Law of Property

Teaching Material

Prepared by:

Fassil Alemayehu

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INTRODUCTION

In common English parlance, the term property refers to things or objects such as a house, a land, a car, a table…etc. It also refers to the right of ownership of person. Hence, you commonly hear a person claiming that a certain thing or object is his property, that some body took his property…etc. However, the term, in its legal usage, refers to the rights a person may have in relation to things or objects that have economic value. The things or objects in relation to which property rights are exercised are called d objects of property. Hence, property refers to rights such as ownership, possession, usufruct, use, and rights of servitude, recovery, preemption and promise of sale.

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

Book III Title IV, Arts 1126-1674 of the Civil Code of Ethiopia, which is the main body of the property law of the country. In addition to this, the FDRE Constitution of 1995, the Re-enactment of the Lease Holding Proclamation No 272/2002, Land Use Proclamations, Condominium Proclamation No 370/2003, Expropriation of Landholdings for Public Purposes and payment of Pro No 455/2005 and the regulations issued for the implementation of the proclamation and other laws are also component parts of the Ethiopian Property Law that you should study.

This material contains nine units. Unit one deals introductory concepts such as patrimony, property and property law. It also discusses the objects of property/ things or goods/, the classification of things in various categories, the purpose of such classification…etc. Unit two, which is concerned with the right of possession, discusses the various theories of possession, the modes of acquisition, defects, significance, protection, transfer and loss of possession. Unit three discusses right of ownership. Under this unit the definition and elements ownership, the modes of acquisition, transfer, proof and extinction of right of ownership shall be discussed. An attempt shall also be made to highlight the type of property rights that can be had in relation to land and water under the current Ethiopian laws. The concept of joint ownership, its sources, its advantages and disadvantages, the rights and duties of the joint owners

and the termination of joint ownership shall be discussed under unit four. Unit five deals the cases of dismemberment of the right of ownership, i.e., usufruct, use right and right of habitation. It shall outline the sources of usufruct, use and habitation, the rights and duties of the parties and finally the grounds of extinction of these rights.

The concept of servitude, its sources, its nature, purpose, the rights and duties of the servient and dominant tenement, and the grounds of extinction are discussed. Right of recovery, promise of sale, right of pre-emption and prohibition of assignment and attachment are discussed under unit seven. Unit Eight deals with the concepts of public domain and expropriation. Under this unit the concept of public domain, the properties forming part of the public domain and their distinctive nature shall be discussed. It shall also assess the concepts of expropriation and public purpose and the procedures and requirements for expropriation. Finally unit nine discusses types and nature registration of properties, the purpose and significance registration. The discussions in each unit are supplemented by illustrations, exercises and review questions.

Students are advised to read the books and materials referred to in the course syllabus and this material as well as other relevant books and materials on property law.

Students are also advised to read the material in conjunction with the provisions of the relevant law.

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

UNIT OBJECTIVES

This unit is intended to acquaint students with the concept of patrimony and property, property law, the scope of property law, objects of property /things or objects/, classification of things and the purpose of classifying things in to various categories. It also tries to familiarize students with the various theories regarding the origin of property rights, the justifications for the existence and protection of property rights by the law and condemnation of the institution of private property.

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

- distinguish between patrimonial and extra-patrimonial rights
- understand the concept of property, objects of property and property law.
- identify the various theories regarding the origin, justifications and condemnation of private property.
- identify the scope of property law and distinguish it from other laws governing relations between persons in relation to objects, such as contract law and tort law.
- understand the rationales behind classification of things into various categories.
- classify things into various categories and the significance /purpose of classification,

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

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

Patrimonial rights that arise out of contractual or extra-contractual relations are generally governed and protected by the law of obligations, i.e., by the law of contracts when they arise out of contractual relations and by the law of torts when they arise out of extra-contractual relations. These categories of patrimonial rights are also referred to as rights in-personam / personal rights/ because they can be exercised against a specific person or persons. On the other hand, patrimonial rights over things/ property rights/ are governed by the law of property and they are also called rights in-rem/ real rights/ since they can be exercised against any person who may interfere with the right-holder's enjoyment.
Extra-patrimonial rights, which are defined above, are governed and protected by family law, penal/ criminal law and other branches of law based up on the particular type of right in question.

Similarly, the obligations or liabilities of a person which are governed and protected by the civil law may be patrimonial or extra-patrimonial depending up on whether they can be valued in terms of money or not.
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, who is the editor of Aubry and Rau's DROIT CIVIL FRANCAIS Volume II, Seventh Edition, 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:

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

1.2 THE CONCEPT OF PROPERTY

The term property has a variety of uses. In ordinary English, it refers to ownership or title and you usually hear an owner claim that this or that thing is "his or her property", Sometimes, it also refers to the res or the thing over which ownership right is exercised such as a house, a car, a table…. Furthermore, in its broad sense, property means everything that has material or moral value for human beings beginning with their own body, reputation, and freedom to think and act.

However, in its narrower and proper legal sense, property may be defined as an exclusive right to control, use, transfer… an object or a thing of economic importance and its fruits, exclude all other persons from its use and enjoyment and the follow the thing and its fruits in the hands of any person who might have unlawfully taken it. It is a name for a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of persons with respect to things having economic or financial value. Hence, accurate legal terminology ought to reserve the use of the word property for designation of rights of persons with respect to things. This is because the use of the concept of property to denote human, civil political and family rights would be stretching the concept beyond limits and would cause confusion. 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. The things in relation to which such property rights are exercised are objects of property rather than property itself. Hence, the house, or the car, or the table in relation to which an ownership right is exercised is properly called an object of the right of ownership.

Art 40/1/ of the FDRE Constitution which guarantees the right to property provides that

Property right includes, unless restricted by law for public purposes, the rights to acquire, use, and transfer things/ tangible or intangible/ of financial value.

Property rights are rights in-rem in the sense that it creates an obligation, on all other persons, to refrain from any act of interference in the use and enjoyment of a thing one owns or possesses. It also entitles a possessor or an owner of a thing to pursue such thing in the hands of any person in to whose possession the thing might have come. It is important to note here that private property is guaranteed and protected not only against interference by the government and its agencies but also by individuals and other persons.

In this regard, Art 1206 of the Civil Code provides for the right of an owner to claim and recover the thing owned from any person who, without his consent, possesses or holds it and to oppose and repel any act of usurpation. See also Arts 1148 and 1149 of the Civil Code. Compare the remedies available to a creditor to whom performance is not made, Arts 1771-1805 of the same code.

1.3 DEFINITION AND SCOPE OF PROPERTY LAW

What is the law of property? Could it be said that it is the law relating to physical objects such as a house, land a car … etc? Or is it a branch of law dealing with or governing relations between a person and things or objects?

Not every transaction, right, or liability relating to physical objects/ material things/ is regarded as relevant to the law of property, for instance, a contract between an owner of a car and a garage to service the car is part of law of contract rather than the law of property.

Similarly, interference in the enjoyment of or damage caused to physical objects is an ordinary tort and not subject to property law. However, certain torts involving property claims /such as trespass and nuisance in relation to buildings and land/ have an effect that is more specific to property rights and are governed by the law of property than the law of torts. However, nuisances committed by a person with no proprietary claim are more part of torts than property law.

Like all other laws, property law seeks to articulate the principles, policies, and rules by which disputes are to be resolved and by which transactions may be structured so that disputes may be avoided. What distinguishes property law from other kinds of law is that the principles, policies, and rules of property law deal with the relationships between and among members of a society with respect to things. The things may be tangible, such as land, a factory, or a diamond ring or intangible, such as stocks and bonds or a bank account.

For instance, in a case between Amleset Teame and W/ro Almaz Wolde and Ato Berhane G/yesus, in Civil File No 158191, the plaintiff was a minor when her father died in 1993 and the share of money from her father's inheritance was deposited at the Commercial Bank of Ethiopia T/Haimanot branch in the name of the defendants but on her behalf. Now the plaintiff who has attained the age of majority has instituted an action for declaration of her ownership to the money plus interests thereto. The first defendant admitted the claim of the plaintiff while the 2nd defendant was earlier expelled from the country and the case was seen in his absence.

The court framed the issue as to whether the action was a real action or personal action against the defendants, and as to whether the plaintiff is the owner of the money so deposited.
Regarding the 1st issue the court held that thought the case is instituted against the two defendants, it is not a personal action demanding remedy from the defendant, rather it is a request for declaration of her right as an owner of the money deposited for her benefit by the defendants. / Compare Art Arts 1128 and 1206 of the Civil Code/.
Regarding the 2nd issue, the court decided that the plaintiff has proved the fact that she has inherited the money in question from her father/ and has become an owner as per Arts 1205/2/ and 1184 of the Civil Code/ and the account was opened and the money was deposited in the bank by the defendants for the benefit of the plaintiff who was a minor at the time and declared the plaintiff to be the owner of the money and instructed the bank to pay the money to plaintiff.

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

As we have seen earlier, property is frequently defined as the rights of a person with respect to a thing. However, this definition is of little importance in legal discourse because a thing cannot have meaning full legal relationship with a person, for example, a thing cannot bring or defend a lawsuit. Property law does not deal with the rights, privileges in the abstract; it deals with relationships between and among persons.

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

1.4 THEORIES OF PROPERTY

"The right of property refers to the despotic dominion which is claimed by a person claims and exercises over external things of the world and to exclusion of all other persons in the universe. It is a right that is regarded highly by mankind; however, only few go in to the trouble of asking themselves about its origin and foundation. The majority of us are pleased with our possession and seem to be afraid to look to the means by which it was required as we are fearful of the defect in our title or at best we rest satisfied with the decision of the court in our favor without examining the reason or authority up on which those laws have been built." William Blackstone.

Under the following sections we shall attempt to examine the origin and foundation of private property.

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

We shall discuss these theories in the following sections.

1.4.1 THEORIES REGARDING ORIGIN OF PROPERTY

A. THE POSITIVIST THEORY

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

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 my self up to its cultivation with the sure though distant of harvest.

Property and law are born together and die together. Before laws were made, there was no! property; take a way laws, and property ceases. 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. The person must give its freedom an external sphere in order to live as an idea. This external sphere, capable of embodying the person's freedom, consists of the rest of the word, every thing that is distinct from the person. From the need to embody the person's free will from the abstract realm to the actual, Hegel concludes that the person becomes a real self only by engaging in a property relationship with something external. Such a relationship is the goal of the person.

