General Property Law

Samara University

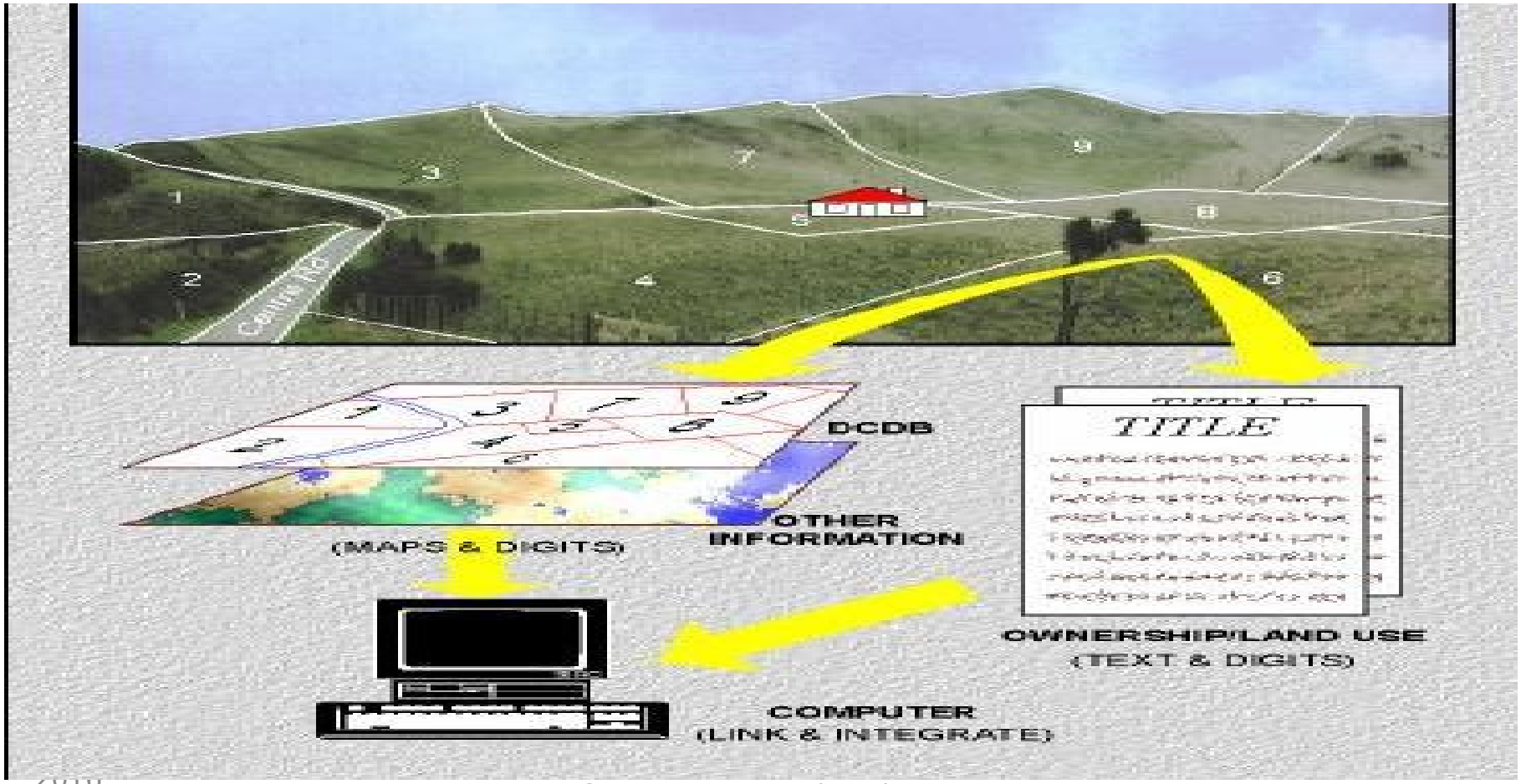
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PROPERTY LAW (Arts 1126-1646)



Objectives

After the completion of this course, students are expected to:

- Know the definition, nature and classifications of property
- Understand the various rights exercised over objects
- Discuss the ***concept***, ***acquisition***, ***extinction*** and ***transfer*** of possession and ownership rights
- Analyze the concept and arrangement of ***joint ownership***.
- Understand the concepts of ***usufruct*** and ***servitude*** under the civil code
- Analyze the concepts relating to right of ***recovery***, ***pre-emption*** and ***promise of sale.***

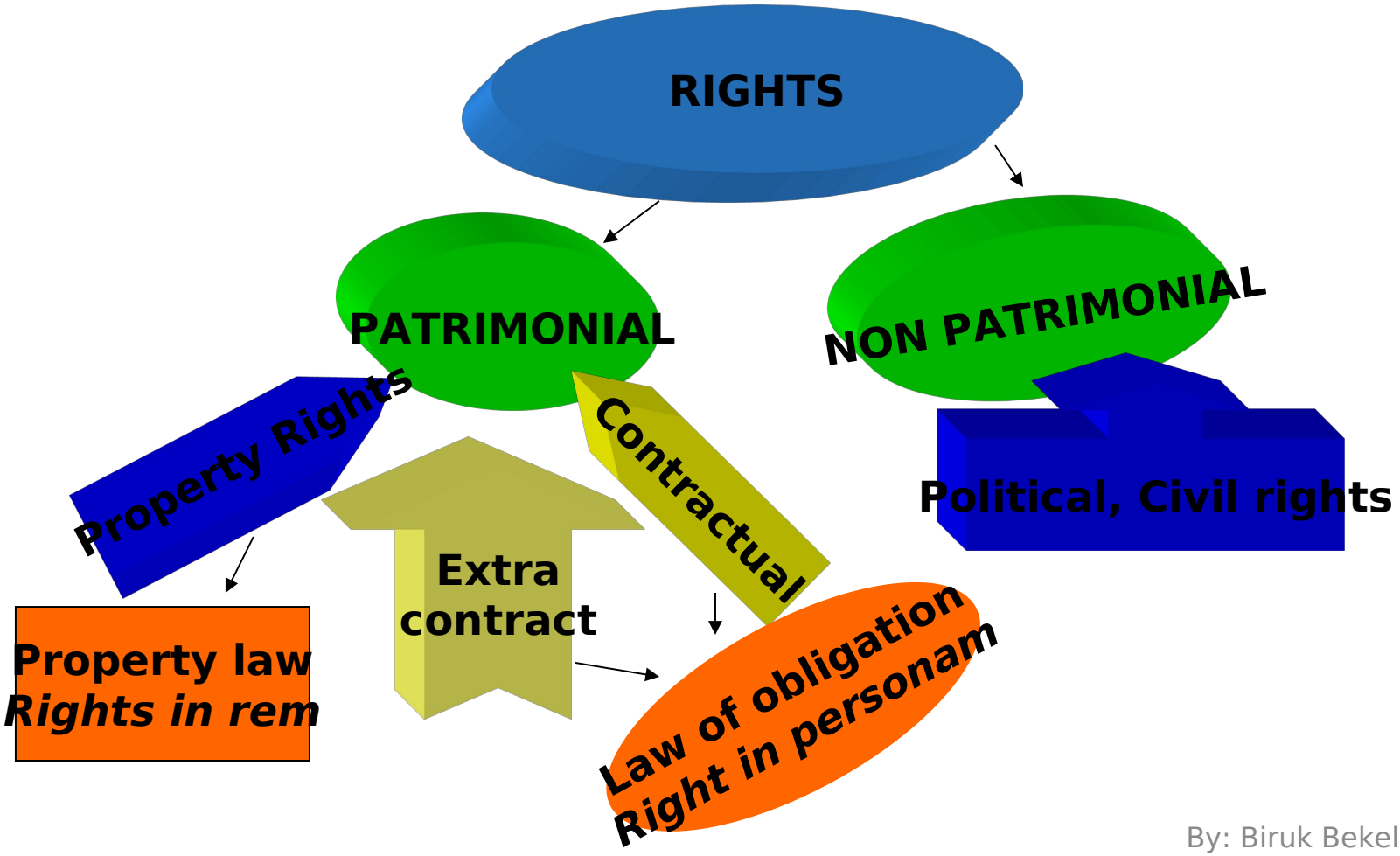
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Chapter 1

