring with it the possession of another thing that is connected with it depends up on the

circumstances of the particular cases.

b) The relation of the possession to other persons. A person shall be considered to be in possession of a thing, where the facts of the case are such as to create a reasonable expectation of non-interference in the use of it.

EXERCISE: Which theory of possession do you think is adopted by the Ethiopian Civil Code? Answer after examining Arts 1140, 1141, 1142, 1145/1/, 1146/3/ and 1147 of the code.

2.1.2 DEFINITION OF POSSESSION

The term 'possession' may be defined as the detention and enjoyment of a thing by a person himself or through another person in his name. It refers to the relation of person to a thing over which he may, at his pleasure, exercise such control as the character of the thing permits to the exclusion of other persons. Possession in the narrow legal sense is the holding of a thing in the power of a person who intends to exercise, with regard to it, a property right. Refer to Art 1140 of the Civil Code.

The exercise of a right in relation to an object consists of either physical acts of use, enjoyment, or transformation, or legal acts of administration and disposal. Possession is, in the broadest sense, the state or relation of fact that gives a person the physical, actual and exclusive capacity with regard to a thing to carry out acts of use enjoyment or transformation.

(Art. 1148 & 1149 0f cc)

The concept of possession first emerged to refer to the physical control of a thing by a person. When the law came in to existence, this fact was taken in to account and certain advantages are attached to the person (possessor). Hence, possession/physical control/ was the basis in law of these advantages. However, a problem arises when the law attributes, to persons who are not actually in control, some or all of those advantages or deny them to persons who are actually in control the thing for the sake of convenience and policy. Reasoning then took the form that whenever a man has these advantages, this must be because he has possession. As a result, distinction

arose between actual control and possession. Hence, physical control (custody or detention) is distinguished from possession.

The distinction between detention and possession follows from a proper analysis of the latter concept, i.e., the fact that possession is made up of two elements

c. The Corpus or element of physical control
d. The Animus or element of intent with which such control is exercised.

Accordingly, though the holder and the possessor have the same physical control, the difference between them is found in the mental element, i.e., the intent of the possessor and what distinguishes the possessor from the mere holder is the animus domino or the desire to hold for one self and not on behalf of another. On the other hand, the mere holder holds the thing not for his own benefit but for the benefit of another person.

Hence, the following three situations became possible in relation to possession of a thing.

- A man could have physical control without possession and its advantages.

- He could have possession and its advantages without physical control.

-He could have both, i.e., he may have physical control as well as the advantages attached to possession.

2.2 ACQUISITION OF POSSESSION

……..

2.3 DEFECTS OF POSSESSION

Possession may be affected by flaws either in the mental element/ the animus /or in the nature of the physical acts / the corpus / through which possession has been acquired or continued. A defective possession shall not produce the effects that are normally associated with possession. Similarly, Art 1146/1/ of the Civil Code also provides that defective possession shall not give rise to any right. The following are the grounds that can render a possession defective.

2.3.1 PRECARIOUS POSSESSION

Possession of a person is affected by the defect of precariousness if the person does not have a right of ownership in relation to the object he holds.

According to French terminology, precarious possessions refer to the possession of those who hold a thing for

another on basis of an agreement or in such quality that, at the expiration of the agreement, or where they lose their quality, they must return the thing. Hence, the possession of a usufructuary, a limited user /usage/, a tenant farmer, leaseholder or a pledgee, a creditor secured by antichresis, a tutor with regard to a minor's property is affected by the defect of precariousness.

(Art. 1146 of cc)

2.3.2 CLANDESTINE POSSESSION

Possession is clandestine, that means not open, if the acts by which it was acquired and continued were not such as to be known to the outside, especially to those persons against whom they are to be claimed. This defect can be healed as soon as it is revealed by material acts openly carried out.

Clandestineness is purely a relative defect that can be subject to claim only by those who could not have known about the possession.

2.3.3 VIOLENCE

Violence is another defect that may mar possession. In other words, a possession acquired or continued by acts involving physical or psychological violence is vitiated by a defect of violence.

Violence represents a purely relative defect that can be asserted only by the person against whom it was exercised.

The Ethiopian law does not clearly declare violence as a cause for defectiveness of possession. See Art 1146 of the Civil Code. However, we can deduce from the provisions of Art 1148, which allows a possessor to use force to recover a thing which has been taken away from him through violence, that a person who used force to acquire possession is not protected by the law as his action is unlawful and violates public interest for peace and order. Therefore, a possession that is acquired through violence or force is defective and cannot produce the effects of a lawful possession.

2.3.4 AMBIGUITY/ DUBIOUSNESS

Possession is said to be ambiguous where it is not clear whether the person is holding a thing in his own name or in the name of another person. According to Art 1146/3/, a possession is said to ambiguous or dubious where, in the circumstances, it is doubtful whether the thing belongs to the person

who claims to be the possessor or whether he holds the thing on behalf of another person. This type of defect clearly related to the mental or animus element of possession. An ambiguous possession shall not have the effects of possession.

(Arts 1146/1/, 1168 and 1150)

2.4 EFFECTS OF POSSESSION

1. Possession may create ownership either by occupation, i.e., by taking control of res-nullius/ a thing with out an owner/ or through the expiration of a period of acquisitive prescription. See Art 1151 and 1168 0f the Civil Code.
2. Possession is a prima facie evidence of ownership, and he who would disturb a possessor must show either title/ownership or a better possessory right and defense of lack of legal title by the possessor may not be set up him. For example, a jeweler cannot claim the return of a ring from a person who found it on the ground that the finder is not an owner, nor can a person who is not an owner claim the return of a thing from a thief. Hence, even a wrongful possession is good against all persons except the true owner or one claiming through him or one claiming a prior possessory right. See Art 1193 of the Civil Code.

3. Possession is the basis for certain remedies because the law protects a possessor, as it does not always know that a possession in question is unlawful. In times when proof of title was difficult and transfer of property required intricate formalities, it would have been unjust to cast on every man whose possession was disturbed the burden of proving a flawless title. The doctrine that in most eases possessors are the rightful owners may not be historically accurate, but it is convenient for the law to reward possession as well- founded, at least until a superior title is shown to exist.

Hence, the law protects, even a wrongful possessor, from dispossession by the owner without due process of law and the owner has to institute legal action by proving his ownership right to recover the thing. See Art 1206 of the Civil Code.

2.5 PROTECTION OF POSSESSION

Here we shall discuss two main types of protections provided by the law.

2.5.1 POSSESSORY ACTIONS

In the broadest sense, and in contradistinction from negatory actions that are based ownership or title, possessory actions are those that are based exclusively on possession without touching the basis of the title. In this broad sense, possessory actions include actions to retain possession, actions in restraint of works by neighbors and actions to recover possession. Compare Arts 1149 and 1206 of the Civil Code. In other words, possessory actions are legal actions or suits instituted by a possessor who has been disposed of his possession or whose possession is interfered with or whose possession is threatened by the actions of another person.

Things and interests with regard to which a possessory action can be brought are corporal immovable, their usufruct, servitudes and immovable rights of enjoyment and use. However, since possession of corporeal movable things /chattels/ is equivalent to ownership, the action applicable to them is negatory actions, i.e., actions based on title or ownership and that are intended to recover the same.

The possessor of land expropriated for public purposes such as construction of local roads can bring a possessory action against the municipality, which would contest his right to be compensated. This action does not aim at retention or recovery of possession, but at the recognition for the purpose of establishing his title to the compensation.

Immovable things in the private domain of the state, the departments and municipalities can be acquired by adverse possession; hence they can be the objects of possessory actions.

Immovable things which are found on a land belonging to another person but which can be possessed separately from it, can be a separate object of a possessory action. This principle applies not only to buildings constructed on some one else's land, but also to trees and crops planted on the land of another.

Usufruct, use and habitation rights can be the object of possessory actions in as much

as they are related to corporeal immovable things in-commerce/ belong to the private domain./. Since the facts that constitute the contents of these rights are by their nature contrary to any presumption of purely precarious enjoyment, they can give rise to a possessory action, without the plaintiff being required to show the title on which his right rests.

