General Property Law
Possession
1140-1150

Manaye A. Shagrdi (LL.B., LL.M.)

Lecturer of Law, School of Law, Jimma University College of Law and Governance.

©Manaye A. Shagrdi, 2016

Learning Objectives

At the end of this chapter, learners are expected to:

- Understand the meaning of possession and distinguish it from a mere holding;
- Analyze the legal effects of possession and its importance;
- List and discuss the type of protections accorded to a possessor;
- Compare and Contrast possessory actions and petitory actions;
- Identify the modes of transfer of possession;
- Identify the grounds on which possession is lost; and
- Solve practical cases involving issues of possession.

Organization of the Chapter

1. Theories and definition of possession
2. Acquisition of possession
3. Defects of possession
4. Effects of possession
5. Protection of possession
6. Transfer of possession
7. Loss of possession

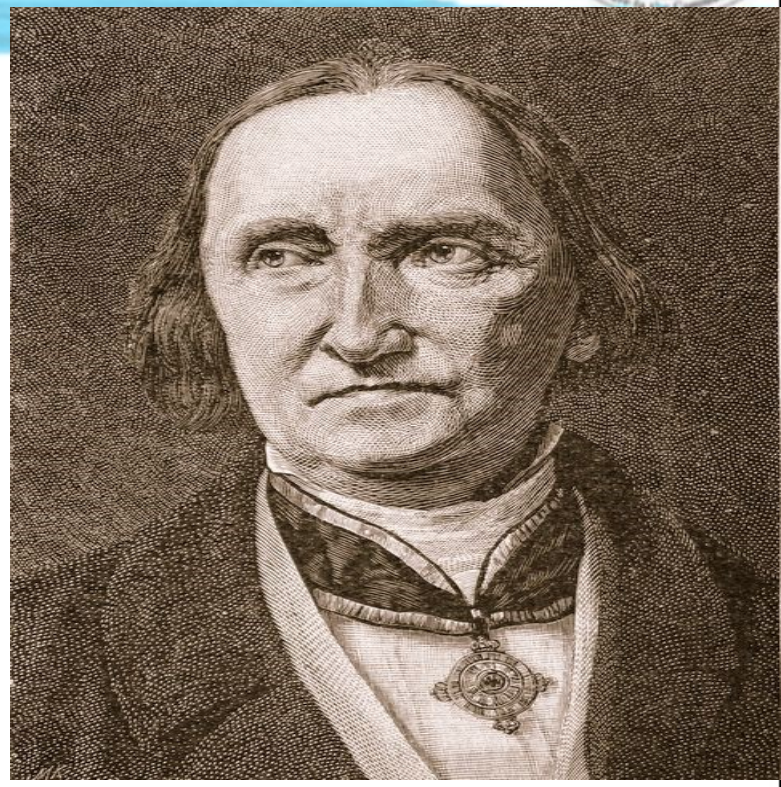
Possession is PROPERTY; *i.e.*, it is a right exercised over objects of property. Accordingly, like ownership and usufruct right, it is RECOGNIZED and PROTECTED by the law.

1. THEORIES AND DEFINITION OF POSSESSION

1.1. Theories of Possession

A. Classical Theory of Possession (Savigny's Theory) (Subjective Theory)

- Savingy claims that possession consisted of two ingredients
    1. *Corpus possessions (effective physical control); and*
    2. *Animus possession (the intention to hold as an owner)..holding the thing on your behalf*
- He claims what distinguishes a mere detentor from a possessor is that the former lacks animus possession (intent to control the thing for himself)
- His theory is referred to as a *"subjective theory of possession"* because it emphasises on the intention of a person to define existence of possession



Friedrich Carl von Savigny
(1779 –1861)
19th-century German jurist and historian.

1. THEORIES AND DEFINITION OF POSSESSION
1.1. Theories of Possession…Cont'd

A. Classical Theory of Possession (Savigny's Theory)…*cont'd*

- Savigny's theory explains why a tenant, a borrower, and an agent are not possessors under Roman law. *They lack intent although there is physical control.*
- *Criticism*: Failed to explain why possessory right was given to non-owners in certain cases, such as pledgee, under Roman law. Besides, it fails to explain situations where possessory rights are given in the absence of animus possession. E.g., usufructuary, pledgee, antichresis holder
  - Savigny rejected them as anomalies (exceptions) and termed them as derivative possession, (Possession derived from owner).
    - *Then why no derivative possession for detentors such as a borrower, depositee, a tenant etc…??*