GENERAL OVERVIEW OF PATRIMONY, PROPERTY AND PROPERTY LAW

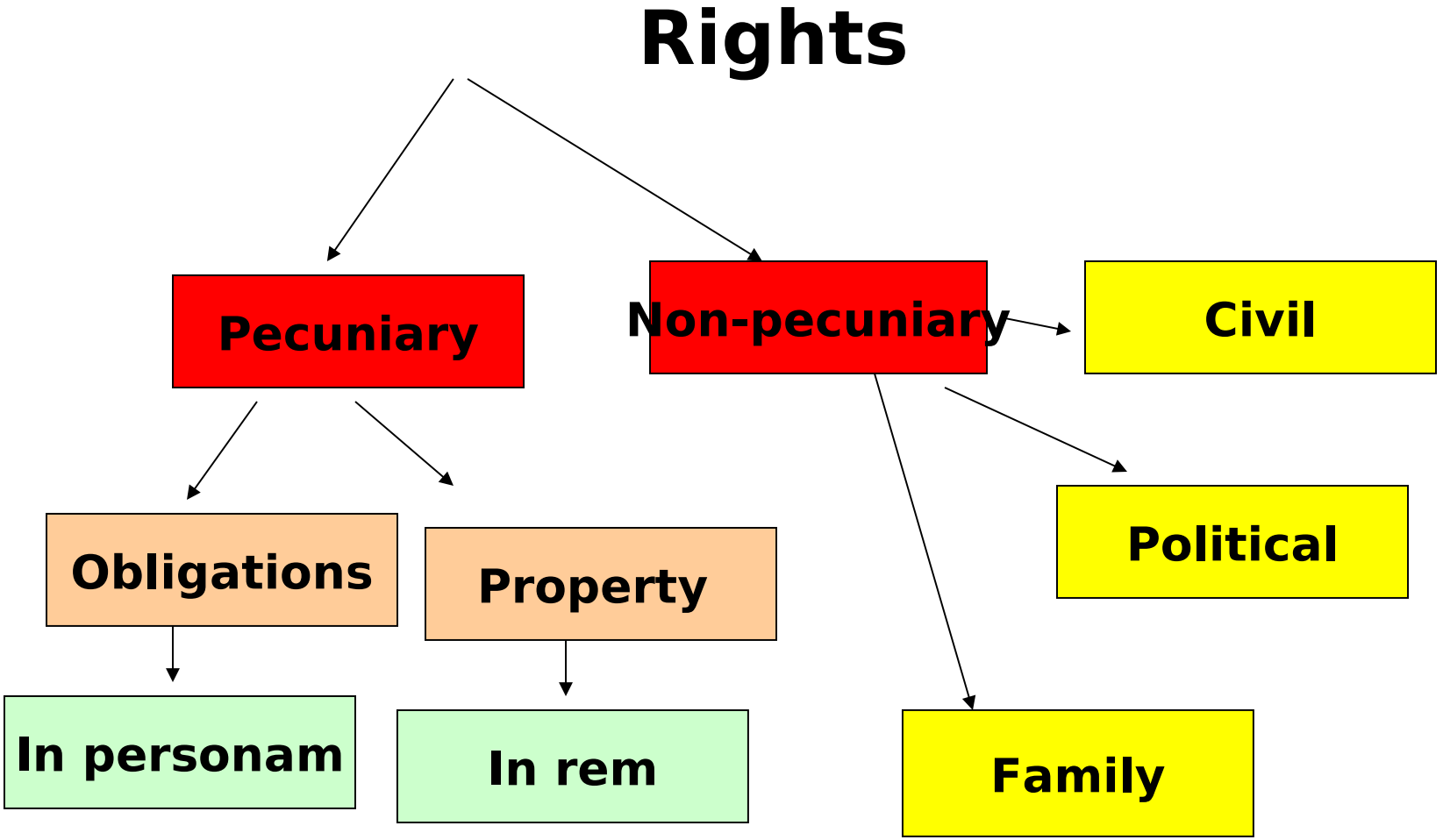
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Property rights are governed by property law; while contract and tort by law of obligation



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Classification of rights



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Nature and Definition of property

- Property law is one part of ***Civil law*** that …..**governs the relationship between people(right holder and third parties) and things.**
- **In this relation ship, rights take a catalyst role (links the two).**
- It 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.

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- **Q. Is property a thing or a right?**

- ***Commonly***, the term refers to ***things*** or ***objects*** such as a house, a land, a car, a table, mobile phones…etc.
- It also refers to the right of ***ownership*** of a person. Hence, you may commonly hear a person claiming that a certain thing or object is his property, that somebody took his property…etc.

- **However, 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

- the right to follow the thing and its fruits in the hands of any person who might have unlawfully taken it.

- The term, in its legal usage, refers to the ***rights*** a person may have in relation to things or objects that have economic value.
- The things or objects in relation to which property rights are exercised are called ***objects of property.***
- Hence, property refers to rights such as ***ownership***, ***possession***, ***usufruct***, and rights of ***servitude***, ***recovery, pre-emption*** and ***promise of sale.***

Recognition of Right to Property :

- Art 40/1/ of the FDRE Constitution which **guarantees the right to property** provides that **property right includes,**

  …… unless restricted by law for public purposes, the rights to acquire, use, and transfer things/ tangible or intangible/ of financial value **in a manner compatible with other individuals rights.**

❖ In addition to what the constitution provides, there are different laws that, in one way or an other, deal with property.

- Civil Laws (like the civil code, the revised family code)
- Lease Laws or urban land laws (laws that govern the land lease hold arrangements in a certain town area…proc. No 721/2011)
- Rural Land Laws (laws that govern the acquisition, transfer…of rural lands in a state).
- Intellectual Property Laws (laws that govern the intellectual rights of musicians, artists, performers, script writers…etc). It is an ***incorporeal right***.