Hence, private property originated in the person's attempt to actualize his/her free will, i.e., when someone extends his will to external things he makes that thing a part of himself.
Hegel clearly makes the claim that a human being can only become properly developed- actualize her freedom- in the context of a community of others. Thus, though he speaks of the person in the sphere of abstract right only in the Kantian sense of abstract rationality, he implicitly claims that personhood in the richer sense of self-development and differentiation presupposes the context of human community.

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. Although explicit elaboration of this perspective is wanting in modern writing on property, the personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty. In addition to its power to explain certain aspects of existing schemes of property entitlement, the personhood perspective can also serve as an explicit source of values for making moral distinctions in property disputes, and hence for either justifying or criticizing current law. It is not surprising that personhood has played a part in property theories all along the political spectrum. Conservatives rely on an absolute conception of property as sacred to personal autonomy. Communitarians believe that

changing conceptions of property reflect and shape the changing nature of persons and communities. 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.

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

If it makes sense to say that one owns one's body, then, on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one's personhood. If the body is property, then objectively it is property for personhood. This line of thinking leads to a property theory for the tort of assault and battery. Interference with my body is interference with my personal property. Certain external things, for example, the shirt off my back may also be considered personal property if they are closely enough connected with the body.

The idea of property in one's body presents some interesting paradoxes. In some cases, bodily parts can become fungible commodities, just as other personal property can become fungible with a change in its relationship with the owner: Blood can be withdrawn and used in a transfusion, hair can be cut off and used by a wigmaker; organs can be transplanted, on the other hand, bodily parts may be too" personal" to be property at all.

Finally, let us consider the view that 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. It is frequently remarked that dogs resemble their masters; the attributes of many material goods, such as cars and clothes can proclaim character traits of their owners. Of course, many would say that becoming too enthralled with property takes away time and energy needed to develop other faculties constitutive of personhood. 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.

This view of personhood also gives us insight into why protecting people's "expectations" of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.

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, this communion of goods had never been applicable, even in the earliest stage, to the substance of the thing nor could it be extended to east the use of it. This is because by the law of natural and reason acquired there in a kind of transient property that lasted so long as he was using it and no longer, i.e., the right of possession continued only for the time only the act of possession lasted. Thus the land was in common, and no part of it was the permanent property of any man in particular, yet whoever was in occupation of a determined spot, for rest, shade or the like acquired for the time being a sort of ownership, from which no one can derive him by force, for this would have been unjust an contrary to the law of nature. But the instant he has quitted the use or occupation of it, another reason might seize it with out injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce/ fruits/ and yet any private individual might get the sole property of the fruit which he had gathered for his own repast.

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 human life also grew more and more refined means of convenience were devised to render it more easy, commodious and agreeable such as habitations for shelter and safety and raiment/ incentives for warmth and decency. But no one would be at the trouble to provide either so long as he had only the usufructuary property in them, which was to cease at the instant he quitted possession. In case of habitations in particular, it was natural that even the brute creation to which every thing else is in common maintained a kind of permanent property in their dwellings, especially for the protection of their young, the invasion of which they esteemed a very flagrant injustice and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall, which seem to have been originally mere temporary huts or moveable cabins suited to the design of providence for more speedily peopling the earth and suited to the wondering life of their owners before any extensive property in the soil or ground should be established.

Then, movable things come to be more appropriated than the permanent /substantial subsoil, partly because they are more susceptible of long occupancy which might be continued for months without sensible interruption and partly because few of these things could be fit for use unless and until improved and ameliorated by the bodily labor of the occupant, this bodily labor is universally allowed to give the fairest and most reasonable title to an exclusive property there in.

Hunting, and animal rearing (for milk, meat and their skins and hides) the latter is more secure than hunting and digging water wells even where the land and hedges still belonged to all in common represent the most common way of creating property right.

As the world grew more populated it became more difficult to find new spots to inhabit without encroaching upon former occupants. Furthermore, constantly occupying the same particular spot depleted the fruits and spontaneous produces of the earth and it, therefore, became necessary to pursue some regular method of providing a constant subsistence and this necessity resulted in or at least encouraged the art of agriculture. The art of agriculture, by regular connection and consequence introduced and established a more permanent property in the soil /land. It was clear that the land would not produce sufficient quantities and qualities without the assistance of tillage, but who would be at the

pain of tilling it if another might watch an opportunity to seize up on and enjoy the product of his industry art and labor? Therefore, had it not been for a separate property in land and movables vested in some individuals, the world should have continued a forest and men must have been mere animals of prey. Hence, necessity begat property and in order to insure that property recourse was had to civil society which brought along with it along a train of inseparable concomitants: states, governments, laws, punishment and the public exercise of religions duties.

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

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

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

In the late 17th century, Samuel von Pufendorf refined a theory of the origins of property rights that had been in existence since ancient times. Property, he said, is founded in the physical power manifested in

seizing the object of property /occupation/. In order, however, to convert the fact of physical power into a right, the sanction of the state is necessary. However, the state cannot make a property right where physical possession is not present. Thus, both occupation and state sanction are necessary conditions for legitimacy of property.

The acceptance of the divine right of grab is not wide spread today as it was once. Maine suggests that this doctrine is probably the result of later thought. It is only when the right of property has gained a sanction from long practical inviolability, and when the vast majority of the objects of property have been subjected to private ownership that mere possession is allowed to invest the first possessor with ownership or dominium over commodities in which no prior right has been asserted. In a crowded world, occupation applies only to a relatively unimportant degree; less often does the vacant forest await the tiller. The theory of occupation hardly provides a reasonable account of the origin of property, and it is even less satisfactory as justification of property. Why should he who is lucky enough to size a thousand acres become an owner?

In the common law, first possession / occupancy is the root of title or property. This raises two main questions;

1/ what constitutes possession? And

2/ why should it be the basis of property?

In Pierson V. Post [New York Supreme Court 1805], Post was hunting a fox on an abandoned beach and almost had it in his gun sight when an interloper appeared killed the fox and run away with the Caracas. The indignant Post sued the interloper for the value of the fox on the theory that his pursuit of the fox had established his property right to it.

The court disagreed, and held that possession or occupancy went to the one who killed the animal, or who at least wounded it mortally or caught it in a net. These acts bring the animal with in the certain control that gives rise to possession and hence a claim of property/ ownership.

Possession thus means a clear act where by the entire world understands that the pursuer has “an unequivocal intention to appropriating the thing to his individual use”. A clear rule of this sort should be applied because it prevents confusion and quarrelling among persons.

The case presents two great principles for defining possession. First, notice to the world through a clear act and second, reward to a useful labor. The latter principle, of course, suggests a labor theory of property, which implies that the person gets the prize when he mixes his labor with the thing by hunting, collecting, occupying etc… On the other hand, the former principle suggests at least a weak form of the consent theory, i.e., the community requires clear act so that it has the opportunity to dispute the claim or to acquiesce in or to acknowledge individual ownership where the claim is clear and no objection is raised.

Why, then, is it so important that property owners make and keep their communication clear? Economists have an answer: they argue that clear title facilitates commerce and minimize resource wastage on disputes.

If I am careless about who comes on to the corner of my property, I invite others to make mistakes and to waste their labor and resources to make important improvements to what I have allowed them to think is theirs. I thus encourage contention, insecurity and litigation, which wastes everyone's time, energy and resources. However, if I keep my property claims clear, every one will know that they should deal with me directly if they want to use my property. We can bargain, rather than fight; through trade, all items will come to rest in the hands of those who value them most. If property lines are clear, then anyone who can make better use of my property than I can will by or rent it from me and turn it to his better use. / Carole M. Rose, Possession as the Origin of Property/

D. LABOR OR ENTITLEMENT THEORY

John Locke argues that natural reason tells us that men, being once born, have a right to their preservation, and consequently to food, drink, and such other things nature affords for their subsistence. Revelation, when giving an account of those grants God made of the world to Adam, and Noah and his sons, states that God has given the earth to humankind in common. How men have come to have property in several parts of that which God given to humankind in common?
God, who has given the world to men in common, has also given them reason to make use it to the best advantage of life and convenience. The earth and all that is there in is given to men for the support and comfort of their being.

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 there by makes it his property. This is because he has removed it from the common state of nature and has placed it in to some thing which is exclusively his own.
It is this labor that puts a distinction between those that are appropriated and those which are common. In other words, the difference between things owned privately and those, which are commonly owned by all human kind, lies in the fact that ones labor has been added to on.

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?"

A number of writers, more or less contemporary to Locke proposed another theory of the basis of ownership / property. They argued that the original owner got title through the consent of the rest of humanly who were, taken together, the first recipients of the earth and its resources from God. However the problem with this theory involve what Law and Economics writers would call " administrative costs "; how does every one get together to consent to the division of thing among individuals?

1.4.2. THEORIES REGARDING THE JUSTIFICATION OF PRIVATE PROPERTY

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

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

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

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

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

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

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

All property relations in the past have continually been subject to historical change consequent upon the change in historical conditions. The French Revolution, for example, abolished feudal property in favour of bourgeois property. The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property. But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products that is based on class antagonisms, on the exploitation of the many by the few.

In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property. We Communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence. Hard-won, self-acquired, self-earned property! Do you mean the property of the petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is still destroying it daily. Or do you mean modern bourgeois private property? But does wage-labour create any property for the labourer? Not a bit. It creates capital, i.e., that kind of property which exploits wage-labour, and which cannot increase except upon condition of begetting a new supply of wage-labour for fresh exploitation."

1.5 OBJECTS OF PROPERTY

1.5.1 DEFINITION

The phrase 'objects of property' may be defined as the goods or things over which a right of property may be exercised. The French Civil Code uses 'choses' and 'beins' to refer to objects of property but without defining and distinguishing them. In its title on things and their classification it talks about 'beins' while in the title dealing with ownership it uses the term 'choses'. As a result French

commentators tried to define and distinguish between these two terms. Accordingly they suggested that the word ‘choses’ should refer to anything, which exists in nature, whether susceptible of appropriation, while the term ‘beins’ should refer to objects of riches or fortune, i.e., things that are susceptible of appropriation. In other words, things that can be appropriated are ‘beins’ not only when they belong to someone in particular, but also when they belong to no one. Here it is important to note that all ‘beins’ are ‘choses’ while not all ‘choses’ are ‘beins’.