Legal servitudes or servitudes established by law can give rise to a possessory action provided that the plaintiff still is or was, at the time when the interference occurred, in possession of the servitude.

According to Art 1149/1/ of the Civil Code, a possessor [or even a holder] who is dispossessed of his possession or whose possession is interfered with may institute an action for the restoration of the thing or cessation of the interference and claim compensation for damages resulting from the dispossession or interference.

According to Art 1149/1/ of the Civil Code, a possessor [or even a holder] who is dispossessed of his possession or whose possession is interfered with may institute an action for the restoration of the thing or cessation of the interference and claim compensation for damages resulting from the dispossession or interference.

However, Arts 1210 and 1225/2/ of the code that impose an obligation on the holder of a land to refrain from acts that can damage or endanger buildings on a neighboring land such as excavations, digging wells, other underground works and planting trees close to boundary line, imply that a possessor whose possession is affected by such acts may apply to a court for the enforcement of these obligations by the owner/holder.

Finally, according to Art 1149/2/, a possessory action of any type shall be barred if not brought within a period of one year/ the Amharic version provides two years/ from the day of the usurpation or interference. This means that the possessor loses his right to require the restoration of the thing or cessation of interference where he fails to institute legal action with in the period of two years. However, he may still recover the thing by instituting action for restitution/ nugatory action/ under Art 1206 of the Civil Code provided that he can prove his right of ownership and as long as he has not lost his ownership through

extinctive prescription. See Art 1168 and 1189 of the code.

2.5.2 USE OF FORCE

Use of force is the other means provided by the law for the protection of possession. Actually this 'self-help' type of protection is considered as a protection provided for the person of the possessor or holder and not merely for the protection of his property. It would also be unjust to prohibit a person from using force to repel or resist usurpation or to recover a thing, which has been taken away from him and require him to seek judicial remedy.

(Art. 1148 of cc, Art. 68(c), 75 & 78 FDRE cr. Code, Art. 16, 26(1) & 40 of FDRE consn)

2.6 TRANSFER OF POSSESSION

The transfer of possession may result from contracts such as sale, donation or operation of the law. Possession may be transferred by the delivery or handing over the thing or documents representing the thing such as a bill of lading, consignment note, a ware house goods deposit certificate. It may also be transferred through delivery bravemanue, i.e., an agreement between the holder and the person for the account of whom the former exercises possession and in which the holder ceases to hold in the name of another and begins to possess in his own name. Alternatively, it may be transferred through constructive possession in which the possessor agrees to cease to hold in his own name and to begin to hold for the account of another who is considered as the actual possessor. See Arts 1143-1145 of the Civil Code.

Is registration required for the transfer of possession under the Civil Code? Compare Arts 1143-45 and 2878 of the Civil Code.

2.7 LOSS OF POSSESSION

Since both animus and corpus are necessary for possession, possession is lost when one of the two elements ceases to exist. The isolated continuation of one element does not suffice to maintain it.

Possession is lost only by deliberate abandonment or by a physical obstacle that makes it impossible to restitute, at any time the possessor desires, the state of affairs that construed the possession. However, this principle does not apply absolutely and we have to make the following distinctions. See Art 1142 of the Civil Code.

Furthermore, possession is not necessarily lost just because a third person has occupied the immovable. It shall be lost only if he occupies the immovable for a year. /Compare Arts 1142 and 1149 of the Civil Code/. If the former possessor lets this period elapse with out any act of enjoyment or any claim for return of possession, whether he did or did not know of the adverse occupancy, he shall lose his right of possession. This is true even if he manifested his intention to continue in possession by acts such as the payment of taxes.

UNIT THREE-OWNERSHIP

3.1 DEFINITION AND ELEMNTS OF OWNERSHIP

Right of ownership is the widest and the ultimate property right that may be had in relation to things or objects. Ownership may be defined as legal relationship that gives rise to certain rights and obligations between persons in relation to an object.

Ownership is said to be absolute in the sense that the owner may do as he likes with the thing that is his own. The rights of an owner include;

1.The right of use and enjoyment, which includes the right to determine to what type of use the object may be put, to deal with the fruits of the thing as he likes, and even the right to destroy the thing or its fruits. See Arts 1205/1/ and 1270-1271 of the Civil Code.

2. The right of possession that includes the right to exclude others. Property right is essentially a guarantee of the exclusion of other persons from the use and handling of the thing over which the right is exercised and the right to reclaim it from the hands of another. See Arts 1204, 1148 and 1149 of the Civil Code.

3. The right to transfer the thing and its fruits for consideration or gratuitously which could be intervivos / while the owner is alive / or mortis causa/ up on his death/ and the right to charge them as security (mortgage or pledge). See Arts 1205/2/ and 3049/2/ of the Civil Code.

4. The right to leave or abandon the thing or its fruits at will. See Art 1189 of the Civil Code.

Some other sources also argue that a right of ownership is composed of the following main elements;

- The right to use the object himself (the usus)

-The right to collect and use fruits - such as crops or rents (the fructus)

-The right to dispose of it and its fruits by alienation by destruction (abandonment) and the right to charge it with pledge or mortgage (the abuses)

Ownership is said to be 'exclusive' because these rights are in principle available only to the owner, and is "perpetual" since these rights are neither extinguished by non-usage nor limited by duration. See Art 1204 of the Civil Code.

To understand the concept of ownership comprehensively, let us try to distinguish between:

1. Ultimate Ownership- in which other persons hold the rights of present enjoyment temporarily through contracts such as usufruct or lease and the residual magnetic core is left to the owner.

2. Complete or Beneficial Ownership- in which the owner enjoys all the rights and privileges emanating from it.

3.2 RESTRICTIONS ON THE RIGHT OWNERSHIP (Art. 1204(1) of cc)

These restrictions may be based on public interest.

(Art. 2369 &2373, 1319(2), 1460, 1464, 1210 & 1225, 1226, 1246(1), 1245,)

F.The owner/holder of land is required by law to allow access to his land/ holding in some circumstances. Hence, he/she may not prohibit access to his/her land where it is necessary: -

- To prevent or avoid eminent damage or danger to life or property (Art. 1217)

- To repair of walls or buildings (Art 1218)

- To recover lost things or animals (Art 1219)

- To install of pipes (Arts 1220, 1252, 1253)

- To allow right of way to a neighbor (Arts 1221-1224, 1249(2))

3.3 PROPERTY RIGHTS WITH REGARD TO LAND AND WATER

(Art. 40 of FDRE constitution)

3.3.1 SCOPE OF RIGHT OF OWNERSHIP/USE OF LAND

The ownership/holding and use right/ of land includes what is above it. In other words, the air space is exclusively the owner's/ holder's/ and he can erect in it structures, he may demand the destruction of works which, in any way infringes his air space, or the cutting of branches which grow in to it. See Art 1211 and 1212 of the Civil Code.

(Art. 1211, 1212, 1214, 1200, 1209, 1210)

The ownership/holding of the land extends to a depth below, including all the objects located there. Art 1255(2) limits this right to a depth of 100 meters.

3.4. ACQUISITION OF OWNERSHIP

A person may acquire property rights in a variety of ways. For instance, a person may become an owner of a property by occupancy of things that do not have an owner/ res nullius/ or by transfer from an owner or even a non-owner by operation of the law. For systematic purposes, a distinction is made in civil law jurisdictions between original and derivative acquisition. This distinction is important in light of the general principle of property law that no one can transfer a better title than he/she has. This means that, ordinarily, the transferor, in order to transfer a perfect right of ownership to the transferee, he must have a perfect right of owner ship himself. However, in cases of original acquisition it is possible for a non-owner to transfer a perfect right of ownership. Acquisition of ownership through possession in good faith under Arts 1161-1169 of the Civil Code is a particular example of this situation.