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- **In common law countries property right (ownership)….. is considered as bundle of rights.**
- In the bundle of rights theory, ownership of real property is compared to a **bundle of sticks.**
- **Each stick represents a distinct and separate right, which may be…**

the right - to use the thing,
- to lease/rent it,
- to sell it,
- to use it as a collateral for debts
- to give it away by way of…donation, gift etc
- dispose/destroy it

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Right in *rem* Vs. Right in *personam*

- **Depending upon the sources of the right, Patrimonial right is classified as:**

  1. A right in rem

- **It is an interest assessable in terms of money, which is dependant upon a thing (res).**

- **It is ascertainable/protected against the whole world at large, thus, it confer a direct and immediate power or authority over a thing.**

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- **Such right is a wider one in that it can be defended against any person.**

- **Rights in-rem create an obligation, on *all other persons*, ……to refrain from any act of interference…in the use and enjoyment of a thing one owns or possesses.**

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2. Rights in Personnum

Is as well a right assessable in terms of money….but it is ascertainable only against *a particular person.*

- **Such rights emanate from:**

❖ **Contract (**when a person enters into contractual arrangements concerning a thing the right emanates)

❖ **Extra-contract (**this happens when a person incurs liability either *vicariously*, due to his/her *fault* or *strict liability; but,* in the absence of contractual agreements)

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Consider the following examples:

- **If you own a car/laptop,** you have the right to exclude every person in the world.
- **If you rent a car/ lease your agricultural land to Abebe,** however, you can exercise your right only against Abebe. (e.g. in case of non performance of the contract)
- **If Kebede has caused damage on your property by the car he is driving or his dog bite your little child. What would be your ground to sue Kebede?**

Classification of property

Necessity for classification of property

1. **The economic and social values attached to things are not the same**, i.e., certain things are more important than others are.

   Hence, it seems un fair to treat a table and a house in one group.

2. **It helps the legislator to enact special rules governing the particular category of things.**

   Hence, we need to have special rules that govern immovable and special movable things.

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Property may be classified as:

- Tangible Vs intangible
- Movable Vs immovable
- Accessories Vs intrinsic
- Public Vs Private Domain

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Tangible Vs Intangible

- This classification is based on the physical or material nature of things or objects,…….. that can be perceived by the senses and those which cannot be so perceived.

- **Tangible things**

  are things that have material or physical existence and unity and hence, can occupy space and can be seen or touched.

E.g. Table /Chair

- Intangible Things

  are things that do not have material existence.

E.g. Copy Right

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Movable Vs Immovable

According to Art. 1126 things (goods) are either movable or immovable.

The basis of this classification is :

- Physical mobility or immobility

Movable things ..... which can move by themselves or be moved by man..... without losing their individual character. Art.1127

E.g. an ox, a car, table

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- **Immovable Things …….cannot move by themselves or cannot be moved by man….. unless they are first dismantled or demolished/lose their individual character**
- **According to Art. 1130 ….Land and buildings shall be deemed to be Immovable**
- **“Land” includes the ground and any fixture to the land.**(trees, fence etc)
- **Trees and crops are also intrinsic, part of the immovable which have no separate existence Art.1133**

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- **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.

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E.g. The transfer of ownership right of a table is different from transferring a vehicle/car.

Because, among other things, it requires registration of transferee in the register kept by the relevant government organ… and issuance of a title deed in the name of the transferee similar to an immovable good. /See Art. 1185 and Art.1186 of the Civil Code. /

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- **Movables by anticipation:**

These are immovable things by nature but which the law consider them as movable things.

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

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- This rule is also applicable to the component parts of a building which is going to be demolished and its intrinsic elements…… such as the doors, windows, corrugated iron sheets, pipes and electrical appliances…….. are considered as separate movable objects even before the house is demolished.

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Immovable by Nature Vs Immovable by Destination

- ***Immovable by nature*** ……. are things that cannot be moved from one place to another at all…….. or that cannot be moved by man without being divided in to several parts or with out losing their individual character .

  E.g. Land, building

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- **Immovable by destination-**

  Movable by nature, but since it is permanently destined to serve the immovable (for its economic exploitation), it becomes also immovable.

  E.g. horses, cattle, tractors are movable things. However, if they are intended to facilitate the use and exploitation of a land, then they will be considered as immovable things by their destination.

- E.g. if you sale a house what things does it include? what about a hotel ?

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- **What advantages in the classifications (mov vs immov)?**

A. The mechanisms of **acquisition of ownership** differs. [E.g Acquisition via occupation Art. 1151, PIGF Art 1161-1167]

B. The mechanism of **transfer of rights** differs in the two.[E.g See Arts 1185, 2274,2444(1), 1723, 2877 – 2879]

C. To determine **which court has the jurisdiction** to entertain a case relating to the a thing. [See Art 24 Vs 25 of the Civil Prc. code]

D. Establishing a **security** against the two differs

mortgage [Art 3041 & ff]- for immovable things; while ***pledge [Art-2825 & ff]*** for movable things.

E. Different **period of limitations** to ascertain rights on the things. [See Arts-1165 & 1192 vs Art1168]

F. Different scenarios of transferring a right in the two.

G. Different mechanism of **proof of ownership** [See Arts 1193 vs 1194-1196]

H. The rule of **paterna paternis materna maternis** / See Art 849 of the Civil Code/

Intrinsic Vs. Accessory

- **Intrinsic element**

  Art. 1132 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.**

- **If detached however, it may have its own independent existence**

  E.g. Trees, pipe lines, crops, etc.

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Examples:

1. A hay-tucker attached to a tractor may be considered by farmers as forming part of the tractor **/custom of the farming community/.**

2. A house in a farm may also be **considered as forming part of the land (custom).**

3. **Water pipes in a building……** cannot be detached from the building without damaging the floor in which they are buried.

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

- **Rights on or dealings relating to the principal thing shall include the intrinsic elements unless the parties have agreed expressly that such rights or dealings shall not apply to them. Art 1131**

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- A thing that becomes an intrinsic element of another thing **ceases to exist as a distinct movable thing**. **Arts. 1134(1)**
- If the thing became an intrinsic part of the principal object, **third parties right shall be extinguished.(but they can claim reimbursement of the value of such thing and compensation) Art. 1134(2)(3)**

Example

- Assume ‘A’ used a sack of cement that belongs to ‘B’ while constructing his house with out the consent of the owner (B). After constructing the house, he transferred it to ‘C’ up on a contract of sale. After a while, ‘B’ come to know that his cement has been used to the construction of the house.

  Q. What will be his remedy in this particular scenario?

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Accessory-immovable by destination

Art. 1136- Anything which the possessor or owner of a thing has permanently destined for the use of such a thing shall be deemed to be an accessory.

- **Relation of destination…(permanently destined**

  for the use of such thing..)

E.g. CD player and a car etc.

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

- **In the absence of an express provision to the contrary, rights on and dealings relating to the principal thing shall apply to the accessory. Similar with intrinsic elements Art. 1135.**

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- **Temporary separation of the thing shall not, in any way, terminate the character of accessories.** Art 1137.
- **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.(different from the case of intrinsic)**

- **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 the date when it is so destined. **Art 1138/2/.**

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- Consider the following example:
- Assume that Zeru owned a car. He borrowed a CD player from Goshu to play music on the car. After some days, Kefale bought both the car and the CD player from Zeru believing that both things belong to Zeru through a contract concluded on December, 10, 2006 E.C. Later on, Goshu awared of the dealing between Zeru and Kefale that included his CD player. He instituted a court action against Kefale claiming that the CD player should be returned to him.

Based on the facts above, answer the following questions:

A. Do you think that Goshu will be successful? Why/ why not? (5%).

B. Would your answer be different if Goshu can support his claim with a written document that embodied the CD player to the car on September 20, 2006 E.C agreed with Zeru? Why/ why not? (5%).

- **Finally, the owner 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. Art. 1139**

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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 enacted for reasons of public policy, protection of individual rights, promote the general welfare, increase social wealth or maximize social utility.

Cont….

- **Property and law are born together and die together**. Before laws were made, there was no property. Take away laws, and property ceases.
- Similarly, E. Jenks argues **that private property is a creation of the state.**

Cont…

- 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

- 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 (desire)**, i.e., **when someone extends his will to external things he makes that thing a part of himself.**

Cont…

- Similarly, Professor Margaret Jane Radin has argued that **to be a person, an individual needs some control over resources in the external world.**
- The premise underlying the personhood perspective is that to achieve proper self-development-- to be a person--an individual needs some control over resources in the external environment.

