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

1.1 Concept of patrimony

According to contemporary civilian writers, rights can be divided in to patrimonial rights and extra patrimonial rights.

A, Patrimonial rights (proprietary rights) are all rights that can be valued or measured in terms of money or rights that are susceptible of economic value. It may be defined as the set of all interests, assets and liabilities with an economic value.

B, Extra patrimonial rights (non-proprietary rights) are all right that can't be assessed or measured in terms of money or rights that are not susceptible of economic value. For example, the paternal or maternal powers of parents the status of individuals, the right of man to his own body or name, etc cannot be measured in money.

Patrimonial rights also classified into two

1, Rights in personam or personal right is not referring to those attributes of personality such as status of a person, liberty of a person, human dignity, right to life, honour, bodily integrity, privacy, etc. We said these are extra patrimonial (non-proprietary) rights and interests.

A right in personam literally does mean a right against or in respect of a person. It may be defined as an interest protected solely against determinate individual(s). it is governed by law of obligations like contract and tort law

Unlike rights in rem, a **right in personam** is available only against particular person(s) and it corresponds to a duty imposed up on determinate individual(s). It may be thus explained as a right which a person has against another person or determined and limited number of persons to demand payment of money or a performance of a contract.

The ultimate responsibility of the debtor is a financial one, i.e a sum of money will be paid to satisfy the interest of the creditor (saving the exceptional circumstances of forced performance).

Unlike rights in rem, most **rights in personam** involve positive obligations; Exceptionally, there are some cases of rights in personam that involve the obligation to refrain or abstain or tolerance

A right in personam is effective only between the parties, the creditor and the debtor. For the presence of right in personam there has to be at least two persons.

Action in personam or **personal action** if the claim is framed as an obligation, for instance, a claim for performance of a contract of sale of land or a ship, such right is personal. There was no difference between movables and immovable.

2, A right in rem (real rights) in the literal sense, right exercised against or in respect of an object of property (a res) though in fact, in the true sense, a right is exercised against another person (s).It is an interest assessable in terms of money, which inheres in or over or upon a thing (res) and protected against the world at large. Also, as any other type of right necessarily, it has its own correlative duty and involves a relationship of persons relating to an object of property. It is said that rights in rem confer a direct and immediate power or authority over a thing. It is governed by property law.

Unlike rights in person, it represents a relation between an owner of a right and an undetermined multitude of persons.

Unlike rights in person, A right in rem constitutes a universal passive obligation and is defined as a legal relationship established between one person as active subject and all other persons as passive subjects. This relationship imposes a passive duty to refrain from interferences with the peaceful possession of the holder of the real right.

Action in rem (real action) was an action for the recovery of dominium one in which the plaintiff claimed that a certain thing belonged to him and ought to be restored or given up to him. Thus in action in rem the plaintiff had to pray for the restitution of a res.

The Romans asked what the nature of the right asserted is. Hence, if it is a claim of title to a specific thing/ res/, the action is in-rem, for example, a claim of ownership of land or a sheep.

Generally The totality or unity of patrimonial rights and obligations of a person constitutes his patrimony. However, the modern conception of patrimony, including the one contained in the German Civil Code, restricts the definition of patrimony to the totality of a person’s patrimonial rights only. According to this conception, a person’s patrimonial obligations are the charges/burdens over a person’s patrimony rather than constituting its elements.

Yet another view expressed by Paul Esmein, considers patrimony as the totality of property rights, i.e., rights related to objects, of a person and its elements are such objects which under the civil law have the quality of property. It is the totality/ universality/ of rights because the various property interests are unified through the person of the owner. According to the classical theory, patrimony is distinct from the actual elements of which it is composed. Hence, the loss or extinction of one or more of its elements does not affect its existence, and also its contents may vary from time to time to the extent where it may be negative, i.e., the sum of his obligations exceeds the sum of his rights. The concept of patrimony is essential to explain the rules of universal succession. For instance, an heir or legatee by universal title shall succeed all patrimonial rights and obligations of the deceased person, in other words, such an heir or legatee cannot succeed the rights only since the elements of patrimony are transferred to him as unit. /See Arts 826, 898 & 942 of the Civil Code./

Aubry and Rau, in their classical theory, contended that the unity of patrimony is derived from the person in whom the rights and obligations are centered; hence, patrimony should be regarded as the emanation of the personality of its holder and the expression of the legal power with which a person is invested. Accordingly, **the characteristics of patrimony** are to be sought in the nature of personality. Hence, it follows that:

- Every patrimony presupposes a person who is its holder: this is based on principle that only human being bear right and obligation
- Every person has a patrimony; from the concept of right in rem that puts negative obligation on all persons not to interfere with the enjoyment of property right holder.
- A person can have only one patrimony; since it is the totality of all patrimonial rights and obligation. With the exception of succession case where an heir may have two patrimonies until the object he succeeds forms his personal property.
- Patrimony is inseparable from the person of its holder; total transfer of property is impossible while a person is alive because it is related with his personality.

1.2 Concept of property

Property is actually a dynamic term whose meanings contents and scopes change from time to time and varies from place to place. Treating those physical things of value as lands, buildings, cows, slaves, radio, pen, etc, represents the time immemorial conception of property which

is the physicality conception. The inclusion of intangible things such as patent rights, copyrights, trade-marks (design) trade secrets, goodwill etc has evolved through time with ever increasing civilization, technological developments and changes in the economic base of society which in turn brought about development in legal thinking.

In its larger meaning, property embraces everything to which a man may attach a value and have a right, and which leaves to everyone else, or merchandize, or money.

Legally speaking Property is the rights that persons have with respect to things (whether corporeal or incorporeal) that have a pecuniary content or economic value. 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 follow the thing and its fruits in the hands of any person who might have unlawfully taken it. The concept property can be analyses as the aggregate of rights, privileges, power and immunities with their corresponding duties, disabilities and liabilities.

Furthermore, it would be inaccurate and narrow to use the concept of property to refer to ownership or title because the legal usage of the term includes other rights such as possession, usufruct, use, and servitude.

Thing (object of property right) is defined as resources of wealth which society attaches to them some economic, aesthetic, spiritual or cultural values.

Is all things are necessarily object of property right?

Nevertheless, it must be known that all things are not necessarily objects of property rights. There are things physical or incorporeal which cannot be legitimate objects of property. Certain objects may be excluded for customary, or religious or other public policy reasons. Generally, legislation, doctrine or jurisprudence in various legal systems define the things that may or may not become objects of property rights. Customs and morality as well as public policy and scientific truths may trigger for such exclusions. Hence, making human persons, or human body or any part there of an object of property interests is no more acceptable in the contemporary world. Of course, some exceptions may be found with regard to parts or certain bodily organs for some public interests in various nations. Like hair, blood,

Is all rights that persons have with respect to things are property rights? That is governed by property law

But only rights that confer a direct and immediate authority over a thing, that is, real rights (rights in rem) are governed by the civil law of property. Eg. In case of k of sale of house before the k issue is settled and buyer gets power to exersice control on the house, the relation that a paerson has is not real right so not governed by law of property

Conclusion Neither all things are objects of property rights, nor all rights that person have with respect to things are property rights.

The nexuses between patrimony and property

Are they similar?

From the foregoing discussion, one can easily notice that property and patrimony are not synonymous terms; patrimony is wider than property since it encompasses personal rights (rights in personam) beside those domains of property, i.e., rights in rem. So only patrimonial rights over things is property

1.3 Concept of Property Law

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

1.4 THEORIES OF PROPERTY

1.4.1 THEORIES REGARDING ORIGIN OF PROPERTY

A. THE POSITIVIST THEORY

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

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regarded as mine, except through the promise of the law that guarantees it to me. It is law alone that permits me to forget my natural weaknesses. It is only through the protections of law that I am able to enclose a field, and to give myself up to its cultivation with the sure though distant of harvest.

Property and law are born together and die together. Before laws were made, there was no! property; take a way laws, and property ceases. Similarly, E. Jenks argues that private property is a creation of the state and achieved only after a long struggle with the clan. If we consider as the essential characteristics of private property, the right to exclude others, the right to charge the thing for a debt, to alienate or leave by will, it is true that the state has provided the machinery by which these rights are enjoyed.

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

B. THE HEGELIAN THEORY

According to George Wilhelm Friedrich Hegel, a human person is merely an abstract unit of free will or autonomy that does not have a concrete existence until that will acts on the external word. From the need to embody the person's free will from the abstract realm to the actual, Hegel concludes that the person becomes a real self only by engaging in a property relationship with something external. Such a relationship is the goal of the person. Hence, private property originated in the person’s attempt to actualize his/her free will, i.e., when someone extends his will to external things he makes that thing a part of himself.

Similarly, Professor Margaret Jane Radin has argued that to be a person, an individual needs some control over resources in the external world. She explores the relationship between property and personhood, a relationship that has commonly been both ignored and taken for granted in legal thought. 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. The

necessary assurances of control take the form of property rights. Welfare rights liberals find entitlement to minimal level of resources necessary to the dignity of persons even when the entitlement must curtail the property rights of others.

It is a well-known fact that individual and communal life without property is inconceivable. As one famous legal scholar observed, human life and human society would be impossible without the use and consumption of material things. Food, cloth and tools are essential for individual as well as communal life. property is regarded as an indispensable foundation of the free individuals living in welfare states.

What is important in personhood is a continuing character structure encompassing future projects or plans, as well as past events and feelings. The general idea of expressing ones character through property is quite familiar. The attributes of many material goods, such as cars and clothes can proclaim character traits of their owners. But, 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. This at least suggests that property may have an important relationship to certain character traits that partly constitute a person.

C, THE OCCUPATION/ FIRST POSSESSION/ THEORY

In the beginning of the world The Creator gave to man dominion /ownership/ over all the earth and over the fish of the sea and over the fowl of the air and over every living thing that moves up on the earth. This is the only solid foundation of man‟s dominion over external things.

However, when mankind increased in number, craft and ambition, it became necessary to entertain conceptions of more permanent dominions and to appropriate to individuals not the immediate use of the thing only but the very substance of the thing to be used. Otherwise, innumerable tumults must have arisen and the peace and order of the world be continually broken and disturbed while persons were striving on who should get the first occupation of the same thing or disputing which of them had actually gained it.

As observed earlier, occupancy gave the right to the temporary use of the soil. So it is agreed up on all hands, that occupancy also gave to the original right to the permanent property in the substance of the earth itself, which excludes every one else but the owner from the use of it. There is of course some difference among the writers on natural law concerning the reason why occupancy should convey this right, and

invest some one with this absolute property; Grotious and Puffendorff insisted that this right of occupancy was based on the tacit/ implied assent of all mankind that the first occupant should become the owner; and Barbeyrac, Titius and Locke argued that there is no such implied assent; nor was necessary that there should be; since the very act of occupancy alone being a degree of bodily labor, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title.

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

D, LABOUR OR ENTITLEMENT THEORY

Though the earth and all the creatures are common to all men, every man has a property in his own person to which nobody has any right to but himself. 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 thereby makes it his property. This is because he has removed it from the common state of nature and has placed it in to something which is exclusively his own.

The difference between things owned privately and those, which are commonly owned by all human kind, lies in the fact that one's labor has been added to on. However, this theory has certain problems, first, in the absence of prior theory of ownership, it is not self evident that one owns even his/her own labor that is mixed with something, second, the labor theory does not provide guidance in determining the scope o f the right that one establishes by mixing one‟s labor with something else. Robert Nozick described this problem as follows, "suppose I pour a can of tomato juice in to the ocean: do I now own the sea?"

1.4.2. THEORIES REGARDING THE JUSTIFICATION OF PRIVATE PROPERTY

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

A) Occupation theory- tries to justify the existence of private property on the ground that the first occupier should be rewarded and property

acquired in such a manner is ethically justifiable. He who first reduces in to possession of a piece of property has the best of justifications for remaining in control, and hence the institution.

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

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

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

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

the proletariat by the bourgeoisie. Hence, private property is the evil that has to be abolished. Please read the following excerpt from the Communist Manifesto.

1.5 OBJECTS OF PROPERTY

Objects of property referred as the goods or things over which a right of property may be exercised. Or

In its legal usage, the term thing refers to some possible or potential mater of rights and duties which, conceived as a whole and apart from all others, can be separately perceived by the senses.

According to this definition, the term may refer to;

- A thing, which is corporeal (has physical existence) and tangible (can be clearly seen to exist) matter, which has an organic or physical unity, for example a horse, block of marble.
- A thing, which is corporeal and tangible, but consists of specific things, (inorganic unity) for example, a flock (group) of sheep, a house (it is the collection of things).
- A thing, which is neither material/ corporeal/, nor tangible but which is an element of wealth, for example a copyright or a patent right, a claim for payment of sum of money…etc.

So it refers to things in the sense of any possible matter over which legal right of property may be exercised.

When we see Book III of the Ethiopian Civil Code, which is the law governing property, we find that „objects of property", i.e., „things" are not properly defined. However, the various principles found scattered in the provisions of Articles 1126_1139 help us to understand what things may be considered as objects of property /things or objects/ in the Ethiopian property law.

1.5.1 CLASSIFICATION OF OBJECT OF PROPERTY

1, MOVABLES VS IMMOVABLE

Art 1126 All goods are movable and immovable accordingly this classification pertains to things called "Good". The Amharic Version (wrongly) states that all corporeal goods are movable or immovable. The classification is too general that it is not confined to corporeal things alone. What does movable mean? What about immovable?

A, Movables

In law we can classify movables as:

I, movables by nature

ii. movables by anticipation, and

iii. movables by the fiction of the law.

(i) Movables by nature

Objects of property have been divided into movable and immovable in consideration of the physical nature of corporeal things with relation to their mobility. Things are movable or immovable according to whether they can be transported or can transport themselves (cattle) from one place to another without having to be uprooted or detached from a thing itself fixed in the ground.

Movables by nature are defined under Art. 1127 c.c. This article rules. Movables by nature are things that have a material existence; they are physical objects; they are perceivable, visible to the sense organs. They have body and occupy space. The word “chattels” is an equivalent for movables. Movability refers to the ability of a corporeal (physical) thing to move itself from one place to another place or the capacity of that physical thing to be moved (transported) from one destination to another destination by agent without being uprooted, of detached or without being damage or injury to the thing.. Thus movables by nature are those physical (corporeal) things that can move or can be moved from one place to another place without substantial damage to them.

The status of mobile homes and trailers which are not common here in our country until this time may be controversial but the experience of other countries shows that they have to be regarded as movables by nature.

Movables by nature may further be classified in to two: Ordinary movables by nature and special movables by nature. These two categories of movables by nature are regulated or governed by different rules of law. As an example we may simply cite Art. 1186(1) and (2)

Such movables by nature as car, trains ship, airplane, and Television are governed by special rules of law and hence are treated as special movables by nature. Each of these special movables by nature have their own respective laws. Ordinary movables by nature, however, are regulated and governed by the Civil Code.

Mind you here that the basis of classification of things into movables by nature and any other involved these: material existence & movability. And the classification of movables by nature into ordinary and special is

made on the basis of the law applicable to each of them which emanted from the pressing need and valuable interests that special movables represented. Legal transactions that involve special movables by nature thus require stringent rules and body of principles. For Example, the acquisition and transfer of ownership, proof and extinction of ownership of these special movables are as provided in the special laws (proclamations, regulations and legal notices).

(ii) Movables by Anticipation article 1133, 2267,2268

It is normally exceptions to immovable by nature. Immovable refers to the fixity of objects of property or the inability of physical things to move or to be moved. While in fact movables by anticipation are immovable by nature they will be treated as movables. Immovable objects will be regarded as movables in the eye of the law when there is a factual anticipation of separation or detachment of those objects in the near future through the will of the right holders

Art 1133(2) (trees & crops) shall be deemed to be distinct corporeal chattels where they are subject to contracts such separation.

In principle trees, crops & fruits are to be regarded as component parts, or intrinsic elements of the tracts of land in which they are connected. In so far as that factual connection or attachment remains intact they are treated as parts of the immovable by nature.

But if some legal transaction implied there separation in the near future, they would be treated as movables. They are to be regarded as movables because there is anticipation that they will be changing their status. This is purely a result of legal abstraction

Before such immovable change their status into movables certain conditions need to be fulfilled. These prerequisites are:

- the thing has to be primarily an immovable by nature;
- this thing must be one whose separation is anticipated; and
- a juridical act that implies the separation of the thing must exist. (not only contract (1133(2) and 2268) but also will, donation etc..).

Of these preconditions, the first may appear simple to understand. However, this may not be always true. The question of which immovable things by nature are susceptible to such a juridical act needs serious consideration because all immovable by nature are not susceptible to such change of status. For instance land, the best and foremost example of immovable by nature cannot qualify for this precondition. In other

words, any immovable by nature which cannot be expected to exist as a self-sufficient movable, or which cannot be a subject matter of separate legal transaction fails to fulfil the first criterion.

On the other hand, movables by anticipation are not confined to trees and crops. It includes some materials of a building, quarry and other intrinsic parts of immovable by nature Art. 2268 C.C supports this view after proclaiming the scope of application of chapter 1 (sale) as confined to corporeal movables under Art. 2267, then Art 2268 goes on to include those movables by anticipation, of which crops, materials of a building under demolition or products of a quarry are expressly provided.

Even from the reading of the above provisions of Art.2268, it is possible to conclude that movables by anticipation are not limited to those things expressly provided as crops, materials of a building under demolition or products of a quarry. These are rather examples see the expression “in particular” (2268(2)

When we come to the second precondition, it must be known that every crops, trees, quarries, materials of buildings, etc, is not necessarily a movable by anticipation. As made clear herein above, they are, in fact and in law, parts of immovables by nature. So long as that association or close attachment with the other immovables by nature lasts and in so far as there is no expectation or anticipation of their immediate separation, they are regarded as intrinsic elements of the immovable they are attached with, or if treated as separate, self-sufficient objects of properly, as immovables by nature as such. In principle such intrinsic elements, or immovables by nature shall be regarded as immovables by nature.

However, there are some crops, trees, fruits, materials of buildings, or a building, quarries and others that will be cut down or harvested, or demolished in time. When crops & fruits ripe, when trees get maturity for different purposes, when the need arises for the demolition of parts of buildings or when quarries are needed, etc, that close connection with the other immovable by nature will cease to exist. If the time had already arrived and any of these separated from the immovable the separated objects are regarded as movables by nature. On the other hand, if any of these are not in fact separated but there is an anticipation in the meantime that they will be separated, they will be treated as movables by anticipation provided that a valid judicial act that aims at detachment of these things is concluded.

It is simply immovables by nature in fact are regarded as movables by anticipation for policy reasons. Had there not been such an anticiptation

of separation and a juridical act which aims at such separation, they were simply to be treated as parts of the other immovable by nature, or depending on the circumstance as self-sufficient, independent immovables by nature. Without anticipation of their separation they will not change their status from immovable to movable. Hence “anticipation” or “expectation of what will happen in the near future” is a basic ingredient in such cases.