Derivative Acquisition; Refers to the mode of acquisition right of ownership through transfer from one person to another. It is a mode of acquisition in which the right of the transferee is dependent on the right of the transferor. Hence, the governing principle here is that no one can transfer a better title or right than he has, and where the transferor is not an owner or if his right is defective, the transferee will not acquire right of ownership or will acquire a defective right.

Derivative acquisition may result from contracts such as sale and donation/ Arts 2266-2426 and 2427-2470 of the Civil Code respectively or from the will of a deceased person/ testate succession/ or the operation of the law, in cases of in testate

succession/ Arts 826-1125 of the Civil Code/.

Original Acquisition; This mode of acquisition involves the creation of new property a right, which is independent of any preexisting rights over the same thing. This mode acquisition differs from derivative acquisition of property rights in which an existing property right is transferred from the transferor to the transferee, and the latter's right depends on the right of the former. This mode of acquisition of ownership includes occupation, possession in good faith, accession and usucaption/ acquisitive prescription, which are discussed below.

3.4.1 OCCUPATION

Occupation is a mode of acquiring ownership by the sole fact of taking possession of a thing that does not have an owner with the intention of becoming an owner. This mode of acquisition is largely limited to chattels such as wild animals, birds, fish /res nullius/ and abandoned chattels /res derelicte/ and treasures.

Hence, occupation or first possession as a mode of acquisition of ownership right is limited to the following cases.

1. Wild Animals; a person may acquire ownership right of wild animals living in natural

freedom through the act of hunting and fishing in accordance with the relevant provisions of Wild Life Development and Conservation Proclamation. However, this cannot apply to semi-domesticated animals that customarily return to the same habitat, for example, pigeons, bee swarms. See Art 1152 and1153 of the Civil Code.

Art 850 of the FDRE Criminal Code also penalizes a person who violates laws, regulations or directives for the protection of the national arbores cent species, flora and fauna with fine or arrest. See also Art 681 of the criminal code.

2. Treasures; A treasure is anything hidden or buried to which nobody can show an ownership title and which is discovered by chance. According to Art 1159/3/ of the Civil Code, for a thing to be considered as a treasure it must be

found buried or hidden, in an immovable or movable thing, for a period of at least 50 years on the date it is discovered and nobody can prove it belongs to him/her.

3. Lost things; lost things and misplaced things have an owner but the owner does not know where to find them. However, the law attributes ownership to the finder after a lapse of certain period of time, or completion of certain requirements such as announcement of the find or report to the authorities. Under Ethiopian law the finder of a lost thing has the duty to comply with rules requiring him to report the find. See Art 1154/1/ of the code.

(Art. 1154, 1155, 1156, 1157, 1158, (Art. 1192 & 1151 of cc))

3.4.2 POSSESSION IN GOOD FAITH

Acquisition of ownership through possession in good faith is a mode of acquisition in which a person who purchases a corporeal movable thing from a person who is not an owner or who is not entitled to alienate or transfer a thing, becomes an owner of such thing originally as a result of his good faith. (Art. 1161(1) & 1162(1) of cc)

This mode of acquisition is based on practical considerations of impossibility of registration of all chattels /corporeal movable things/ and the consequent impossibility for the purchaser to ascertain the title of the seller of such goods. It is also intended to protect freedom of contract that helps the promotion of free transfer of goods and ensure security of transactions by enabling the bona fide purchaser to acquire a new right of ownership by protecting him from any claim by the true owner of such thing 1161(2). Otherwise, transactions involving chattels in respect of which registration and issuance of deeds is almost impossible, will result in uncertainty of contracts and business transactions and will hinder free circulation of goods.

(Art. 1165, 1167 & 1166)

3.4.3 ACQUISITIVE PRESCRIPTION (USUCAPTION)

The concept of prescription, in its broad sense includes both acquisitive prescription through adverse possession (usucaption)

and extinctive prescription (statute of limitations).

Acquisitive prescription is a mode of acquiring ownership title or some real interest through possession that is free from defects, exclusive and continuous (see Art 1168 and1150 junction of possession). Furthermore, the possession must be adverse, i.e., contrary the owners will, which means that where the possessor had acquired possession of the immovable with the consent of the owner the rules of usucaption or acquisitive prescription shall not apply.

Limitative/extinctive prescription is a defense through which it is generally possible to resist a claim on the sole ground that the claimant failed, for a certain period, to bring the action or to exercise the right on which it is based.

Acquisitive prescriptions, similar to limitative prescription provide a defense against an action for restitution by the former owner; and a restitution claim against any adverse possessor, including the former owner. The rationale behind this principle is that owners must not leave their property unattended for a long period of time. In case where the owner leaves his property unattended and fails to claim its restoration with in the period of time determined, the law assumes that the owner does not need the property any more and hence decides to reward a person who can put the same to a better use for himself and the public.

(Art. 1168, 1150 & 1146 of cc)

A person who possessed a thing for a period lesser than 10 years shall only acquire right of usufruct.

Similarly, Art 1168/2/ of the Civil Code entitles the person who does not fulfill the requirements of Art 1168/1/ but who has fulfilled the requirements under Art 1146 and 1149/2 / to the right of possession and the protections provided for possessors. Hence, a person who possessed, for more than two years but lesser than fifteen years, an immovable belonging to another and whose possession is defect free shall be considered as a lawful possessor protected by the provisions of Art 1148 and 1149 of the code. The same shall be true of a person who did not comply with the tax requirements of Art 1168/1/ of the code.

3.4.4 ACCESSION

Accession is a mode of acquisition of ownership through the union of two or more things belonging to two or more persons. If the thing which is joined does not have a master before, a person acquires it by the sole fact that nobody can claim it. In other words, for a thing to be acquired through accession, the two things must belong to different persons.

In principle, when the two things now joined belonged to different persons before the union, each owner should be able to request their separation. However, in majority of cases such separation cannot take place without deterioration of the things or often it is impossible. Hence, the solution is to attribute anything formed by such union to one person and compensate the other, based on the maxim "Accessio cedit principali, i.e., the owner of the principal owns the new thing, See Art 1183(2) or require it to be commonly owned by the owners of the component parts in certain proportion. See Art 1183(1)

Accession also applies to increase from breeding in case of animals/ accession by separation/. Hence, the owner of the mother shall become the owner of the calf. See Art 1171. Similarly, a person who owns a thing also owns its natural fruits, in cases of ownership of things capable of bearing fruits. See Art 1171 of the Civil Code.

ACCESSION OF MOVABLE THINGS TO IMMOVABLE THINGS

(Crops sown on the land of another person; Art. 1172- 1174) (Plantations on a land belonging to another; 1175- 1177), (Buildings on a land belonging to another person 1178- 1180), (Using materials belonging to another; 1181 & 1134 of cc))

ACCESSION OF MOVABLE THINGS TO MOVABLES

Accession of one movable to another can take place in one of the following forms:-

1. Adjunction: It is a union of two things belonging to different owners in which the things form a single whole though each is a distinct and recognizable part of the new thing formed by the union. (Art. 1183(2))

2. Transformation (specification) - is the act of making anew thing with material belonging to someone else, the worker shall become the owner of the new thing if the labor supplied is of great value than that of the material. (Art. 1182)
3. Commingling /fusion/ - occurs when two dry or liquid things /matters belonging to different owners are commingled or fused so that they cannot be separated without difficulty. (Art. 1183(2))

3.5 TRANSFER OF OWNERSHIP RIGHTS

According to Art 1184 of the Civil Code right of ownership may be transferred from the owner to another person by the agreement of the owner which may be a contract of sale (see Art 2266) or contract of donation (see Art 2427) or a contract of barter according to Art 2408 and 09 or by will. It may also be transferred, in cases of in testate successions, by the operation of the law. For instance, the properties of the deceased person shall be transferred, according to Art 842, to his/her children.

In this regard the principle applicable is "nemo dat qoud non habate" which means that the transferor may not transfer a better right than he has on the object. Therefore, in order for a person to transfer a perfect right of ownership he/she must have a perfect right of ownership.