John Austin argues that things are such permanent objects that can be perceived the senses. They are permanent in the sense that they can be perceived repeatedly. According to this definition and other common usages, for a certain matter to be considered as an object of property, it must have:

_ a certain element of permanence, as opposed to events and facts, for example a puff of smoke may not be considered as a thing since it lacks permanence. However, the precise degree of permanence required is difficult to determine.

_ a certain element of physical unity i.e. organic unity as in the case of an ox or a sheep, or inorganic unity as in the case of a house made of bricks.

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

According to this definition, the term may refer to;

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

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

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.

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

1. Things /goods which have material existence such as a car, an ox a house/ corporeal things/ (Art 1127), as well as claims and rights contained in securities to bearer which are incorporeal or intangible by nature but which are assimilated to corporeal things (Art 1128) and

2. Things which have no physical or material nature but which are perceptible by senses for example natural forces of economic value such as solar and wind powers which are mastered and put to use by man kind (Art 1129)

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

As we have seen above, French writers distinguish between 'beins' and 'choses', so you think that such distinction is possible under Ethiopian law?

It may be concluded that the phrase 'object of property' refers to the things/goods over which a potential right of property may be exercised and it may be a thing which have material or physical existence, i.e., a corporeal thing or a thing which does not have such material or physical existence, i.e., an incorporeal thing. As to which things may be appropriated and which are not, depends on the existing laws, for example land which was appropriable i.e., capable of private ownership during the time of the enactment of the civil code is now the common property of the peoples of the country. Art 40 of the FDRE Constitution provides that land belongs to the people of Ethiopia and cannot be privately owned or appropriated and all Ethiopians have the right to use land.

1.5.2 INTRINSIC ELEMENTS OF THINGS

Art 1132 of the Civil Code defines intrinsic elements of goods as things, movable or immovable, which are regarded by custom as forming part of a thing, or which is materially united to a thing and can not be detached there from with out destroying or damaging such thing. For instance, a hay-tucker attached to a tractor may be considered by farmers as forming part of the tractor /custom of the farming community/. A house in a farm may also be considered as forming part of the land (custom).

A windshield of a vehicle is materially united with the latter and cannot be separated from it without damaging the use of the car, as the vehicle is incomplete without a windshield. Water pipes in a building cannot be detached from the building without damaging the floor in which they are buried.

Trees and crops are considered as intrinsic elements of land until they are separated there from or until a contract for their separation is concluded.

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

1. Rights on or dealings relating to the principal thing shall include the intrinsic elements unless the parties have agreed expressly that such right or dealings shall not apply to them. For instance, a contract of sale of a land rights or mortgage of a land shall include the houses and trees that are considered as its intrinsic elements, unless the parties have expressly agreed that the sale or mortgage relates only to the principal and not to the intrinsic elements. Art 1132/1/

2. A thing that becomes an intrinsic element of another thing ceases to exist as a distinct movable thing. For instance, a water pipe fitted in a building or a newly bought windshield glass fitted to a vehicle ceases to exist as a separate thing or object of property. Hence, the right, which third parties previously had on such thing, shall be extinguished; and an owner or a person who has any other right in relation to such thing cannot recover the object from the owner of the principal thing. However, such person may claim reimbursement of the value of such thing and compensation for damages based on the rules of unlawful enrichment. See Arts 1134 and 2162-2163 of the Civil Code.

1.5.3 ACCESSORIES OF THINGS

Art. 1136 of the Civil Code defines an accessory as anything, movable or immovable, which the owner or the possessor / the Amharic version limits to the usufructuary and not other possessors/ of the thing has permanently destined for the use of another thing. For instance, if an owner of a car puts a jack permanently for the use of his car the jack shall be considered as the accessory of the car.

A tractor, or a pair of oxen, or a horse put by the owner/possessor of a land for the use of his land is considered as accessory. Similarly, a plot of land adjacent to a certain farm that is intended for the use of the farm or a private water well out side a certain farm and which the owner/possessor of the farm has destined for the use of such farm as a source of water is considered as an accessory to the principal thing, the farm.

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

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

principal thing with the belief that he will benefit from the accessory. See Art 1139 of the Civil Code.

1.6. CLASSIFICATION OF OBJECTS OF PROPERTY

1.6.1 THE PURPOSE OF CLASSIFICATION

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

Firstly, the economic and social values attached to things are not the same, i.e., certain things are more important than others are. For instance, buildings or houses and land / immovable things/ have a much higher economic and social importance or value than most movable things such as furniture, shoe or an ox. As a result, the rules governing the acquisition, transfer, proof and extinction of property rights over the various categories of objects are different. For instance, contracts relating to immovable things have to be made in writing and must be registered with the appropriate public organ, while contracts relating to most movable things are not subject these requirements. Furthermore, the existence of property rights in relation to immovable things must be proven by producing special written document, while the possessor of most movable things is presumed by law to be the lawful owner. / See Articles 1723, 1195 and 1193 of the Civil Code/.

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

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

1.6.2. CORPOREAL AND INCORPOREAL THINGS

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

Corporeal things are things that have material or physical existence and unity and hence, can occupy space and can be seen or touched. Hence, things such as a house, a car, an ox, and a watch are corporeal things. According to Art 1127 of the Civic Code, corporeal things are things that have material or physical existence and that can be seen and touched. This provision, however, is not limited to the definition of corporeal things

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EXERCISE:

1. Identify the other category of things defined under Art 1127.
2. Define the concept 'chattels' comment on the propriety of the use of the term 'corporeal chattels' under the same provision.

Corporeal things are divided into movable and immovable things, which shall be discussed later on.

Incorporeal things are things that do not have a material or physical existence, that cannot occupy space and hence that cannot be perceived by the senses. This category primarily include rights particularly those that have economic value and can be expressed in terms of money. For example, copyrights and patents, which are a bundle of claims to prevent others from copying and selling a work of art or to prevent others from using the protected process or invention without the permission of the author or the inventor. Rights and claims arising from various contracts and contained in negotiable instruments such as checks, promissory notes, bills of exchange, shares, bonds, warehouse goods' deposit certificates and bills of lading are also examples of this category of things. See Arts 715, 325, 345, 429-444, 570, 610 of the Commercial Code, and Arts 2806-2824 of the Civil Code.

The Ethiopian Civil Code under Art. 1128 recognizes this classification by including claims and other right incorporated in {securities} to bearer in the realm of objects of property or things. In addition to

these, natural forces of an economic value such as solar and wind powers used for generation of electricity are considered as incorporeal things from the moment they are controlled and put to his use. Though these things are incorporeal by nature the law, for the sake of convenience, regards them as corporeal things. / See Art 1129 of the Civil Code/

However, Property Law does not govern most of these things. Copyrights and patents fall within the scope of Intellectual Property Law, the rights contained in checks, promissory notes, bills of exchange, shares, bonds, warehouse good's deposit certificates and bills of lading are governed by the law of Negotiable Instruments, and other laws governing companies, contracts of carriage, contracts of ware housing and other specific laws which you will study under other courses. **See Art.** 325 (1) (2) (3) **Art** 715 716 719 825 of the Commercial Code.

Now let us see why Art. 1128 singled out claims and rights incorporated in securities to bearer and considered them as objects of property governed by property law.

Let us start by defining securities. Securities are one type of negotiable instruments particularly, documents containing rights for payment a certain amount of money. Shares or stocks and bonds or debentures issued by companies or treasury bills issued by the government through the national or central bank are the typical examples of securities. A person who is a holder of a share, for example, is entitled to receive a share of the companies annual profit/ if any/ and to share in the assets of the company at time when the company is dissolved. 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.

Now the question is whether the law has intentionally excluded other claims and rights incorporated in other types of securities, i.e., securities registered in the name of a specified person and securities to order and also rights and claims contained in other types of negotiable instruments. Should Art 1128 include bearer commercial instruments and bearer documents of title to goods?

The writer of this material does not believe that claims and rights incorporated in negotiable instruments in general and securities in particular should fall with in 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 other wise. 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.

1.6.3 MOVABLE AND IMMOVABLE THINGS

The modern distinction is between movable and immovable things. The basis of this classification is physical mobility or immobility and the value or importance attached to various types of property.

1.6.3.1 MOVABLE THINGS

Movable things are things which can move by themselves or be moved by man without losing their individual character. Hence, an ox, a car, table, a book …etc are movable because they can move by themselves or be moved by man from place to place with out being dismembered in to several parts. Things that cannot move by them selves or cannot be moved by man unless they are first dismantled or demolished are not movable things. See Art. 1127 of the Civil Code.

Is a cabin or similar structure intended to serve as a house but which is attached to ground by bolts and which can be easily disengaged and transferred to another place a movable thing according to the definition under Art 1127? Explain.

A. SPECIAL MOVABLE THINGS

These are movable things by nature but to which the law attaches characteristics of immovable things. The law does so mainly because of the importance attached to these types of things. The rules governing the acquisition, transfer and proof of rights over ordinary movable things/ also called

chattels/ shall not apply to special movable things, because they are governed by the rules applicable to immovable. For instance, a right of ownership over a table is transferred by a simple delivery of the table, while owner ship of a special movable thing, such as a motor vehicle, is transferred in the same manner as a transfer of a building by registration of the act transferring the right, registration of transferee in the register kept by the relevant government organ and issuance of a title deed in the name of the transferee. /See Art 1185 and 1186 of the Civil Code. /

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

B. MOVABLES BY ANTICIPATION

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

According to Art 1133(2), trees and crops which are considered as intrinsic elements of land will be considered as distinct movable things or chattels where they are the subject to contracts for their separation. For instance, where a contract for the sale of standing trees is concluded, the tress that are not yet cut are considered as movable objects starting from the date of conclusion of such contract. They are called movables by anticipation of their future removal from the land. The same is also true of component parts a building which is going to be demolished and its intrinsic elements such as the doors, windows, corrugated iron sheets, pipes and electrical appliances are considered as separate movable objects even before the house is demolished. Similarly, a contract for extraction and sale of products of quarry such as stone and sand shall have the same effect in relation to such things. Refer to Art 1133/2/ and 2268 of the Civil Code.