The time element, how close should it appear that such immovable is anticipated to be cut down or harvested or demolished? It must be only when the separation approaches or when it becomes clear that such separation in the near future an inevitable state of fact.

III. Movables by the Fiction of the law Art. 1128, 1129

These are the third type of movable. Unlike the other two which have material existence, hence corporeal, movables by the fiction of the law are non- material, incorporeal objects of property.

In reality one cannot speak about the movability or immovability of incorporeal things. They do not occupy space, do not have body and hence cannot move themselves or cannot be moved by any other agent. They are not fixed things. These objects of property are creations of the mind, having pecuniary value. Despite all these, those incorporeal objects which bear some economic interests are regarded as movables. This is another good example to show that classification of objects of property is not necessarily associated with the nature of things.

A closer and critical reading of these two articles (1128, 1129) shows that material things are not at the forefront of the rules enacted. The articles are not dealing with securities to bearer and natural forces or the sources of these natural forces as such.

Securities to bearer are instruments or documents that incorporate or embody pecuniary interests in them. They are parts of negotiable instruments. Securities to bearer, on the other hand, are securities that do not specify the name of the beneficiary of the rights, i.e., the person to whom the money is to be paid is not specified in the document. Rights contained in securities to bearer may be transferred by simple delivery of the document, and any person who holds the document is presumed as a lawful holder and payment shall be made to such person.

Negotiable instruments are those documents incorporating rights to entitlements in such manner that it is impossible to enforce or transfer the rights separately from the instruments. As it is expressly provided under Art. 715(2) of the 1960 commercial code of Ethiopian commercial

instruments, transferable secuirites and documents of title to goods are common examples of negotiable instruments. Bill of exchange, promissory notes, cheques, travelers cheques and ware house goods deposit certificates are commercial instruments (Art. 732(2) comm. Come). Again bill of exchange, promissory notes and cheques are payable to bearer, i.e, payable to any person whosever bears any of these see comm. code Arts. 719, 721 cum Arts. 735(f), 823(e) and 833 (1) (c) respectively

All these negotiable instruments, whether payable to bearer or payable to order (i.e, payable to a particular person or his order) or any other nature as in the case of transferable securities and documents of title to goods exhibit two qualities. First and foremost comes the documents, physical, tangible objects or simply papers. Without the interest embodied in these documents, the papers are objects of property rights and since they can be moved from place to place without losing their individual character, they are movables by nature so the papaers as such are treated under Art. 1127 c.c. aaaaa

The second and the most puzzling quality of negotiable instruments is the claim and right incorporated or embodied in the documents. The claim or right embodied, in a given cheque for example, is something invisible. It is incorporeal. This incorporeal pecuniary interest is different from the document which embodies it, thought it cannot be enforced without the documents. And Art.1128 c.c is dealing with such types of claims and rights embodied in documents.

Of course Art. 1128 is providing a rule about those claims and rights contained in securities to bearer-not about claims and rights contained in any types of negotiable instruments. Whether this provision is intended to deal with these narrow class of interests, actually including bearer shares (Art.325 comm. Code.) leaving aside many other such as interests embodied in instruments that are payable to order or any other is not clear. And this triggers, at least, for two divergent opinions.

As Art, 1128 stands now, those claims and other incorporeal rights are treated as corporeal movables, may be one possible interpretation. On the other hand, one may interprete the article as standing for all categories of claims and rights embodied in any negotiable instrument since all are interests contained in documents.

The writer of text material does not believe that claims and rights incorporated in negotiable instruments in general and securities in particular should fall within the scope of property law because the rules governing most other types of property are not applicable to these rights

and claims. Though Art. 1128 considers theses rights and claims as corporeal movable things governed by property law, specific provisions of the law of property provide otherwise. For instance, Art. 1165 provides that stolen corporeal movable things may be reclaimed by the owner even from a person who has acquired them in good faith, while this is not possible in respect of currencies and securities to bearer. This is also the rule in cases of stolen negotiable instruments in general and securities in particular. See Art 1167 of the Civil Code and Art 718, 751/2/, 849 of the Commercial Code.

As the saving clause " unless otherwise provided by law", under Art.1128 makes it clear, those claims and incorporeal rights embodied in securities to bearer are treated as movables in so long as there is no other law providing otherwise. It means that the law —maker can determine these claims and rights to be regarded as immovables.

When we come to Art 1129, "Natural forces of an economic value such as electricity" can be obtained from waterfall, wind, sunrays, geothermal heat, etc. And this article is not talking about the water, wind or hear or sun rays as such. Rather it is concerned about the force generated from theses corporeal and incorporeal things. When the forces/ manifested through light, heat, cool, sound or any other /are appropriated (mastered) by persons and start to give some economic or any other use to many they shall be regarded as corporeal movables. This is again another fiction made by the legislative body. And whenever the law-maker deems it necessary, it can provide otherwise i.e. it can treat them as immovables.

Besides all the above, Art-124 com. Code provides that a business is an incorporeal movable. It is possible also to gather the intent of the legislature with regard to interests or claims contained in shares (shares other than bearer shares), in insurance policy, in documents of title to goods, in voucher of goods warehoused etc. Since there are provisions in the civil and commercial codes of Ethiopia that provide about the pledgeability of the claims and interests therein, and because pledge relates to movables, we may conclude that they are regarded as movables by the fiction of the law. A cross reference to Arts. 329,697 and 729 comm. Code and Art. 1260, 2816, 2829, 2863-2874 c. c reinforces our view.

Even though these category of incorporeal things are treated as movables a detailed examination of body of principles and rules in various parts of our laws prove that movables by the fiction of the law have their own specific body of laws. Those principles and rules of law

that are applicable for corporeal movables (whether movables by nature and /or anticipation) are not necessarily applicable to movables by the fiction of the law.

In many continental law jurisdictions, movables are regarded as residuary or reserving category of objects of property within that classification of things into movable and immovable. It means, according to such systems, that any thing which is not treated as immovable is to be treated as movable. Hence, usufruct in movable things, artistic and literary interests (copyrights), patents, other pecuniary interests in movable objects, even in rem actions involving movables, etc are treated as movables by the fiction of the law. In our case, we dont have, until the writing time, similar provisions. So whether an usufuruct interest in a movable object or copyright is to be treated as movable or immovable is an open question.

(B) IMMOVABLES

Since the division of things in to movable and immovable has many significances See Arts. 1723, 2266ff, 2829,3047,849,etc of the Civil Code, Arts. 25 & 27, in civil procedure code (1965), Arts. 68 and 277 of the revised federal family code or Arts. 79 and 288 of the family code of the Amhara national regional state, Arts. 665-684 &685-688 of the criminal code/2004) to appreciate the significance of our discussion here.

Classifications of immovable

- Immovable by nature
- Immovable by destination; and
- Immovable by the object to which pecuniary interests apply.

A, IMMOVABLES BY NATURE

Arts. 1130 and 1133(1) are dealing with immovable by nature. The first article provides that land and buildings shall be deemed to be immovable. The second article proclaims the intrinsic nature of trees and crops to lands. And there is no straight forward and express definition of immovable given by the law-maker yet we can deduce the meaning of immovable by nature from the acontrario reading of art. 1127 and the gist of two articles cited now.

Accordingly, immovable by nature may be defined as those material things (corporeals) that cannot either move themselves or be removed from one place to another. In brief they are fixed corporeal objects.

Arts. 1130 and 1133(1) seem to limit the category of things immovable by their nature to those of lands, building and trees and crops before they are separated to the land. This is not the case however. There are a lot others which may be found scattered in the various parts of the Civil Code and probably in any other specific statutory laws. while proclaiming about objects of public domain Art. 1446 C.C. lists the following under the specific title of “immovables”. These are

- roads and streets, canals and rail ways,
- seashores, part installations and lighthouses, and
- Buildings especially adapted for public services such as fortifications and churches.

Besides, party-walls, ditches, water and gas pipes and electrical and other lines, and fences are immovable by nature-see Arts. 1201-1203 C.C. barns, gas tanks, and depots are also immovable by nature.

Generally, immovable by nature includes tracts of land, trees, crops and fruits, buildings and other constructions, and all things which are so closely connected with tracts of land or buildings as to be regarded as intrinsic elements thereof. And in a strict sense, observed one famous property law scholar, this category is also a juristic abstraction. Because it is possible these days to move all the above using contemporary mechanical means or device. The law regards the land, buildings, trees, crops, canals and other constructions as immovables by nature though they could be removed by application of extraordinary mechanical means. In this light, therefore, it appears that immovability by “nature” is a creation of the law based both on practical considerations and on inherent characteristics of the things concerned.

Land is the most obvious and representative of things immovable by nature. By “land” we are not treating the earth planet as such; rather land refers to a part or portion of the earth. This may relate to rural farmlands and postural lands and urban tracts of lands.

The other category of things within the immovable by nature, as said above, involves trees, crops and fruits. These are referring to standing crops and the fruits of trees not yet gathered and trees before they are cut down or before they are reduced to the category of movables by anticipation. Trees and plants in the ground, even in nurseries, should be treated as immovable by nature though it is obvious that they are destined to be transplanted. In other words, trees and plants in nurseries that are meant to be separated from the ground would remain as immovable by nature until in fact they are uprooted or until a valid juridical act which envisages the reparation of them in the meantime is

concluded. But plants in containers and pots appear to be movables by nature unless the fall under the second category of immovable, i.e, immovable by destination.

Art. 1133 (1) provides that trees and crops shall be an intrinsic element of the land until they are separated there from. Never the less, the gist and general application of this provision should be regarded as changed at least since the enactment of proclamations No. 31/1975 and 47/1975, proclamation that nationalized all rural and urban lands following the Dergues Socialist ideology and motto of land to the tillers. By virtue of these proclamations, all land which was previously owned by private owners has become public property. This is still the case as Art 40 of the FDRE constitution expressly maintains it. While all urban and rural land is under public ownership, trees, crops and fruits are still in private ownership. This shows that trees, crops and fruits are not forming intrinsic or component parts of land. Hence these are to be treated as separate immovable by nature.

The other obvious category of immovable by nature is what is referred to as buildings under Art. 1130 C.C. But what is meant by “buildings”? Well, this appears simple to understand. This is not always true however. Of course there are simple instances such as residence houses in the urban and rural areas, offices of public institutions as such.

(II) IMMOVABLES BY DESTINATION

A thing which by virtue of Art. 1127 is regarded as movable by nature will be treated as immovable for another policy reasons. Immovable by destination are things movable by their nature but classified as immovable because of their close association with an immovable. They preserve their identity as movables and do not become component parts or intrinsic elements of an immovable. Hence, immovable by destination are not provided for under Arts. 1130-1134 C.C. They are different from immovable by nature, and immovable by the object to which rights apply.

Regarding such movables by nature which is closely associated with immovable by nature as immovable is important. Because of their close association in forming an economic unity, society regards them as accessories to the more permanent immovable things. Hence in many legal transactions and lawful activities these immovable by destination will follow the immovables by nature. In cases of transfer, attachment and seizure, partition and other legal transactions they will be following the immovableness by nature.

Arts. 1135-1139 c.c concern in part about these things called immovables by destination. They are one component or variety of accessory elements. As will be shown accessories consist of movables by nature that are permanently destined to the service of another movable or immovable by nature. These are things simply grouped or destined to give economic service for another movable by nature or immovable by nature.

If it were not for the determination or decision of the entitled person, they were separate, independent and self-sufficient objects of property interests. It is the desire to get more economic or aesthetic utility from the co-ordinated relationship and existence in unity that dictates for deviation from the normal and regular treatment of these things. And it must be clearly known that it is not every person that can change the status and independent individual (separate) existence of those movables by nature through destination. As expressly provided for under Art. 1136 only owners or usufructuaries —individuals having the best real rights in or over or upon these objects of property can determine otherwise. Even these entitled persons are not empowered by law to determine, the status and general condition of these objects as they want. Certain conditions must be fulfilled, rather.

Accordingly, it is possible to observe in some cases that cattle, containers, agricultural tools, seeds, beehives, machinery equipment, tractors, etc, all movables by nature, being treated as immovables by destination upon the preference of those entitled persons in agricultural, industrial and commercial works. This is not to employee that all these things are immovables by destination. Whether a given movable is actually destined for another immovable has to be rather checked case by case. Hence what matters is not such physical attachment but some close association /whether they are attached physically or are in a proximate physical relationship /and the actual or potential to generate more economic or aesthetic utility when they form a unity.

(iii) IMMOVABLES BY THE OBJECT TO WHICH THEY APPLY

It relates to intangible, incorporeal or non-physical things as servitude (right of way in anothers land), usufruct, mortgage and antichresis.

Assume you are an owner of a given building. This building, which commonly will be referred as property, is legally speaking an object of proprietary interest. Because you are the only person who has the most complete and exclusive right you can enjoy it or you can dispose it- you can sale or donate it to another or you can demolish it. But lets say that you have mortgaged this building to Dashen Bank S.C. to secure the

payment of the loan you obtained from the Bank. Dashen Bank has a real right in this corporeal thing. Though the Bank cant dispose as you can, it can exercise its own real right against any person including you, the owner. It has an assertable ritht in rem. This is a real right existing in anothers, i.e, yours, object of property. It is a real encumbrance or charge.

Again, by virtue of Art. 3088 C.C you can mortgage your immovable by nature to another mortgagee in addition to Dashen Bank, or you can charge it with usufruct to another party without the need to secure the consent of Dashen Bank. So, the other mortgagee or usefractuary will have his own right in rem that will be unsuitable against every person including you, the owner, as Dashen Bank and any person having any right in rem or personam. And the object of such right in rem is an incorporeal one. All such rem rights are called jura in re aliene.

In this case you, the owner, have an immovable by nature (Art. 1130) as the object of your proprietary interest, i.e, ownership. And in the strict sense of the term your property is this ownership right. But Dashen Bank has also a proprietary interest called mostgage. This real right exists in the corporeal immovable by nature. Something incorporeal, understandable to the parties, is serving as an object of that proprietary interest of the Bank.

And immovables by the object to which such real rights in referring to such in corporeal objects at the back of which exists an immovable by nature that serve as an object of the most complete real right (ownership).

To state the same thing otherwise, the owner of the immovable by nature is said to have a jura in repropria. The object of this right of ownership is a corporeal immovable by nature-building. The mortgagees (those who have got the guarantee of payment-recured creditors) and the usufructuary have their own separate and independent proprietary right in the thing (in the building) which doesnt entitle each of them to dispose of the building. By the more fiction of the law, the objects of these rights in rem, which are really less complete than ownership, are said to be an immovable by the object to which these rights apply. In reality these real rights are existing in the corporeal immovable object of another person. The mortgagees, and the usufructuary have proprietary interests in your object of property. For you, their right is encumbrance (charge) you will be under a real obligation to honour the rights of the mortgagees and the usufructuary. In your own thing some others are again having real right, property. The object of their property is different

from the object of your property. Yours is an immovable by nature, theirs is an incorporeal one which entitles each of them to assert their own interest against every person in the world. By more fiction, the object of their property is expressed as an immovable since the fiction is related with the physical immovable object.

Now, coming to the Ethiopian legal regime in general we dont find such third category of immovable, at least there is no express indication provided by the legislature. While the Civil Code under Arts. 1309 and 1359 for example recognize the possibility of having such real rights as usufruct and servitude in anothers immovable by nature, it does not expressly say anything regarding the movability or immovability of the objects of such real rights. There is no such fiction given by the law-maker in an express manner.

The effects of the classification of things into movables and immovable

Generally different rules of law of property apply to the different categories of things regarding Acquisition, transfer, extinction and proof of ownership.

2. CORPOREALS —VS- INCORPOREALS

The terms corporeal and incorporeal, though found in different places in our civil Code, are not defined. such as black's law dictionary and in the legal literature corporeals are defined as those physical, material, tangible objects of property. On the other hand, incorporeal are immaterial, non-physical, intangible things. These things do not have body, hence they dont occupy space, they are not perceptible to our senses. But they do exist in reality bearing economic interests. You take business good-will, trade-marks and trade- names, patents and copyrights.

Take also one musical album of Artist Aster Awoke. The cassette you bought in a given music shop in a corporeal object and it belongs to you. But that incorporeal thing which pertains to the rhythm and style of the music is Asters object of copyright.

Besides those jura in re propria as we observed herein before, there are other incorporeal things in corporeal, material objects. So, Gebrus share in the above desk, Tewabechs recurity in the pledge are incorporeal objects. There is proprietary interest in the share and in the pledge. These are what we referred as jura in re aliena. We can mention many others such as servitude, usufruct, use, habitation, mortgage, antichresis, lien etc. These are incorporeal things.

The division of objects of property into corporeal and incorporeal doesnt appear to be expressly recognized under the Ethiopian Civil Code. The readings of Arts. 1127, 1128 and 1129 seem to establish a different classification. As it appears, movable things are divided into corporeal and incorporeals. While Art. 1127 is about those material things that have physical existence and can move or be moved from place to place, the other two articles are concerned about incorporeal objects.

However, it is obvious that lands, buildings, trees, crops and other immovables by nature are also corporeal things. Again, if we refer to Arts. 1260 (rights on share), 1309 (usufruct in rights or in an inheritance), 1318 (rights in rem over credits and incorporeal rights) etc., we easily conclude that the classification mentioned above is an imperfect one. The correct division of objects of property rights rather involves not only movables but also immovables and other immaterial things.

The effect of the classification

Due to their nature, corporeal objects and incorporeal things are mainly regulated by different rules and principles of law. The interactions of persons that involve corporeal objects as a basis of the relationships is regulated by the rules in the Civil Code as incorporated in Book III. And some of the provisions in this part may also be applicable for interactions that involve incorporeal things. In other case one either finds separate sections of articles that are applicable for some incorporeals or a separate and special law will be made to govern juridical relations thereto. We may cite the new copyright and neighboring rights protection proclamation made in 2004 copyright and Neighboring Rights proclamation No. 410/2004.

The division of objects of property into corporeal and incorporeals, therefore, entails a number of different consequences. The nature and scope of rights of individuals, the mode of acquisition, transfer and extinction of rights relating to these things, the degree of protection and life span of rights of individuals with regard to those corporeal and incorporeal things, the mode of proof, judicial jurisdiction and things related to attachment, seizure and execution, etc, in regard to those two types of objects vary greatly.

3. INTRINSIC ELEMNTS-VS-ACCESSORIES

Arts. 1131-1139 deal with intrinsic elements and accessories. If a given object of property is a simple, single object this section will be non-applicable to it. But if different substances or component elements have

come in association to form a composite thing this diction on intrinsic and accessory elements will be relevant and appropriate.