Cont…

- For example, if you express your generosity by giving away fruits that grow on your orchard, then if the orchard ceases to be your property, you are no longer able to express your character. Therefore, private property needs to be protected.

C. THE OCCUPATION/ FIRST POSSESSION/ THEORY

- Private property is come in to existence when the man began to physically control and exclude others. [Physical manifestation]

D. LABOR OR ENTITLEMENT THEORY

- The earth and all that is there in is given to men for the support and comfort of their being. It is common for everyone.
- **The labor of his body and the work of his hands**, we may say, **are properly his.** So 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.

Cont…

- **It is this labor** that puts a distinction between **those that are appropriated** and **those which are common.**
- In other words, **the difference** between **things owned privately** and **those, which are commonly owned by all human kind**, lies in the fact that **ones labor has been added to on**.

Cont…

- However, this theory has certain problems,

1. 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,
2. 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. Suppose I pour a can of tomato juice in to the ocean: do I now own the sea?

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

- 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.**

B) Labor theory

- Private property is the result of individual labor because industry (hard work) should be encouraged. The whole effect ensures economic growth.

C) The Utilitarian theory

- Justifiable because it increases human 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.**

E) Marxist Theory

- Property is the evil that has to be abolished. Because, private property served and is serving as a means of exploitation of the slave by the slave owner.

Chapter two

Possession

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Objectives:

- Understand the meaning of possession,theories and it basic features that distinguish it from a mere holding.
- Understand the legal effects of possession
- Know protections provided by the law to the possessor.
- Identify the modes of transfer of possession.

THEORIES OF POSSESSION

1. SAVIGNY'S/CLASSICAL/ THEORY

- Savigny, a German jurist argued that possession consisted of two ingredients, corpus possessions, i.e., **effective control** and animus domino, i.e., the **intention** to hold as an owner.
- **Possession=corpus [Physical Control] + Animus [Mental element, i.e. the intention to hold as an owner]**

Cont…

- The **tenant**, **the borrower**, and **the agent** are not possessors in Roman law because, **they did not intend to hold in their own right.**
- However, this theory failed to explain a scenario in which a certain individual may be considered as possessor with having animus such as pledgee & usufructuary.

2. JEHRING'S THEORY

- According to this theory 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 rights.**

- However, it fails to explain the cases where the law **denies possessory right** to those who are in exclusive physical control of a thing such as a **borrower, a tenant and a depositee.**

3. 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

- The relation of the possession to other persons **a reasonable expectation of non-interference** in the use of it is required to be possessor of corporeal objects.

- Pitfall: Critiques argue that **expectation of non-interference is not necessary for the continuation of possession.** For example, a man continues to possess his pocketbook although a thief is pursuing him that he would interfere with his use of it in a

Which theory of possession do you think is adopted by the Ethiopian Civil Code?

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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 a 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**

- **The reading of Art. 1140-1147 shows that there are two elements to fulfill for a possessor.**
  - **Physical control of the thing** (corpus element)
  - **Intent to use the thing** (Animus element)

  These two cumulative elements make distinction between a mere holder and a possessor

- **Art. 1140. - Definition**

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

- **Art. 1141 Direct and indirect possession**

  *The possessor may exercise his control over a thing ……..**directly or through a third party who holds such a thing.***

Hence, **there are two types of possession as expressly written in the very title of Art. 1141**.

These are direct possession and indirect possession.

Possession..

- **Art. 1147(1) on its part proclaims that "… he who began to possess on behalf of another person shall be regarded as a mere holder."**

  E.g. Borrower of a thing, warehouse service

- **What distinguishes a possessor from a mere holder is clearly**

  his attitude towards that object of property.

- **If one holds it for himself, the holder is at the same time a possessor,**

  but if one holds it for another, the holder is simply treated as a mere holder, a detentor.

Possessors .....E.g. lessee, use-fractures

A Mere holders.....E.g. agents, guards,

Acquisition of possession

- The acquisition of possession is realized **if the two constitutive elements concur,**
  - **The physical control of the thing (corpus)** and
  - **The intention to control a thing for ones own interest/ animus/.**

- **In Ethiopia, possession may be acquired through different means, such as**
  - **Contract**
  - **Inheritance**
  - **By operation of the law and so on.**

Transfer of Possession

Three Types of Delivery

A. Actual Delivery

- **As a matter of principle a thing may be transferred to others by delivery of the thing(transfer of possession/thing)-**

  E.g. Book Art. 1143,

B. Symbolic Delivery

- **the thing may be transferred by delivery of a document (the document which represent the thing)**

  E.g. House & car via keys

- Documents representing the thing such as a bill of lading, a ware house goods deposit certificate [**Art. 1144**

C. Constructive Delivery

- **When only Animus is delivered and corpus remains with original possessor. glance at Arts1145**
- **Example; sale of fungibles<substitutable goods> see also Arts 1747,1778**

Defect 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.**

- **Art 1146/1/ provides that defective possession shall not give rise to any right.**

- **A possession is defective if it is secretive or dubious (Art. 1146) and precarious.**

- **Art.1146(2) – Secretive/ Clandestine……..unknown to the outside that the person is the possessor**
- **Art.1146(3) - Dubious……. if it becomes doubtful about the true possessor i.e. whether the person is holding in his own name or on behalf of another**

- **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.**

- **Precarious possessions refer to the possession of those who hold a thing for another on basis of an agreement** at the expiration of the agreement, **they must return the thing**

  This shows that it is only an owner who has a certain and secure possession.(no presumed defects)

- Others such as **usefractuary, lessee, tenant, pledgee** have **temporary right,** after some time (e.g. termination of contract) **they will return the thing to the owner.**

Cont…

- The other ground is **violence.** It may render possession defective. See Arts-1148 & 1149 of the Civil Code
- **Non-use???:** Our civil code keep silent. However, in land proclamation [Rural Land Proc.] it is one ground that make possession defective and hence, one ground for termination of right.

Effects of Possession

- **Possession may create ownership either by occupation**, i.e., by taking control of **res-nullius/ a thing without owner/** or through the **expiration of a period of acquisitive prescription**. [See Art 1151 and 1168]

- **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.[see 1193 of the Civil Code]

- **Possession is the basis for certain remedies because the law protects a possessor.**

Even a wrongful possessor shall not be dispossessed without due process of the law and with out proving the existence of a better title. See- Art 1206

Why protection?

1. To protect and promote constitutional rights of individual and thereby promote democracy. / See Art 40 of the FDRE Constitution/
2. To ensure peace and security.
3. To appreciate industriousness.

Protections accorded to possession

- A possession might be violated for certain reasons. To protect the interventions, the law provides different mechanisms.

- **Two methods to protect one's possession are :**
  - **Possessory action**
  - **Use of Force**
- **Possessory actions are…….** **legal actions or suits instituted by a possessor…. if his right is affected.**

- According to art 1149 (1) **this action may be instituted by a possessor [even a holder]** **if one's possession is:**
  - **Deprived** (dispossessed or taken away/evicted)
  - **Interfered with** (use and enjoyment)

- **The application must be either for:**
  - **restoration of the thing or**
  - **cessation of the interference and**
  - **claim for compensation if any.**

Eg.1 The Kebele forcefully evicted a tenant(without any justifiable reason)

Eg.2 Land lord repeatedly required the tenant to leave the house, even threatened him to use force.