1.6.3.2 IMMOVABLE THINGS

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

are attached to the ground such as trees and crops are not treated as immovable things under the law.

A. IMMOVABLES BY NATURE

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

Art 463 of the 1870 Civil Code of Louisiana divided immovable things into three categories: immovables by nature, immovables by destination and immovables by the object/ purpose to which they are applied. Art 462 of the same code defines immovables by nature as things that cannot move by themselves or be moved from one place to another. It further provides that buildings and other constructions shall be considered as immovables by nature regardless of whether they have their foundations in the soil and the courts have properly classified as immovables things whose foundations rested on blocks or posts. Furthermore, the code does not require unity of ownership as a prerequisite of immobility. Hence, buildings and other constructions erected by persons other than the owner of the land are immovables by nature

However, the definition of immovable things by nature is deleted by the revised civil code of 1978 on the ground that it contradicts the reality since contemporary mechanical advancements make possible the relocation of immense quantities of earth, timber, buildings and various other kinds of constructions. It appears, therefore, that immovability by nature under the present Louisiana law is a legal fiction based partly on practical considerations and partly on inherent characteristics of things. Hence, in light of contemporary conceptions, the only immovables by nature are tracts of land, i.e., portions of the surface of the earth individualized by boundaries.

The 1978 revision made no changes in the classification of buildings. Hence, buildings that belong to the owner of the land/ ground are component parts of the land and are immovables. When the owner of the land/ground is different from the owner of the building, the building is considered as a separate

immovable. Thus, under the revised code, as under the 1870 code, buildings are classified as immovables.

However, constructions other than buildings are classified, under the revised code, as movables unless they are considered as component parts of a tract of land. To be considered as a component part of a tract of land it must meet two requirements: it must be permanently attached to the ground, and it must belong to the owner of the ground.

The term ‘land’ refers to a space as much as it refers to the material of which that part of the land is made. In its spatial aspect, land is immovable, while in its material aspect it may be removed, at least partially, by removing the soil. A house attached to land is an immovable in law, but obviously, it may be moved in fact by demolishing. The nature of an immovable cannot be understood unless we realize that, starting from a physical test, the law has gradually extended the notion.

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

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

As we will see in subsequent sections the rules governing acquisition, transfer and proof of rights of ownership to immovable things are more rigorous as compared to the rules governing acquisition, transfer and proof right ownership over movable things. This is because immovable things have more economic as well as social value and the law provides them more protection. Compare the provisions of Art 1193 and 1195, 1185 and 1186

B.IMMOVABLES BY DESTINATION

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

Reread the discussion on accessories of things under section 1.4.2.4 above and compare what things constitute immoavables by destination.

1.6.4 REAL AND PERSONAL PROPERTY

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

1. The rules of intestate succession are different for the two types of property. Compare the paterna-patternis materna-maternis rule under Art 849-851 of the Civil Code.

2. Only personal property can be owned absolutely, where as real property could be split up in to successive interests-tenancy, lease usufruct…etc.
3. Personal property was primarily liable for the payment of debts.
4. 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?

1.6.5 MISCELLANEOUS CLASSIFICATIONS

A. CHOSE IN ACTION AND CHOSE IN POSSESSION

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

The growing importance of negotiable instruments and company stocks, the increase in the value copyrights and patents have increased the role chose in action plays in the economic life of the present day states.

C. 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 any thing 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 Art

1745 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.

REVIEW QUESTIONS

1. Discuss the origin and justification for private property based upon the theory of labor theory.
2. Comment on the provisions of Art.1128 by focusing on its scope of application, the reason for exclusion of other rights over which property rights may be exercised. You may refer to Arts.1167, 1347 and 1351 in doing so.
3. 'Rights other than those contained in securities to bearer are not objects of property.' Do you agree? Why? Why not?
4. What are the rationales behind classification of things into various categories? Discuss by citing examples.
5. Explain is the basis for the classification of things into corporeal and incorporeal things.
6. What is the basis of classification of things into movable and immovable things? Explain.
7. Discuss the concept of property.
8. Property is different from the ownership of a thing and the object of property or the thing over which it is exercised.
9. What are intrinsic elements of things? Explain by citing examples.

10. What are accessories of things? Explain by citing examples.
11. Property rights over special movable things are governed by the rules governing immovable things. Do you agree? Why? Why not?
12. Intrinsic elements of things are related to movable things by anticipation. Explain.
13. Accessories of things are related to immovable things by destination. Explain.
14. What are the effects of treating as intrinsic elements and accessories of other things?

UNIT TWO-POSSESSION

Introduction

Possession is one of the main property rights a person may have in relation to objects/things. This UNIT is intended to acquaint students with the concept of possession, its elements, the importance of possession, the rights of the possessor, the protection provided to the possessor by the law, transfer and loss of possession.

UNIT OBJECTIVES

This Unit is intended to enable students to:

- understand the meaning of possession and distinguish it from a mere holding.
- understand the legal effects of possession and its importance.
- identify the protections provided by the law to the possessor.
- distinguish between possessory actions and nagatory actions.
- identify the modes of transfer of possession.
- identify the grounds on which possession is lost.
- solve practical cases involving issues of possession.

2.1 TEHORIES AND DEFINITION OF POSSESSION

2.1.1 THEORIES OF POSSESSION

SAVIGNY'S/CLASSICAL/ THEORY OF POSSESSION

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

The distinction between detention and possession follows from a proper analysis of the latter concept. Possession is made up of two elements

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

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.

JEHRING'S THEORY OF POSSESSION

He started by posing the question why did Roman law protected possession by means of interdicts. He argued that they were devised to benefit owners by protecting their holding of property and so placing them in the advantageous position of being defendants in any action as to title. Persons who hed property would be owners in majority of cases and possession was attributed to them in order to make the interdicts available. 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. He contended that the animus element was simply an intelligent awareness of the situation or fact.

According to this theory a possessor is a man, who in relation to a thing, is in a position in which an owner of such thing ordinarily is, animus being merely an intelligent consciousness of the fact. In other words, a possessor is a man who, in relation to a thing resembles an owner, i.e., who has direct physical control of such thing. This theory explains those cases, which were difficult to Savigny such as the pledgee and the usufructuary that were given possession right. However, it fails to explain the cases where the law denies possessory right to those who are in execlusive physical control of a thing such as

a borrower, a tenant and a depositee. The anomaly in this theory is that not every detentor is a possessor and it fails to explain these exceptions.

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

SALMOND'S THEORY

(Salmond on Jurisprudence 7th Ed)
A Modified version of Savigny's theory has exerted a considerable influence on English writers and the same shift in the meaning of possession has occurred in English law as in Roman law; 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 him. Nor is it necessary for its commencement, where for example a child or a ruffian may both make for a purse 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

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

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

thing to carry out acts of use enjoyment or transformation. 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, with out 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

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

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

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 with out possession and its advantages.
- He could have possession and its advantages with out 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 with out 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 POSSESSION

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

Simple occupants lack the animus element (intent to hold for them selves). This presumption is tied to the origin of their possession and continues through out 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

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

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

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. Further more, 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. See Arts 1146/1/, 1168 and 1150 of the Civil Code.

2.4 EFFECTS OF POSSESSION

1. Possession may create ownership either by occupation, i.e., by taking control of res-nullius/ a thing with out an owner/ or through the expiration of a period of acquisitive prescription. See Art 1151 and 1168 0f the Civil Code.

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

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

2.5 PROTECTION OF POSSESSION

As we have seen the preceding section, one of the most important effects of possession is that it is the bases of certain protections by the law.

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 fort 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 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 some one 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.

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

2.5.1 POSSESSORY ACTIONS

In the broadest sense, and in contradistinction from negatory actions that are based ownership or title, possessory actions are those that are based exclusively on possession with out 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.

Possessory actions, under French law, are those which aim directly and principally at the recognition of the possession in favor of the plaintiff. They are based on an actual possession or quasi-possession having the characteristics required by law and contained for at least one year. 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; or to obtain the suspension of construction or other works the completion of which could adversely affect possession of the plaintiff.

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 some one else's land, but also to trees and crops planted on the land of another.

Usufruct, use and habitation rights can be the object of possessory actions in as much as they are related to corporeal immovable things in-commerce/ belong to the private domain./. Since the facts that constitute the contents of these rights are by their nature contrary to any presumption of purely

precarious enjoyment, they can give rise to a possessory action, 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.

According to Art 1149/1/ of the Civil Code, a possessor [or even a holder] who is dispossessed of his possession or whose possession is interfered with may institute an action for the restoration of the thing or cessation of the interference and claim compensation for damages resulting from the dispossession or interference. Hence, our law also recognizes possessory actions for the restoration of possession and cessation of interference in possession. However, it does not clearly allow the possessor or holder to require the cessation of works on the neighboring land, which can damage or endanger the works on his land. However, Arts 1210 and 1225/2/ of the code that impose an obligation on the holder of a land to refrain from acts that can damage or endanger buildings on a neighboring land such as excavations, digging wells, other underground works and planting trees close to boundary line, imply that a possessor whose possession is affected by such acts may apply to a court for the enforcement of these obligations by the owner/holder. 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.

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.

Art 1149/3/ of the code provides that the court, provided that the plaintiff has proven his possession and the interference in such possession, shall order the cessation of interference or the restoration of the thing unless the defendant can prove forthwith and conclusively the existence of a right in his favor justifying his conduct.

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?

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.

2.5.2 USE OF FORCE

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

The law allows the possessor or holder to use force in order to repel violent actions of persons aimed at taking the thing under his control. 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.

EXERCISE: Read Arts 68/c/, 75 and 78 of the FDRE Criminal Code, and Arts 16, 26/1/ and 40 of the FDRE Constitution and explain the rationale behind self-measures adopted in the criminal code and the civil code.

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.

In Execution File No 33443 at the Federal First Instance Court between Lions Agri Mechanization Services and Ato Hordofa Deti et.al the judgment creditor requested the attachment and sale of;

1. A coffee plantation situated in Jima Zone, Seka Woreda,
2. A Wheat harvest /crops situated in Bale Zone, Golelcha Woreda and
3. A Wheat harvest /crops in Bale Zone, Harega Woreda

which belong to the judgment debtors and which are subject to an injunction order to restrain their transfer since 1/3/99 E.C.