1. THEORIES AND DEFINITION OF POSSESSION

1.1. Theories of Possession…..Cont'd

B. Jehring's Theory of Possession (Objective)

- Why did Roman law protect possession by means of interdicts? His answer was:
  - Devised to benefit owners by protecting their holdings if they have actual physical control.
  - The ***doctrine of interdicts*** aims at protecting a person who has a physical control.
- He claims that a possessor is a person who, in relation to a thing, RESEMBLES AN OWNER, i.e., who has direct physical control of such thing. (unless, based on special practical considerations, the law denied him possession.)
  - Didn't believe in the animus element of possession (animus is merely an intelligent consciousness of the fact that you have a physical control)
  - If you have a physical control the thing, you factually resemble an owner. Therefore, you are also regarded as a possessor.

1. THEORIES AND DEFINITION OF POSSESSION
1.1. Theories of Possession…..Cont'd

B. Jehring's Theory of Possession (Objective)…*con'td*

- His theory is regarded as "Objective theory of Possession" because it awards possession based actual physical control, whether the person controls the thing for himself or for another person.
- Explains situations where possessory rights are given in the absence of animus possession. E.g., usufructuary, pledgee, antichresis holder
- Criticism: Fails to explain situations in which possessory rights are denied even in the presence of exclusive physical control. E.g. *borrower, tenant, depositee*
    - A detentor can be a possessor but may not be an owner. E.g. Antichresis, (Art 3117 cum 1168) or Pledgee (Art 1192 cum 1151)

1. THEORIES AND DEFINITION OF POSSESSION

1.1.. Theories of Possession…..Cont'd

C. Salmond's Theory of Possession

- His theory is a modified version of Savigny's theory. The term "possession" is not confined to physical control as in Savigny's.
- Salmond distinguished between:
  - *Possession in fact* (w/c is possession in truth and in fact) and ***possession in law*** (w/c is a legal fiction).
  - *Possession of physical Objects* (w/c is corporeal possession) and *possession of rights* (w/c is incorporeal possession)
- He defined corporeal possession as a claim for a continued exclusive use of physical objects. And corporeal possession consists of two elements. They are:
  - One, corpus possessionis
    - The r/n of the *possessor to the thing* (ability to use the thing, as he thinks fit)
    - The r/n of the *possession to other persons* (to create a reasonable expectation of non-interference from others)
  - animus possidendi (intent to exclude others)

Criticism:

- Expectation of non-interference is not necessary for the continuation of possession.
- In his theory, corpus and animus are possession themselves. At the same time they are also regarded as conditions for acquisition of possession.

1. THEORIES AND DEFINITION OF POSSESSION

1.1.. Theories of Possession…..Cont'd

Which of the above theories of Possession best explains the theoretical foundation of Ethiopian law on possession as enshrined under articles 1140-1150 of the CCE

1. THEORIES AND DEFINITION OF POSSESSION

1.2. Meaning of Possession

Meaning of POSSESSION under Eth. PL (1140)

- Possession is the holding of a thing with an intention to exercise property right on the thing held.
  - A person becomes a possessor if she/he exercises actual control over a thing (1140)
- Possession made up of two elements:
  - Corpus or physical control (expressly provided under 1140)
  - Animus or intent to exercise property right (impliedly provided)
    - *1141….Indirect possession. You remain a possessor even if another person is exercising control on your behalf*
    - 1142…*temporary loss of physical control doesn't cause loss of possession as intention to control remains*

1. THEORIES AND DEFINITION OF POSSESSION

1.2. Meaning of Possession…..Cont'd

Possession v. Detention (Mere-holding/Simple Occupancy)

- Possession is <u>not equivalent</u> with detention (mere-holding).
- *Similarity*: there is physical control (corpus element) in both cases
- *Difference*:
  - *<u>Possessor</u>* has the animus domino or the desire to hold for one self and not on behalf of another (mental element (animus))
  - A *<u>mere holder</u>* holds the thing not for his own benefit but for the benefit of another person. E.g., *tenant*, *borrower*, and *agent* were *not possessors* in *Roman law*
  - A *<u>detentor</u>* becomes either a mere-holder or a possessor

1. THEORIES AND DEFINITION OF POSSESSION

1.2. Meaning of Possession…..Cont'd

Possession v. Detention

Because of the d/c b/n Possession v. Detention (Mere-holding) a person can have:

- A *physical control* without *possession* and its advantages.
- *Possession* and its advantages without *physical control*.
- Both *physical control* with *possession* and its advantages.

3. ACQUISITION OF POSSESSION

- Act of acquiring physical possession is called as seizin (apprehension).