E.g. 3 Art 1225…to refrain from causing nuisance, smoke, unpleasant smell.

Possessory Action Period of Limitations

- **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. Art 1149/2/**
- **However, he may still recover the thing by instituting action for restitution** under Art.1206 provided that
  - **he can prove his right of ownership and as long as he has not lost his ownership through extinctive prescription.** Art 1168 and 1189.

Cont…

- What is the difference b/n possessory action and negatory action?

- Negatory actions are **based ownership or title**, where as possessory actions are those that are based **exclusively on possession with out touching the basis of the title**.
- Possessory actions include actions to retain possession, actions in restraint of works by neighbors and actions to recover possession.

Cont…

- 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.

Attention!

- 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/ negatory 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**.

Use of Force

- **Use of force…….** is the other means provided by the law for the protection of possession.
- Art. 1148, **the possessor or holder has the right to defend his possession……. by using a reasonable force**

  - to prevent a person who intends to dispossess him or

  - to retake possession of a thing which has been taken away from him by force or which has been stolen from him provided that the usurper is caught……. in the act or when running away.
- E.g. Using force against a thief, intruder etc

Loss of Possession Right

1. **Non-use [Rural Land Law Proc]**
2. **Consent of the possessor**

2.1 Sell

2.2 Relinquish/ See Art 1164/

3. **Loss of the object/ Arts-1151,1152,1153/**
4. **Law/ Legal Declaration / Arts-1192,1168/**

Chapter 3

Individual Ownership Right

Session Objectives

- Define ownership and its component elements.
- Identify the ways by which ownership right is acquired.
- Identify the restrictions on the right of ownership.
- Understand the grounds and modes of transfer of ownership.
- Understand the grounds on which right of ownership is extinguished.

Meaning

- Ownership is defined (Art. 1204) as **the <u>widest right</u> that may be exercised over <u>a corporeal thing</u>.**

- **Owner has the following rights**
  - **Use and enjoyment** (use, rent/lease, mortgage, pledge, …)
  - **Right of possession in exclusion of others** (non-interferences, discontinuity, restriction)
  - **Right of alienation** (sale, inherit, donate, **destroy**)
  - **The right to leave or abandon the thing or its fruits at will.**
- **In its Roman context ownership right is explained as :**
  - Usus (use and enjoyment)
  - Fructus (collect fruit…..rent..)
  - Abusus (Transfer/sale, destroy)

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Ownership Rights is said to be:

- **Exclusive because these rights are in principle available only to the owner**

- **Relatively "perpetual" since these rights are neither extinguished by non-usage nor limited by duration. [Art 1206]**

- It is said to be **absolute** b/c the owner may do as he likes with the thing that is his own. But, this does not mean there are no limitations up on ownership right.

Forms of ownership

1. ULTIMATE O/P

- 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/BENEFICIAL O/P

- the owner enjoys all the rights and privileges emanating from it.

Restriction of Ownership Right

- **RULE**: O/P right may *not* be divided *nor* restricted except in accordance with law
- GROUNDS OF RESTRICTION
- **Public Policy:**
  - Limitation on exercise of o/p rights b/c of health, safety and security: animals with contagious diseases (2369 & 2373), Sale of medicines, alcohol, tobacco, dynamites
  - Restriction on acquisition of o/p right: land and natural resources, cultural heritages, antiquities, narcotics, guns,
- **Contractual ground:**
  - Right of preemption[Art 1410(2)], promise of sale[Art 1410(1)], contractual servitude

Cont…

- **Mutual interest of neighborly estate**
  - excavations or ditches (1210 and 1225)
  - nuisances to a neighbor by noise, smoke, gases odor (1225/26)
  - use of water (1245, 1246 (1))
  - allowing access to land (1217-24, 1249(2), 1252, 1253)

PROPERTY RIGHTS WITH REGARD TO LAND AND WATER

- Under Art 40 of the FDRE Constitution land/ **both rural and urban/** is declared to be **the property of the state of Ethiopia and its peoples.**
- Regarding property rights in relation to **water resources**, Arts 1255 and 1447 of the Civil Code provide that **waterways (rivers), lakes and underground accumulation of water shall be deemed to form part of a public domain,** i.e., **they can not be privately owned, alienated, or acquired through possession in good faith, occupation.** See also Art 1454 and 1455. Furthermore, according to **Art 40(3)** of FDRE Constitution water resources, which include both surface and underground water, are common property of the peoples and state of Ethiopia.

Cont…

- Hence, the type of property right that may be had in relation to water resources is **a use right** provided by the Water Resources Management Proclamation No 197/2000. **However, water shall be private property where it is collected in a man made reservoir, basin or cistern (an underground container that is used for collecting & storing rainwater) from which it does not flow naturally.** See Art 1229 of the Civil Code.

SCOPE OF RIGHT OF OWNERSHIP/USE OF LAND

- Possession right ; not ownership right over land at the current legal system of Ethiopia can be exercised as per Art 40(3) of the FDRE Constitution.
- The possessor, for instance, can exercise the following rights: See Arts- 1209,1255(2), 1211,1212,1213,1216...

Acquisition of Ownership

- **A person may acquire property rights in a variety of ways.**
- For systematic purposes, a distinction is made in civil law jurisdictions between **original** and **derivative acquisition.**

1. Derivative Acquisition;

- **refers to 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.**
- **Here, no one can transfer a better title or right than he has!!!**

Cont…

- It can happen by:
  - **Transfer by juridical acts**
    - Sale (2266-2426)
    - Donation inter vivos (2427-2470)
    - Donation mortis causa (Will) (826-1125)
  - **Legal** (E.g. intestate succession)
  - **Judicial** (E.g., attachment for execution of judgment)

2. **Original Acquisition**

- **This mode of acquisition involves the creation of new property right, which is independent of any preexisting rights over the same thing.**
- It is possible for a non-owner to transfer a perfect right of ownership. E.g. PIGF

e.g. **Occupation, Possession in Good Faith, Accession and Usucaption/ Acquisitive Prescription**

1. Occupation:

Art.1151- taking possession of a thing without an owner (animals, bee…. etc)

Art. 1154: Possession of a thing found (abandoned, lost and found, treasury)

2. Possession in good faith

Art. 1161: Getting ownership of a thing by contract in good faith

3. Usucaption/acquisitive prescriptions

Art.1168: **The possessor who has paid for fifteen consecutive years the taxes relating to the ownership of an immovable** shall become the owner of such immovable.

4. Accession

It refers to increment/addition from a thing own (fruit, breeding,..) Art. 1170 ff. or the merger/mixture of two things which belongs to two or more persons

1. Occupation [Art. 1151-1160]

- 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**.
- This mode of acquisition of ownership is not applicable to immovable property. Because,
- **Art 1194** of the Civil Code makes immovable things without an owner the property of the **state**. Furthermore, Art 40/3/ of the FDRE Constitution makes land and all natural resources the property of the state and the peoples of Ethiopia and hence will not be acquired via occupation.

A. 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.**
- Under Ethiopian law, no person may hunt wild animals or use products thereof **unless he is granted a written permission by the Wildlife Conservation and Development Authority. /**See - Wild Life Development and Conservation Pro No 575/2008/
- Art 850 of the FDRE Criminal Code penalizes a person who violates such laws

B. Treasures- Art 1159

- A treasure is any thing hidden or buried to which **nobody can show an ownership title.**
- **It should be buried or hidden, in an immovable or movable thing, for a period of at least 50 years on the date it is discovered.**
- However, a person shall not acquire ownership of **archeological discoveries and antiques** because of the historical importance attached to these categories of treasures.