Accordingly the court has granted the order However, Chilalo Enterprise PLC and Ato Assefa Degefa objected to the attachment and sale of these properties as per Art 418 of the Civil Procedure Code on the ground that they have acquired the right of use and possession to these properties through contracts transferring the land lease rights concluded on 14/9/94, and 2/12/95 E.C and the judgment debtors have no right to the land use/lease right, the crops and other properties thereon.

The court held that though Art 16(1) of Pro No 3/87 as amended by Pro No. 23/90 of the Oromiya Regional State allows the transfer or sale of the land use/ lease right, such transfer will be effective only where the Oromiya Investment Bureau and the Investment Board accepts or agrees to the transfer and registers the transfer. However, in the case at hand such acceptance is not acquired and the transfer is not registered. Therefore, the court rejected the objection and ordered the attachment and sale of the properties.

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

2.7 LOSS OF POSSESSION

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

However, a possessor shall not be considered to have lost his possession by the sole fact that, at a given time, he was not able to exercise physical control in relation to the thing or that he did not intend to hold it in his own name and for his own benefit.

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.

REVIEW QUESTIONS

1. Under Ethiopian law, possession consists of a mere physical control only'. Do you agree? Why? Why not?
2. Discuss the elements of possession?
3. Discus the defects of possession by relating to the provisions of the Civil Code of Ethiopia.
4. What are the legal effects/ significances of possession?
5. What is the theory of possession adopted by our law of possession? Explain by relating to the provisions of the Civil Code.
6. What are the grounds on which possession may be transferred?
7. What are the ways in which possession may be transferred?
8. Define the concept of possessory actions and distinguish it from negatory actions.
9. Discuss the protections given by the Ethiopian property law to a possessor.
10. Discuss the main categories of possessory actions by relating to the provisions of the Civil Code.
11. What is the effect of temporary loss of the element of corpus on possession under Ethiopian law? Explain.

12. Discuss the difference between possession and mere holding by refering to the relevant provisions of the law.

UNIT THREE-OWNERSHIP

UNIT OBJECTIVES

In this unit, you shall study the concept of ownership, the specific rights and benefits constituting ownership, the ways in which ownership is acquired, transferred, proved and extinguished. You will also study the restrictions that are imposed by law on the owner, and the purpose of such restrictions.

The unit also discusses the current law governing land and other natural resources and the rights that a person may have in relation to these things.

At the end of this Unit, you are expected to;

- define the concept of ownership and its component elements.
- identify the ways by which ownership right is acquired.
- identify the restrictions on the right of ownership.
- understand the grounds and modes of transfer of ownership.
- identify the various modes of proof of right of ownership.
- understand the grounds on which right of ownership is extinguished.
- identify the types of right a person may have in relation to land and water resources under Ethiopian law.

3.1 DEFINITION AND ELEMNTS OF OWNERSHIP

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

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

1. The right of use and enjoyment, which includes the right to determine to what type of use the object may be put, to deal with the fruits of the thing as he likes, and even the right to destroy the thing or its fruits. See Arts 1205/1/ and 1270-1271 of the Civil Code.
2. The right of possession that includes the right to exclude others. Property right is essentially a guarantee of the exclusion of other persons from the use and handling of the thing over which the right is exercised and the right to reclaim it from the hands of another. See Arts 1204, 1148 and 1149 of the Civil Code.
3. The right to transfer the thing and its fruits for consideration or gratuitously which could be intervivos / while the owner is alive / or mortis causa/ up on his death/ and the right to charge them as security (mortgage or pledge). See Arts 1205/2/ and 3049/2/ of the Civil Code.
4. The right to leave or abandon the thing or its fruits at will. See Art 1189 of the Civil Code.

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

- The right to use the object himself (the usus)
-The right to collect and use fruits - such as crops or rents (the fructus)
-The right to dispose of it and its fruits by alienation by destruction (abandonment) and the right to charge it with pledge or mortgage (the abuses)

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

The owner can, at will, use or enjoy his property, dispose it of, perform all the legal transactions to which the thing is susceptible, and to exclude all other persons from participating in the exercise of these rights.

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.

The fact that an owner may cede so many rights and still retain ownership raises difficulties of definition. From this we can consider ownership as the magnetic core which remains when all present rights of enjoyment are removed from it and which attracts to itself the various elements temporarily held by others as they lapse.

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

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

3.2 RESTRICTIONS ON THE RIGHT OWNERSHIP

Tough ownership is said to be absolute and exclusive right a person may have relation to things, it may be made subject to various restrictions. See Art 1204/1/ of the Civil Code.

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/, defines cultural heritage as anything tangible or intangible which is the product of, in pre-history or history times, human creativity and labor and that reflects the evolution of nature and which has historical, cultural, scientific and artistic value provides for various restrictions on the right of ownership, exploration, discovery and study things that are classified as cultural heritages. 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 state may confiscate any privately owned cultural heritages when it believes that they are not properly protected, repaired or restored or where they are exposed to damage or decay. See Art 25/1/ of the proclamation. The state can also expropriate, against payment of compensation, objects of historical, artistic or archeological interests where it finds it necessary to preserve them in a museum. See Art 25/2/. Furthermore, transfer of privately owned cultural heritages is subject to prior notification by both parties to Authority which has a right of preemption, i.e., a priority right to purchase the cultural heritage. However, transfer for commercial purposes and transfer out side the country are not allowed under all circumstances. See Arts 23, 24, and 27 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.

Public interest or service includes construction of pre-determined public works such as public health, urbanization, conservation of historical or natural monuments and sites, reforestation and conservation forests.

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

Though property rights with regard to land and water will be discussed in detail by separate courses, i.e., Land Law and Water Law respectively, the rules governing property rights on land and water are briefly discussed in this section with a view to give a general introduction to students.

Land had been, as any object of property, subject to private ownership and had been governed under the Civil Code prior to 1975 when the Derg, the military and communist regime, enacted laws nationalizing rural and urban land and abolished private ownership of land. However, individuals were given a right to use land for farming and construction of residential or business buildings against payment of taxes on income from agricultural activities or land tax.

After the fall of the Derg in 1991 and the ratification of the FDRE Constitution in 1994, land remained public property, however, private ownership of land has become, once again, one of the most important political, economic and social issues in the country.

Under Art 40 of the FDRE Constitution land/ both rural and urban/ is declared to be the property of the state of Ethiopia and its peoples. See also Art 4 of the Federal Rural Land Administration Proclamation No 1997. However, the constitution entitles Ethiopian farmers and pastueralists to obtain farmland/ pastureland free of charge and a right of use of such land. It also provides that investors in the agriculture sector may also obtain land in accordance with land use laws to be issued by the regions.

The land use/ holding rights recognized by the constitution and the federal land administration law shall be implemented and administered by the states/ regions of the federation, which shall issue specific laws for the implementation of these rights.

In urban areas, individuals and investors have the right to obtain land necessary for construction of buildings for residential or commercial purposes in accordance with the land lease law issued by the House of Peoples Representatives and City or Regional governments. See Re-enactment of Urban Lands Lease Proclamation No 272/2002.

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

Hence, the type of property right that may be had in relation to water resources is a use right provided by the Water Resources Management Proclamation No 197/2000. However, water shall be private property where it is collected in a man made reservoir, basin or cistern 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/ holder's/ and he can erect in it structures, he may demand the destruction of works which, in any way infringes his air space, or the cutting of branches which grow in to it. See Art 1211 and 1212 of the Civil Code.

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 what ever 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 Civil Code is a particular example of this situation.

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

Derivative acquisition may result from contracts such as sale and donation/ Arts 2266-2426 and 2427-2470 of the Civil Code respectively or from the will of a deceased person/ testate succession/ or the operation of the law, in cases of in testate succession/ Arts 826-1125 of the Civil Code/. 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.

3.4.1 OCCUPATION

Occupation is a mode of acquiring ownership by the sole fact of taking possession of a thing that does not have an owner with the intention of becoming an owner. This mode of acquisition is largely limited to chattels such as wild animals, birds, fish /res nullius/ and abandoned chattels /res derelicte/ and treasures. 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; a person may acquire ownership right of wild animals living in natural freedom through the act of hunting and fishing in accordance with the relevant provisions of Wild Life Development and Conservation Proclamation. However, this cannot apply to semi-domesticated animals that customarily return to the same habitat, for example, pigeons, bee swarms. See Art 1152 and1153 of the Civil Code.

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. However, this right may be made subject to restrictions and prior permit granted by the appropriate government organ. Hunting or fishing of specific species of animals may also be banned on grounds of protection of endangered species. 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. Refer to Wild Life Development and Conservation Pro No 575/2008 and Forest Development, Conservation and Utilization Pro No 542/2007.

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 any thing 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 no body 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 of

archeological 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. However, as far as this writer knows, no comprehensive rules governing lost objects are enacted with the exception of a 1938 E.C directive issued by the Ministry of Finance regarding lost and found cattle. In the absence of such rules the finder is required to use appropriate means to make his find known and try to identify the owner and inform him about the find. Depending on the particular circumstances of the case, the finder may have to make public announcements/ that may include local radios/ or post notices, at public places…etc, about the thing found. See Art 1154/2/ of the code. 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 with out 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

delivery of the thing to the local Finance Bureau. Where the thing is perishable or where its preservation is onerous, the court shall order its sale by auction and the transfer of the proceeds of the sale to the finance bureau.

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.

3.4.2 POSSESSION IN GOOD FAITH

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

The purchaser will acquire the ownership of the thing at the time when he takes of possession of the thing according to Art 1143-46 of the code. A purchaser is presumed to be in good faith in the absence of contrary evidence showing that the purchaser knew, at the time of taking possession, that the seller was not the owner of the thing. However, a proof that the purchaser discovered the fact that the seller was not the true owner of the thing after he took possession may not rebut this presumption. See Art 1163.

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. However, the owner cannot exercise this right of recovery where the thing is a currency or a security to bearer even where it is stolen from him. The owner of a stolen property must exercise such right within a period of three years from the date of theft. See Arts 1165 and 1167 of the code.