Further still, the existence of a given component part may sometimes be a necessity for the composite thing to serve as an object of property interest as determined by customer economic considerations or any other. Without that component element the composite thing may not exist, or if it exists it may not give the expected complete services. Such component parts of a composite thing are identified as essential component parts or intrinsic elements in general. Whereas those component parts of a composite object that have come to the union or association to broaden the scope of serviceability of the composite thing, or to beautify or decorate it, or to proliterate the economic benefit are referred to as nonessential component parts or accessories of the principal object.

A, Intrinsic element article 1131-1134

Definition;- intrinsic elements are defined under Art. 1132. From the reading of this article we can observe that a double meaning is given to intrinsic elements; namely, natural meaning and customary (traditional or cultural meaning).

Art. 1132 (2) provides for a natural meaning of intrinsic elements. It reads:

“Anything which is materially united to a thing (a principal or composite thing as such) and cannot be detached there from without destroying or damaging such thing shall be deemed to be an intrinsic element there of””

The factual association, the physical attachment is so strong that an attempt to dissociate it entails adverse effects to the whole or a part of the composite object of property. In other words, the intrinsic element is an essential component of the composite object.

As can be gathered from the above —cited provision, for an intrinsic element to exist two conditions must be fulfilled. These elements of natural intrinsic elements are:

- material union of the intrinsic element with the principal object or the composite thing, and
- Impossibility of detachment of this intrinsic element from the principal (composite) object without entailing damage or injury or loss to the composite thing or any part thereof.

The building is made up of many things such as bricks, cement, iron rods (fero in Amharic), rafter, beams, tins, nails, chipboard, various woods, dye etc. All these are essential elements. They really constitute the composite object, the building. All these and other elements are materially, physically attached each other.

It is also possible to talk about trees and crops before they are separated from a plot of land. As they are firmly attached to the tract of land, they may be treated as intrinsic elements of the tract of land. Thus Art. 1133 (1) provides that "trees and crops shall be an intrinsic element of the land until they are separated there from".

However, the associations of trees and plants and crops with tracts of land involve certain peculiarities not shared by other ordinary (normal) intrinsic elements. For example, cutting a tree from a given land will not be destructing or damaging that land in the restrictive sense of Art. 1132(2), not in the ecological or environmental concern sense. Even though there exists material union (attachment) each of them can be independent objects of property rights. This is true in our case especially as of public ownership of Rural lands prodamation No. 31/1975, and Government ownership of urban lands and Extra Houses proclamation No. 47/1975 which reduced all rural and urban lands from the private domain into the public domain without envisaging the treatment of crops, plans and trees cultivated by individuals in their own possession after the redistribution. Again Art. 40 of the FDRE as well as Regional constitutions recognize this separate treatment of lands and on the one hand, and trees, plants and crops on the other hand. Ovbiously, therefore, at present trees, plants and crops should be treated as self-sufficient, independent objects of property but not as intrinsic elements of the land as provided under Art. 1133(1).

The nature of natural intrinsic elements can also be understood in movable objects of property whether in an ordinary or special movable. Simply look into your jacket, trouser, tables, cupboard, sofa, car, television, refrigratior, mobile apparatus, bed, watch, doro wat, briefcase, computer PC, etc. In all these objects you will observe the existence of many essential component parts which fulfils the requirements envisaged by Art. 1132(2).

Besides, Art. 1132(1) provides another definition for intrinsic elements. According to this sub-article "anything which by custom is regarded as forming part of a thing shall be deemed to be an intrinsic element thereof." Unlike sub (2) of this article which requires material union, in this case there is no such condition. It is the customary treatment of a

given thing as a part and parcel of another thing, principal or composite, that determines its intrinsic quality and status.

There are a lot of instances of intrinsic elements of another thing in our life experiences that does not necessarily require material attachment or union. For example in a balance (that apparatus which is in shops to weigh things such as sugar and coffee) we do find beam (ye mizan dingay), pivot, pans or scales treated as intrinsic element by custom. Pair of shoes in itself and its lace (maseria) kettle (jebena) and its lid, pen and its lid (kdan), Masinko (traditional music instrument) and its harp, pestle and mortar etc can be mentioned here. In short, if a given thing is treated as an integral part of another without there being any material union that thing is an intrinsic element. Most of the time they cannot exist separately and independently as an object of property

And any juridical act that involves the principal or composite object relates the intrinsic element thereof as well. Of course, individuals can expressly determine otherwise. In this regard, Art. 1131 provides that:

“unless otherwise provided, rights on, or dealing relating to, goods shall apply to all intrinsic elements thereof.” Thus, in principle any juridical act that pertains to “goods” equally applies to or affects the intrinsic element of that “good”.

Art. 1134 C.C provides about the legal consequences of a thing becoming an intrinsic element of another and the rights of third parties whose objects of property is now being treated as intrinsic element of another. This article proclaims:

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

As sub-(1) makes it clear, so long as a thing is treated as an intrinsic element of another it cannot be an object of separate property rights. It cannot stand as a self-sufficient object of property. If it had been a separate, independent and self-sufficient object of property before, its separate and independent existence ceases to continue as of that moment that it has become intrinsic element of another. In certain cases a person who previously had a real right over that object which has now become an intrinsic element of another may not practically be able to follow and reclaim that object. Say, if your five quintals of cement is unlawfully taken by another person who used it to construct his own or anothers building, you will not be able to reclaim it in kind. Art. 1206 (will not be really applicable in such cases as it will be beyond the

capacity of persons to separate the previous object amidst the composite thing).

Thus, sub art 2 provides all rights which third parties previously had on such thing shall be extinguished. Despite sub (2) of this article, the critical and contextual reading of Art. 1183(1) would seem to allow for a joint ownership of the composite thing in certain cases where several component parts of comparable value have come to form that composite thing.

In other cases, however, a person whose object has now become an intrinsic element of another thing would be forced to drop his claim on that object. In such cases the third party is provided with another legal remedy, i.e asserting a right in personam against another person with a view to acquire a substitute or the value of the thing with attendant damages. This is what Art. 1134 (3) provides for. And this claim pertains to non-contractual liability or un lawful enrichment. It is legally possible for such affected person to institute an action in personam against the person who unlawfully misappropriated his object of property thereby making it an intrinsic element of another. It is also possible to claim for damages against the real right holder of the composite thing (despite the latters innocence) since the claimants object has in effect enriched him or that the risk should fall against this latter person alone or jointly with the wrong doer. Actually these are insues that will be determined on the basis of law of obligations and procedural laws.

But, it should be pointed that payment of damage by the wrong doer for the unlawful act he committed against the third party (i.e the real right holder of that object before it became an intrinsic element) is provided under Art. 1134(3). This damage may be actual or future depending on the unique circumstance of the case. Hope fully, this is intended to discourage those persons who may takes the law unto their hands with a view to enrich themselves or others at the expense of the real right holders of such objects of property.

Of course the exception envisaged under Art. 1131 may apply when there are express indications by concerned parties.

B. Accessories

Accessories are things that have come to same association or connection with another principal thing with a view to broaden the service of the latter, or simply to decorate or beautify it. These are objects of property that can exist separately, independently and distinctly. As is the case in intrinsic almost all elements, accessoies are movable objects. But, unlike

intrinsic elements, accessories are susceptible of separate real rights but follow the principal thing in the absence of contrary determinations.

Arts 1135-1139 c.c are about accessories and legal issues related to them. Art-1136 provides a definition for accessory things. It reads.

“Anything which the usufructuary (According to the Amharic and French versions) or owner of a thing has permanently destined for the use of such thing shall be deemed to be an accessory thereof.”

This definition shows that accessories are things that are destined to the use of another thing. As the general gist of this article and subsequent provisions proves, accessories are movable objects. They are not naturally or customarily forming a unity within a principal thing, whether movable or immovable. Rather it is the decision of a usufructuray or an owner that creates such a coordinated or dependent relationship between it and another principal object.

As observed hereinbefore, accessories or non-essential component parts of a composite thing are movable by nature. They really fulfill the conditions provided under Art. 1127.

Nevertheless, the law gives some privileges for some real right holders of principal and accessory objects to change the condition and status of such accessory objects with a view to increase the economic or aesthetic utility of certain principal objects. Those entitled persons are only the:

- usufructuary (as the sources show it, thought the English veision incorrectly says posseson) or
- owner

Now the next question that we have to raise will be whether the usufractuary or owner of which object of property is entitled to destine. Is it the usufractuary or owner of the principal or the accessory? As we can understand from the expressions “usufructuary or owner of a thing…” and “…the use of such thing …” under Art 1136, it is the usufructuary or owner of a principal thing that destines an accessory object for the use of the principal thing.

In such cases the accessory which is destined to the service of a movable by nature will be treated as another element of that movable by nature. No change of status that relates to movability or immovability will come about in such instances; simply the accessory will be treated as a movable and as part of the principal movable object. But, in the case of a destination of an accessory to the service of an immovable by nature, the accessory will be losing its movable status and will be treated as an

element of the immovable by nature there by attaining an immovable status. This is what we call as immovable by destination.

Once an accessory is destined to the service of another principal movable or immovable by nature, it will be treated as a component part of the principal thing. This is the case even when there is no physical attachment between the accessory and the principal object as is the case when cattle, beehive, agricultural implements (tools), tractors. Etc are destined to the service of a mechanized farmland by owners of the land, or when certain tools, equipment and spare parts are deposited in a store in a factory with a view to use them as substitutes, or when the owner destines his own radio cassette or tape and/or extra type to the use of his car etc.

Since accessory things do not necessarily need to be physically attached to the principal thing, they can give more economic service or convenience or be decorations to the principal thing even when they are at some proximate distance. Even temporary separation or detachment of an accessory thing from a principal will not have the effect of terminating the pre-existing accessory principal relationship (Art.1137).

Hence reading on, the face any juridical act that relates to a principal thing also affects the principals accessory. Art. 1135 establishes the principle. It proclaims.

“In doubtful cases, rights on, or dealings relating to, things shall apply to the accessories thereof.” So, depending on the circumstance any juridical act that relates to a principal thing may relate also to its accessory. Art.3064 (1), for example, provides that the mortgage shall charge the mortgaged immovable together with its intrinsic elements and accessories.

But, the expression “in doubtful cases” compels as to make a pause and contrast it with the expression under Art. 1131, for intrinsic elements. Obviously for all practical purposes any juridical act that involves the principal thing also involves the intrinsic elements of that principal thing (Art-1131). It is only when it is provided otherwise in an explicit and unequivocal manner, that the intrinsic elements will not be affected. But in the case of accessories, it is only when we are left with doubt that we shall be treating that the juridical act also affects the accessory. In other words, in so far as the parties are clear about their transaction as relating to accessories, their clear intention will be enforced. Even when they failed to indicate their intention in an explicit and unequivocal manner, one has to search what was intended in the circumstances. If it is possible act does not include accessories of the principal thing, they

will be treated differently. On the contrary, if it proved difficult to know what was really intended, and if still the doubt persisted despite any attempt to dispel it, the doubt will be resolved in favour of including accessories with the principal as the juridical act also affects the accessories of the principal object.

In so far as the usufructuary or owner of a principal thing destined his own accessory to the service of the principal, there may not be recurring problems. Things will be complicated if:

- a usufructuary or an owner of a principal thing destines the movable object of another; or
- a usufructuary or an owner of a movable destines his own object to a principal of another.

As to the destination of ones movable to the service of anothers principal there may not be that much problem as the usufructuary or owner of that accessory willed to commit it. Even the usufructuary or owner of the principal may not insist to claim an interest over that association as the law had made it clear that such destinations shall be made by the usufructuary or owner of a principal thing and not vice versa.

With regard to (a) above, Art. 1138 seems to envisage the possibility. According to sub (1) if usufructuary or owner of a principal thing destines the movable of a third party, this doesnt affect the rights of that third party. It is proclaimed that the rights which third parties may have on a thing shall not be affected by such thing being destined to the use of a movable or immovable. This provision will be enforced to its full extent in so far as these principal and accessory things are in the hands of that usufructuary or owner that established the association. But, if these principal and accessory things are transferred to another third party in good faith, the rights of those third parties whose movable object is destined and transferred to another good faith third party will come into clash with the rights of a transferee in good faith. Here we have two third parties in good faith one whose movable object is transferred to another through destination, and another is a transferee in good faith. Art. 1138(2) provides a solution for such incidents. It says:

“such rights (the rights of those whose object is destined by another) may not be set up against a third party in good faith (the transferee) unless they are embodied in a written document dated prior to this thing (the movable, now treated as an accessory) having been so destined.”

Thus, this provision seems to adopt a compromise solution. Neither of these third parties shall always be protected against the other. At times

one will be a loser and at another time a winner. In so far as there was no good faith on the part of the transferee at the time of transfer, the transferee (third part) is not protected at all. Even when there was good faith on the part of the transferee, there are times wherein the right holder of that object would be entitled to assert his claim against the transferee in good faith. This would happen provided that there was a written document that recognizes the right (s) of the claimant and that the written document contained a date which pre-dates the transfer date. If there is no written document made prior to that transfer to the transferee, the previous right holder cant follow his object and assert his right over cant follow his object and assert his right over it. Since will be another good example to show an exception to the principle of rights of real right holders.

Unlike Art. 1134 which provides for the remedies of affected third paties, Art. 1138 does not state the remedies of those third parties in good faith on two opposite sides, in case when one of them is to be a loser. We can fill this gap by analogizing the remedies provided under Art. 1134(2) and (3). Of course, the gap can be resolved by resorting into the non-contractual and unlawful enrichment provision of the Civil Code. Only an action in personam seems to be left for the loser party.

Art. 1139 also provides the possibility of terminating such association between a principal and an accessory. Cessation of the character of accessory is recognized expressly. Sub (1) of this article provides that the owner of a thing may put an end to the character of accessory of such thing. But this should not be open only for an owner it should include the usufructuary since Art. 1136 recognizes the destination of accessories not only by an owner but also by a usufructuary. So, he who is entitled to create such a status, should also be permitted to cease it similarly. Of course, such cessations should not be allowed in a manner that adversely affects the interests of third parties (Art. 1139(2).

4. PRIVATE DOMAIN —VS- PUBLIC DOMAIN

Simply stated, if an object of property is owned by the public at large, if it is at the disposal of the public, it is referred to as a public domain. In other words an object of property which is directly placed or left at the disposal of the public or which is destined to a public service and is under the state or administrative agencies of the state is said to be a public domain (see Art. 1445 C.C).

Any other property, whether jointly owned by private individuals or by individuals and the state, or by any private individual, or the state in its private capacity, is refered to as private domain. The rule is that any

object of property which is not declared to be a public domain, is a private domain. Hence, public domains are to be found expressly declared as falling out side of the private domain. For example Arts. 1446, 1447 and 1448 list those objects that fall under the public domain. As per proclamations No. 31/1975, and 47/1975 as well as the 1994 FDRE constitution, land, whether in the urban or rural areas, also falls under the public domain.

The effects of this classification

Unlike objects within the private domain, things that are within the public domain are not objects open for acquisition of individual or joint ownership. Hence no person can acquire right ownership over any of the objects of public domain through occupation, possession in good faith, usucaption or accession (Artd-1454-1457). Again they are inalienable unless the proper organ determines otherwise validly (Art.1454).

5. REAL -VS- PERSONAL PROPERTY

Real rights/ rights in-rem/ refer to either a power to recover a specific thing, or more often a right that may be exercised against any person, while personal rights or /rights in-personam/ are rights that may be exercised against a particular person. The Romans asked what the nature of the right asserted is. Hence, if it is a claim of title to a specific thing/ res/, the action is in-rem, for example, a claim of ownership of land or a sheep. However, if the claim is framed as an obligation, for instance, a claim for performance of a contract of sale of land or a ship, such right is personal. There was no difference between movables and immovable.

In the English law, on the other hand, a real action is one in which a thing /a res/ may be specifically recovered. However, land was the only res that could be recovered, because in case of movable things, the defendant might choose between returning the chattel or paying damages. Hence, land came to be described as real property and movable things as personal property.

This classification has the following important effects;

- The rules of intestate succession are different for the two types of property. Compare the paternapatternis materna-maternis rule under Art 849-851 of the Civil Code.
- Only personal property can be owned absolutely, where as real property could be split up in to successive interests-tenancy, lease usufruct…etc.
- Personal property was primarily liable for the payment of debts.

- Special rules of transfer apply to immovable things. Compare Arts1723/1/, 1185, 2877 and 2878 of the Civil Code, contracts relating to immovable things have to be made in writing and registered

EXERCISE: Is this classification recognized under Ethiopian law? Why? Why not?

1.6 MISCELLANEOUS CLASSIFICATIONS

A. CHOSE IN ACTION AND CHOSE IN POSSESSION

English law divides all personal property into chose /things/ in possession and chose /things/ in action. A chose in action includes all personal right of property, which can only be enforced by action and not by taking physical possession. If A owes B ten pounds, B has a chose in action. An owner of a car has a chose in possession, because, even where another person is unlawfully using it, the owner has a right of retaking it. See Art 1148 of the Civil Code. However, a creditor is confined to sue the debtor in court to recover his money. Patent rights, copyrights, probably right of action for breach of contract and right of action for damages are also chose in action.

B. FUNGIBLE AND NON-FUNGIBLE THINGS

Fungible things consist of movable things that, in ordinary dealings, are usually determined by number, measurement or weight and hence any unit is, from its nature or by mercantile usage, treated as the equivalent of any other unit. A contract for the delivery of fungible things is performed by delivering anything of the same nature. For example, a contract of sale of a kilo of butter is performed by delivering one kilo of butter of the quantity and quality that he desires and not by delivering a specific piece of butter. However, the person may require a specific piece of butter and in such cases; the debtor may perform the contract by delivering that specific butter, not another thing of same nature. See Art1745 and 1748 of the Civil Code. The creditor may not refuse delivery of fungible things on the ground that the quality or quantity offered to him does not exactly conform to the one agreed up on.

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

Things may also be classified in to things that are used or enjoyed by consuming or alienating. For instance, food staffs are used or enjoyed by consumption. These types of things cease to exist after the use. Similarly, money is used by alienation or transferring it to other persons in exchange for goods and services. The other class of things includes permanent things such as a car, house, land or other movable or immovable things intended to be used or enjoyed by continual use. Compare Arts 1327, 2471 and 2478 of the Civil Code.

CHAPTER TWO

POSSESSION

2.1 TEHORIES AND DEFINITION OF POSSESSION

2.1.1 THEORIES OF POSSESSION

A, SAVIGNY'S /CLASSICAL/ THEORY OF POSSESSION

Savigny, a German jurist who based his theory on the text of Paulis, argued that possession consisted of two ingredients (elements);

- 1, **corpus possessions**, element of physical control and
- 2, **Animus** or element of intent with which such control is exercised. Savigny thought that since the detentor and possessor have the same physical control the difference between these terms must be found in the mental element, the intent which distinguishes the possessor is the animus domino the desire to hold for one self and not on behalf of another.