The right of ownership of ordinary corporeal movable things (chattels) is transferred by the transfer of possession, pursuant to the provisions of Art 1143-45. Possession may be transferred by delivery or handing over of the thing, or by delivery of document representing the thing such as bills of lading, way bills, warehouse goods' deposit certificates or constructively, i.e., by declaration of the possessor of a thing that from that time on he will hold the thing in the name of the creditor who failed or refused to take delivery.

On the other hand, transfer of ownership right over immovable things and special movable things is effected by striking out of the name of the transferor and entering the name of the transferee in the registers of immovable things and special movable things respectively, and issuing a new title

deed in the name of the transferee. See Art 1185 and 1189 of the code.

3.6 PROOF OF OWNER SHIP RIGHTS

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3.7 EXTINCTION OF OWNERSHIP RIGHTS

Extinction of right of ownership may be absolute in the sense that the owner or another person may no longer exercise right of ownership in relation to that thing because the thing is destroyed, or it has lost its individual character. (Art. 1188)

Ownership right may also be extinguished absolutely if the thing is expropriated for public purposes. Ownership of wild animals will be extinguished absolutely if they regain their natural freedom and become res nullius. See Art 1152(1).

(Art. 1191 & 1192 of cc)

Ownership of immovable things and special movable things in respect of which there is a requirement of registration/ Art 1723, 1185 / shall be extinguished when the registration is cancelled / Art 1190 /.

UNIT FOUR- JOINT OWNERSHIP

4.1 DEFINITION AND SCOPE

Joint ownership or Co-ownership is the right of ownership exercised by two or more persons in relation to the same object. In other words, it refers to the right of use and enjoyment, right of possession and exclusion of others and the right to transfer a thing or to charge it with pledge or mortgage exercised jointly by several persons. See Art 1257 (1) of the Civil Code.

THE SCOPE OF RULES GOVERNING JOINT OWNERSHIP

The rules on joint ownership are developed and applied to cases where the relations between the co-owners are simple relations of common interest in a thing.

Joint ownership of things is regulated primarily by the agreement entered into by the joint owners at the time of inception of joint ownership, where joint ownership arises from contracts, or by the agreement entered in to after the joint ownership is created and/or by the mandatory provisions of the rules contained in the Civil Code, i.e., Arts 1257-1308. In other words, the rights and duties of the joint owners, the use and

administration of the thing are regulated by the agreements entered in to by the joint owners provided that the agreements are not defective/ invalid/ and are not contrary to mandatory provisions of the Civil Code mentioned above. See Arts 1264, 1265, 1266, 1267, 1268/2/, 1271 and 1274 of the Civil Code.

The permissive provisions of the Civil Code shall apply where there is no agreement or a provision governing the various aspects of joint ownership or where such agreement or provision is defective or invalid. See Arts 1263, 1275, 1260 1268/3/ of the Civil Code.

4.2 ADVANTAGES AND DISADVANTAGES OF JOINT OWNERSHIP

ADVANTAGES

The fact that a thing may be owned by two or more persons helps people to acquire certain property very important for their lives, which they would not have otherwise acquired because of lack of sufficient financial capacity by joining or contributing a lesser amount of money. (Art. 1281- 1308 of cc)

Joint ownership will also help in achieving efficient utilization of scarce resources.

DISADVANTAGES

It is usually difficult to obtain the agreement of all joint owners to reach a certain decision. Hence, joint ownership may hinder the free transfer of goods because joint owners may not have the opinion and understanding as to the importance of the proposed act to agree to the proposed act. (Art. 1265 & 1266 of cc)

4.3 SOURCES OF JOINT OWNERSHIP

Joint ownership may arise from an agreement/ a contract/ or a will or the provisions of the law. **Joint Ownership Arising from Contracts**- a contract is a common source of joint ownership. Two or more persons who intend to acquire and use a thing commonly or jointly may enter in to a contract creating joint ownership. In other words, the main purpose or object of a contract creating joint ownership is to create ownership right for two or more persons in relation to the same object or thing. For these contracts to be valid and enforceable, they have to fulfill all the requirements for the formation a valid

contract, i.e., consent, capacity, object and form. See Arts 1676/1/, 1768 and 1679-1730 of the Civil Code. However, you have to note that no special form is required for validity of contracts of joint ownership and they can be made orally unless they are required to be made in writing by law or the agreements of the parties. Accordingly, contracts creating joint ownership over immovable things and special movable things have to be in writing. See Arts 1719-1730, 1282 and 1283 of the Civil Code.

Joint Ownership Arising from the Law – Joint ownership may also arise from the provisions of the law. For instance, Art 1060 of the Civil Code provides that a succession shall remain in common between the heirs until it is partitioned or divided among them and the provisions of the Civil Code, i.e., Arts 1257-1308 shall govern the rights and duties of co-heirs. Similarly, Art 1393 of the Civil Code, which deals with a right of recovery exercised by two more persons of the same standing, provides that they will be considered as joint owners of the thing recovered.

Note: A right of recovery is a right given by the law to certain group of persons to compel the buyer of a certain object to sell it back to them. The law grants such right because of the relation that exists between the seller and the persons to whom such right is granted.

(Art. 1176(1), 1177(3), 1183(1) of cc)

4.4 RIGHTS AND DUTIES OF JOINT OWNERS

Joint owners have the following rights and duties;

- ✓ Right to Use and Enjoy the Undivided Thing/Property, and its Fruits. (Art. 1263 &1264 of cc)
- ✓ Right to Administer the Thing. (Art. 1265, 1266 & 1259 of cc)
- ✓ According to Art 1267 each co-owner shall bear, in proportion to his/her share, the costs of administration, taxes... and necessary costs (costs incurred to avoid lose or damage to the thing). (Art. 1268 of cc)
- ✓ Each joint owner has the right to dispose of his share of rights in the undivided interest in the thing jointly owned. (Art. 1260 & 1261 of cc)

- ✓ Each joint owner has the right to request termination of joint ownership. (Art. 1271, 1272, 1273 & 1274 of cc)

4.5 SPECIAL CASES OF JOINT OWNERSHIP

A. PERPETUAL JOINT OWNERSHIP

Perpetual joint ownership represents a joint ownership in which joint owners do not have the right to demand termination.

(Art. 1276 of cc)

Perpetual/ continuous/ usually exists in relation to indispensable accessories of things intended for the common use of two or more estates belonging to different owners.

B. PARTY WALLS

A party wall is a wall placed on the boundary line between two estates, and belonging in common to their owners, including the land on which it rests. (Art. 1201, 1202, 1278- 80 of cc)

C. CO-OWNERSHIP IN BUILDINGS IN WHICH FLOORS OR APARTMENTS ARE SEPARATELY OWNED

The present day's growth of population and urbanization processes, the scarcity of land and cost of building necessitates/ make imperative the construction of buildings which contain floors or apartments belonging to different persons. In addition, the construction of a collective house is cheaper than construction of several individual houses because the cost of land, the roofing and various other materials and appliances is divided among several Co-owners.

UNIT FIVE - USUFRUCT

5.1 DEFINITION

Usufruct may be defined as a real right, temporary or for life, which entities a person called, the usufructuary, to possess, use and enjoy a thing, which belongs to another person called the bare owner, and its natural fruits, with the duty of preserving its substances and restitution to the bare owner up its termination. (Art 1309(1), 1328, 1347, 1348, and 1311 of the Civil Code.)

In other words, usufruct represents a case in which the constituent elements of a right of ownership are divided or partitioned among two or more persons, i.e., the owner of the thing, called the bare owner, and the person who has the present right of

possession and use of the thing/uses/ and the right to collect and use its fruits /fructus/, called the usufructuary.

Accordingly, a right of usufruct may be created in relation to

- Incorporeal things
- Corporeal things
- Movable things
- Immovable things

5.2 SOURCES OF USUFRUCT

Art 1310 of the Civil Code provides that, in the absence of provision to the contrary, the rules governing the acquisition, transfer, extinction of right of ownership shall apply to the acquisition, transfer or extinction of usufruct right.