REQUIREMENT

- *Control and Intention:* acts leading to acquisition of possession:
  - Are generally acts that result in the acquisition of both elements (corpus and animus)…. Possession requires both control and intention. It is obtained from the first moment that both those conditions exist simultaneously. Usually, intention precedes control, as when you see a coin on the ground and reach down to pick it up.
  - However:
    - Possession my be created in the absence of one of the elements. E.g. obtaining a bills of lading and document of entitlement to goods
    - Possession may not be obtained if the conduct leading to the existence of the elements result in criminal or civil violation of property rights

3. ACQUISITION OF POSSESSION

One-sided or two-sided way

- The act leading to acquisition of possession may be a one-sided act or a two-sided act.
- A one-sided act by which factual control is established can take the form of:
  - Apprehension (taking an object not in someone's possession) or
  - Seizure (taking an object in someone's possession).
- A two-sided form of obtaining possession involves handing over the possession from one party to another. However, the party handing over possession must intend to do so.

3. ACQUISITION OF POSSESSION

Possession acquired by consent

- Most property possessed is obtained with the consent of someone else who possessed it. They may have been:
  - purchased,
  - received as gifts,
  - leased, or
  - borrowed.
- The transfer of possession of goods is known as delivery.

3. ACQUISITION OF POSSESSION

Possession acquired by consent

- Most property possessed is obtained with the consent of someone else who possessed it. They may have been:
  - purchased,
  - received as gifts,
  - leased, or
  - borrowed.
- The transfer of possession of goods is known as delivery.

3. ACQUISITION OF POSSESSION

Possession acquired without consent

- It is possible to obtain possession of a thing without anyone else's consent.
  - First, you might take possession of something which has never been possessed before. This can occur when you catch a wild animal; or create a new thing, such as a loaf of bread.
  - Secondly, you might find something which someone else has lost.
  - Thirdly, you might take something from another person without their consent.
- Possession acquired without consent is a property right which the law protects. It gives rise to a right of possession which is enforceable against everyone except those with a better right to possession.

4. MODES OF TRANSFERRING POSSESSION (Arts 1143-45)

1. By Delivery of the thing (1143)

- Physical delivery
- If it is through contract, possession becomes effective when the thing is delivered…1143
  - Includes accessories…meaning of delivery under art 2274
  - Seller obligation to deliver…2266, 2273
- Modes other than contract include: will, law, donation and judicial

4. MODES OF TRANSFERRING POSSESSION (Arts 1143-45)

2. By Delivery of document of entitlement to a thing (1144)

- The document represents a thing
- It enables the transferee to be able to dispose the thing
- Example:
  - Bill of lading, warehouse deposit certificate
- Holder of document v. possessor of the thing
  - If a dispute arises b/n the two, the possessor of the thing prevails
    - But contrary proof (showing bad faith) is possible

4. MODES OF TRANSFERRING POSSESSION (Arts 1143-45)

3. Constructive Delivery (1145)

- Applicable to things which are:
  - certain and pertain to generic species
  - Individualized to a new possessor
- The actual possessor must declare that he/she is detaining it on behalf of the new possessor
- Rights of creditors of the actual possessor is not affected in the event of the latter's bankruptcy

5. DEFECTS OF POSSESSION (1146-1147)

- Defects of possession is caused by flaws either in:
  - the mental element or
  - the nature in w/c physical control is acquired.
- Unless cured, most defective possessions (such as clandestine and dubious possessions) do not give rise to possession right (1146/1/).
- The grounds that can render a possession defective are:
  - Precarious Possession (1147)
  - Clandestine Possession (1146(1&2))
  - Violence (implied from 1148)
  - Ambiguity/Dubiousness (1146(1&2))

4. DEFECTS OF POSSESSION

A. Precarious Possession (1147)

- It is unwarranted or risky possession
- A person who holds a thing on behalf of another is a mere-holder – not a possessor.
- Mere-holding doesn't make you a possessor where there is an owner or another person with a better possession right…..*animus defect*
  - E.g., a usufructuary, a tenant farmer, leaseholder, a pledgee, a creditor secured by antichresis, a tutor holding minor's objects of property
- Precarious possession gives a right that is effective against anyone except the person on whose behalf she/he is possessing it. Because even a mere holder has a legal protection under arts 1148 and 1149 of CCE
- Defect cured by actual change of title – not by a change of intention