This theory explains why the tenant, the borrower, and the agent are not possessors in Roman law, i.e., they did not intend to hold in their own right.

However, this theory was faced with the difficulty that in certain cases Roman law gave a non-owner possessory right which savigny rejected as anomalies (exceptions) and termed them as derivative possession, i.e., possession derived from the owner. If so a detentors such as a borrower, depositee, a tenant etc…must also have derivative possession.

B, JEHRING'S THEORY OF POSSESSION

According to this theory a possessor is a man, who in relation to a thing, is in a position in which an owner of such thing ordinarily is, animus being merely an intelligent consciousness of the fact. In other words, a possessor is a man who, in relation to a thing resembles an owner, i.e., who has direct physical control of such thing. He held that whenever a

person looked like an owner in relation to a thing, he had possession of it unless, based on special practical considerations, the law denied him possession. This theory explains those cases, which were difficult to Savigny such as the pledgee and the usufructuary that were given possession right. However, it fails to explain the cases where the law denies possessory right to those who are in execlusive physical control of a thing such as a borrower, a tenant and a depositee. The anomaly in this theory is that not every detentor is a possessor and it fails to explain these exceptions.

The special reasons of policy that lay behind the interdicts required that the person in control should be protected. To that extent possession had factual basis, but outside that sphere the factual basis ceases to help. For example, in cases where the usucaptor of an immovable property who has given it on antichresis/ see Art 3117 cum 1168/ or the usucaptor of a movable thing who has pledged it to his creditor /see Art 1192 cum 1151, the creditor looks like an owner since he actually holds the thing and has possession for the purpose of the interdicts; but the usucaptor too had possession though he no longer resembled an owner as he does not have the physical control of the thing.

C, SALMOND'S THEORY

A Modified version of Savigny's theory the term is not confined to physical control. He started by distinguishing between possession in fact and possession in law. He claims that there is only one conception and that is possession in fact which is possession in truth and in fact, and possession in law is a legal fiction. He then distinguished between possession of physical objects, which he called corporeal possession and possession of rights, which he called incorporeal possession.

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

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

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

This later condition of expectation of non-interference is one of the grounds on which Salmond‟s theory is criticized. Critiques argue that expectation of non-in6terference is not necessary for the continuation of possession. For example, a man continues to possess his pocket book although pickpocket, who would interfere with his use of it in a few moments, is pursuing(chasing) him. Nor is it necessary for its commencement, where for example a child or a ruffian(violent man who commit crime) may both make for a purse(borsa) lying in the street, but if the child is the first to pick it up, he gets possession even though the ruffian is certain to interfere the very next moment.

The other point of criticism is the assumption that corpus and animus, which are only conditions for the acquisition of possession, are possession themselves.

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

2.1.2 DEFINITION OF POSSESSION

Previously possession merely signified the physical control over a thing by a person, later on this became contingent up on internal attachment. Accordingly, one who had physical control of an object and an animus (mental disposition to use and enjoy the object in exclusion of others) obtained that status of possessor. But, any other person who physically held the thing without the desired psychological element was relegated to a status of detentor (mere holder). So, the distinction between possession and detention became apparent.

In this new context then possession was and still is, defined in various ways. Some of those include the following:-

- “Possession is the actual holding of a thing accompanied by the intention to hold it for oneself and for not another.” (Grotius)

- “Possession is a relation between a person and a thing which indicates that the person has an intention to possess that thing and has the capacity of disposing it of.” (Zachaiae)

- “The possession of a material object is the continuing exercise of a claim to the exclusive use of it.” (salmond)

- “Possession is the actual detention of something, with the intention of keeping it for oneself.” (author omitted).

On the other hand, detention or custody retained the earlier meaning of possession i.e, physical control of a thing by a person. Its other descriptions included such expressions as “physical possession”, “de facto or actual possession”, “custody”, and “corpus possessionis” or simply “natural possession”. All these simply refer to the physical (external) contact a person has with an object. after a passage of some time, a person was regarded as possessor of a given object even when he had no actual holding. For example when he falls asleep, when he is away from his land or house, etc.

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

The exercise of a right in relation to an object consists of either physical acts of use, enjoyment, or transformation, or legal acts of administration and disposal. Possession is, in the broadest sense, the state or relation of fact that gives a person the physical, actual and exclusive capacity with regard to a thing to carry out acts of use enjoyment or transformation. However, the exercise of the legal acts of administration or disposal does not necessarily require the fact of possession because an agent who is acting in the name of the actual possessor may perform such acts. The owner of a thing can sell or lease it even if it is occupied by or is in the possession of a third party.

If a person has a thing in his power, without intending to exercise to it a real right, the situation is more specifically called simple occupancy or holding, or detention. Simple occupancy does not have, in French Law, the legal effects of possession except for the power to bring a special possessory action for the return of the occupancy. If the occupant is allowed to defend his holding by force against acts of aggression aimed at the thing, it is simply an exercise of self-defense. Compare the provisions of Arts 1148 and 1149 of the Civil Code, which seems to treat both the holder and the possessor in a similar manner.

Furthermore, if the mere holder has, in certain cases, the right to require restitution until he is reimbursed with whatever may be due to him in connection with the thing occupied, such right is not derived from the occupancy, but from a creditor‟s right which has resulted in the occupancy.

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

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

- The Corpus or element of physical control and
- the Animus or element of intent with which such control is exercised.

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

This analysis explains why the tenant, the borrower, and the agent are not possessors in Roman law, because they do not have the intention to hold in their own right.

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

- A man could **have physical control without possession** and its advantages.
- He could have **possession** and its advantages **without physical control**.
- He **could have both,** i.e., he may have physical control as well as the advantages attached to possession.

2.2 ACQUISITION OF POSSESSION

The acquisition of possession is realized if the **two constitutive elements concur**, i.e., where the **present and exclusive power to act physically** with regard to the thing **(corpus)** and the manifestations of an **intention to keep** the thing as **owner (Animus)** exist.

The action by which a person obtains the present and exclusive power to act physically with regard to thing is called **seizin (apprehension**). This power can result from various material circumstances or situations and suffices to acquire possession, without regard to the physical nature of the acts or means through which it was obtained. Thus, it is possible to take possession of a land without physically entering it or of a corporeal movable thing without touching it. However, acts which constitute criminal violation of property rights or which would have been enjoined judicially as affecting possession of a third party are not effective for acquiring possession.

The taking of possession can be executed not only by the intended acquirer, but also through the offices of a third party acting as an agent or representative. The intention to control a thing for ones own interest/ animus/ must be manifested by an external act which is usually represented by the taking of possession itself or entering in to an agreement or other legal transactions.

As distinguished from exercising physical control, which can be exercised through third party, the intent to possess must internally exist in the person of the possessor himself and manifested by him. However, it may be manifested through a mandate given in advance to a third party to take possession. In such cases, the principal acquires possession from the time when the agent entered into a contract or other juridical act for his account

2.3 DEFECTS OF POSSESSION

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

2.3.1 PRECARIOUS (not safe, uncertain, dangerous) POSSESSION

Possession of a person is affected by the defect of precariousness if the person does not have a right of ownership in relation to the object he holds. According to French terminology, precarious possessions refer to the possession of those who hold a thing for another on basis of an agreement or in such quality that, at the expiration of the agreement, or where they lose their quality, they must return the thing. Hence, the possession of a usufructuary, a limited user /usage/, a tenant farmer, leaseholder or a pledgee (a person to whom the pledge is given or creditor, (case of movable property. Pledger - debtor), a creditor secured by antichresis, a tutor with regard to a minor's property is affected by the defect of precariousness.

Simple occupants lack the animus element (intent to hold for themselves). This presumption is tied to the origin of their possession and continues throughout its duration. Simple change of intention, that is the intention to hold henceforth for their own account, is not capable to change their occupancy in to a genuine possession.

However, those simple occupants who hold a real interest in the thing, such as a usufructuary, a holder of a use right, and a pledgee are considered as possessors in relation to all persons other than the person to whom they have the obligation to return the thing.

The defect of precariousness can be healed only by change in the nature of the possession resulting from a legal ground originating in a third person or from the owner, or from a formal contest by the simple possessor against the person for whose account he has been holding.

Is precarious possession a defective possession under Ethiopian law? Read Art 1146 of the Civil Code.

2.3.2 CLANDESTINE POSSESSION 1146(1 and 2)

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

Possession, which is entered in to openly, does not become clandestine by the sole fact that it was not continued openly if the nature of the thing in possession does not imply acts of open enjoyment. In such a case, the possession could be considered clandestine only if the occupant took extraordinary precautions to hide the continuation of his enjoyment. Clandestineness is purely a relative defect that can be subject to claim only by those who could not have known about the possession.

2.3.3 VIOLENCE

a possession acquired or continued by acts involving physical or psychological violence is vitiated by a defect of violence.

In French law, violence employed to acquire possession does not make it defective perpetually and the defect is healed if the possession continues peacefully. It is not necessary that the object of possession be first returned to the control of the person who was deprived of it, or that the possession is converted through the change of cause. However, the benefits attaching to a possession are acquired only if the peaceful enjoyment continues for at least one year.

If the defect of violence is healed by peaceful enjoyment of one year, the effects will be retroactive to the time when possession was acquired. Furthermore, a possession which is originally non-violent, or in which the defect of violence is healed by one-year's peaceful enjoyment, does not become defective by the sole fact that the possessor uses force to maintain himself in possession. Violence represents a purely relative defect that can be asserted only by the person against whom it was exercised.

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

2.3.4 AMBIGUITY/ DUBIOUSNESS

Possession is said to be ambiguous where it is not clear whether the person is holding a thing in his own name or in the name of another person. According to Art 1146/3/, a possession is said to ambiguous or dubious where, in the circumstances, it is doubtful whether the thing belongs to the person who claims to be the possessor or whether he holds the thing on behalf of another person. This type of defect clearly related to the mental or animus element of possession. An ambiguous possession shall not have the effects of possession. For instance, it cannot be the base for acquisitive prescription (1192). See Arts 1146/1/, 1168 and 1150 of the Civil Code.

2.4 EFFECTS OF POSSESSION

1. **Possession** may create **ownership** either by **occupation** (1151), i.e., by taking control of res-nullius/ a thing without an owner/ or through the expiration of a period of acquisitive prescription. See Art 1151 and 1168 (usucaption) of immovable) of the Civil Code.

2. **Possession** is a **prima facie evidence** of **ownership**, and he who would disturb a possessor must show either title/ownership or a better possessory right and defense of lack of legal title by the possessor may not be set up him. For example, a jeweler cannot claim the return of a ring from a person who found it on the ground that the finder is not an owner, nor can a person who is not an owner claim the return of a thing from a thief. Hence, even a wrongful possession is good against all persons except the true owner or one claiming through him or one claiming a prior possessory right. See Art **1193** (proof of movable ppty) of the Civil Code.

3. **Possession** is the **basis for certain remedies (**basis for certain protection by the law**)** because the law protects a possessor, as it does not always know that a possession in question is unlawful. In times when proof of title was difficult and transfer of property required intricate formalities, it would have been unjust to cast on every man whose possession was disturbed the burden of proving a flawless title. The doctrine that in most eases possessors are the rightful owners may not be historically accurate, but it is convenient for the law to reward possession as well- founded, at least until a superior title is shown to exist. Hence, the law protects, even a wrongful possessor, from dispossession by the owner without due process of law and the owner has to institute legal action by proving his ownership right to recover the thing. See Art **1206** of the Civil Code.

2.5 PROTECTION OF POSSESSION,

The law protects possession for the following reasons,

- 1. It aids the criminal law by preserving the peace and order as the latter is best secured by protecting a possessor and leaving the true owner if there is one to seek his remedy in a court of law.
- 2. It is protected as part of the law of the tort since it is an extension of the protection, which the law throws around persons.
- 3. It is protected as part of law of property because it is difficult to know that the possession in question is unlawful. At times when proof of title is difficult and transfer of property require intricate (yeterakek or complicate) formalities, it would have been unjust to cast on every man whose possession was disturbed the burden of proving a flawless title.

Hence, the law protects possession by presuming the possessor to be the owner until someone else proves a better right to the thing than the possessor. Therefore, to ask why the law protects possession amount to asking why the law protects ownership.

Two main Types of Protections provided by the Law

1. POSSESSORY ACTIONS

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

The **purpose of these actions** is either to **keep** the plaintiff in **possession**, if he has been **interfered** with; or to **restitute** him to his possession if he has been (dispossessed; these two regonized under art 1149(1)) or to **obtain the suspension** of construction or other works the **completion** of which could **adversely affect possession** of the plaintiff. But this is not provided under art 1149 but see art 1210 and 1225(2) of the code that impose an obligation on the holder of a land to refrain from acts that can damage or endanger buildings on a neighboring land such as excavations, digging wells, other underground works and planting trees close to boundary line, imply that a possessor whose possession is affected by such acts may apply to a court for the enforcement of these obligations by the owner/holder. Furthermore, the court may interpret such actions as indirect interference in the peaceful enjoyment of possession by the plaintiff and may order the cessation of such works and payment of compensation for damages.

NB The action for recovery of possession (reintegrande) **does not aim** at the **recognition of possession** in favor of the plaintiff. It is an action by which the possessor, or even a simple holder, who has been dispossessed can claim that a state of things, which was changed or eliminated to his detriment by violence or otherwise, be restored.

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.

EXERCISE: Can a possessor of a special movable object bring possessory action?

Corporeal immovable things can be the object of possessory action bearing on possession of the land itself, only if they are in-commerce /private domain/ and are susceptible of being acquired by adverse possession/ acquisitive prescription. Hence, it shall not apply to things that are considered as part of the public domain. See Art 1444-1447 of the Civil Code.

Furthermore, where one private person brings against another private person a possessory action and where only private interests are contested between them, the defendant cannot plead the character of public domain possessed, according to him, by the immovable in issue. The possessor of land expropriated for public purposes such as construction of local roads can bring a possessory action against the municipality, which would contest his right to be compensated. This action does not aim at retention or recovery of possession, but at the recognition for the purpose of establishing his title to the compensation.

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

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

Usufruct, use and habitation rights can be the object of possessory actions in as much as they are related to corporeal immovable things in-commerce/ belong to the private domain./. Since the facts that constitute the contents of these rights are by their nature contrary to any presumption of purely precarious enjoyment, they can give rise to a possessory action, with out the plaintiff being required to show the title on which his right rests.

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

subject of possessory action with out the plaintiff having to show the title on which his possession is based. However, the exercise of discontinued servitudes cannot, in principle, serve as basis for possessory action without distinction as to whether the exercise is apparent or non-apparent.

Another issue that needs to be raised in this regard is why our law grants a mere holder the protection of possessory actions. Under French law, a mere holder who has been dispossessed may bring a possessory action for the restoration of his holding. This is because of the need to preserve peace and order, since denying him such remedy would encourage unlawful actions of usurpers that threatens public order. However, a mere holder is not allowed to bring the other types of possessory actions that aimed at recognition of possession, since in these cases the acts are not considered as a threat to public peace and order.

Finally, according to Art 1149/2/, a possessory action of any type shall be barred if not brought within a period of one year/ the Amharic version provides two years/ from the day of the usurpation or interference. This means that the possessor loses his right to require the restoration of the thing or cessation of interference where he fails to institute legal action with in the period of two years. However, he may still recover the thing by instituting action for restitution/ nugatory action/ under Art 1206 of the Civil Code provided that he can prove his right of ownership and as long as he has not lost his ownership through extinctive prescription. See Art 1168 and 1189 of the code.

EXERCISE: 1. Can the defendant raise his right of ownership as defense? What about a defense based on the fact that he has a better possession to the thing than the plaintiff? 2. What other defenses can a defendant in possessory actions raise? Base art 1149/3

In a case between **Ato Gebru Gurmu and Woreda 5 Keblele 07** Administration, in Civil File No 321189 at the Federal First Instance Court, the plaintiff requested the court to order the defendant to cease / stop interfering in his possession of the houses he built in 1978 and have been using ever since. He argued that the houses he has rented from the defendant were destroyed by fire in 1978 and he built new houses at his own cost with the consent of defendant who has recognized his ownership through various letters it has written to this effect. The plaintiff further argued that the defendant has ordered him to sigh a new contract of lease with respect to these houses or risk eviction and requested the court to order the cessation of such interference.

The defendant on his part raised a preliminary objection challenging the jurisdiction of the court, and argued and that cases involving land holding, construction and those relating to commercial, health, education, environment and municipal services under the supervision or jurisdiction of the city administration shall be adjudicated by municipal courts and not by the regular courts, according to art 24 of Pro No 87/89. It also argued that the plaintiff subleased the house which has leased from it to another person and this has caused the loss of his right on the houses as per the circular issued by the Addis Ababa City Administration on the issue of sublease and hence the plaintiff does not have a standing to sue. Alternatively, the defendant argued that the houses which the plaintiffs claims to own are owned by the defendant who leased them to the plaintiff in a contract concluded in 1976 E.C and the fact that he has rebuilt the houses after their destruction does not give him right of ownership to them, and hence its action does not constitute the interference in his possession.

The court held that it has jurisdiction to adjudicate the case as the dispute does not relate to issue of land holding nor construction, rather it is related to interference in possession of the plaint over the houses it has built.

It also held that the contract of lease between the litigants were extinguished when the houses were destroyed by fire in 1978 and hence the defendant‟s right of ownership to the houses is also extinguished which makes the circular on sublease inapplicable to the case at hand.

It also held that the plaintiff is the owner and possessor of the house and the act of defendant requiring him to sign a new contract of lease or risk eviction constitutes interference in the peaceful enjoyment of possession of the plaintiff. Finally, it ordered the defendant to stop interference in the defendant‟s possession. Compare Art 1149 of the Civil Code.

Can interference in possession be caused through noise? In a case between Bahirnesh Afework et.al and Ato Abayneh Dada and Kale-Hiwot Church the plaintiffs instituted an action under Civil File No 115113 at the Federal First Instance Court alleging that the 2nd defendant operates a church in a house it rented from the 1st defendant where prayers, quires and other acts of worship are conducted using microphones which causes excessive noise in the neighborhood that is exclusively residential area which, interferes with their possession. Hence, they requested the court to order the cessation of interference according to Art 1149 of the civil code.

The 1st defendant on his part argued that he has the right to use his house in a manner he whishes including renting it, however he denied causing excessive noise that disturbs the plaintiffs. The 2nd defendant also argued that there was no noise that disturbs and interferes with the possession of the plaintiffs as a result of worshiping at the house it has rented from the 1st defendant.

After hearing witnesses presented by the litigants, the court held that the prayers, quires and other acts of worship disturbs the residential neighborhood and interferes with their possession. It added that though the defendants have the right to use their property, and worship, such rights should not be exercised in a manner that does not disturb and interfere with the peaceful enjoyment of the possession of the plaintiffs. Compare Art 1213-1226 of the civil code.