Cont…

- Furthermore, **the thing must have been owned originally,** and **precious stones or gold grains found in their natural mining place** are not considered as treasures. Ownership of natural resources belongs to state and a person must acquire **a license to mine natural resources.**

Cont…

- Who shall acquire **ownership of treasures discovered buried in land** under the current land holding system. **Should it be the landholder** or **the state and the peoples of Ethiopia?**

- What about cultural heritages discovered ? Can they be owned via occupation?
- According to the Cultural Heritages Pro No 209/2000, cultural heritages, **which include treasures,…… that are found or discovered in land through purposeful exploration or accidental or fortuitous discovery shall be owned by the state, and the discoverer shall have no right in relation to such treasure or cultural heritage**.
- **A person who accidentally discovers a cultural heritage is required to report his finding and surrender the same** to the Cultural Heritage Research and Conservation Authority. Failure to comply entail criminal liability as per Art 680 of the Criminal Code.

C. Lost things /Art 1154-1158/

- **Lost 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(after ten years Art 1192) and completion of certain requirements such as announcement of the find or report to the authorities.**
- **If the finder fails to carry out his duty in notifying the authorities or taking the measures necessary to trace the owner or appropriates the lost object he may face criminal liability according to Art 680/1/ of the FDRE Criminal Code.**

D. Abandoned things

- **are things to which the owner has clearly renounced his right of ownership and hence which are without a master or owner. Art 1191**

e.g. things which are disposed off in waste disposal areas.

E. Animals & Bees- Art 1152 & 1153

2. Possession in good faith [Art 1161-1167]

- **Good faith…**
  - genuinely though transferor was owner…
  - Good faith must exist at the time when possession was acquired
- **Contract of sale/ for consideration**
- **Possession of the thing must have been taken**
- **Applicable to ordinary movables only**
- **RECLAIMING:**
  - STOLEN THING: must be claimed within 3 years (5 years in the Amharic version)
  - If voluntary relinquished it cannot be reclaimed
  - Currency or Securities to bearer cannot be reclaimed

3. Usucaption / Acquisitive prescription [Art- 1168 & 1169]

- **Acquisitive prescription is a mode of acquiring ownership title or some real interest through possession that is ..... continuous and free from defects.**

- Art. 1168:The possessor who has paid for **fifteen consecutive years..... the taxes relating to the ownership of an immovable** shall become the owner of such immovable.

- **It seems this no longer works for land. But, it works for buildings.**

- E.g.1 In a case between Ato Hailu H/Giorgis and Wro Yeshi H/Mariam in Civil File No 29575 at the Federal First Instance Court,
- The defendant possesses **a house since 1968 that belonged to the plaintiff and paid tax in her own name.**
- The plaintiff demanded recovery of house **(after more than 30 years)** but the defendant claimed that she becomes an owner by virtue of Art. 1168

4. Accession

- **Accession** is a mode of acquisition of ownership **through the union of two or more things……. belonging to two or more persons.**
- **It also refers to increase from breeding Art. 1171(1) As regards ownership, increase from breeding shall follow the mother.**
- An owner of a thing will also own the fruit (Art.1170)

1. Accession of movable to Immovable

- ***Crops sown on another person's land Art.1172-1174***

  - Sowing against clear objection, in good faith/ permission
- ***Plantations(trees) on a land belonging to another***
- ***Building using materials belonging to another***

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Conditions	Crops	Trees	Building
Against clear objection	All will go to land owner **Art.1172**	All will go to land owner **Art 1175**	Builder has no right **Art 1178**
-In good faith **-Without objection/ Up on permission**	**Sower will get 25% Art. 1173** **The person who saw can take everything**	**Joint owner/The land holder owns the trees after payment of compensation Art. 1176**	**Builder will be owner Art 1179**
A land holder….. builds, plants, works using another person's material…… will be the			

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2. Accession of movable to movable

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

- ***Transformation (specification)***: **a worker transformed a thing using another's material will be the owner…… if the labor is greater than the value of the thing. Art 1182.**

- ***Adjunction:*** Art 1183(2) **if two things which are belonged to two people united together,…… the owner of the principal should be an owner of the whole**.

E.g. If someone uses another person's spare part for his car

NB: In both cases the other person **will be compensated for the value of his property or the owner now should compensate the person whose materials has been used in the above cases .**

- ***Commingling /fusion/: Art.* 1183(1)**

  If things belonging to different people are fused and difficult to separate them.

  They will become joint owners.

  E.g. Ink, gold

Transfer of ownership

- Ownership right may be transferred to another by :
  - Contract (E.g. sale Art. 2266, donation Art. 2427) ,
  - **Will (testate succession),** or
  - **By Law (intestate succession/ inheritance.)**
- **The transferor may not transfer a better right than what he has on the object.**

- **Transfer of ownership of movable chattels (goods) may be effected by transferring possession. Art. 1186, Art.1143, Art.1144, Art. 2274(meaning/essence of delivery)**

- However, in exceptional circumstances**, ownership of chattels may be transferred at a different time than the time of transfer of possession, *in case ownership right is reserved* until payment is made Art.2387, Art 1187**

- **The transfer of immovable and special immovable (car) needs the entry of the contract or will….. into registry (municipality, Transport authority).Art. 1185,**
- Read also **Art. 1720, 1723,** 2877, **2878(to have effect on third parties),**

Proof of Ownership

- Do you need some document for every possession that you have?
- **The mode of proof…… of the existence of a right of ownership varies…. depending on the type of the object of the right.**
- **The owner of an ordinary corporeal movable object / a chattel/ shall prove his right to the thing by the mere fact of possession. Art. 1193(1) , but the presumption can be rebutted 1193(2)**

- **The owner of an immovable object or a special movable object ……..may establish his ownership right by producing a title deed/document, which is given by the concerned authority. Art.1195**

Art.1587 ff (procedures of registration)

Extinction of Ownership

- **Ownership may be terminated by one of the following reasons** Art.1188-1992
  - Loss or destruction of the thing **Art. 1188**
  - Transferred or acquired by third party **Art. 1189**
  - Striking of owner's name from registry**(immovable) Art.1190**
  - Unequivocally waiving of rights(corporeal chattel) **Art. 1191**

- Period of prescriptions **Art.1192 (**an owner where he failed to exercise them **for a period of ten years by reason of his not knowing where such chattel was or that he was the owner thereof**.)

Chapter 4
Joint Ownership

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Joint ownership

- **Joint ownership or Co-ownership…….. is the right of ownership exercised by….. two or more persons…….. in relation to the same object.**
- **Such rights may emanate from:**
  - **agreement/contract , will or the law** (E.g. **Art. 1257-1308 Art. 1060, Art 1183(1)**)
- **Each joint owner has the right to…….**

  use, pledge/mortgage, sale, inherit etc of his share.

Art .1260 the share of joint owners is presumed to be equal.

E.g. A, B, and C jointly own a tractor

- **The following are the main characteristics or natures of joint ownership;**
  - **The thing, which is jointly owned, is undivided** and,
  - Each joint owner is considered as **owner of each and every part of the thing.**

  e.g. jointly owned horse
- **The fruits** of the jointly owned property shall also be a joint ownership. Art. 1264

Rights and Duties of joint owners

- **Right to Use and Enjoy** the Undivided thing/Property, **Art.1263**
- **Right to Administer the Thing-** Art.1265, 1266
- **Bearing costs- Art. 1267** , Art.1268
- **Freedom to transfer ones own shares-Art. 1260**
- **Right of pre-emption Art.1261, Art. 1388(2)** right to purchasing back a share sold to third person by one of the joint owners.