4. DEFECTS OF POSSESSION

B. Clandestine Possession (1146(1&2))

- It is surreptitious, covert or secret holding.
- It is a type of possession that tends to create a presumption of absence of right in the eyes of third parties
- It may relate to both *corpus* and *animus defect… To determine the source of the defect*, ***check whether the person concealed his physical control or his intent to control****!!*
- It does not give rise to a right of possession. Nor does it get the legal protection accorded to possession unless the defect is cured.
- Defect cured by openly exercising possession rights

4. DEFECTS OF POSSESSION

C. Ambiguity/Dubiousness (1146(1&2))

- Doubtful whether the person is a possessor or he/she is detaining it on behalf of another person. .....*animus defect*
- Unlike precarious possession, it is not even clear whether he is keeping the thing for himself or another person.
- It does not give rise to a right.
- Dubious possession cannot be a ground for acquisition of ownership through acquisitive prescription. (1146/1/, 1168 and 1150)
- Defect cured by clarifying the ambiguity

4. DEFECTS OF POSSESSION

D. Violence (implied from 1148)

- A purely relative defect that can be asserted only by the person against whom violence was exercised.
- Not clearly stated as defect in Ethiopia…But inferable in that this type of possession is not protected. (1148)
  - Besides, acquisition of possession through violence is illegal. In Case No: 36645 (Vol. 9), FDRE Supreme Court Cassation Division has ruled that possession acquired illegally doesn't give legal right.
- In French law, such possession may be healed if it continues peacefully.

5. SCOPE OF POSSESSION RIGHT

- A right to carry out acts of use enjoyment or transformation.
- A right of direct or indirect physical control
- A right to exclude others from exercising physical control
- A right to be presumed as an owner where the thing is ordinary movable

6. EFFECTS OF POSSESSION

- It may *create ownership* either by:
  - *Occupation* (res-nullius/ res-derelicate) (1151)
  - *Usucaption* (acquisitive prescription or adversary possession) (1168)
- It is a *prima facie evidence* (proof) of *ownership*…
  - Historically, possessor is likely to be a rightful owner
  - But rebuttable by contrary proof
- It is *a protected property right*

7. PROTECTION OF POSSESSION

1. Possessory Action (1149)
   - *Plaintiff*: possessor or holder
   - *Cause of action*:
     - Plaintiff deprived of possession
     - Plaintiff's possession interfered with
   - *Remedies include*:
     - restoration of the thing; or
     - cessation of interference; and
     - *Compensation*
   - *Potential defenses of the Defendant*:
     - Proving forthwith that he/she is a rightful possessor (conclusive proof)
     - Invoking statute of limitation (ONE year according to EnV or TWO years according to AmV)
   - *Not applicable to:*
     - Ordinary movable things
   - *Different from Negatory (petitory) Action*

7. PROTECTION OF POSSESSION

V. Protection of Possession

- Use of Force (1148)
  - *By*: possessor or holder
  - *Against an act of*:
    - Usurpation; or
    - interference
  - *It can happen through:*
    - violence
    - A secret act
  - *Conditions*
    - Must be done forthwith
    - Must be justified based on the circumstance

8. EXTINCTION OF POSSESSION

- *Principle*:
  - Where either the corpus or animus element doesn't exist any more for d/t reasons
- *Exceptions*:
  - *Bare-owners*
  - *Temporary loss of physical control*

9. Importance of possession

- Possession is one of the most important concepts in property law.
- A possessor or an owner of an object of property has the right of possession and may assign that right wholly or partially to another who may then also assign the right of possession to a third party.
- There is a rebuttable presumption that the possessor of property also has the right of possession. With regard to ordinary movable thing, possession also creates a rebuttable presumption that the possessor is an owner of the thing.
- Evidence to the contrary may be offered to establish who has the legal right of possession to determine who should have actual possession, which may include evidence of ownership (without assignment of the right of possession) or evidence of a superior right of possession without ownership.
- Possession of a thing for long enough can become ownership by termination of the previous owner's right of possession and ownership rights. E.g. Acquisition of ownership by usucaption (acquisitive prescription) (Art 1168)
- In most common law countries, possession itself is a property right. In many civil law countries, possession is not a right but a (legal) fact which enjoys certain protection by the law. It can provide evidence of ownership but it does not in itself satisfy the burden of proof. For example, ownership of a house is never proven by mere possession of a house.
- A possessor enjoys certain judicial protection against third parties even if he is not the owner.
- For example, if you leave a book that belongs to you at a cafe and the waiter picks it up, you have lost possession. When you return to recover the book, even though the waiter has possession, you have a better right to possession and the book should be returned.

FDRE Supreme Court Cassation Rulings on possession