Usufruct may arise from;

1. The law / as in the case of French law/
2. Contract
3. Will

Usufruct may be created by agreement or contract for consideration or without consideration. According to Art 2410 of the Civil Code, an owner may transfer the usufruct of a thing by contract for consideration. In such cases, the rules governing contracts of sale shall apply. The rules as to the form and publicity requirements for contracts shall also apply to contracts creating usufruct. Hence, contracts creating usufruct right on immovable things and special movable things shall be made in writing and registered with the organ registering immovable things or special movable things. See also Art 1723 of the Civil Code.

Usufruct may also be created by a will of the deceased owner. The owner of a certain property may, by his last will, bequate on another person the right to possess, use and enjoy and collect the fruits of the thing after his death. See Art 912 and 929 of the Civil Code.

Usufruct may be created for a limited period of time or for lifetime of the usufructuary. See Art 1322(1) of the Civil Code.

Usufruct created in favor of bodies corporate or properties with specific destination shall terminate after 30 years or such shorter period provided by the contract or will creating it. Refer to Art 1322(2) of the Civil Code.

5.3 RIGHTS AND OBLIGATIONS OF THE USUFRUCTUARY

1. The Conservation of the Substance of the Thing: (Art. 1309(1), 1330 of cc). However, the usufructuary can make changes that increase the value of the thing without changing its form.(Art. 1336 of cc)

2. The usufructuary has the right to use and enjoy the thing, and its fruits.

(Art. 1312, 1330(2), 1328 & 1324 of cc)

3. The obligation to up-keep the thing: (Art. 1313, 1337 & 1338(2) of cc)

4. The usufructuary has an obligation to pay all the charges encumbering the profits of the thing such as annual taxes such as land tax, building tax or income taxes and other charges that are normally payable out of the income derived from the thing. See Art 1314 of the Civil Code.

5. The usufractuary has an obligation to inform the bare owner about any act of interference by a third person in the rights of the bare owner. (Art. 1342 of cc, 1341, 1148 1149 & 1319(2) of cc)

6. The usufructuary has an obligation, at the time of extinction of the usufruct, to restore or restitute the thing to the bare owner or his agent. (Art. 1317 of cc)

5.4 RIGHTS AND OBLIGATIONS OF THE BARE OWNER

1. He has the duty to refrain from any kind of interference with the right of the usufructuary to possess, use and enjoy the thing and collect and use its fruits.

2. He must undertake major repairs as defined under Arts 1337 and 1338, which are not result of the usufructuary's fault.

3. He has an obligation to cover extra ordinary charges. Art 1315

5.5 EXTINCTION OF USUFRUCT

1. Death of the usufructuary- (Art. 1322(1))

2. Lapse of the period for which it is created. (Art. 1322(1) of cc)

3. Extinctive prescription – lack of exercise of any of the usufruct rights or complete absence enjoyment, use possession by the usufructuary or by his agent in relation to chattels/ ordinary corporeal movable things/ shall result in the termination of usufruct. (Art. 1310 & 1192 of cc)

4. The loss or destruction of the thing; (Art. 1319 & 1310 of cc)

5. Consolidation or merger of the position of the bare owner and the usufructuary in one person shall also result in the extinction of usufruct right. (Art. 1676(1) & 1842 of cc)

6. Forfeiture or waiver of right by the usufructuary; (art. 1310, 1191, 1676(1) cum 1825 of cc)

7. Acquisitive prescription in favor of a third party; (Art. 1310 & 1168 of cc)

5.6 RIGHT OF USE AND HABITATION

5.6.1 RIGHT OF USE

Right of use is a temporary real right (for agreed period of time or for life the beneficiary) which entitles the beneficiary, called the user, to use a thing of another person and to receive its fruits such as profits or rents… but only within the limits of his own and his family's needs.

The right of use is not recognized under the Ethiopian Civil Code; hence we shall briefly see the rights and obligations of the user under the French Civil Code.

The rights and obligations of the user are governed by the instrument that created the use right, but in the absence of such provisions in the instrument the user will have the following rights and obligations.

1) The user has the right to the profits or fruits of the thing proportional to his and his family's needs. He can claim the various fruits or produce only in an amount in which each kind of produce will be consumed by him and his family, i.e., spouse, children and servants. However, collateral family members and ascendants are not included.
2) The user has the same duties as a usufructuary. Please, read the discussion regarding the duties of the usufructuary.
3) The user cannot transfer, assign or lease his right, or substitute a third party, hence, the right of use may not be seized by the creditors of the user, even if it was constituted for consideration. But he can sell a portion of the fruits, which he acquired in ownership by taking them directly or having them delivered.

The right of use is extinguished in the same manner as the right of usufruct is extinguished.

5.6.2 RIGHT OF HABITATION /OCCUPATION OF PREMISES/

This right is merely a particular type of right of use, i.e., a right of use exercised over residential houses or premises. Hence, the rules discussed in relation to usufruct and use rights are applicable to the right of habitation or right of occupation of premises.

Art 1353 of the Civil Code defines the right of habitation or right of occupation of premises as a right to live in a house or part of a house belonging to another person. The beneficiary of the right of habitation has the right to live in the house with his/her spouse, direct ascendants, descendants and servants. See Art 1354 of the Civil Code.

(Art. 1355, 1356, 1357 & 1358 of cc)

UNIT SIX- SERVITUDE

6.1 DEFINITION

Servitude is a right in rem / real right/ over a definite plot of land, called the servient tenement and annexed to another plot of land, called the dominant tenement. In other words, it is a property right vested in the owner/holder of one plot of land to use a land belonging to another for certain purposes. Servitude is a right that can only exist in relation to two or more plots of land belonging to two or more persons. However, these lands are not required to be adjacent. (Art. 1359(1 & 2) of cc)

Servitude may also be defined as an encumbrance or restriction on the right of ownership of the owner of the servient tenement for the benefit of the owner of dominant tenement.

(Art. 1360 & 1373 of cc)

As any real right, not only the burden of servitude runs with the servient land its benefit also runs with the dominant land. This is the essence of a real right (servitude) as opposed to personal servitudes, such as the right of usufruct, use and habitation that are also called personal servitude. (Art. 1361 of cc)

Servitude creates an obligation, on the owner of the servient tenement, only to refrain from preventing the owner of the dominant tenement to do certain acts that

the latter would not have been able to do otherwise. In other words, servitude shall not create an obligation to perform positive acts on the owner of the servient tenement. (1359(2) of cc) But Art. 1360 & 1373 of cc are exception to this principle.

6.2 PURPOSE OF SERVITUDE

A person may be unable to make the most advantageous use of his land or building without some rights over the land belonging to his neighbors.

Therefore, the main purpose of servitude is to enable the owner of the dominant tenement to derive the best possible use and benefit from his land by giving him certain rights on the land belonging to another person, called servient owner. However, unless the servitudes that may be created on a land are restricted in number and extent, it may hamper the profitable use of the servient land and gravely diminish its value, and this will ultimately injure public interest. This is because the owner/holder of such land can not use his land in the manner he desires and other persons will not be interested to acquire such land as their right of ownership is limited or encumbered by the servitude or the right of another person.

Therefore, the law tries to restrict the number and extent of encumbrances or servitudes on the servient tenement in the following ways.

1. Servitude should be used exclusively for the purpose of using or exploiting the dominant land and it must be used exclusively for that purpose. In other words, the owner of the dominant tenement may not use the servient tenement for the purpose exploiting another land that is not part the dominant tenement.
2. The law also limits the rights of the owner of the dominant tenement to use the servient tenement only to purposes for which the servitude was created at its inception. In other words, it cannot be used for new purposes that may arise after the creation of the servitude.