2. USE OF FORCE (self-help type of protection)

According to Art 1148 of the Civil Code, 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.** The law, under Art 1148, entitles even a mere holder to this mode of protection of possession. As mentioned above, this is because this mode of protection is more than a mere protection of property interests of a person; it rather intended to enable the person to take measures to protect his/her personal security.

2.6 TRANSFER OF POSSESSION

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

Is registration required for the transfer of possession under the Civil Code? Compare Arts 1143-45 and 2878(The sale of an immovable shall

not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situate). the Civil Code.

2.7 LOSS OF POSSESSION

Since both animus and corpus are necessary for possession, possession is lost when one of the two elements ceases to exist. The isolated continuation of one element does not suffice to maintain it. NB Temporary hindrance to control the thing doesn't result in loss of possession. The same is true to animus domino.

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

Under French law possession of movable things is lost as soon as they have ceased to be under the power or control of the possessor. Possession of wild animals is lost as soon as they have acquired their freedom. Possession of tamed animas such as bees and pigeons is lost when they cease to return habitually to their hives or dovecotes, or when they lose their animus revertendi, i.e., „their intention/habit to return".

Possession of immovable things can be preserved solo-animo, i.e., it is not lost just because the possessor has voluntarily abstained, for a time, from material or physical acts of possession or has been incapable to exercise them because he was too far away, or because of the nature of the immovable, or because of some temporary obstacle. However, abnormally long intervals between acts of possession, taking in to account the nature of the thing, may be considered as a tacit renunciation. Compare Art 1142 of the Civil Code.

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

UNIT THREE-OWNERSHIP

3.1 DEFINITION AND ELEMNTS OF OWNERSHIP

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

- The right of **use and enjoyment** of the object itself and fruits. It include right to destroy the thing or is fruits. see Arts 1205/1/ and 1270-1271
- The **right of possession** that includes the right to exclude others. Arts 1204, 1148 and 1149
- The **right to transfer** the thing and its fruits for consideration or gratuitously which could be intervivos / while the owner is alive / or mortis causa/ up on his death/ and the **right to charge** them as security **(mortgage or pledge**). See Arts 1205/2/ and 3049/2/ of the Civil Code.
- The right to **leave or abandon** the thing or its fruits at will. See Art 1189

Ownership is said to be '**exclusive'** because these rights are in principle available only to the owner, and is "**perpetual"** since these rights are neither extinguished by non-usage nor limited by duration. See Art **1204** of the Civil Code. **However,** an owner may not possess or exercise all the rights set out above and his rights may be restricted by law or by an agreement he has made with another person. For instance, the **law of nuisance** limits, in the interest of his neighbors, the owner‟s right to use his property as he wishes or he may transfer some of his rights to another through a contract of usufruct or hire or lease. See Arts 1215-1227 and 1309-1352 of the Civil Code.

The term ownership is a convenient method of denoting, as a unit, the various rights and privileges that constitute the content of ownership rather than ownership itself. Hence, a person may transfer some or all of these rights while still retaining ownership over the object. For example, an owner who has leased his house shall retain ownership of the house even though he has temporarily lost his right to possess and use the house until the term of the lease expires, which shows that ownership is distinct from its contents.

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

- 1. **Ultimate Ownership**- in which other persons hold the rights of present enjoyment temporarily through contracts such as usufruct or lease and the residual magnetic core is left to the owner
- 2. **Complete or Beneficial Ownership**- in which the owner enjoys all the rights and privileges emanating from it.

3.2 RESTRICTIONS ON THE RIGHT of OWNERSHIP see 1204(2)

These restrictions may be based on public interest, for instance the law orders that animals affected by or suspected of having contagious diseases be reported and isolated, that they not be sold or offered for sale. Compare Arts 2369 and 2373 of the Civil Code. Sale of miracle remedies may be prohibited, sale of medicines is reserved for pharmacists, and the sale of alcohol, narcotics, guns, tobacco, and matches is regulated. Under French law historical monuments/ antiquities/ may not be sold, if they are owned by the state. And if individuals own them the state has a right of preemption upon their sale by public auctions.

Similarly, under Ethiopian law/ Research and Conservation of Cultural Heritages Proclamation No 209/2000/, For instance, cultural heritages discovered after the 27th of June 2000 may not be privately owned / Art 14/2/ and Art 35/3/ of the proclamation. Individuals who own or possess cultural heritages on the coming in to force this law are required to report their possession to the Cultural Heritages Conservation and Research Authority and get them registered. See Art 17 of the proclamation.

The owner of a movable may be deprived of his property through requisition under conditions specified by law; similarly immovable things may be expropriated, against payment of compensation, where they are needed for public purposes. See Arts 1319/2/ 1460 and 1464 of the Civil Code. The law may also require that an owner be prohibited completely from exercising certain powers naturally inherent in right of ownership, or allow him to exercise them only under specific conditions. Such restrictions or burdens that result from the law constitute statutory/legal servitudes, if they are established with relation to one estate for the immediate benefit of another estate with a character of a dominant estate. Outside this situation, these servitudes are considered as limitations on the exercise right of ownership.

The restriction on the right of ownership may also be based on **considerations of mutual** interest of **neighboring estates**. In other words, contiguity of land belonging to different persons creates conflicts if, either or both of them, wish to enjoy their holdings without any consideration of possible damages or annoyances caused to the other. Restrictions on the powers which ownership right usually involves can prevent these conflicts.

- A. It is prohibited to undertake on ones estate works or operations that may materially endanger a neighboring estate for instance,

excavations or ditches which may result in damages to buildings or agriculture. See Arts 1210 and 1225 of the Civil Code.

- B. The law prohibits owners from causing nuisances to a neighbor by noise, smoke, gases odor if it exceeds limits considered tolerable. See Art 1225 "Good neighborly behavior". The neighbor who is the victim of such nuisance may require repair of the damage caused or get an injunction/ a court order requiring suspension of such act/ and payment of compensation. See Art 1226.
- C. The law prohibits an from directing water to another's holding waters other than proceeding from rain or a spring and flowing naturally from higher to lower grounds. For example, water from a well, or a shaft, waste or polluted water from industry, water used for irrigation may not be directed to the neighbors land. See Art 1246 (1) of the Civil Code.
- D. The owner of a building must construct the roof so that rainwater falls in to the public road or on his own land. See Art 1245.
- E. Under French law the owner of a wall or a building, which is not far enough from the neighboring estate is required to permit opening of direct or indirect view or access of light through windows with wired glass panes "picture windows" and iron grillwork with opening not larger than 10 cm.
- F. The owner/holder of land is required by law to allow access to his land/ holding in some circumstances. Hence, he/she may not prohibit access to his/her land where it is necessary: - - To prevent or avoid eminent damage or danger to life or property (Art. 1217) - To repair of walls or buildings (Art 1218) -To recover lost things or animals (Art 1219) - To install of pipes (Arts 1220, 1252, 1253) - To allow right of way to a neighbor (Arts 1221-1224, 1249(2))

3.3 PROPERTY RIGHTS WITH REGARD TO LAND AND WATER

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 cannot 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.

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 manmade reservoir, basin or cistern from which it does not flow naturally. See Art 1229 of the Civil Code.

3.3.1 SCOPE OF RIGHT OF OWNERSHIP/USE OF LAND

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

He can also contest the stretching of cables or wires over his land/holding/, for the purpose of transporting objects or energy. There is a presumption that the owner/holder of the land owns what is constructed on it. However, this presumption is refutable if the owner of a building is different from the owner/holder of the land on which it stands. See Art 1214 and 1200 of the Civil Code. However, the natural proposition that ownership of the land implies the title to whatever is above it cannot be reversed to conclude that the ownership of works on it implies ownership/holding of the land. Nor does the ownership of the subsoil, for example, a cave or a subterranean quarry, carry a legal presumption that the owner owns/holds also the surface. See Art 1209, 1210 and 1214 of the Civil Code.

The ownership/holding of the land extends to a depth below, including all the objects located there. Art 1255(2) limits this right to a depth of 100 meters. The owner has the right to cut the roots of trees of a neighbor that grow into his holding. Under French law Quarries and surface mines (open air exploitation of iron ore deposits that has ceased to be feasible with out shafts) are at the disposal of the surface owner, but the owner of the surface may exploit mines only on the basis of concession or exploitation permits.

3.4 ACQUISITION OF OWNERSHIP

A person may acquire property rights in a variety of ways. For instance, a person may become an owner of a property by occupancy of things that do not have an owner/ res nullius/ or by transfer from an owner or even a non-owner by operation of the law. For systematic purposes, a distinction is made in civil law jurisdictions between original and derivative acquisition. This distinction is important in light of the general principle of property law that no one can transfer a better title than he/she has. This means that, ordinarily, the transferor, in order to transfer a perfect right of ownership to the transferee, he must have a perfect right of

owner ship himself. However, in cases of original acquisition it is possible for a non-owner to transfer a perfect right of ownership. Acquisition of ownership through possession in good faith under Arts 1161-1169 of the CC (case of theft) is a particular example of this situation.

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

Derivative acquisition may result from contracts such as sale and donation/ Arts 2266-2426 and 24272470 of the Civil Code respectively or from the will of a deceased person/ testate succession/ or the operation of the law, in cases of in testate succession/ Arts 826-1125 of the Civil Code/. However, these rules are the subject of separate subjects, the Law of Sales and Law of Succession and are not discussed here. See also the discussion of transfer of ownership right under 3 .3 below.

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

A. OCCUPATION

Occupation is a mode of acquiring ownership by the sole fact of taking possession of a thing that does not have an owner with the intention of becoming an owner. This mode of acquisition is largely limited to chattels such as wild animals, birds, fish /res nullius/ and abandoned chattels /res derelicte/ and treasures. In the past, land could also be acquired by occupation or cultivation. Now a days, however, it is subject to license or grant by the state, which is supposed to hold title to all unclaimed land even in countries where land may be owned privately. By the same token, Art 1194 of the Civil Code also makes immovable things without an owner the property of the state and hence renders this mode of acquisition inapplicable to immovable things in Ethiopia even before the nationalization of all land in 1975 and the coming in to force of the FDRE

Constitution which, under Art 40/3/, makes land and all natural resources the property of the state and the peoples of Ethiopia.

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

- **1. Wild Animals-** However, this cannot apply to semi domesticated animals that customarily return to the same habitat, for example, pigeons, bee swarms. See Art 1152 and1153 of the Civil Code. **Under French law**, the person who has the right to hunt wild animals or fish is usually the owner, usufractuary or the lessee of the land on which hunting or fishing takes place. Similarly, a person may become an owner by hunting or fishing on land belonging to the state. 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.Art 850 of the FDRE Criminal Code also penalizes a person who violates laws, regulations or directives for the protection of the national arbores cent species, flora and fauna with fine or arrest. See also Art 681 of the criminal code.
- **2. Treasures**; A treasure is anything hidden or buried to which nobody can show an ownership title and which is discovered by chance. According to Art 1159/3/ of the Civil Code, for a thing to be considered as a treasure it must be found buried or hidden, in an immovable or movable thing, for a period of at least 50 years on the date it is discovered and nobody can prove it belongs to him/her. The rule is that the owner of the immovable or movable thing in which a treasure is discovered shall acquire ownership to it by occupation or his discovery. However, where the treasure is discovered by a person who is not the owner of the thing in which it is found, the finder shall be entitled to half of the value of the treasure he discovered. However, a person shall not acquire ownership ofarcheological discoveries and antiques because of the historical importance attached to these categories of treasures. 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.

The issue that should be raised here is as to 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? Note that Art 40/3/ of the FDRE Constitution

declares that land and other natural resources shall owned by the state and the peoples of Ethiopia.

Furthermore, according to Art 14/1/ and Arts 29-41 of the Research and Conservation of 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. See Art 41 of the proclamation. Failure to comply with this punishable up on compliant, under Art 680/2/ of the FDRE Criminal Code, with fine not exceeding 5,000.00 Birr or according to the gravity of the case with simple imprisonment not exceeding one year.

- **3. Lost things**; lost things and misplaced things have an owner but the owner does not know where to find them. However, the law attributes ownership to the finder after a lapse of certain period of time, or completion of certain requirements such as announcement of the find or report to the authorities. Under Ethiopian law the finder of a lost thing has the duty to comply with rules requiring him to report the find. See Art 1154/1/ of the code. Eg **post, publication, announcement**… A finder who has complied with this requirement shall have the right to keep the find in his possession and shall take all the necessary measures to preserve thing. See Art 1155 of the code. However, where the thing is vulnerable to rapid deterioration or where its custody or preservation is onerous, the finder may sale the thing at a public auction in which case the proceeds of the sale shall replace the thing sold. See Art 1156 of the code. **Art 680/1/** of the FDRE Criminal Code provides that a person who appropriates a lost object which he has found without notifying the authorities or taking the measures necessary to trace the owner shall be punishable, up on compliant, with fine not exceeding 5,000.00 Birr, or according to the gravity of the case, with simple imprisonment not exceeding one year.

However, the owner retains the right to ask for its return as long as he has not lost his right of ownership, i.e., with in a period **of ten years** from the date of loss of the object. See Arts 1157/1/ and 1192 the Civil Code. In such cases the owner shall have the obligation to reimburse the finder with the expenses the latter has incurred for the custody and

preservation of the thing. See Art 1157/2/ of the code. The finder may also apply to a court, with in a period of one year from the date of restitution of the thing to the owner, for payment of reward by the owner. Where the owner is in better financial position than the finder and where the owner has no or little chance of finding the thing himself, the court may order the owner a reward not exceeding 25% of the value of the thing found. See Art 1158 of the code. Where the owner fails to claim the return a thing found with in a period of ten years the finder shall become a thing without a master and the finder shall acquire its ownership through occupation. See Art 1192 cum 1151 of the Civil Code.

However, the prevailing practice in this regard/ in and around requires the finder to report his find to the police in the locality where he found the thing. Where the owner appears before the police and establishes that he/she is the owner of the thing, the police shall deliver the thing found him/her. Where no person appears and claims the restoration of the thing with in a reasonable period of time, the police shall apply to a court to issue a summon, which shall posted in the notice board of the court, requiring the owner to appear before the court on the date fixed therein. Where no person appears before it on the date fixed or where the person claiming to be owner fails to prove his claim, the court shall order the

EXERCISE:

Visit the police station, the courts and the finance bureau at your locality and find out the practice in relation to lost and found things and try to find out the legal basis of such practice.

4. Abandoned things; are things to which the owner has clearly renounced his right of ownership and hence which are without a master or owner. See Art 1191 of the Civil Code. The fact that a thing has been abandoned may be clearly expressed by the owner or may be presumed from acts such as finding the thing at a local rubbish or waste disposal area…etc. Hence, a person who finds and possesses an abandoned thing or a derelict thing with the intention of becoming an owner shall acquire ownership right through occupation. See Art 1151 of the Civil Code.

B, POSSESSION IN GOOD FAITH

In other words, a person who purchases a corporeal movable object from a finder or a thief, with the belief that he was purchasing it from the owner of the thing or a person who is entitled to alienate it, shall become the new owner of the thing where he purchased it in good faith, i.e., with the belief that the seller is the actual owner of the thing and took

possession of the thing. See Art 1161(1) and 1162(1) of the Civil Code. This mode of acquisition is based on practical considerations of impossibility of registration of all chattels /corporeal movable things/ and the consequent impossibility for the purchaser to ascertain the title of the seller of such goods. It is also intended to protect freedom of contract that helps the promotion of free transfer of goods and ensure security of transactions by enabling the bona fide purchaser to acquire a new right of ownership by protecting him from any claim by the true owner of such thing 1161(2). Otherwise, transactions involving chattels in respect of which registration and issuance of deeds is almost impossible, will result in uncertainty of contracts and business transactions and will hinder free circulation of goods.

As we have said above, the former owner may not claim or recover the thing from the good faith acquirer except where the thing is stolen.1165 and 67. Arts 1166 However, seems to imply that a good faith acquirer who purchased a stolen thing under other circumstances will not be able to claim reimbursement from the seller, which is contrary to the rules governing contracts of sale. See Art 2282 of the Civil Code.

NB This mode of acquisition is not applicable to immovable things and special movables such as vehicles in respect of which there is a requirement of registration and special mode of proof, i.e., production of title deeds, is required. See a case between Eng. Santina` Mascaro and W/ro Aynalem Taddesse in the Federal Supreme Court Civil Appeal File No 3616, text page 69. And do EXERCISE: 1. Do you agree with the decision of the court? Why? Why not? 2 Are the rules of acquisition of ownership through possession in good faith applicable to the case? Explain. 3. What about the right of ownership of the widow/ the respondent/ on the common properties of the marriage established by lower courts?

C. ACQUISITIVE PRESCRIPTION (USUCAPTION)

The concept of prescription, in its broad sense ,includes both acquisitive prescription through adverse possession **(usucaption)** and **extinctive prescription** (**statute of limitations).**

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

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

Acquisitive prescriptions, similar to limitative prescription provide a defense against an action for restitution by the former owner; and a restitution claim against any adverse possessor, including the former owner. The rationale behind this principle is that owners must not leave their property unattended for a long period of time. In case where the owner leaves his property unattended and fails to claim its restoration with in the period of time determined, the law assumes that the owner does notneed the property any more and hence decides to reward a person who can put the same to a better use for himself and the public. According to Art 1168 of the Civil Code a person who has possessed an immovable belonging to another for a period of fifteen consecutive years and who has been paying taxes relating to ownership of such immovable shall become the owner of the immovable through acquisitive prescription or usucaption.

The main requirement in this mode of acquisition is that the possession should be adverse, i.e., the possessor must have a claim contrary to the right of the owner and persons who possesses an immovable thing on the permission of the owner may not acquire right of ownership to it. In addition, the possession should also be continuous /see also Art 1150 of the code/ and free from defects under Art 1146 of the code.

The other main requirement for the acquisition of ownership through adverse possession /usucaption/, is payment of taxes relating to the immovable for 15 consecutive years. As opposed to French law, which only requires possession of a determined period of time, Ethiopian law introduces additional requirement, i.e., payment of taxes payable on the immovable. Furthermore, though the English version of Art 1168/1/ generally requires payment of taxes relating to the immovable, the Amharic version of the same provision specifically requires the payment to be made in the name of the possessor. Since, the official Amharic version prevails in such cases of disparity, the possessor of an immovable is require to pay the taxes payable on the immovable in his own name. This additional requirement makes the application of this mode of acquisition very difficult and limited, as tax authorities may not be willing to issue tax payment vouchers in the name of a person who is not an owner.

Similarly, Art 11168/2/ of the Civil Code entitles the person who does not fulfill the requirements of Art 1168/1/ but who has fulfilled the requirements under Art 1146 and 1149/2 / to the right of possession and the protections provided for possessors. Hence, a person who possessed, for more than two years but lesser than fifteen years, an immovable belonging to another and whose possession is defect free shall be considered as a lawful possessor protected by the provisions of Art 1148 and 1149 of the code. The same shall be true of a person who did not comply with the tax requirements of Art 1168/1/ of the code.