  E.g. In the above example if A sells his share to D, the other joint owners (B and C) may demand D to sell it back to them.
- **Right to request termination Art. 1271 (if it is movable), Art 1272 (if it is immovable)**

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Perpetual Joint ownership

- Perpetual joint ownership represents **a joint ownership…… in which joint owners do not have the right to demand termination**
- This kind of joint ownership exists where continued joint ownership is in accordance **with the nature or purpose of the thing or where sale or partition is impossible or unreasonable**. **Art 1276**
- Example: passages, yards, wells, paths, roads, dams, canals, **party walls (Art.1281),** and common portion of condominium houses (The Condominium Proclamation No 370/2003)

Chapter four
Usufractuary Rights

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Use-Fractuary Rights

Objectives

At the end of this section, students will be able to:

- define the concept of usufruct and identify the elements constituting it.
- identify the sources of usufruct.
- Understand the things that a usufructuary right can depend on.
- understand the rights and duties of the usufractuary and the bare owner.
- identify the ways in which a usufruct is extinguished.

Definition

- Usufruct may be defined as **a real right, temporary or for life, which entitles 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,**

Art 1309(1), 1328(fruit).

- **The things susceptible of usufruct, i.e., things in relation to which a right of usufruct may be created.**
  - **Incorporeal things**
  - **Corporeal things**
    - **Movable things**
    - **Immovable things**

- **Things that are consumed by their first use are not susceptible of usufruct in the proper sense of the term**

- **Example**

❖ Assume that your friend gave you a kilo of banana according to a usufructuary agreement. How you are going to use the banana or would you eat the banana or use it for some other purpose but without losing its natural character there by returning it to the bare owner?

❖ Or can we safely arrange usufructuary right on a kilo of banana that will be disposed by its first usage?

Sources of Usefruct

- **The rules governing the acquisition, transfer, extinction of right of ownership .....shall apply to the acquisition, transfer or extinction of usufruct right.**

Art 1310

- **Usufruct may arise from:**
  - The law
  - Contract (with/without consideration)
  - Will - **Art 912 and 929**

Characteristics of Usufruct:

- **It can be created in favor of a single person, or jointly and simultaneously in favor of several persons.**

- **It may be created for a limited period of time or for lifetime of the usufructuary. Art 1322(1)**

- **Usufruct created in favor of bodies corporate shall terminate after 30 years or such shorter period provided by the contract or will creating it.** Art 1322(2)

- **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. Art 1723

Rights and duties of the usefractuary and the bare owner

RIGHTS AND OBLIGATIONS OF THE USUFRUCTUARY

- **The Conservation of the Substance of the Thing**: -

  The usufractuary shall have the obligation to conserve the thing, its form, structure and particular identify.

However, the usufructuary can make changes that increase the value of the thing without changing its form.

Arts 1309(1) and **1330(2)**

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e.g. changing wooden or dirt walls to a concrete walls there by increasing the value of the house.

But the usefractuary may not claim payment of compensation

Art 1336(1)

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

However, he has an obligation to exercise due care and diligence

Arts 1312

What if the bare owner can prove that the usufructuary is not performing his duties …..what can be done??

The court may order the usefractuary to furnish security, in the form of pledge, mortgage or personal guarantee, to protect the interests of the former.

Art. 1324(1)

- **The obligation to up-keep the thing: –**

The usufructuary has an obligation to have regular maintenance and repair works done at his cost.

Art 1313

He has an obligation to inform the bare owner where the thing requires major or considerable repairs ……where he is not at fault for such damage or deterioration of the thing.

But what is a major repair??

- **Considerable or major repairs are repairs that require expenses that are greater than the average annual income generated by the thing.** Arts 1337 and 1338(2)

- **Is the bare owner legally obliged to make considerable repairs? Art.1339(1)**

- **The usufructuary has an obligation to pay 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.**

Art 1314 (1)

Can the usufratucary who has paid taxes in relation to the immovable……. acquire ownership right by prescription ?

(Art 1314(2)

- **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.**

What if he failed to comply with his duty??

Where he fails and the bare owner loses his right of ownership,…… he shall be liable to compensate the bare owner…… as if he himself caused the loss or damage of the rights of the bare owner.

Art 1342

- **The usufructuary as a possessor of the thing, shall have a right to bring possessory action and to use force to protect his possession.**
- The action can be brought against **any person, including the bare owner, who interferes with his possession of the thing.**

Arts 1341(2)

- **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.**

- **He shall be liable for the loss or deterioration of the thing,…… where the loss or deterioration is resulted from his fault.**

Arts 1317

RIGHTS AND OBLIGATIONS OF THE BARE OWNER

- **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.**
- **He may undertake major repairs**

  Arts 1337 and 1338, which are not result of the usufructuary's fault.
- **He has an obligation to cover extra ordinary charges.** Art 1315

EXTINCTION OF USUFRUCT

- **Death of the usufructuary-**

  A right of usufruct is sometimes called a personal servitude because it depends on the life of the usufructuary. Art 1322(1)

- **Lapse of the period for which it is created. Art 1322(1)**

- **Extinctive prescription –**

  Lack of exercise of any of the usufruct rights or complete absence of enjoyment, use, possession shall result in the termination of usufruct.

Art 1310 cum 1192 of the Civil Code.

- **The loss or destruction of the thing;**

Arts 1319, 1310 cum 1188

- **Consolidation or merger of the position of the bare owner and the usufructuary in one person**

Arts 1676/1/ cum 1842

- **Forfeiture or waiver of right by the usufructuary clearly and unequivocally**

Arts 1310 cum1191(Movable chattels) and Art 1676/1/ cum 1825

- **Acquisitive prescription in favor of a third party**

  Alike ownership right, the right of usufruct shall be extinguished as a result of acquisition of usufruct right on the thing in favor of another person.

Art 1310 cum 1168

Chapter Five

SERVITUDES

Art.1350-1385

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Section Objectives

At the end of the unit, students are expected to:

- define the concept of servitude.
- understand the purpose of servitude and its drawbacks.
- identify the nature and various types of servitude.
- identify the sources of servitude.
- identify the rights and duties of the owners of the servient tenement and the dominant tenement.
- understand the grounds on which servitude is extinguished.

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.**

- It can 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.**
- **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)

- **As any real right, not only the burden of servitude runs with the servient land its benefit also runs with the dominant land…. unlike use and habitation.** Art 1361

PURPOSE S 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.**

E.g. The most convenient access to the high way from one part of once land may lie across the land of his neighbor

- However, **the law tries to restrict the number and extent of encumbrances or servitudes** on the servient tenement in the different ways.

E.g. the servitude only to be used for ***originally intended purpose.***

SOURCES OF SERVITUDE

- **Servitudes arising from contracts. Art 1362/1/ &Art.1363(shall be made in writing)**

For such contract to have a legal effect on third parties it shall be registered . Art.1364

- **Servitude may also arise from the will** of the deceased person who divides his land holding between two or more persons. **Art 1362/2/**

- **Acquisitive Prescription. Art 1366**

  servitude may arise from enjoyment of the servient tenement for a period of ten years.

  a servitude acquired through acquisitive prescription shall not affect third parties…… unless its acquisition is registered in the register of immovable properties

- **Servitude may also arise out of the provisions of the law.**

  As a matter of principle the law guarantees individual holdings from any possible encroachments through providing the right to bring possessory action and to use reasonable force.