(Art. 1376, 1375, 1377, and 1380 of cc)

3. The owner of the servient tenement has the right to redeem the servitude where the benefits or advantages it provides to the dominant tenement are lesser than the inconveniences or damages it

causes to the servient tenement. See Art 1383.

4. The owner of the servient tenement cannot be required to do positive acts; he may merely be required to abstain from doing something or to permit the owner of the dominant land to do something on the servient land.

6.3 SOURCES OF SERVITUDE

The right of servitude may arise from a contract, a will, acquisitive prescription or the provisions of the law.

1. Servitudes arising from contracts; (Art. 1362(1) of cc)
2. Servitude may also arise from the will of the deceased person who divides his land holding between two or more persons. (Art. 1362(2) of cc)
3. Acquisitive Prescription; (Art. 1366, 1367 & 1368(2) of cc)
4. Servitude arising out of the provisions of the law. The contiguity of land belonging to different owners or occupied by different persons creates conflict if either or both of them wish to enjoy their lands without any consideration for the damages or annoyance caused to the other. These conflicts can be eliminated only by limiting the powers that the right of ownership usually involves. Specific provisions of the Civil Code, which determine what is allowed and what is prohibited, are intended to prevent some of these potential conflicts. Refer to the provisions of Art 1217, 1218, 1219, 1220, 1221-1224, 1245-1254, 1372/2/ of the Civil Code.

6.4 RIGHTS AND DUTIES OF THE PARTIES

6.4.1 RIGHTS AND DUTIES OF THE SERVIENT OWNER/HOLDER

1. The owner/holder of the servient tenement shall have the obligation to allow the owner/holder of the dominant tenement to use his land for the purpose for which the servitude is created and refrain from exercising certain rights such as the right to prevent other persons from entering his land or using his land. (Art. 1359 & 1379 of cc)

2. He also has the obligation to perform works related to the construction, maintenance and repair of the means

necessary for the exercise of rights of servitude by the owner of the dominant tenement, where under the instrument creating the servitude, he has undertaken such obligation. See Art 1373/2/

3. The owner/holder of the servient tenement has the right to redeem the servitude where he can prove that the damages or inconveniences caused by the servitude are way higher than the benefits or advantages derived by the owner of the dominant tenement. (Art 1383 of cc)

4. The owner/holder of the servient tenement may require that the servitude be exercised on such other part of the servient tenement as will be equally convenient to the owner of the dominant tenement. (Art. 1380, 1220(3))

6.4.2 RIGHTS AND DUTIES OF THE DOMINANT OWNER/HOLDER

1. The owner/holder of the dominant tenement must exercise his rights in a manner, which causes minimum inconvenience or damage to the servient tenement. In addition to this, he may not make any alteration that would increase the burden of the servient tenement. See Art 1375
2. Where the dominant tenement is divided, the right of servitude shall continue for the benefit of the owners/holders of each parcel of land. However, such division shall not increase the burden of the servient tenement, and the owners/holders of the divided parcels of land shall exercise their rights, for instance right of way, using the same area or piece of the servient land. See Art 1377.
3. Similarly, where the servient tenement is divided, the owner/holder of the dominant tenement shall have the right of servitude on each of the new parcels of land. See Art 1378.

6.5 TYPES OF SERVITUDE

6.5.1 URBAN SERVITUDES AND RUSTIC/ RURAL SERVITUDES

Urban servitudes are servitudes created and enjoyed in urban areas. They include right of view, right of way and the various other servitudes arising out

of the law such as the right to install water, gas or electrical lines. On the other hand, rural or rustic servitudes are those types of servitudes created and enjoyed in rural areas such as right of way or right to cross a parcel of land on foot, with animals, during the dead season, across fields, rights of pasture, watering animals, wood-cutting, irrigation. See Art 1371 of the Civil Code.

6.5.2 CONTINUOUS AND DISCONTINUOUS SERVITUDES

A continuous servitude is a servitude that continues without continuous human intervention. For example, Servitudes of view and drawing water are considered as continuous servitudes.

A discontinuous servitude is a servitude that cannot exist without a continuous human intervention. Therefore, for such kind of servitude to continue to exist, the beneficiary must continue to use /exercise the right created by it. (Art. 1382 of cc)

6.5.3 APPARENT AND NON-APPARENT SERVITUDES

Apparent servitudes are servitudes that are manifested by external works such as ditches, pipelines or an aqueduct, roads (means of enjoyment). (Art. 1366(1 & 2) of cc)

Non-apparent Servitudes are servitudes whose existences are not manifested by external works necessary for their enjoyment by the owner of the dominant tenement. Servitudes of pasturing animals, cutting wood, and extracting quarry… etc are examples of non-apparent servitudes. See Art 1367 of the civil Code.

6.6 EXTINCTION OF SERVITUDE

Right of servitude shall be extinguished for any one of the following reasons.

1. Waiver /release by the owner of dominant tenement. This ground of extinction is applicable to any kind of servitude. (Art.)
2. Disappearance of the apparent signs in cases of apparent servitudes or failure to exercise the right arising out of the servitude, and the cancellation of the entry of the servitude in the register of immovable properties up on the application of the owner/holder of the servient tenement. See Art

1381(3) and (1) and Art 1366 of the Civil Code.

3. Redemption of the servitude by the owner of the servient tenement; (Art. 1383, 1384 & 1385 of cc)
4. Surrender of the servient tenement to the owner of the dominant tenement; (Art. 1374 of cc)

UNIT SEVEN - RIGHT OF RECOVERY AND RESTRICTIONS ON THE RIGHT TO TRANSFER CERTAIN THINGS

7.1 RIGHT OF RECOVERY

7.1.1 DEFINITION

Right of recovery is a right of a person to recover a thing sold by an owner from the buyer by paying the price and costs the latter has incurred. (Art. 1386 of cc)

The right of recovery is intended to keep things within a certain group of persons, such as a family or joint owners. It is intended to keep the thing among persons having a blood relationship because of the economic or social values of immovable things have among the society. It is also intended to keep a property among persons who have close relationship, in cases of joint owners, and keep strangers out there by securing peace and co-operation. Allowing strangers to acquire a share in a jointly owned thing may create problems in the administration of the thing, as almost all decisions have to be made by majority or unanimous vote of joint owners, which may become very difficult if a person who does not get along with the joint owners allowed to acquire a share in such things.

This right is always the result of legal provisions. Therefore, this right may not arise from contract, will or any other source. Furthermore, it is a right personal to the beneficiary and hence cannot be transferred to another person, nor can creditors of the beneficiary exercise it on his behalf. See Arts 1387 and 1397 of the Civil Code.

7.1.2 PERSONS HAVING A RIGHT OF RECOVERY

There are two classes of persons to whom a right of recovery is granted by law.

1. Relatives by consanguinity;

(Art. 1389 & 1394(2), 1124 & 1125 of cc)

(Art. 1391, 1393, 1392, 1396 of cc & 842-851 of cc)

Furthermore, only relatives from the paternal line have a right of recovery on an immovable which descended from the paternal line and only those from the maternal line can exercise a right of recovery on an immovable descending from the maternal line. See Arts 1390 and 849 of the Civil Code.

2. Joint Owners shall have a right of recovery where one of the joint owners sells his share of right in thing jointly owned.

(Art. 1260, 1261, 1388, 1394, 1393 & 1262 of cc)

7.1.3. CONDITIONS FOR THE EXERCISE OF RIGHT OF RECOVERY

The beneficiary of a right of recovery must declare his intention to buy the thing or usufruct within two months from the date he is informed of the transfer of ownership or usufruct to a new owner or usufructary, (if he is notified). See Art 1400. However, if he is not notified, then he may exercise his right with in a period of one month from the date the joint owners knew of the transfer. On the other hand, where the right is exercised by relatives, the beneficiary must declare his intention to exercise his rights within six months from the date of transfer of possession.

Such declaration of intention to buy/ exercise a right of recovery/ must be accompanied by securities, which may be in the form of pledge, mortgage or personal guarantee to secure the payment of the price and other expenses. See Art 1403.