However, where the immovable is a rural land which is subject to a communal /family/ land holding tenure /Rest Land/, a member of the family may not claim to have acquired individual ownership to the land through adverse possession and any other member of the family may claim at any time his right to such land. See Art1168/1/ second paragraph. In other words, the rules governing acquisition of ownership through ususcaption are not applicable to rural land in parts of the country where land is the common property of the family, /rest holding/.

These requirements are cumulative and both must be fulfilled before a person can acquire right of ownership through adverse possession. However, note that the application of this mode of acquisition is restricted to immovable things and that an owner of a movable thing who failed to exercise his right of ownership /to claim restitution of the thing for a period of 10 years/ loses his right of ownership and the thing becomes a thing without an owner /res nullius/, which can be acquired by occupation. See Arts1192 and 1152.

See a case between Ato Hailu H/Giorgis and Wro Yeshi H/Mariam in Civil File No 29575 in the reference note and do exercise below

D, ACCESSION

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

In principle, when the two things now joined belonged to different persons before the union, each owner should be able to request their separation. However, in majority of cases such separation cannot take place without deterioration of the things or often it is impossible. Hence, the solution is to attribute anything formed by such union to one person and compensate the other, based on the maxim **"Accessio cedit**

principali, i.e., the owner of the principal owns the new thing, See Art 1183(2) or require it to be commonly owned by the owners of the component parts in certain proportion. See Art 1183(1)

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

ACCESSION OF MOVABLE THINGS TO IMMOVABLE THINGS

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

ACCESSION OF MOVABLE THINGS TO MOVABLES

- **Adjunction:** It is a union of two things belonging to different owners in which the things form a single whole though each is a distinct and recognizable part of the new thing formed by the union. In such cases, the owner of the principal thing shall become the owner of the new thing but will have to pay the value of the thing so joined to the owner of the accessory thing. For instance, where an owner of damaged vehicle / a wreck / uses parts of a wreck belonging to another, the owner of the new thing /the principal/ shall become the owner of such parts/ the accessory/. (See Art 1183(2)
- **Transformation (specification)** - is the act of making anew thing with material belonging to someone else, the worker shall become the owner of the new thing if the labor supplied is of great value than that of the material, for example, a painter who uses canvas and ink belonging to another person shall be the owner of the painting he has done. See Art 1182
- **Commingling /fusion/** - occurs when two dry or liquid things /matters belonging to different owners are commingled or fused so that they cannot be separated with out difficulty. In such cases, the persons, in proportion to value of the material each owned, shall jointly own the new to thing so formed. For instance, where ink belonging to two different persons are mixed to form an ink with a different color, the new thing/ink/ shall be jointly owned by the

persons in proportion to value of the ink each used to own. See Art 1183(2).

3.5 TRANSFER OF OWNERSHIP RIGHTS

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

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

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

However, in exceptional circumstances, **ownership of chattels** may be **transferred** at a **different time** than the **time of transfer of possession**. This is true in cases of sale with ownership **right reserved** (see Art 2387 of the code). In such cases, ownership will be transferred from the seller to the buyer at the time when the buyer pays the price, i.e., the transfer of possession shall not transfer ownership to the buyer until the later pays the agreed price. However, the seller may not or the buyer may not raise such provision against third parties/ for instance, the creditors of either party who may want to attach such thing/ unless such third party accepts such provision or it(the provision) has been publicized through registration in a public registry in accordance with law. See Art 1187 of the code.

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

and issuing a new title deed in the name of the transferee. See Art 1185 and 1189 of the code. **See a case between Ato Kebede Argaw** and **Commercial Bank** of **Ethiopia** at the Cassation Division of the Federal Supreme Court, in Cassation File No 16109, (ppty nr p 2). **See also a case between W/ro Gorfe G/Hiwot** and W/ro Aberash Dubarge and Getachew Nega at the Cassation Bench of the Federal Supreme Court (ppty nr p3). **See also another case** between **Habteab Kifle and Esayas Likke and Baziben Kelile** at the Supreme Court in Civil Appeal File No 570/80, **(transfer of ownership of car.** it is complicated case that can be question. P 4**)**

3.6 PROOF OF OWNER SHIP RIGHTS

The mode of proof of the existence of a right of ownership varies depending on the type of the object of the right.

1, The **owner** of an **ordinary corporeal movable object / a chattel/** shall prove his right to the thing by the mere fact of possession. The same is also the case for rights contained in **bearer negotiable instruments**. See Art 1193 of the Civil Code and Art 721 of the Commercial Code. According to these provisions, the possessor of a chattel or a holder of a bearer instrument shall be presumed to be the owner thereof unless interested persons prove the contrary.

2, **The owner of an immovable object** or a **special movable object** may establish his ownership by producing tittle deed which is given by the keeper of register of immovable things or the organ registering special movable things. See Art 1593-1561 of the Civil Code. According to Art 1195 the issuance of a title deed shall give rise to a presumption that the person named therein is an owner of the immovable mentioned. However, this presumption may be rebutted where:- -

- The title deed is not issued in accordance with the law, see Art 1553-1636
- The title deed is issued by an authority having no jurisdiction, see Art 1553(1)
- The title deed was issued on the basis of an invalid act, such as a void contract
- The plaintiff acquired the ownership of the immovable after the day on which the title deed was issued.

All structures, crops, trees, buildings and other works on a land and caves, wells and other works under the surface are presumed to be owned by the owner/holder of the land. However, this presumption may be overcome by contrary evidence w/c may be witnesses or other

evidences. See Art 1200. **Party walls** - any wall or fence, which lie on the boundary line separating two lands shall be presumed to be jointly owned unless one parcel of land only is fenced in or unless the contrary is proved by evidence showing that they are individually owned. See Art 1201. This presumption shall not apply to **ditches** on boundary lines if the embankment is made on one side only.

Ditches that lie on the boundary line are presumed to be owned by the owner/holder on whose land the embankment is made. This presumption may also be rebutted by proof to the contrary. See Art 1202

Accessories; the ownership of a thing, movable or immovable, includes the ownership of the accessories, natural or artificial, which are necessary part of the thing. See Art 1203. **Water, gas and electricity supply lines -** are deemed to be accessories of the undertaking from which they emanate and which provides the service. See Art 1203, this presumption may be rebutted. **Ownership of fruits**- the ownership of a thing includes the objects, which it is capable of producing, either by itself, or with human help, as well as of monetary benefits that can be gained from it. For example, crops, rents …See Arts 1170 and 1171 of the Civil Code.

3.7 EXTINCTION OF OWNERSHIP RIGHTS

Extinction of right of ownership may be absolute in the sense that the owner or another person may no longer exercise right of ownership in relation to that thing because the thing is destroyed, or it has lost its individual character. This is because property rights do not exist without a thing, which is the object of right. See Art 1188 of the Civil Code. Ownership right may also be extinguished absolutely if the thing is expropriated for public purposes. Ownership of wild animals will be extinguished absolutely if they regain their natural freedom and become res nullius. See Art 1152(1).

Extinction of ownership right may be relative, i.e., only in relation to the present owner, if it is acquired by another person through acquisitive prescription /usucaption, or transfer or waiver or renunciation. The right of ownership shall also be extinguished where the owner, with the intention to have it acquired by the first finder or occupant, abandons the object. See Art 1191 of the Civil Code. The owner of a corporeal movable object shall lose his right as an owner where he fails to exercise, for a period of ten years, the rights arising out of ownership. See Art 1192 of the Civil Code. However, this does not apply to a person who has transferred the thing to another, for example, by a contract of loan for use Art 2767 of the Civil Code.

Ownership of immovable things and special movable things in respect of which there is a requirement of registration/ Art 1723, 1185 / shall be extinguished when the registration is cancelled / Art 1190 /. However, this is only a formal requirement to accomplish the transfer rather than a ground for the transfer of ownership.

UNIT FOUR- JOINT OWNERSHIP

4.1 DEFINITION AND SCOPE

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

The 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

Hence, if for example, four individuals A, B, C and D jointly own a building having four rooms and each joint owner occupies one room, the building shall remain undivided and each room belongs to all the joint owners and not to the particular person who occupies and uses it. **Note that** the **share joint owners** have in the thing is determined **by the agreement** entered in between them. However, where there is **no agreement** as to the share of joint owners, the **law** presumes that they have equal share.

THE SCOPE OF RULES GOVERNING JOINT OWNERSHIP

The rules on joint ownership are developed and applied to cases where the relations between the co-owners are simple relations of common interest in a thing. Hence they do not apply to things held jointly as a result of a partnership agreement, i.e., an agreement to join resources with the purpose of undertaking commercial activities and earning a profit. Though such cases represent special cases of joint ownership, they are governed by the law governing businesses and business organizations rather than by the rules of joint ownership under Property Law. Compare Arts 211 and 228 of the Commercial Code.

Similarly, even though marriage results in the community of property of spouses common/joint properties of spouses are governed by special

body of law, i.e. Family Law not by the law of property. Furthermore, joint ownership of things is regulated primarily by the agreement entered into by the joint owners at the time of inception of joint ownership, where joint ownership arises from contracts, or by the agreement entered in to after the joint ownership is created (if not defective/ invalid/ and are not contrary to mandatory provisions of law) and/or by the mandatory provisions of the rules contained in the Civil Code, i.e., Arts 1257-1308

4.2 ADVANTAGES OF JOINT OWNERSHIP

The fact that a thing may be owned by two or more persons helps people to acquire certain property very important for their lives, which they would not have otherwise acquired because of lack of sufficient financial capacity by joining or contributing a lesser amount of money. For example, two neighbors who cannot afford to buy and use private automobile may contribute certain amount of money and buy an automobile to be used as service. Similarly, ten formers who do not have sufficient amount of money to purchase a tractor or a water pump individually may contribute money and buy a tractor or a water pump which they can jointly use to cultivate their lands. Or persons who want to build their own homes may establish an association and build a condominium / an apartment building/. See Arts 1281-1308 of the Civil Code.

Joint ownership will also help in achieving efficient utilization of scarce resources. For example, construction of individual houses for twenty households requires a substantial amount of money since it needs a large area of land and a large amount of construction materials such as cement, sand, bricks, reinforcement iron bars and corrugated iron sheets. While, a condominium building that can accommodate the same number of households may be constructed at a much lesser cost because the foundation, the main walls and the roof are common.

DISADVANTAGES

The guiding principle is that joint owners shall, acting together, administer the thing jointly owned. Administration here may refer to how the thing is used, its repair and maintenance, bringing or defending legal actions, sale, lease, pledge or mortgage of the thing jointly owned and these decisions has to be made by joint owners acting together. Furthermore, certain decisions such as the decision to sale, or mortgage, or pledge the thing or a decision to change the purpose for which the thing is acquired /transformation of the thing/ has to be made by unanimous consent of all joint owners. See Art 1265 and 1266. However, it is usually difficult to obtain the agreement of all joint owners to reach a

certain decision. Hence, joint ownership may hinder the free transfer of goods because joint owners may not have the opinion and understanding as to the importance of the proposed act to agree to the proposed act.

4.3 SOURCES OF JOINT OWNERSHIP

1, Ownership Arising from Contracts; Two or more persons who intend to acquire and use a thing commonly or jointly may enter in to a contract creating joint ownership. For these contracts to be valid and enforceable, they have to fulfill all the requirements for the formation a valid contract, i.e., consent, capacity, object and form. See Arts 1676/1/, 1768 and 1679-1730 of the Civil Code. However, you have to note that no special form is required for validity of contracts of joint ownership and they can be made orally unless they are required to be made in writing by law or the agreements of the parties. Accordingly, contracts creating joint ownership over immovable things and special movable things have to be in writing. See Arts 1719-1730, 1282 and 1283

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

Note: A right of recovery is a right given by the law to certain group of persons to compel the buyer of a certain object to sell it back to them. The law grants such right because of the relation that exists between the seller and the persons to whom such right is granted. For instance, relatives of a seller of an immovable thing and joint owners have a right of recovery. See Arts 1386, 1388 and 1389, Arts 1176/1/ cum 1177/3/ and 1183/.

EXERCISE: 1. Read Arts 1176/1/ cum 1177/3/ and 1183/1/ and identify the specific cases in which the provision is applicable and joint ownership is created as a result. 2. Identify other provisions of the law that create joint ownership.

RIGHTS AND DUTIES OF JOINT OWNERS

- **Right to Use and Enjoy the Undivided Thing/Property, and its Fruits**. See Arts 1263 and 1264.
- **Right to Administer the Thing**: As we have tried to see above, the rights/ interests of the co-owners in the jointly owned thing do

not constitute a specific material unit. In other words, no co-owner individually own specific part/unit of the thing. Therefore, no joint owner can exercise any right or physical act of causing material changes or modifications or change of purpose or exercise a right of creating legal acts such as usufruct, servitude lease, sale, mortgage, pledge of the thing that implies the existence and exercise of complete individual ownership. See Art 1265 and 1266 and 1259. A co-owner may make material changes which do not interfere with the right of use of other joint owners or which is useful to all.

- According to Art 1267 each **co-owner shall bear, in proportion to** his/her share, the costs of administration, taxes... and necessary costs (costs incurred to avoid lose or damage to the thing). 1268, 1268(3) and 1282(2).
- **Each joint owner has the right to dispose of his share** of rights in the undivided interest in the thing jointly owned. See Art 1260 of the Civil Code. Hence, a joint owner may sale, donate, pledge or mortgage his share of right in the thing. Here you have to distinguish between the right to dispose of the thing, which require unanimous decision of all co-owners, from the right dispose of ones share in the thing jointly owned. However, other co-owners have the right of recovery, i.e., to force the third party buyer to sell it back to them. This is a departure from the French law, which is the source of Ethiopian Civil Code, and which does not provide for the right of recovery to other co-owners. See Art 1261 of the Civil Code.
- **Each joint owner has the right to request termination of joint ownership**; In other words, each co-owner has the right to request the court, at any time, for partition or division of the thing or the sale by auction of the thing and division of the proceeds of the sale. This right **cannot** be **waived by agreement** (movable ppty). **However**, the right to require termination of joint ownership of immovable things may be waived for a period not exceeding 5 years by the agreement creating the joint ownership or by subsequent unanimous agreement (see Art. 1274). This is because allowing agreements that prohibit sale or division of the thing for a long period of time shall affect free transfer of goods and commerce, which is considered to have a huge effect public interest.

EXERCISE: Art 1261 of the code provides that the other joint owners shall have the right of pre-emption where a joint owner sells his share in the thing. Comment on the provision by comparing Arts 1386 and 1410 of the code.

Art 1410 (2) A right of pre-emption is a right deriving from an agreement whereby the owner of a thing undertakes to sell such thing in preference to a specified person, should the owner decide to sell it.

Art. 1386. Definition. **The right of recovery** is the right of a person to recover against payment a particular thing given to a third party in ownership or usufruct.

4.5 SPECIAL CASES OF JOINT OWNERSHIP

A. PERPETUAL JOINT OWNERSHIP

Perpetual joint ownership represents a joint ownership in which joint owners do not have the right to demand termination. 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. See Art 1276 of the Civil Code.

Perpetual/ continuous/ usually exists in relation to indispensable accessories of things intended for the common use of two or more estates belonging to different owners, for example, lanes (yeegirmenged tebab), passages, yards (atir gibi), wells, sewer pits (yekoshasha gurguad), paths, roads, dams, canals, party walls, and common portion of condominium houses, in which partition or division would not leave each house owner a separate space necessary for /his/her needs. For instance, it would be impractical and crazy to divide or sale the foundation or staircases (dreja kenmedegefiyaw) of an apartment building. Similarly, the right to co-ownership to walls, ditches, hedges (atir) or other enclosures, which separate contiguous estates, called mitoyennete in French law, constitutes a perpetual joint ownership.

B. PARTY WALLS

A party wall is a wall placed on the boundary line between two estates, and belonging in common to their owners, including the land on which it rests. See Arts 1201 and 1278-80 of the Civil Code. Our law does not define as to what a party wall is and does not cover other kinds of enclosures. See Art 1201, 1202, 1278, 1279 and 1280 of the Civil Code.

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

The ground, the structural walls, the roof, the staircases, the elevator…etc as indispensable accessories, are co-owned by all co-owners by a forced undivided title. In other words, parts of the building that are not intended for the exclusive personal use of one owner are presumed to

be commonly owned. For example, yards, walls, roofing, structural flooring, staircases and elevators, the janitors able, halls and corridors, heating and other ducts of all sorts, except those located within each house. In addition, walls separating two houses or rooms belong to both owners as party walls. However, windows, shutters, and blinds, door so f the rooms and balconies are individually owned.

The point that has to be noted here is that condominiums and buildings referred to under Art 1281 of the code are governed by two separate sets of rules. Ownership right on the individually owned units are governed by the rules of individual ownership discussed under Unit Three while the ownership of the common elements is governed by the rules of joint ownership discussed so far. **See condominium** proclamation No 370/2003.

1, Identify and discuss the special rules governing extinction of joint ownership.

UNIT FIVE - USUFRUCT

5.1 DEFINITION

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

In other words, usufruct represents a case in which the constituent elements of a right of ownership are divided or partitioned among two or more persons, i.e., the owner of the thing, called the bare owner, and the person who has the present right of possession and use of the thing/uses/ and the right to collect and use its fruits /fructus/, called the usufructuary.

For example, let us say that X, an owner of a house, entered into a contract creating usufruct in favor of Y. This contract shall result in the transfer of the right of possession, the right of use, and the right to collect the fruits of the house /the rent if the house is rented / from the bare owner X to the usufructuary Y. See Arts 1328 and 1331 of the Civil Code. Though the owner has transferred these rights, he retains one of the major elements of right of ownership, i.e., the **right to dispose** of the thing. We can also deduce from this that the usufructuary has the duty to preserve the thing and restore it at the time of extinction of the usufruct.

Things susceptible of usufruct,

i.e., things in relation to which a right of usufruct may be created. Accordingly, a right of usufruct may be created in relation to

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

By its nature usufructs presupposes the possibility to use and enjoy a thing, which is its object, while preserving its substance. Hence, things that are consumed by their first use are not susceptible of usufruct in the proper sense of the term. However, French law admits things such as money, grains wine…etc. may be the object of a right called quasi usufruct. Art 1327 of the Civil Code of Ethiopia also recognizes this concept.