The good faith acquirer who bought such thing from a trader who sells similar things, or in a public auction, or in an open market / market overt / has the right to require the seller to reimburse him with the price he had paid for the thing. See Arts1166 of the Civil Code. However, this provision 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.

The universal principle is that the seller guarantees the buyer against total or partial dispossession the latter may suffer and Art 1166 does not introduce any thing new and is redundant. Therefore, the intention of the legislature might have been to impose an obligation on the owner who reclaims the thing from the good faith acquirer to reimburse the latter with the price he has paid and probably proceed against the thief.

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. This is because the purchaser is expected to ascertain the true owner of a thing he is about to purchase by referring to officials registers, which are open for any interested party and can not claim to have purchased the thing in good faith, believing that he was dealing with the t rue owner.

In a case between Eng. Santina` Mascaro and W/ro Aynalem Taddesse in the Federal Supreme Court Civil Appeal File No 3616, the appellant requested the quashing of the decision of the Federal High Court which held that the respondent was the wife of the deceased Renato Poliachi and that all the properties of deceased including the Fiat FLSR Loader which, is the object of dispute between the litigants are the common properties of the marriage, hence the plaintiff /the current respondent/ is the owner of the loader and hence the current appellant must pay Birr 2,078,720 as the income he derived from the rent of the loader between 1779-1984 E.C.

The appellant argued that he bought the loader from the agent of the daughter /the heir / of the deceased in good faith and acquired ownership right to it when he look possession of the same.

The respondent, on her part, argued that she was the wife of the deceased and the properties of the deceased, including the loader in question, are common properties of the spouses as established by lower courts, that she has obtained an injunction order from the high court so that such common properties are not transferred to jeopardize her interest and thence the appellant could not be considered to have been a good faith acquirer. Furthermore, she argued that the respondent should have checked the title deed of the loader and known that the loader does not belong to the seller and could not be considered to be a good faith acquirer. The court framed the issue as to whether the appellant acquired the loader in good faith or not.

The court held that the appellant purchased the property in good faith from an agent who is clearly authorized to transfer the property by the heir of the deceased whose right as an heir to the deceased is duly established by a judgment of a court and that he was not expected to be a ware of the right of the respondent on the property and the injunction she claims to have obtained from the high court. Hence,

it quashed the decision of the high court and held that the appellant has become an owner of the loader and the rent /income he has been collecting as per art 1161/1/ and Art 1170 of the Civil Code.

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?

3.4.3 ACQUISITIVE PRESCRIPTION (USUCAPTION)

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

Acquisitive prescription is a mode of acquiring ownership title or some real interest through possession that is free from defects, exclusive and continuous (see Art 1168 and1150 junction of possession). Furthermore, the possession must be adverse, i.e., contrary the 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 not

need the property any more and hence decides to reward a person who can put the same to a better use for himself and the public.
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.

A person who is not able to acquire ownership of an immovable thing through adverse possession, for instance who possessed a thing for ten years or who failed to pay the taxes relating to the immovabl,e may still acquire a property right lesser than ownership. Under French law, a person who possessed an immovable for more than twelve years acquire right of ownership provided that his possession was adverse, continues and free from defects. However, a person who possessed a thing for a period lesser than 10 years shall only acquire right of usufruct.

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.

EXERCISE:

1. Reread the section on defects of possession and determine whether a person who took possession of an immovable thing through violence or force or whose possession is affected by other defects may acquire ownership under Art 1168.
2. What do you think is the possible explanation behind the requirement of payment of taxes for the acquisition of immovable things through adverse possession?
3. Inquire into the practice of Revenue Authorities in your locality and discuss your findings in class.

In a case between Ato Hailu H/Giorgis and Wro Yeshi H/Mariam in Civil File No 29575 at the Federal First Instance Court, the plaintiff claimed that the defendant is unlawfully holding a house he has built on a 261.25 square meter of land he acquired through transfer and requested its restoration of the house to him. He alleged that he allowed the defendant to use the house. The defendant on her part claimed that she possessed the house since 1968 and have been paying the taxes relating the house in her own name and had acquired a right of ownership as per Art 1168(1) of Civil Code and requested the court reject the claim of the plaintiff. She also argued that the plaintiff's action is barred by a 2 years period of limitation from the date when he claims to have been dispossessed.

The court, after examining the evidences produced by both sides and hearing their witnesses, identified the following issues;

1. Whether or not the defendant has acquired possession of the house lawfully.
2. Whether the defendant should restore the house to the plaintiff.

The plaintiff presented a contract of sale of land where by he acquired the land and witnesses who testified that the plaintiff has constructed the house. The defendant also produced the receipts by which she has been paying taxes in relation to the land and the house since 1968 E.C

The court held that the plaintiff did not prove that the defendant held the house in the name and on behalf of the plaintiff, on the other had the defendant has clearly established that she has been in possession of the house for the last 30 years and has been paying the taxes in her name. Therefore, the court decided that the defendant has acquired right of ownership to the house as per Art 1168 of the Civil Code and rejected the claim of the plaintiff.

EXERCISE:

1. What are the requirements for acquisition of ownership through usucaption?
2. Did the above case fulfill these requirements?
3. Do you agree with the decision of the court?

3.4.4 ACCESSIO

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 with out deterioration of the things or often it is impossible. Hence, the solution is to attribute any thing 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

1. Crops sown on the land of another person who sows seeds on a land that belongs to another person against a clearly expressed objection of the owner/holder shall not become the owner of the crops. Where the crops have already harvested by the sower, the owner/holder of the land shall have the right to claim the whole harvest or the value of the crop harvested from his land. The same rule applies where the owner/holder of the land was aware of the act and wanted to object to the act but was not able to express his objection. For instance, he was far away or sick or prevented from objecting by any other reason, i.e., he was not aware of the act of sowing. Where the sower sows seeds with out the objection of the owner/holder or where he was aware of the act of the sower but failed to object to the act, the sower may be entitled to a fourth /25%/ of the crops provided that he sow the land in good faith or with the belief that the land

belongs to him or has the right to sow the land. However, if the sower acted in bad faith, i.e., with the knowledge that the land does not belong to him or he does not have the right to sow seeds on the land, the whole crop will belong to the owner of the land. (See Art 1172 - 1174)

2. Plantations on a land belonging to another- Where a person plants trees on a land belonging to another person against a clearly expressed objection of the landowner/holder, the latter will acquire ownership to the trees and the former will not have the right to claim the trees or compensation. However, where the trees are planted with the permission of the owner/holder of the land, the two persons shall become joint owners of the trees. But the owner/holder of the land may terminate the joint ownership and may acquire the full ownership of the trees by payment of compensation to be determined by the agreement of the parties or according to the provisions of Art 1177. (See Art 1175 - 1177)

3. Buildings on a land belonging to another person, where a person, against a clearly expressed objection of the owner/holder of the land, constructs a building on a land that does not belong to him, the owner/holder of the land shall acquire the ownership of the house through accession. The same rule applies in cases where the landowner/hoder was aware of the construction but was not able to object to it for any reason. Hence, the landowner/holder may, at any time, force the builder to leave the building or require him to demolish the building and clear the land with out compensation. However, where the landowner/holder knew of the construction but failed to express his objection to the act, the builder shall acquire the ownership of the building. The owner/holder of the land is entitled to evict the builder by payment of compensation to be determined by the agreement of the parties or the provision of Art 1180. (See Art 1178 - 1180)

4. Using materials belonging to another- where a person uses materials belonging to another for building or other works, he shall become the owner of such material by accession, and the former owner of the materials cannot demand the return of the materials. However, the person who used materials belonging to another shall have the obligation to refund the value of the materials to the former owner. Where he acted in bad faith, i.e., he used the materials knowing

that they do not belong to him; he may also be required to pay damages. See Art 1181. Also compare Art 1134 of the Civil Code.

ACCESSION OF MOVABLE THINGS TO MOVABLES

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

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

2. Transformation (specification) - is the act of making anew thing with material belonging to some one 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.

3. Commingling /fusion/ - occurs when two dry or liquid things /matters belonging to different owners are commingled or fused so that they cannot be separated 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 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.

In 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, the applicant challenged the ruling of the

Federal High Court rejecting his application to lift the injunction order it has given in relation to the house he has purchased. The injunction order was given by the Federal High Court on Sene 20,1994 in an execution file between the Commercial Bank of Ethiopia (a judgment creditor) and Ato Bogale Tiga (a Judgment debtor) in relation to the house that was registered in the name of the judgments debtor.

The applicant argued that he has purchased the house in question from the judgment debtor by a contract concluded on Ginbot 9, 1987 E.C; that the contract was concluded in front of the Addis Ababa City Notary and was entered in the register of immovable things at the Addis Ababa City Urban Development Bureau; however, the ownership of the house was not transferred at the time when the injunction order was given.

The high court rejected the request of the applicant to lift the injunction order it has given in relation to the house on the ground that the contract of sale the applicant has made in relation to the house was not entered in the register of immovable properties as per art 2878 of the Civil Code and on the fact that the house in question was registered in the name of the judgment debtor and was not transferred to the applicant.

The applicant challenged this ruling arguing that it that it involves a serious error of law. On the other hand, the respondent argued that the ruling of the high court is correct as the house was registered in the name of the judgment debtor, that ownership right was not transferred to the applicant and that the fact that the contract was attached to file of the immovable at the bureau does not mean compliance with the requirement of Art 2878 of the Civil Code.

The cassation division held, after examining the file of the high court, that the contract of sale was entered in the register of immovable proprieties as required by Art 2878 of Civil Code. It further held that the law does not require the actual transfer of ownership right to the applicant for the contract to have effect against third parties. The purpose of registration under Art 2878 is to give notice to third parties who are intending to have a legal right with respect to the thing which purpose was fully served under the case at hand.

It further reasoned that allowing the injunction to stand and allowing the attachment and sale of the house to satisfy the right of the respondent would amount to attachment and sale a property belonging to one person to perform the obligation of another person with whom he doesn't have any relation.

Similarly, in 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, the appellant challenged the decisions of the Federal First Instance Court and the Federal High Court.