However, in exceptional cases it provides rights for other while imposing restrictions on the land holder.

Examples:

Art. 1217(necessary trespass)

Art. 1218(repair of walls)

Art. 1372/2/ (the right of way to a well) etc

Rights and Duties of the Parties

- **It shall be determined by the instrument creating the servitude.**
- **where the servitude is created by contract or will**
- **where it is created by acquisitive prescription it shall be determined by the manner in which the servitude is created or enjoyed in good faith over a long period of time, i.e., usage.**
- **where the instrument creating the servitude is not enforceable the provisions of the Civil Code shall determine the rights and duties of the parties**. Art 1370

Rights and Duties of the Servient Tenement

- **He has 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 inherent in ownership/holding…..such as the right to prevent other persons from entering his land or using his land. Art 1359**

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- **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.** Art 1373/2/

- **The owner/holder of the servient tenement has the right to redeem the servitude where he can prove that inconveniences there are higher** than the benefits derived by the dominant tenement. **Art 1383**

- **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.**

  Arts 1380,1220(3)

Rights and Duties of the Dominant Owner/holder

- **The owner/holder of the dominant tenement must exercise his rights in a manner,…….. which causes minimum inconvenience or damage to the servient tenement. Art.1375(1)**

- **He may not make any alteration that would increase the burden of the servient tenement and he shall exercise in accordance with the instrument which has created the servitude. Art 1375(2)**

- **Where the dominant tenement is divided, the right of servitude shall continue for the benefit of each parcel.**

However, such division shall not increase the burden of the servient tenement

Art 1377.

- **Where the servient tenement is divided, the dominant tenement shall have the right of servitude on each of the new parcels of land. Art 1378 (1)**

If it is feasible only on one of the parcels the other parcel shall be relieved. Art 1378 (2)

Types of Servitudes

Urban Servitudes Vs Rustic/ Rural Servitudes

Urban servitudes are servitudes created and enjoyed in urban areas/on urban land.

These 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.**

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Rural 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, across fields, rights of pasture, watering animals, wood-cutting, irrigation. Art 1371

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Continuous Vs Discontinuous Servitudes

This classification is based on **whether or not the right of servitude can continue without continuous human intervention.**

- **Continuous servitude is a servitude that continues without continuous human intervention.**

E.g. Servitudes of view and drawing water are considered as continuous servitudes.

- **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.

E.g. Servitudes of way or passage, pasturing cattle and servitude of extracting quarry.. etc. Art 1382

- **This indicates that apparent servitudes are discontinuous servitudes ……since such servitude shall be extinguished……if the owner of the dominant tenement fails to exercise his rights for a period of ten years. Art.1381(3)**

Apparent Vs Non-apparent Servitudes

- **Apparent servitudes are servitudes that are manifested by external works** such as ditches, pipelines, roads (means of enjoyment).
- **Non-apparent Servitudes are servitudes whose existences are not manifested by external works** necessary for their enjoyment by the owner of the dominant tenement. Art 1367

Extinction of Servitude

- **Waiver /release by the owner of dominant tenement.**

  The dominant owner/holder shall extinguish servitude only where it is made in writing and **where the right that was registered in the register of immovable properties is cancelled or stricken out.** Art 1381(1) and (2)

- **Disappearance of the apparent signs in cases of apparent servitudes or failure to exercise the right arising out of the servitude for ten years. Art.1381(3) & Art. 1382**

- **Redemption of the servitude by the owner of the servient tenement**

- According to Art 1383 **the owner/holder of the servient tenement may buy the servitude back where the continuation of the servitude damages the value of the servient tenement.**
- **The benefits driven by the owner/holder of the dominant tenement are lesser than the damages it causes to the servient tenement.** Arts 1384 and 1385

- **Surrender of the servient tenement to the owner of the dominant tenement**

  Servitude shall be extinguished **where the owner/holder of the servient tenement has an obligation to perform positive works** such as construction, maintenance and repair of means of enjoyment and **is not able or willing to cover the costs, and surrenders the sevient tenement to the owner of the dominant tenement.**

Art 1374

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Chapter Six

RIGHT OF RECOVERY

Art. 1386-1443

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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

The right of recovery is intended to keep things within a certain group of persons, such as a family or joint owners.

keep strangers out there by securing peace and co-operation

- 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

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; According to Arts 1389 and 1394/2/, Arts 1124 and 1125

- persons who have a first-degree relationship with the seller have a priority right over those having a second-degree relationship
- Art 1396 excludes right of recovery of relatives where the immovable transferred is situated in urban area/ town planning area/ or where it mainly consists of a dwelling house or some other building

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

Joint owners exercise their right of recovery jointly and acquire equal rights in the share recovered.

However, where one or more of the joint owners are not willing to exercise a right of recovery, such right shall accrue to the other joint owners

Arts 1393 and 1262

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 with in two months from the date he is in formed of the transfer of ownership or usufruct to a new owner or usufructary.

where the right is exercised by relatives, the beneficiary must declare his intention to exercise his rights with in 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.

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, 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

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

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.

EFFECT OF RIGHT OF RECOVERY

- The new owner or usufructuary shall transfer the thing or usufruct to the beneficiary of right of recovery up on of receipt of the price where he acquired the thing for consideration or

  the value of the thing where he acquired the thing on donation. See Arts 1406, 1407, 1408 and 1409

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/

LOSS OF RIGHT OF RECOVERY

- The right of recovery shall be extinguished where the beneficiary fails declare his intention to exercise his right, to recover the thing, with in two months where the **beneficiary is a joint owner.** See Art 1401/1/ of the code.
- Relatives who have a right of recovery shall lose their right where they fail to declare their intention to exercise the right within a period of six months form the date they knew of the transfer. See Art 1401 (2)

PROMISE OF SALE AND RIGHT OF PRE-EMPTION

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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. (See Arts 1410 (1), 1416 and1417).

- A promise of sale, constitutes a restriction on the right of the promisor / the owner/ to dispose of the thing
- he is obliged to sell the thing, **at the price fixed in the agreement creating the promise**, only to the beneficiary of such right
- **the owner cannot sell the thing to another person who might have offered a better price**

- Right of Pre-emption

  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.**

Art 1411, 1426, 1427, 1428 and 1430

Contracts creating promise of sale or right of pre-emption shall not be valid unless

- they are made in writing, and
- specify the time with in which the right is to be exercised,
- the price for which the beneficiary of the right may purchase the thing
- registered in the register of the property concerned.

Arts 1412, 1422 and 1423

the period with in which such right may be exercised cannot exceed a period of ten years. Art 1413

- The rights arising from such agreements cannot be transferred by contract or inheritance and the creditors of the beneficiary cannot exercise them. Art 1415

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. 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. Where he decides to sell the thing, he has the obligation to inform the beneficiary of his intention to sell the thing

Art 1418 /1/ and/2/.

2) In case of attachment, the owner of the thing must notify the situation to the beneficiary.

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.

Art 1419.

4) The beneficiary must exercise his rights before the thing is sold by auction in case of attachment.

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.

Art 1422.

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 with in the period fixed by the contract or 10 years where no period is agreed upon in the contract. See Art 1413

2) Failure to buy the thing before it is sold by auction in case of attachment.

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.

Art 1425 (2)

GOOD LUCK IN YOUR EXAM.

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