5.2 SOURCES OF USUFRUCT

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

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

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

Usufruct can be created in favor of a single person, or jointly and simultaneously in favor of several persons. Usufruct may even be created in such a manner that several persons are **called to enjoy it in succession**, one following the other. For example, a person may be given a right of usufruct until the of his time death and after his death the usufruct may be transferred to his or her heirs who are called to it in the

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

5.3 RIGHTS AND OBLIGATIONS OF THE USUFRUCTUARY

1. The Conservation of the Substance of the Thing: - The usufractuary shall have the obligation to conserve the thing, its form, structure and particular identify. For example, he/she cannot change a field in to a forest, a vineyard (yeweyin tekil) in to yard (atir, gibi), or change the outer or interior layout of a house. See Arts 1309(1) and 1330(2) of the Civil Code. However, the usufructuary can make changes that increase the value of the thing without changing its form. For example, the usufructuary may change wooden or dirt walls to a concrete walls there by increasing the value of the house.

However, he may not claim payment of compensation, at the time of the extinction of the usufruct for improvements, for the improvement he has brought to the thing under usufruct. See Art 1336 of the Civil Code.

2. 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 like a diligent head of family and must use the thing following the pattern established by the owner and he must follow the prior use of the thing. Hence, the usufructuary cannot use a hotel for a different purpose, or a house as a hotel. Refer to Arts 1312, 1330/2/ and 1328 of the Civil Code. Furthermore, where the bare owner can prove that the usufructuary is not performing his duties under these Arts, the court may order the latter to furnish security, in the form of pledge, mortgage or personal guarantee, to protect the interests of the former. See Art 1324 of the Civil Code.

3. The obligation to up-keep the thing: - The usufructuary has an obligation to have regular maintenance and repair works done at his cost. See Art 1313 of the Civil Code. He also 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 that made such repair necessary. However, he will be liable for considerable or major repairs, if they became necessary because of deterioration due to his fault, i.e., damages resulting from failure of the usufructuary to have regular maintenance and repair works done. Considerable or major repairs are repairs that require expenses that are greater than the average annual income generated by the thing. See Arts 1337 and 1338(2) of the Civil Code.

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

5. The usufractuary has an obligation to inform the bare owner about any act of interference by a third person in the rights of the bare owner. For instance, he must inform the bare owner of any person, whether in court or outside of a court, challenging the right of ownership of the bare owner over the thing. Where a usufructuary fails to comply with this provision 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. See Art 1342 of the Civil Code.

On the other hand, the usufructuary as a possessor of the thing, shall have a right to bring possessory action and to use force to protect his possession in case where any person, including the bare owner, interferes with his possession of the thing. See Arts 1341, 1148 and 1149 of the Civil Code. The usufructuary will also have the right of usufruct over the compensation paid in case where the thing is lost or destroyed 1319(2)

6. The usufructuary has an obligation, at the time of extinction of the usufruct, to restore or **restitute t**he 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 resulted from his fault, such as abuse of the thing or failure to exercise due care in the use of the thing or negligence in the use and management of the thing, failure to make necessary or normal repairs…See Arts 1317 of the Civil Code.

5.4 RIGHTS AND OBLIGATIONS OF THE BARE OWNER

1. He has the duty to refrain from any kind of interference with the right of the usufructuary to possess, use and enjoy the thing and collect and use its fruits. For example, he cannot change the thing, which is subject of the usufruct nor can he use or exploit the thing or interfere with the possession of the thing.

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

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

Exercise Read the obligations of the usufructuary and identify the major rights of the bare owner.

5.5 EXTINCTION OF USUFRUCT

The right of usufruct shall be extinguished for either of the following reasons;

1. Death of the usufructuary- a right of usufruct is sometimes called a personal servitude because it depends on the life of the usufructuary. In other words, the right of usufruct shall terminate up on the death of the usufructuary. See Art 1322(1)

2. Lapse of the period for which it is created. For example, a usufruct created for a period of five years shall terminate at the end of the five years. Art 1322(1)

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

4. The loss or destruction of the thing; Similar to the case of loss of ownership right, usufruct shall also be extinguished as a result of the loss or destruction of the object of property. See Arts 1319, 1310 cum 1188 of the Civil Code.

5. Consolidation or merger of the position of the bare owner and the usufructuary in one person shall also result in the extinction of usufruct right. This happens when the usufructuary acquires bare ownership (by contract or succession) or when the bare owner acquires the usufruct by contract. See Arts 1676/1/ cum 1842 of the Civil Code.

6. Forfeiture or waiver of right by the usufructuary; A right of usufruct of chattels shall be extinguished where the usufructuary expresses, clearly and unequivocally, his intention to waive his rights as a usufructuary. See Arts 1310 cum1191 of the Civil Code. Refer also to Art 1676/1/ cum 1825 of the Civil Code. Art. 1825. - Remission of debt.

Where the creditor informs the debtor that he regards him as released, the obligation shall he extinguished unless the debtor forthwith informs the creditor that he •refuses his debt to be remitted.

Should this provision apply to the extinction of usufruct over immovable things and special movable things? Note that the provisions of Art 1191 apply to chattels only.

7. **Acquisitive prescription in favor of a third party**; As we have seen in relation to 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. See Art 1310 cum 1168 of the Civil Code.

5.6 RIGHT OF USE AND HABITATION

5.6.1 RIGHT OF USE

Right of use is a temporary real right (for agreed period of time or for life the beneficiary) which entitles the beneficiary, called the user, to use a thing of another person and to receive its fruits such as profits or rents... but only **within the limits of his own and his family's** needs. **Right of use may be created** by an **agreement,** with or without consideration, or by **will.** Under French Law, use right over land may be acquired, in the same manner as usufruct, by acquisitive prescription of 10 to 20 years, or 30 years, on condition that the user was himself in possession of the land. The right of use is not recognized under the Ethiopian Civil Code; hence we shall briefly see the rights and obligations of the user under the French Civil Code. The rights and obligations of the user are governed by the instrument that created the use right, but in the absence of such provisions in the instrument the user will have the **following rights and obligations**.

1) The user has the right to the profits or fruits of the thing proportional to his and his family's needs. He can claim the various fruits or produce only in an amount in which each kind of produce will be consumed by him and his family, i.e., spouse, children and servants. However, collateral family members and ascendants are not included.

2) The user has the same duties as a usufructuary. Please, read the discussion regarding the duties of the usufructuary.

3) The user cannot transfer, assign or lease his right, or substitute a third party, hence, the right of use may not be seized by the creditors of the user, even if it was constituted for consideration. But he can sell a portion of the fruits, which he acquired in ownership by taking them directly or having them delivered.

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

5.6.2 RIGHT OF HABITATION /OCCUPATION OF PREMISES/

This right is merely a particular type of right of use, i.e., a right of use exercised over residential houses or premises. Hence, the rules discussed

in relation to usufruct and use rights are applicable to the right of habitation or right of occupation of premises. 0910301619

Normally, the physical scope of the right of habitation is determined by the instrument creating it. Unless there are restrictions or reservations in the instrument, the right of habitation includes the whole house, which is its object and all its accessories. However, the beneficiary must not exercise his right beyond the needs of his and his family's residence.

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

The beneficiary of right of habitation whose right is limited to part of a house also has the right to use parts of the building/house and the compound that are intended for the common use of all occupiers of the building. See Art 1355 of the Civil Code. The beneficiary of the right of habitation has an obligation to cover costs required for regular repairs and maintenance of the house in which he lives. However, where his right is limited to part of the building and the owner occupies the other part of the building such expenses are to be covered by the owner of the house. See Art 1356 of the Civil Code.

Similar to the rights of usufruct and use, a right of habitation is personal to the beneficiary and hence cannot be transferred and may not pass to his heirs. See Art 1357 of the Civil Code. Generally, in addition to these rules, the rules governing usufruct shall also apply to the right of habitation or occupation of premises. Refer to Art 1358 of the Civil Code.

UNIT SIX- SERVITUDE

6.1 DEFINITION

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

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

Furthermore, it is held that the right of servitude may be created only for the benefit of another land. This is intended to prevent creation of servitude for the benefit if of an individual or group, which could consist of an obligation to perform positive acts. Note that an obligation to perform personal services or positive acts cannot be made the subject matter of servitude. See Art 1360 and 1373 of the Civil Code.

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

Servitude creates an obligation, on the owner of the servient tenement, only to refrain from preventing the owner of the dominant tenement to do certain acts that the latter would not have been able to do otherwise. In other words, servitude shall not create an obligation to perform positive acts on the owner of the servient tenement. See Art 1359/2/ of the code. One exception to this rule is provided under Art 1360 and 1373 of the Civil Code, which allows the parties to make an agreement in which the owner of the servient tenement undertakes to perform works necessary for the enjoyment and preservation of the right of servitude. Such works may be construction and maintenance of pavements used by the owner of the dominant tenement to exercise his right of way, installation or repair of pipelines to enable the owner of the dominant tenement to have access to water ...etc.

6.2 PURPOSE OF SERVITUDE

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

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

1. Servitude should be used exclusively for the purpose of using or exploiting the dominant land and it must be used exclusively for that purpose. In other words, the owner of the dominant tenement may not use the servient tenement for the purpose exploiting another land that is not part the dominant tenement. This is because servitude is created on one land for the purpose of using and enjoying another land/ the dominant tenement/, and not for the general benefit of the owner of the dominant tenement.

2. The law also limits the rights of the owner of the dominant tenement to use the servient tenement only to purposes for which the servitude was created at its inception. In other words, it cannot be used for new purposes that may arise after the creation of the servitude. For instance, a servitude of created to cross a land on foot cannot be used to use cars where the owner of the dominant tenement purchases a car, because this increases the burden of the owner of the servient tenement. See Art 1376 of the Civil Code. The law also imposes various obligations on the owner of the dominant tenement with the intention of the preventing him from increasing the burden of the servient tenement. Refer to Arts 1375, 1377, and 1380 of the Civil Code.

3. The owner of the servient tenement has the right to redeem the servitude where the benefits or advantages it provides to the dominant tenement are lesser than the inconveniences or damages it causes to the servient tenement. See Art 1383.

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

- To abstain from building or planting trees so as not to obstruct view from the dominant land, or
- To allow the owner of the dominant tenement to walk or drive across his land, or -
- To allow the owner of the dominant tenement to take water or sand or chalk from his land.

5. In order to prevent unfair and excessive burden or damages to the servient tenement, the law under Art 1365 of the Civil Code, provides that where it is not clear as to whether the provisions of a contract create

a servitude running with the land or a personal obligation on the owner of the land, such doubtful provisions shall be interpreted to have created a personal right or obligation and not a servitude. Also refer to Art 1369.

6.3 SOURCES OF SERVITUDE

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

1. Servitudes arising from contracts; According to Art 1362/1/ of the Civil Code, a servitude may be created by an agreement or contract concluded between the owner/holder of the dominant tenement and the owner of the owner/holder of the servient tenement.

2. Servitude may also arise from the will of the deceased person who divides his land holding between two or more persons. In other words, the testator who owns/holds a land may burden one of the lands with servitude of a certain type for the benefit of the legatee of another plot of land. See Art 1362/2/ of the Civil Code.

3. Acquisitive Prescription; According to Art 1366 of the Civil Code, servitude may arise from enjoyment of the servient tenement for a period of ten years. However, this mode of acquisition applies only to apparent servitude. An apparent servitude is a servitude that requires certain external and visible or apparent structures or means for its enjoyment or exercise, which also evidence its existence.

For Example, servitude of way or view may be considered as apparent because it may require construction of a lane or a window by which the servitude is enjoyed. In other words, non-apparent servitudes, i.e., servitudes whose enjoyment do not require installation or construction of external or apparent materials/structures may not be acquired by acquisitive prescription of ten years. The rational behind this rule seems to be clear, because in cases of apparent servitudes the owner of the servient tenement has the opportunity to see acts of interference by another person on his land and can object to the commission of the acts. Hence, the law does not protect a person who fails to do so for a long period. While in cases of the non-apparent servitude, the owner of the servient tenement does not have an opportunity to object to such acts since he might have not known the acts of the owner of the dominant tenement. See Art 1366/2/ and 1367 of the Civil Code.

However, a servitude acquired through acquisitive prescription shall not affect third parties unless its acquisition is registered in the register of immovable properties. For instance, the owner of the dominant tenement cannot exercise his right against the transferee of the servient tenement

unless his rights are entered in the registers of immovable properties. See Art 1368 /2/ of the Civil Code.

4. Servitude arising out of the provisions of the law. The contiguity of land belonging to different owners or occupied by different persons creates conflict if either or both of them wish to enjoy their lands without any consideration for the damages or annoyance caused to the other. These conflicts can be eliminated only by limiting the powers that the right of ownership usually involves. Specific provisions of the Civil Code, which determine what is allowed and what is prohibited, are intended to prevent some of these potential conflicts. Refer to the provisions of Art 1217, 1218, 1219, 1220, 1221-1224, 1245-1254, 1372/2/ of the Civil Code.

6.4 RIGHTS AND DUTIES OF THE PARTIES

The rights and duties of the owner/holder of the servient tenement and the owner/holder of the dominant tenement shall be determined by the instrument creating the servitude, where the servitude is created by contract or will. However, where it is created by acquisitive prescription, the rights and duties of the parties 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. Furthermore, where the instrument creating the servitude does not contain provisions dealing with the rights and duties of the parties, or where such provisions are not valid or where the manner of its creation and enjoyment is not clear, the provisions of the Civil Code shall determine the rights and duties of the parties. See Art 1370 of the Civil Code.

6.4.1 RIGHTS AND DUTIES OF THE SERVIENT OWNER/HOLDER

The owner/holder of the servient tenement shall have the following rights and duties;

1. The owner/holder of the servient tenement shall have the obligation to allow the owner/holder of the dominant tenement to use his land for the purpose for which the servitude is created and refrain from exercising certain rights such as the right to prevent other persons from entering his land or using his land. See Art 1359 of the Civil Code. He must also refrain from acts that reduce or impair the use of his land for the purpose required by the owner/holder of the dominant tenement. For example, he may not construct buildings or plant trees that impair the view or way of the owner of the dominant tenement. See Art 1379 of the Civil Code.

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

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

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

6.4.2 RIGHTS AND DUTIES OF THE DOMINANT OWNER/HOLDER

1. The owner/holder of the dominant tenement must exercise his rights in a manner, which causes minimum inconvenience or damage to the servient tenement. In addition to this, he may not make any alteration that would increase the burden of the servient tenement. See Art 1375

2. Where the dominant tenement is divided, the right of servitude shall continue for the benefit of the owners/holders of each parcel of land. However, such division shall not increase the burden of the servient tenement, and the owners/holders of the divided parcels of land shall exercise their rights, for instance right of way, using the same area or piece of the servient land. See Art 1377.

3. Similarly, where the servient tenement is divided, the owner/holder of the dominant tenement shall have the right of servitude on each of the new parcels of land. See Art 1378.

6.5 TYPES OF SERVITUDE

6.5.1 URBAN SERVITUDES AND RUSTIC/ RURAL SERVITUDES

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

6.5.2 CONTINUOUS AND DISCONTINUOUS SERVITUDES

This classification is based on whether or not the right of servitude can continue without continuous human intervention. Hence, a continuous servitude is a servitude that continues without continuous human

intervention. For example, Servitudes of view and drawing water are considered as continuous servitudes.

On the other hand, a discontinuous servitude is a servitude that cannot exist without a continuous human intervention. Therefore, for such kind of servitude to continue to exist, the beneficiary must continue to use /exercise the right created by it.

Servitudes of way or passage, pasturing cattle and servitude of extracting quarry are examples of discontinuous servitude. See Art 1382 of the Civil Code, which 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.

6.5.3 APPARENT AND NON-APPARENT SERVITUDES

Apparent servitudes are servitudes that are manifested by external works such as ditches, pipelines or an aqueduct, roads (means of enjoyment). Servitude of drawing water, way… etc are examples this type of servitude. See Art 1366(1) and (2) of the Civil Code.

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

German Law classifies servitudes in to **positive** and **negative** servitudes based on the content of the right of servitude. Accordingly, a servitude is considered positive where it entities the owner of the dominant tenement to use the servient tenement for a specified purpose. Servitude of way, extracting quarry, drawing water are examples of this type of servitude.

On the other hand, servitude is considered a negative servitude where it imposes on the owner of the servient tenement the obligation to refrain from doing certain activities on his land, for example, from erecting certain kinds of buildings or planting trees. The owner of the dominant tenement does not have right to perform positive acts on the servient tenement. See Art 1359(2). Right of view is a very good example of a negative servitude.

6.6 EXTINCTION OF SERVITUDE

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

1. Waiver /release by the owner of dominant tenement. This ground of extinction is applicable to any kind of servitude. Waiver or release by 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. See Art 1381(1) and (2) of the Civil Code.

2. Disappearance of the apparent signs in cases of apparent servitudes or failure to exercise the right arising out of the servitude, and the cancellation of the entry of the servitude in the register of immovable properties up on the application of the owner/holder of the servient tenement. See Art 1381(3) and (1) and Art 1366 of the Civil Code.

3. Redemption of the servitude by the owner of the servient tenement; According to Art 1383 of the Civil Code, 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 and, hence, is contrary to the national economy or public interest or where the benefits deriven by the owner/holder of the dominant tenement are lesser than the damages it causes to the servient tenement. See Arts 1384 and 1385 of the Civil Code.

4. 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. See Art 1374.

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

7.1 RIGHT OF RECOVERY

7.1.1 DEFINITION

Right of recovery is a right of a person to recover a thing sold by an owner from the buyer by paying the price and costs the latter has incurred. See Art 1386 of the Civil Code. In other words, right of recovery is a right where by its beneficiary can force the buyer of a thing to sell it to him.

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

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

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

7.1.2 PERSONS HAVING A RIGHT OF RECOVERY

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

1) Relatives by consanguinity; According to Arts 1389 and 1394/2/ of the Civil Code relatives by consanguinity of the seller of an immovable thing have the right to force the purchaser of such immovable, against payment of the price he has paid, to sell it to them. In other words, the beneficiary of right of recovery may, against payment of the price and other costs, recover an immovable from a person who has bought it from a seller who is their blood relative. See also Arts 1124 and 1125 of the code.

Such right shall be exercised according to the degree of relation they have with the seller. Hence, persons who have a first-degree relationship with the seller have a priority right over those having a second-degree relationship. See Art 1391 and 842-851 of the Civil Code. Where the beneficiaries have the same degree of relationship, they shall exercise the right of recovery together and shall become joint owners of the immovable recovered. See Art 1393 of the Civil Code. However, among persons who are in the same degree of relationship, those who live on the land or participate by their personal work in its exploitation are given priority over others. See Art 1392 of the Civil Code. Furthermore, 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. These provisions also imply that the right of recovery

relatives under is limited to cases where rural farmland communally held by a family/ rest land/ is transferred.

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

2) Joint Owners shall have a right of recovery where one of the joint owners sells his share of right in thing jointly owned. See Art 1260, 1261, 1388 and 1394 of the Civil Code. 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. See Arts 1393 and 1262 of the Civil Code.