The Federal First Instance Court held, on the basis of the testimony of witnesses who testified that the contract of sale was duly signed by the parties, that the contract of sale of the house, which was made in writing, was a valid contract enforceable by law and ruled that the applicant's right of inheritance shall not include the part of the landholding and the house which was transferred to the 2nd respondent.

The applicant appealed to the Federal High Court contesting this decision, however, the high a court upheld the decision of the lower court.

The applicant applied to the Cassation Bench of the Federal Supreme Court claiming that lower courts have committed a basic error of law. The Cassation Bench quashed the decisions of lower courts arguing that though the contract of sale was made in writing, it was not authenticated (singed in front of a court or notary) as per art 1723(1) of the Civil Code. Hence, the contract of sale was not a valid contract that can affect the rights of the applicant. Though Art 2877 of the Civil Code dealing with contracts of sale immovable things doesn't require the contract to be made in front of /authenticated by / a court or a notary, Art 1723(1) requires such contracts to be registered with notary or court, i.e., to be authenticated, in addition to being made in writing.

It also noted that the requirement of registration of contract with registers of immovable things (under Art 2878 of the Civil Code) is intended to give notice to third parties about the rights and charges that exist in relation to an immovable in question, while the authentication under Art 1723(1) is a mandatory requirement for validity of contracts relating to immovable things. Contracts relating to immovable things are subject to this additional requirement because of the fact that immovable things have special economic & social importance to the individual right holder and the society at rage and

hence the law provides special protection through strict requirements for contracts relating to them. Furthermore, it argued that there is no contradiction between Art 1723(1) and Art 2877, rather the two provisions are complementary provisions that have to be interpreted and applied in a manner to give effect to the general goal intended to be achieved, i.e., providing special protection to immovable things and ensuring security of transactions/contracts.

In another case between Habteab Kifle and Esayas Likke and Baziben Kelile at the Supreme Court in Civil Appeal File No 570/80, the a appellant claimed that he has purchased the car with Plate No 2-03088 A.A from the 2nd respondent on 12/11/77 E.C, but the car remains registered in the latter's name. The contract was made in font of the notary and was entered in the register of motor vehicles.

The high court argued that a person who claims to be an owner of a motor vehicle must have a title deed as per Pro No 107/1969 and Art 4 of Legal Notice No 360/1967, and that the transfer of ownership shall be effected where the transferor and the transferee appear in front of the official of the Ministry of communication, paid the transfer fee and where the transferor hands over the title deed to the transferee. However, the transferor and the transferee in the case at hand have not complied with this procedure. Hence, since the ownership of the car has not been transferred, the owner of the car is still the 2nd respondent and the car can be attached and sold to pay his debt that is established by judgment in favor of the 1st respondent. The appellant challenged this decision of the high court appealed to the Supreme Court.

The 1st respondent argued that he had instituted a civil suit against the 2nd respondent at the high court for payment of a debt of Birr 32,625.05, and has obtained an injunction order in relation to the car in question after the Road Transport Authority confirmed that the vehicle is registered in the name of the 2nd respondent and that it is not subject to mortgages or another injunction, the ownership of the car is not transferred to the appellant according to Pro No 107/69 and Legal Notice No 360/67, hence the decision of the high court ordering the attachment of the vehicle is lawful.

The 2nd respondent on his part argued that though ownership is not transferred to him he had sold the car to the appellant in a contract concluded at the Addis Ababa Notary and which was entered in the

register of motor vehicles. He also argued that the sale was made before the 1st respondent has instituted the civil action against him.
The appellate court quashed the decision of the high court ordering the attachment and sale of the car on the following grounds;

- Though motor vehicles are movable things, they are required, by special laws, to be registered and their ownership to be proven by producing title deeds. /Art 1186(2) and Pro N0 107/ 1969 and Legal Notice No 360/67/. Hence, the provisions of art 1195 -1198 regarding proof ownership of immovable things shall also be applicable to prove ownership of special movable things

- According to Art 1195(1) the issuance of a title deed by the relevant administrative authority to the effect that a given special movable thing (motor vehicle) belongs to a given person shall raise a presumption that such person is the owner of such thing. Hence, the 2nd respondent in whose name the car is registered and who holds the title deed is presumed to be the owner. However, such presumption may be rebutted according to Art 1196 of the Civil Code.

- One of the grounds up on which such presumption may be rebutted is a proof showing that another person has acquired the motor vehicle after the title deed is used. See Art 1196/c/ of the Civil Code. In the case at hand, the appellant has proven that he has acquired the ownership of the car through a contract of sale concluded on 12/11/77, which was duly authenticated by a notary and was entered in the register of motor vehicles.

Hence, the 2nd respondent is not the owner of the car in question; rather the appellant has become the owner. Therefore, the decision of the court allowing the attachment and sale of the car for the execution of judgment against the 2nd respondent is quashed.
Would the court reach the same decision had it used Art 2878 of the Civil Code?

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. 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. The owner of an immovable object or a special movable object may establish his ownership by producing a title 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 hat 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.

Prior to issuing a new deed, the authorities issuing a title deed has to require the return of the deed previously issued to the previous owner and cancel it. Where the previous title deed is lost or destroyed, the authority has to require the person requesting issuance of new title deed to produce sufficient security to cover possible damages that may be caused to third parties as a result of non-cancellation of previous title deed. See Art 1197.

The state shall be liable to third parties who acquired title based up on deeds which was not issued in accordance with the law or which was issued by authority having no jurisdiction, or which the authority failed to cancel. See Art 1198.

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.

REVIEW QUESTIONS

1. Ownership is the ultimate type of property right that may be had in relation to things. Explain.
2. Discuss the elements of ownership right by referring to the relevant provisions of Ethiopian property law.
3. What is original acquisition of ownership? Discuss by comparing it to derivative acquisition.
4. Discuss the modes of acquisition of ownership originally.
5. Discuss the rationale behind the law governing acquisition of ownership through possession in good faith and its application to chattels only.
6. Explain the differences and similarities between original acquisition and derivative acquisition by referring particularly to possession in good faith and sale.
7. What are the grounds for the transfer ownership right .
8. Explain the difference between the transfer of ordinary movable things/ chattels/ and special movable things, immovable things.
9. What are the ways in which ownership right is proved? Discuss by relating them to chattels, special movables, and immovable things.
10. What are the grounds on which ownership right is extinguished? Explain by relating to the relevant provisions of the Civil Code.
11. What are the types of property rights that may be exercised in relation to land under the present Ethiopian laws?

UNIT FOUR- JOINT OWNERSHIP

Introduction

This unit is intended to acquaint students with the concept of joint ownership or co-ownership and to enable them to distinguish it from individual ownership discussed under unit three.

Objectives

At the end of this unit students are expected to;

- define the concept of joint ownership or co-ownership.
- identify the specific elements constituting joint ownership.
- identify the advantages and disadvantages of joint ownership.
- identify the sources of joint ownership and the rights and obligations of the joint owners.
- distinguish joint ownership from individual ownership.
- distinguish joint ownership from specific instances in which things or objects are held and administered jointly but which are governed by other branches of law.
- identify the ways in which joint ownership is terminated or extinguished.
- identify the special cases of joint ownership, i.e., perpetual joint ownership.
- explain the rules governing ownership of walls and other structures constructed on the boundary lines separating land possessed by several individuals /party explain walls/.
- explain the rules governing ownership of condominium buildings.

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.

For instance, if A, B and C purchase a tractor for the purpose of tilling the land they hold, they are considered as joint owners of the tractor who share the right of use and enjoyment, the right of

possession, the right to exclude other persons from using the tractor, the right to mortgage it or transfer it to other persons through sale or other ways.
The following are the main characteristics or natures of joint ownership;
- The thing, which is jointly owned, is undivided and,
- Each joint owner is considered as owner of each and every part of the thing.

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 and/or by the mandatory provisions of the rules contained in the Civil Code, i.e., Arts 1257-1308. In other words, the rights and duties of the joint owners, the use and administration of the thing are regulated by the agreements entered in to by

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

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

4.2 ADVANTAGES AND DISADVANTAGES OF JOINT OWNERSHIP

ADVANTAGES

The fact that a thing may be owned by two or more persons helps people to acquire certain property very important for their lives, which they would not have otherwise acquired because of lack of sufficient financial capacity by joining or contributing a lesser amount of money. 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 of the Civil Code. It is generally accepted that a free and swift transfer of goods is an essential precondition for effective commercial transactions, which may bring about economic development to a country and benefit the public.

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

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

Joint Ownership Arising from the Law – Joint ownership may also arise from the provisions of the law. For instance, Art 1060 of the Civil Code provides that a succession shall remain in common

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

Note: A right of recovery is a right given by the law to certain group of persons to compel the buyer of a certain object to sell it back to them. The law grants such right because of the relation that exists between the seller and the persons to whom such right is granted. For instance, relatives of a seller of an immovable thing and joint owners have a right of recovery. See Arts 1386, 1388 and 1389 of the Civil Code. The concept of right of recovery will be discussed in detail under Unit Seven.
Arts 1176/1/ cum 1177/3/ and 1183/1/ of the Civil Code other instances of joint ownership arising from the provisions of the law.

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.

4.4 RIGHTS AND DUTIES OF JOINT OWNERS

Joint owners have the following rights and duties;

1. Right to Use and Enjoy the Undivided Thing/Property, and its Fruits: Each joint owner has the right to use the thing jointly owned in accordance with its contractual or legal/ natural purpose. However, he must exercise such rights without preventing other joint owners from using it. Furthermore, the fruits produced by the jointly owned thing, such as agricultural products of a land, increases from breeding of animals and incomes generated from jointly owned things shall belong to all joint owners jointly and each joint owner has the right to demand the partition of the such fruits or the proceeds of the sale of the fruits at any time. See Arts 1263 and 1264 of the Civil Code.

2. 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. Hence, the consent of the other joint owners is required in order to undertake any one of these acts in relation to the thing jointly owned. Generally, it can be said that jointly owned things are administered by the joint owners acting together and each joint owner has the right to participate in decisions regarding the administration of the thing jointly owned. See Art 1265 and 1266 of the Civil Code. Hence, decisions are made by majority vote of joint owners who represent majority share in the thing jointly owned. However, decisions regarding pledge, mortgage, sale, donation of the thing or decisions to change the purpose for which the thing is acquired or decisions to make material changes which cause interference with the right of other co-owners requires unanimous vote of all joint owners. See Arts 1265, 1266 and 1259 of the Civil Code. 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.