According to Art 1398 of the Civil Code, a right of recovery may be exercised where the owner sells the thing or where creditors of the owner attach the thing. In other words, the right of recovery may not be exercised where the owner transfers the thing gratuitously, for instance, where the owner donates the thing. However, Art 1407/1/ indicates that right of recovery may be exercised even where the thing is transferred without consideration. Furthermore, excluding right of recovery in cases where the thing is transferred gratuitously will also be against the purpose of granting right of recovery discussed above. Hence, it does not seem that the legislator intended to exclude right of recovery in such cases.

However, a right of recovery, whoever the beneficiary may be, cannot be exercised in the following circumstance;

1. Where the buyer is himself a beneficiary of right of recovery, i.e., where the property is sold to a blood relative of the seller or a joint owner. See Art 1395 and Arts 842-851 of the Civil Code.

2. Where the immovable sold is situated in a town planning area or it consists mainly of a dwelling house or building. This prohibition particularly applies in cases of the right of recovery of relatives. See Arts 1535, 1536 and 1396 of the Civil Code.

3. Where the thing is expropriated. According to Art 1399 of the Civil Code, a beneficiary of a right of recovery cannot force a public authority or any other organ that has a power to expropriate private property for public purposes. See Also Arts 1460-1488.

7.1.4 EFFECT OF RIGHT OF RECOVERY

(Art. 1406, 1407, 1408 & 1409 of cc)

The person who is forced to transfer a thing to the beneficiary of right of recovery shall also have the right to be reimbursed with;

- Expenses of purchase and legal interest. /Art 1408/1/
- Legal interest on the price or value of thing from the date of payment of the price and or incurring of expense. /Art 1408/2/

7.1.5 LOSS OF RIGHT OF RECOVERY

(Art. 1401(1 & 2) of cc)

7.2 PROMISE OF SALE AND RIGHT OF PRE-EMPTION

7.2.1 DEFINITION AND REQUIREMENTS FOR VALIDITY

These restrictions are contractual, and they may be broadly classified in to three sections, i.e., promise of sale, right of pre-emption and prohibition of assignment or attachment of certain things.

A Promise of Sale- is a contract where by the owner of a thing undertakes to sell it to the promisee or another person specified if and when the promisee or such other person decides to buy it. (Art. 1410(1), 1416 & 1417 of cc)

A promise of sale, constitutes a restriction on the right of the promisor / the owner/ to dispose of the thing because he is obliged to sell the thing, at the price fixed in the agreement creating the promise, only to the

beneficiary of such right and when the latter whishes to buy it.

Right of Pre-emption, on the other hand, is a right arising out of a contract where by the owner of a thing is obliged to sell it to a specified person if and when he/the owner/ decides to sell it. (See Arts 1410(2) and 1418). Though the owner has the right not to sell the thing, his right to sell thing to any person who comes up with the best deal ceases to exist with the conclusion of the contract creating right of pre-emption in favor of the beneficiary.

Promise of sale and Right of pre-emption represent a restriction on the right of ownership of a person and a property right of the beneficiary of the rights only if they are made in relation to immovable things or special movable things in respect of which there is a requirement of registration.

In other words, contracts creating these restrictions in relation to chattels or ordinary movable things shall not constitute a restriction on a right of ownership of a person nor a property right /real right or right in-rem/ in favor of the beneficiary. Hence, the rights and duties arising from these contracts are governed by the law of contracts or obligations and not by property law. See Art 1411, 1426, 1427, 1428 and 1430 of the Civil Code.

(Art. 1412, 1422, 1424 & 1413 & 1415 of cc)

7.2.2 RIGHTS AND DUTIES OF THE PARTIES

A. PROMISE OF SALE

1. The maker of the promise/ the owner of the thing/ may not alienate or sell the thing or charge it with real rights /rights in-rem/ such as usufruct in the period for which the promise is effective. However, he may pledge or mortgage it for an amount not exceeding the price fixed in the contract creating the promise. See Art 1416

2. Where the thing is attached by court order, the owner must notify the promisee of such proceedings. (See Art 1417)

3. Where the owner of the sells the thing to a person other than the beneficiary, the latter shall have the right to force the buyer of the thing to sell it back to him at the price agreed up on in the contract creating the promise.

B. RIGHT OF PRE-EMPTION

1. The owner has the right to create any kind of right in-rem on the thing, but he may not sell or transfer it to another person. (Art. 1418(1 & 2))

2. In case of attachment, the owner of the thing must notify the situation to the beneficiary. See Art 1418 (3)
3. The beneficiary must exercise his right with in two months from the date he received the notice. However, this period of notice may be extended to a period not exceeding one year. Where the period is extended for more than a year, it shall be reduced to one year. See Art 1419.
4. The beneficiary must exercise his rights before the thing is sold by auction in case of attachment. See Art 1421.
5. In case the thing is sold to a third party in violation of the contract creating the right of pre-emption, the beneficiary may recover it from such third party against payment of the price determined in the contract creating right of pre-emption. See Art 1422.

7.2.3 EXTINCTION OF RIGHTS OF THE BENEFICIARY

Rights arising out of contracts creating a promise of sale and right of pre-emption shall be extinguished because of one of the following grounds,

1. Failure of the beneficiary to exercise the right within the period fixed by the contract or 10 years where no period is agreed upon in the contract. See Art 1413 of the Civil Code. The rights arising from a contract creating a right of pre-emption shall be extinguished if the beneficiary fails to exercise his right with in a period of two months from date of notice given by the owner or within the period agreed up on in the contract. See Art 1419 and 1420.

2. Failure to buy the thing before it is sold by auction in case of attachment. See Arts 1417 (2), (3) 1419 (3), and 1421.

3. In cases where the thing is sold to a third party in violation of the contract, the right of the beneficiary will be lost if he fails to require such party to surrender the thing to him with in six months of the date when the third party has taken possession of the thing. See Art 1425 (2)

Prohibition of assignment or attachment arises from a contract or will where by certain things are transferred and where by the transferor prohibits the transferee from assigning or transferring the thing to another person. The producer, maker, seller or owner of such thing may impose these prohibitions. See Art 1426 of the Civil Code.

(Art. 1426(2), 1427, 1428, 929- 936, 2460, 1416(1) of cc)

7.3.2 FORMAL REQUIREMENTS

A provision prohibiting assignment or attachment shall be of no effect unless it is made in writing and it specifies the duration of the prohibition, which may not exceed 20 years or the life of the transferee. See Arts 1430, and 1431. And 1432 of cc

7.3.3 RIGHTS AND DUTIES OF THE PARTIES

1. A property that is subjected to a provision prohibiting assignment or attachment cannot be sold or transferred. If it is sold in violation of the provision, the person stipulating it may recover it form the buyer. See Art 1440 (2), 1442 and 1438.

2. The person making the provision may prohibit the acquirer from assigning or selling it for a period not exceeding 20 years. See Art 1431.

3. The person who made the provision prohibiting assignment has the right of recovery against the buyer. Such right has to be exercised with in two years from date of the assignment or from the expiry of the period fixed in the contract. See Arts 1442 (1) and 1441.

4. In cases of attachment, the person making the provision must exercise his right prior to the attached immovable thing being sold by auction where he has been informed of the attachment. However, where he is not informed of the attachment, he must exercise his right with in a period of two years from the sale of the immovable by action. See Art 1437.

UNIT EIGHT-COLLECTIVE EXPLOITATION OF PROPERTY

8.1 DEFINITION AND NATURE OF PUBLUIC DOMAIN

Art 1445 of the Civil Code, defines public domain as a property belonging to the state or its various administrative units or organs and which is directly placed at the disposal of the public or which is destined to public

service. Furthermore, Arts 1446, 1147 and 1148 enumerate things that are considered as public domain where they are owned by the state.

One of the basic characteristics of properties forming part of the public domain is that they are inalienable. In other words, they cannot be transferred by sale or inheritance or donation or any other mode of transfer unless they are declared that they no longer form part of the public domain. See Art 1454 of the Civil Code.