EXERCISE: Compare the right of recovery of co-heirs/ Art 1125 of the code/ where one of the co-heirs alienates, in whole or in part, his right to the succession, under Art 1124 of the code, and determine whether the restriction under Art 1396 also applies.

7.1.3. CONDITIONS FOR THE EXERCISE OF RIGHT OF RECOVERY

The beneficiary of a right of recovery must declare his intention to buy the thing or usufruct with in two months from the date he is in formed of the transfer of ownership or usufruct to a new owner or usufructary, (if he is notified). See Art 1400. However, if he is not notified, then he may exercise his right with in a period of one month from the date the joint owners knew of the transfer. On the other hand, where the right is exercised by relatives, the beneficiary must declare his intention to exercise his rights 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. See Art 1403.

According to Art 1398 of the Civil Code, a right of recovery may be exercised where the owner sells the thing or where creditors of the owner attach the thing. In other words, the right of recovery may not be exercised where the owner transfers the thing gratuitously, for instance, where the owner donates the thing. However, Art 1407/1/ indicates that right of recovery may be exercised even where the thing is transferred

with out consideration. Furthermore, excluding right of recovery in cases where the thing is transferred gratuitously will also be against the purpose of granting right of recovery discussed above. Hence, it does not seem that the legislator intended to exclude right of recovery in such cases.

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

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

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

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

7.1.4 EFFECT OF RIGHT OF RECOVERY

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 of the Civil Code.

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

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

7.1.5 LOSS OF RIGHT OF RECOVERY

The right of recovery shall be extinguished where the beneficiary fails declare his intention to exercise his right, to recover the thing, within two months from the date when he is informed of the transfer of ownership or usufruct, if he was informed, or within one month form the

date he knew of the transfer, 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) of the code.

7.2 PROMISE OF SALE AND RIGHT OF PRE-EMPTION

7.2.1 DEFINITION AND REQUIREMENTS FOR VALIDITY

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

A Promise of Sale- is a contract where by the owner of a thing undertakes to sell it to the promisee or another person specified if and when the **promisee** or such **other person decides to buy it**. (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 because he is obliged to sell the thing, at the price fixed in the agreement creating the promise, only to the beneficiary of such right and when the latter wishes to buy it. In other words, the owner cannot sell the thing to another person who might have offered a better price, nor can he refuse to sell the thing to the beneficiary of the promise, which, an owner under normal circumstances is entitled to do, provided that the beneficiary has made his decision to buy the thing with in the time agreed up on the contract.

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

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

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

NB As we have tried to see above, the restrictions under this unit, i.e., restriction recognized and enforced under property law, apply to immovable things and special movable things in respect of which the law requires registration. In addition to this, contracts creating promise of sale or right of pre-emption shall not be valid unless they are made in writing, and unless they 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 and they are registered in the register of the property concerned. See Arts 1412, 1422 and 1423 of the Civil Code. Furthermore, the period with in which such right may be exercised cannot exceed a period of ten years. Where the period fixed in the contract exceeds ten years, it shall be reduced to the maximum period provided by the law, i.e., ten years. See Art 1413 of the Civil Code.

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

7.2.2 RIGHTS AND DUTIES OF THE PARTIES

A. PROMISE OF SALE

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

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

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

B. RIGHT OF PRE-EMPTION

1. The owner has the right to create any kind of right in-rem on the thing, but he may not sell or transfer it to another person. Where he decides to sell the thing, he has the obligation to inform the beneficiary of his intention to sell the thing and the chargers/ such as mortgage, usufruct, and servitude etc/ on the thing. See Art 1418 /1/ and/2/.

2. In case of attachment, the owner of the thing must notify the situation to the beneficiary. See Art 1418 (3)

3. The beneficiary must exercise his right with in two months from the date he received the notice. However, this period of notice may be extended to a period not exceeding one year. Where the period is extended for more than a year, it shall be reduced to one year. See Art 1419.

4. The beneficiary must exercise his rights before the thing is sold by auction in case of attachment. See Art 1421.

5. In case the thing is sold to a third party in violation of the contract creating the right of pre-emption, the beneficiary may recover it from such third party against payment of the price determined in the contract creating right of pre-emption. See Art 1422.

7.2.3 EXTINCTION OF RIGHTS OF THE BENEFICIARY

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

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

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

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

7.3 PROHIBITION OF ASSIGNMENT OR ATTACHMENT

7.3.1 DEFINITION

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

Such provisions may freely be made with respect to **ordinary movable things** (chattels). However, such restrictions will bind only the person who accepts them and hence, it does not create a real right that can be raised against third parties. See Art 1426/2/ of the Civil Code.

Prohibition of the right of attachment or assignment with respect to immovable things is possible only in cases allowed by the law. According to Art 1427, 1428 and 929-936 of the Civil Code, the transferor or assignor of an immovable thing or the testator may prohibit the transferor or the holder in tail from assigning an immovable to another person. He may also stipulate that the thing shall not be attached in the hands of the transferee or the holder in tail. See also Art 2460 of the Civil Code.

Ethiopian law in adopting the restriction and provides under, Art 1416 (1), that such restriction with regard to chattels will have no real effect on third parties, unless they knew of the restriction. It also tries to minimize the negative consequences of the restrictions by limiting the period for which it can be made. In other words, a provision prohibiting assignment or attachment cannot be made for indefinite period, following the approach taken by French Law. On the other hand, such restrictions can be made on immovable things with real effects in cases expressly allowed by the law for the purpose of protection of a serious interests, for instance, keeping an immovable with in a family.

7.3.2 FORMAL REQUIREMENTS

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

It must also be registered in the register of immovable things where such provision is made in relation to immovable things. See Art 1432.

7.3.3 RIGHTS AND DUTIES OF THE PARTIES

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

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

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

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

UNIT EIGHT-COLLECTIVE EXPLOITATION OF PROPERTY

8.1 DEFINITION AND NATURE OF PUBLUIC DOMAIN

Not all property of the state, and its various administrative units and the municipalities are subject to the same rules. Some of them form part of the public domain while others form the private domain of the state. Things or property forming part of the private domain of the state are treated in the same manner as the private property of individuals and are governed by the rules governing privately owned property. On the other hand, property forming part of the public domain of the state are governed by the rules dealing with collective exploitation of property rather than the rules governing privately owned property. For instance, properties owned by the public enterprises such as the Commercial Bank of Ethiopia, Muger Cement Factory, Harar Brewery…etc are considered as the private domain of Ethiopia, while the buses owned by the Anbesa City Bus Services, Black Lion Hospital, Atse Yohannes School…etc are considered as the public domain of Ethiopia.

Art 1445 of the Civil Code, defines public domain as a property belonging to the state or its various administrative units or organs and which is directly placed at the disposal of the public or which is destined to public service. Furthermore, Arts 1446, 1147 and 1148 enumerate things that are considered as public domain where they are owned by the state;

- Roads, streets, canals and railways and public parks
- Seashores, port installations and light houses
- Buildings specially adapted for public services such as fortifications, bomb shelters, museums, halls, churches and mosques
- Waterways, lakes and underground accumulations of water
- Land and other natural resources/ Art 40 of the Constitution of the Federal Democratic Republic of Ethiopia/
- Movable things that are placed at the disposal of the public by a public service or entrusted to the custody of a public service such as city buses, manuscripts, artifacts and various other chattels of historical and archeological importance kept in museums
- National libraries and museums, manuscript collections, books, medal, stamps, paintings, statuses & other movables are also considered as public domain.

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

In addition to this, properties forming part of the public domain may not be acquired by possession in good faith or usucaption or acquisitive or extinctive prescription. See Art 1455 of the Civil Code. Finally, properties forming part of the public domain may not be occupied by a private person without the authorization of a competent public authority. See Art 1456 of the Civil Code.

8.2 EXPROPRIATION

8.2.1 DEFINTION

Generally, expropriation (civil law legal system) or eminent domain, compulsory sale or condemnation (common law legal system) may be defined as the power of a sovereign state to take or authorize the taking of private property for public purpose or use without the owner’s consent but conditioned up on payment of commensurate/just compensation in advance.

This power of the state is said to be the natural extension of its sovereignty and derived, according to the contractarians/ the proponents of the social contract theory of the state/, from the will of the people/ citizens which transferred some of their rights to the state for purpose of achieving peace, order and security of life and property.

Here it is important to distinguish expropriation from **police power**, which is a power of the state to make sure that private property is used /enjoyed in accordance with rules and regulations intended to ensure public safety, peace and health. **For example**, demolishing buildings constructed in violation of safety rules and urban planning, infested buildings, quarantining or culling of animals infected with deadly transmissible diseases …etc are manifestation of police power and as they do not involve the transfer of the property to the state, while expropriation involves the transfer of the property to the state for the purpose of, for instance, construction of roads, hospitals schools…etc and the provision of public cervices. In addition, this power is exercised without payment of compensations as opposed to expropriation, which presupposes compensation.

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

According to Art 40(8) of the FDRE Constitution private property shall not be taken or expropriated by the state unless it is required for public purposes or use and unless compensation that is equal to the value of the property is paid in advance. This provision prohibits even equivalent exchanges unless the government is acting for a public use. Though, under the current land holding system, land and all other natural resources are owned by the state and peoples of Ethiopia, the land holding rights enjoyed by citizens may still may be expropriated where such land is required for public purposes, i.e., construction of roads, schools, hospitals, town planning …etc against payment of compensation, which shall be equivalent to amount of damage incurred by the holders.

INDIRECT EXPROPRIATION

Where the work or project intended does not seriously impair the rights of the owner or the possessor or does not notably reduce the value of the immovable, for example installation of underground pipes, aerial lines, electric or telephone poles, the competent authorities may use indirect expropriation. In other words, such authorities or service providers may undertake such works without the need to follow the procedures required for expropriation. However, the competent authorities may not use

indirect expropriation to acquire or extinguish ownership of dwelling houses. The person whose right is affected by this procedure has the right to claim, with in a period of three years of the completion of the work, a compensation for the damages he suffered as a result. See Arts 1485-1488 of the civil code.

8.2.2. PUBLIC PURPOSE

Public purpose is a crucial element/requirement before the expropriation of private property. It is a requirement of due process of law in the context of expropriation, and failure to comply with it may render the taking of private property unlawful and unconstitutional. See Art 40/8/ cum 9/1/ of the FDRE Constitution. Furthermore, taking of private property for purposes other than "public purposes" leads to violation the of the right to property of individuals and abuse of the power by the government that in turn creates insecurity and ultimately discourages investment and commerce. This is because individuals will be discouraged from acquiring and improving property, expanding their holdings and investment if a government is free to force owners to surrender their properties for any purpose including, the benefit of another individual.

As to what constitutes public purpose, however, is open for debate and it differs from time to time and from system to system.

Generally, there are two main views as to what the concept of public purpose refers.

The first view holds that public purpose is equivalent to public benefit, utility or advantage. Hence, any taking which tends to enlarge resources, increase industrial energy and productive power of any substantial number of inhabitants or a section of the state or a purpose which leads to the growth of towns and creation of new resources for the employment of capital and/or labor, which contributes to the general welfare and prosperity of the whole community serves a public purpose and is justifiable. According to this view, expropriation of private property is justified if the undertaking for which the property is taken produces direct or indirect benefits to the public at large or to the section of the community. However, this view may open the way for unlimited interference by the government in the property right of citizens.

The second view holds that public purpose exists only where the undertaking for which the property is to be expropriated is to be directly used or enjoyed by the public, Such as schools, hospital, roads etc.

Unlike the first view, this view proposes a strict interpretation of the concept and requires the public to be the direct beneficiary of the proposed undertaking and to which it shall have equal and direct access. In other words, expropriation for a purpose, which may indirectly benefit the public is not justifiable or is unlawful. Hence this view tends to limit the power of the government in expropriation private property.

When we examine the **rules of the civil code in this regard,** we find that the civil code does not provide the concept of **public purpose**. However, it clearly provides that the state may not expropriate private property solely for the purpose of generating income or financial benefits. Hence, generating revenue for the government does not constitute „public purpose" and taking private property on this ground would be unjustifiable and unlawful. See Art 1464/1/ of the code. However, where the project for which the land is required would also benefit the local community/ the public/ by increasing the value of properties in the area the project shall be deemed to serve public purpose and expropriation is possible. See Art 1464/2/ of the code. It is also possible to argue that a proposed project would serve public purpose where it benefits the local community by creating job opportunities, creating market for raw materials…etc. In other words, indirect public benefit from the proposed project constitutes public purpose under the civil code.

According to Article 1463 of the Civil Code, the competent authorities must determine whether the project for which the land is required serves public purpose or not and a notice to this effect has to be published. In certain circumstances, public inquiry may be necessary before such declaration is made and published, i.e., the declaration will only be made after the public is consulted and interested person have expressed their views regarding the project. See Art 1465 of the code.

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

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

2. That it helps to achieve and consolidate sustainable socio-economic development. Generally speaking, a project for which the land is required shall be declared to serve public purpose where it is believed to, directly

or indirectly, benefit the public and where it is also believed that the project can contribute its share in the economic development of the country.

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

8.2.3 EXPROPRIATION PROCEDURES UNDER THE CIVIL CODE

1. Determining as to whether the proposed project serves a public purpose or not or declaration of public purpose. The competent authorities may hold, where it appears necessary, a public inquiry as to whether the proposed project serves public purpose. See Arts 1463 and 1465 of the code.

2. The competent authority shall determine the land required for the implementation of the project, and personal notice shall be given to the owners, bare owners, usufructuaries of the immovable he intended expropriation. See art 1466. They are entitled to express their views on the necessity of such expropriation within a reasonable period of time.

3. Where there is no opposition or the opposition is not accepted, the competent authorities shall make or issue the expropriation order. The order shall transfer the ownership and other rights on the immovable, free of any charge or encumbrance, to the competent authority concerned. Art 1467 of the code.

4. Expropriation orders, issued by the competent authorities, must be served on the owner of the immovable and other persons, if any, whose rights on the immovable are entered in the register of the immovable to be expropriated, i.e., the dominant owners who have servitude rights over the immovable, the usufractuary, the mortgagee, lessee…etc. See Art 1468 of the code.

5. The person whose property right is affected by the expropriation shall notify the competent authority the amount of compensation he claims for such rights with in a period of one month from the date of service of the order. However, any interested person, such as a creditor, may object to the amount of compensation fixed below a certain amount or may oppose the payment of compensation in fraud of his rights. This opposition or objection shall be made with in the period of one month from the date of service of the order. See Arts 1470 & 1471 of the code.

6. If the competent authority does not agree with the amount of compensation claimed by the person entitled, the amount to be paid shall be fixed the Arbitration Appraisement Committee, which shall be constituted according to rules to be enacted. /Art 1472 and 1473/1/ of the code.

7. The committee will have the duty to fix the amounts of compensation but it cannot decide on disputes regarding the right giving rise to compensation. The amount of compensation or the value of replacement land shall be equal to the actual damage, which shall be assessed on the day when it makes the decision. See Arts 1473-1474 of the code. The committee shall take in to account, in fixing the amount of compensation or the value of the land to be given replacement of the expropriated land, the claim or statement made by interested parties regarding the value of the properties or rights to be expropriated, and the increase of the value of the property as a result of construction of public works in the area. However, the committee shall not take in to consideration any improvement or buildings on the land, which are made after the service of the expropriation order and any speculation of increase in the value the immovable resulting from the proposed public work. See Art1475 and 1476 of the code.

8. The competent authority or/and the person who is entitled to payment of compensation may appeal to a court, with in a period of three months from date of service of the decision of the committee, against such decision. See Art 1477 of the code. The authority shall take possession of the land only after paying the compensation. In case of appeal by the person entitled to the compensation against the amount fixed by the committee, it shall take possession of the immovable only after it has paid the fixed amount to the owner. See Arts 1478/1 & 2/ of the code. The court may not reduce the amount of compensation fixed by the committee. Where the court increases the amount of compensation, the competent authorities shall pay the additional amount. See Art 1478/3/ of the code.

9. Where the expropriated person is to be given a replacement land, with or without monetary compensation, the competent authority shall take possession of the land only after it hands over such land to the person. Where the appeal is ledged by the authority, the owner shall remain in possession of the land until the court gives the decision. If the decision is not given with in a period of one year from the date of appeal and compensation is not paid, the expropriation order shall be invalid and the owner is not required to comply with it. See Art 1478/4/ of the code. The court may increase the amount of compensation or order payment of

additional compensation, in cash in case the owner was given replacement land. Such additional payment has to be made with in a period of one month from the date of judgment. See Arts 1478-1479 of the code.

UNIT NINE- REGISTRATION OF PROPERTY

9.1 NATURE AND TYPES OF REGISTRATION

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

Property registration systems may be „documents or deeds" registration system or „title or ownership" registration system. Under a documents registration system, documents or acts creating or transferring rights on immovable things are field or kept systematically to give notice interested parties a notice of the transactions involving the immovable concerned. However, registration of documents does not constitute a conclusive evidence of ownership on the immovable as the contracts or acts creating or transferring the right may be invalid, or the transferor may not be the true owner and cannot transfer a genuine right of ownership.

On the other hand, **ownership or title registration systems** register ownership or other right, such as usufruct, servitude or mortgage rather than the acts or contracts creating such rights. Registration under this system is a conclusive proof of the right unless the person registered as owner acted fraudulently. In other words, a person who, in good faith, acquired an immovable from a person who is registered as an owner and have his right registered will acquire a genuine right of ownership even where the transferor was not a true owner or the transferor acquired the immovable under an invalid contract.

9.2 PURPOSES OF REGISTRATION

1, creating security of property rights by recording the rights and encumbrances relating to the thing and providing evidence to the right holders. See Arts 1195-1198 of the Civil Code.

2, It also enables a potential buyer or mortgagee to ascertain that he or she is dealing with a person who is entitled to sell or mortgage the thing, i.e., the owner and acquire a legally enforceable right of ownership or mortgage. In the absence of a system of registration a person who

intends to buy or secure his rights with mortgage will not be able know whether the person he is dealing with an actual owner and runs the risk of dispossession or eviction or inability to enforce his mortgage. See Arts 2884 and 3049 of the Civil Code.

9.3 THINGS REQUIRED TO BE REGISTERED

9.3.1 IMMOVABLE THINGS

However, Art 3363 of the Civil Code provides that the provisions of the civil code shall not be operational until a date to be fixed by an order to be published in the Negarit Gazeta. Such order has not been issued yet and hence the provisions of the civil code dealing with registration of immovable, i.e., Arts 1353-1646 have not come in force. However, various municipalities have been registering immovable and issuing title deeds.

9.3.2 SPECIAL MOVABLES

As we have discussed above in the chapter one, the applicable for special movables is not the general property law. Thus the registration requirements are also provided in such special with out of the scope of general property law. Besides we have discussed relevant provision with regard to registration special movables under chapter four (particularly under the topic of proof of ownership.