In addition to this, properties forming part of the public domain may not be acquired by possession in good faith or usucaption or acquisitive or extinctive prescription. See Art 1455 of the Civil Code.

Finally, properties forming part of the public domain may not be occupied by a private person without the authorization of a competent public authority. See Art 1456 of the Civil Code.

8.2 EXPROPRIATION

8.2.1 DEFINTION

Generally, expropriation or eminent domain may be defined as the power of a sovereign state to take or authorize the taking of private property for public purpose or use without the owner's consent but conditioned up on payment of commensurate/just compensation in advance.

Art 1460 of the Civil Code defines expropriation as a proceeding whereby the competent authorities compel an owner [against payment of commensurate compensation in advance see Arts 1470-78 of the code] to surrender the ownership of immovable required for public purposes. It can also be used to acquire or extinguish usufruct, servitude or other property rights /rights in rem/ on an immovable or it may be used for terminating, prior to the agreed term, a contract of lease relating to an immovable owned by public authorities.

INDIRECT EXPROPRIATION

(Art. 1485- 1488 of cc)

8.2.2. PUBLIC PURPOSE

Public purpose is a crucial element/requirement before the expropriation of private property. It is a requirement of due process of law in the context of expropriation, and failure to comply with it may render the taking of

private property unlawful and unconstitutional. See Art 40/8/ cum 9/1/ of the FDRE Constitution.

As to what constitutes public purpose, however, is open for debate and it differs from time to time and from system to system. Generally, there are two main views as to what the concept refers to.

The first view holds that public purpose is equivalent to public benefit, utility or advantage. Hence, any taking which tends to enlarge resources, increase industrial energy and productive power of any substantial number of inhabitants or a section of the state or a purpose which leads to the growth of towns and creation of new resources for the employment of capital and/or labor, which contributes to the general welfare and prosperity of the whole community serves a public purpose and is justifiable.

According to this view, expropriation of private property is justified if the undertaking for which the property is taken produces direct or indirect benefits to the public at large or to the section of the community. However, this view may open the way for unlimited interference by the government in the property right of citizens.

The second view holds that public purpose exists only where the undertaking for which the property is to be expropriated is to be directly used or enjoyed by the public, Such as schools, hospital, roads etc. Unlike the first view, this view proposes a strict interpretation of the concept and requires the public to be the direct beneficiary of the proposed undertaking and to which it shall have equal and direct access. In other words, expropriation for a purpose, which may indirectly benefit the public is not justifiable or is unlawful. Hence this view tends to limit the power of the government in expropriation private property.

(Art. 1464(1 & 2), 1463, 1465 of cc)

According to Art 2/5/ of the Expropriation of Landholdings for Public Purposes and Payment of Compensation Pro No 455/2005 a proposed project shall be deemed to serve public purpose where the appropriate body decides, pursuant to the urban structure or development plan;

1. That it ensures the right of the public to benefit directly or indirectly from the use of the, land

2. That it helps to achieve and consolidate sustainable socio-economic development.

Generally speaking, a project for which the land is required shall be declared to serve public purpose where it is believed to, directly or indirectly, benefit the public and where it is also believed that the project can contribute its share in the economic development of the country.

Similarly, according to Art 2/7/ of the Re-enactment of Urban Land Lease Holding Pro No 272/2002, 'public interest' means that which an appropriate body determines as a public interest in conformity with the master plan or development plan in order to continuously ensure the direct or indirect usability of land by peoples, and to progressively enhance urban development.

Under this proclamation, expropriation of urban land is allowed in order to implement the master plan or urban development plan and it is presumed that the public directly and indirectly benefits from the implementation of the plan.

The current proclamation regarding expropriation does not provide for such public inquiry or consultation with the public.

Compare Arts 89/6/ and 92/3/ of the FDRE Constitution, which require consultation of the public in the preparation and implementation of economic and environmental policies.

UNIT NINE- REGISTRATION OF PROPERTY

9.1 NATURE AND TYPES OF REGISTRATION

Registration of properties refers to a system, established and managed by appropriate state organs, in which various property rights are entered. The main purpose of registration is to provide security to the right holder and to other persons to whom the property will be transferred.

9.2 PURPOSES OF REGISTRATION

One of the most important purposes of registration of immovable and special movable properties and issuance of title deeds is creating security of property rights by recording the rights and encumbrances

relating to the thing and providing evidence to the right holders. The existence of a system of registration provides the owner of an immovable or a special movable thing with security or guarantee that his right of ownership is recognized and protected against any claim or interference by other persons. (Art. 1195- 1198 of cc)

It also enables a potential buyer or mortgagee to ascertain that he or she is dealing with a person who is entitled to sell or mortgage the thing, i.e., the owner and acquire a legally enforceable right of ownership or mortgage. (Art. 2884 & 3049 of cc)

9.3 THINGS REQUIRED TO BE REGISTERED

The requirement of registration applies to immovable things and special movable things, because of their high economic and social value and they are easily identifiable, and various acts, public or private, which are intended to recognize, create, modify, transfer or extinguish rights related to them. This is because registration of everything that can be the object of property is impossible and even if it is possible to do so, commercial transactions will be greatly affected as a buyer has to check registers to be sure that he is transacting with the owner of the thing.

(Art. 1193, 1161- 1197 of cc)

Under the following sections we shall try to discuss the rules governing registration of immovable and special movable things required to be registered under Ethiopian law.

9.3.1 IMMOVABLE THINGS

(Art. 1553- 1558 of cc)

A. REGISTER OF PROPERTY

Register of property is a register in which all acts, i.e., contracts or wills, or judgments, or compromises, intended to recognize, create, transfer, modify or extinguish the right of ownership, usufruct, use, habitation, servitude of one or more persons on an immovable, are registered.

(Art. 1567- 1572 of cc)

B. REGISTER OF MORTGAGES

This a type of register in which all acts intended to create, modify, or extinguish a right of mortgage, or to transfer a debt secured by a mortgage or assign the right of priority arising from mortgage are entered. Legal actions, by the mortgagee or any

other creditor, for the attachment of immovable things shall also be registered in the register of mortgages. See Arts 1573 and 1574.

C.REGISTER OF IMMOVABLES

A register of immovables is a register, which shall be kept where the district in question does not have a cadastral survey plan, which makes keeping register of property and register of mortgages possible. In other words, it is an alternative system of registration. (Art. 1575- 1582 of cc)

D. REGISTER OF OWNERS

This register, as we have seen earlier, is used where the district does not have a cadastral survey plan that is needed to implement the three types of registration discussed above. It is a register that contains, in alphabetical order, the name of owners of immovable things situated in the district. Where several persons jointly own an immovable thing, a separate leaf shall be assigned to each owner in the register.

(Art. 1583- 1586 of cc)

F. REGISTRATION PROCEDURES

However, Art.1363 of cc and 1353- 1646 of cc

9.3.2 SPECIAL MOVABLE THINGS

Special movable things that are required to be registered by the law include ships, airplanes, motor vehicles, businesses and televisions.

9.4 LEGAL AND ECONOMIC SIGNIFICANCE OF REGISTRATION

One of the most important purposes of registration of immovable and special movable properties and issuance of title deeds creates security of property rights by recording the rights and encumbrances relating to the thing and providing evidence to the right holders. The existence of a system of registration provides the owner of an immovable or a special movable thing with security or guarantee that his right of ownership is recognized and protected against any claim or interference by other persons. An owner of a thing whose right is registered can fend off any contrary claim of title by other persons by the mere fact of such registration and the deeds issued there under. See Arts 1195-1198 of the Civil Code.

It also enables a potential buyer or mortgagee to ascertain that he or she is

dealing with a person who is entitled to sell or mortgage the thing, i.e., the owner and acquire a legally enforceable right of ownership or mortgage. (Art. 2884 & 3049)

Registration of properties also plays significant economic roles by facilitating commercial transactions and creating capital necessary for investment and economic development.