3. 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). Each co-owner has right to force other co-owners to reimburse him with necessary expenses. In other words, a joint owner who incurred costs for the maintenance and preservation of the jointly owned thing has the right to demand reimbursement of the money he has paid in proportion to their shares. For example, where a joint owner pays for the maintenance of a house jointly owned there by preventing further damages, the other joint owners have the duty to contribute an amount of money in proportion to the amount of share they have in the house. See Art 1268 of the Civil Code. However, a joint owner may relieve himself of this obligation by surrendering his share in the thing to the joint owners. See 1268(3) and 1282(2).

4. 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.

5. 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. If the thing jointly owned is a movable thing, a joint owner may apply for sale by an auction. See 1271. This right cannot be waived by agreement.

   If the thing jointly owned is an immovable thing such as a building, a joint owner may apply for division or sale by auction where division seriously reduce the value of the thing or is contrary to its nature or purpose (see Art 1272 and 73). The court also has the power to decline the request for division or sale of the immovable jointly owned where the time for sale or division is not appropriate, for instance if sold now it would fetch a price which is way below its actual value.
   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). Where the period fixed in the contract exceeds five years, the agreement not to require sale or division of the immovable jointly owned shall have no effect beyond five years and the joint owner may require termination of the joint ownership by division or sale. 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 preemption where a joint owner sells his share in the thing. Comment on the provision by comparing Arts 1386 and 1410 of the code.

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, passages, yards, wells, sewer pits, 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 of an apartment building.

Similarly, the right to co-ownership to walls, ditches, hedges 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.

A wall is any masonry work, one made of materials bonded with cement, plaster or lime stone mortar. Any wall corresponding to this definition is subject to rules governing party walls. See Arts 1201 and 1278-80 of the Civil Code.

Party Co-ownership of ditches: Any ditch separating two estates is considered party co-owned, unless only one of these estates is enclosed, or there exists a documentary title or a prescriptive title or unless there exists a feature implying exclusive ownership, such as a dike or pile of excavated earth only on

one side of the ditch which is then considered as belonging to the owner/holder of the and on which such dike or pile of earth rests. See 1202 of the Civil Code.

Party Co-owned hedges: Any hedge, live or dry, which serves to separate two estates is presumed to be party co-owned, unless only one of the estates is enclosed or unless there exists a documentary title or prescription

.

Other enclosures are also considered as party co-owned unless there exists a contrary documentary title, prescription title or feature contrary to the presumption.

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

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 with in 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 Condominium Proclamation No 370/2003, which applies in Addis Ababa and Dire Dawa City Administration, defines a condominium as a building for residential or other purposes and which has five or more individually owned units and common elements in a high-rise building or in a row of houses that includes the land holding on which it rests. See Arts 2/1/ and 3. Units of a condominium, that may consist of one or more rooms, refer to the parts that are intended for exclusive use of one joint owner and are individually/separately owned by such joint owner while the common elements of a condominium refer to the parts which are intended for the common use of all or some of the joint owners and that are jointly owned by such joint owners. See Arts 2/2/ and 2/12/ of the proclamation and Arts 121281 and 1289 of the Civil Code.

According to Art 8 /1 and 2/ of the proclamation, the owner of a unit is entitled to full right of ownership and hence he shall have the right to use, transfer, by sale or donation or exchange, charge it mortgage the unit he/she owns and he shall have a joint ownership on the common elements, i.e., the right of use and participation in the administration and management of such parts. The right to use common elements is undivided and is attached to the unit ownership and rights or dealings involving the unit shall also be effective on the common elements. Hence, the sale of the unit by the owner shall also transfer the right to use the common elements. See Art 9 of the proclamation.

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.

EXERCISE:

1. Reread the section on the extinction of ownership and try to apply these rules to the extinction of joint ownership.
2. Identify and discuss the special rules governing extinction of joint ownership.

REVIEW QUESTIONS

1. What are the sources of joint ownership? Explain

2. What are the advantages of joint ownership? Explain
3. What is the disadvantage of the joint ownership? Explain
4. Explain how joint ownership helps in achieving efficient utilization of scare resources.
5. Art 1261 talks about right of pre-emption of joint owners. Comment on the provision by comparing it with the provisions of Art 1386 and 1410 of the Civil Code.
6. Define the concept of joint ownership and discuss the rights it incorporates.
7. What are the major characteristics of joint ownership that distinguish it from individual ownership? Discuss.
8. What are the main rights and duties of joint owners? Discuss
9. What are the special eases of joint ownership? Explain.
10. What are party walls and condominium buildings? Discuss.
11. What is perpetual ownership? Discuss.

UNIT FIVE - USUFRUCT

UNIT OBJECTIVES

This unit is intended to deal with usufruct as one type of property rights. At the end of this unit students are expected to;

- define the concept of usufruct and identify the elements constituting it.
- distinguish usufruct from other similar rights such as use right and right of habitation of buildings.
- identify the sources of usufruct.
- understand the rights and duties of the usufractuary.
- identify the rights and duties of the bare owner.
- identify the ways in which a usufruct is extinguished.

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, 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.

Having defined the concept of usufruct, now let us discuss the 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

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.

Exercise

Re-read unit two which dealies with acquisition, transfer and loss of ownership right and try to apply those rules to the acquisition, transfer and loss of usufruct right.

Usufruct may arise from;

1. The law / as in the case of French law/
2. Contract
3. Will
4.

Usufruct may be created by agreement or contract for consideration or without consideration. According to Art 2410 of the Civil Code, an owner may transfer the usufruct of a thing by contract for

consideration. In such cases, the rules governing contracts of sale shall apply. The rules as to the form and publicity requirements for contracts shall also apply to contracts creating usufruct. Hence, contracts creating usufruct right on immovable things and special movable things shall be made in writing and registered with the organ registering immovable things or special movable things. See also Art 1723 of the Civil Code.

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

Usufruct 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.

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

5.3 RIGHTS AND OBLIGATIONS OF THE USUFRUCTUARY

1. The Conservation of the Substance of the Thing: - 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 in to yard, 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 usufructuaty 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 out side 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 the thing to the bare owner or his agent. He shall be liable for the loss or deterioration of the thing, where the loss or deterioration 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

The bare owner shall have the following rights and obligations;

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

From the discussions made above regarding the obligations of the usufructuary, we can identify the rights of the bare owner.

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 some times 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.

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 with in 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.

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.

REVIEW QUESTIONS

1. Define the concept of usufruct and enumerate the rights that constitute it.
2. Compare the right of usufruct with the right of ownership and identify their differences and similarities.
3. What are the sources of rights of usufruct? Discuss
4. Art 1310 provides that the rules governing the acquisition, transfer and loss ownership of corporeal movable things shall apply to the acquisition transfer or loss of usufruct! Comment on its application.
5. What are the rights and duties of a usufracturary? Discuss
6. What are the rights and duties of a bare-owner? Discuss
7. Usufruct represents a dismemberment of ownership. Explain
8. Compare the right of usufruct overland under the civil code and the land holding or use right under the FDRE constitution and the land holding use rights laws.
9. Discuss the grounds on which the right of usufruct, use, and right of habitation are extinguished.
10. Define the right of use and the right of habitation and distinguish them from the right of usufruct.

UNIT SIX- SERVITUDE

UNIT OBJECTIVES

This unit is intended to acquaint students with the concept of servitude and the rules governing this property right. At the end of the unit, students are expected to;

- define the concept of servitude.
- understand the purpose of servitude and its drawbacks.
- identify the nature of servitude.
- identify the sources of servitude.
- identify the various types of servitude.
- identify the rights and duties of the owners of the servient tenement and the dominant tenement.
- understand the grounds on which servitude is extinguished.
- be able to analyze and handle cases involving disputes arising from servitudes.

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

A person may be unable to make the most advantageous use of his land or building with out some rights over the land belonging to his neighbors. For example;

- My land may not have quarry or water sources while my neighbor's land has it in plenty. Hence, I cannot construct on my land because of shortage of construction materials such as stones and sand or I may not irrigate my land because my land does not have a water source or is not adjacent to a water source.
- The most convenient access to the high way from one part of my land may lie across the land of my neighbor. Hence, I cannot have a convenient short cut unless I have the right of way on my neighbors land.
- I may wish to be sure that if I build up to the boundary of my land, my neighbor will not subsequently darken my window by building up to the boundary on his side or by planting trees.

I may achieve these goals by concluding a contract to this effect with my neighbor, but this is would create a personal right between the parties to the contract, which do not bind the future owner of such

land. Hence, the law provides, under certain circumstances, the owner of one land a real right/ right in rem/ on the land belonging to another. The law also gives a status of a right in rem to servitudes arising from other sources including those arising from contracts.

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

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

1. Servitude should be used exclusively for the purpose of using or exploiting the dominant land and it must be used exclusively for that purpose. In other words, the owner of the dominant tenement may not use the servient tenement for the purpose exploiting another land that is not part the dominant tenement. 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.

4. 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 parties shall be as specified in the instrument creating the servitude and as entered in the register of immovable properties. In other words, 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.

With this introduction in mind, let us discuss the rights and duties of the parties.

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.

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

6.4.2 RIGHTS AND DUTIES OF THE DOMINANT OWNER/HOLDER

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

6.5 TYPES OF SERVITUDE

6.5.1 URBAN SERVITUDES AND RUSTIC/ RURAL SERVITUDES

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

6.5.2 CONTINUOUS AND DISCONTINUOUS SERVITUDES

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.

REVIEW QUESTIONS

1. Define the concept of servitude and discuss it in relation to other property rights such as an ownership and usufruct.
2. Explain the things in relation to which a right of servitude may exist?
3. Servitude may be considered as right of property from the point of view of the dominant tenement and a restriction or limitation on the right of property from the perspective of the servient tenement. Explain.
4. What are the types of servitude recognized by the Ethiopian civil code? Discuss.
5. What are the sources of servitude?
6. What are the ways in which servitude may be extinguished?
7. Discuss the rights and duties of the servient tenement.
8. Discuss the rights and duties of the dominant tenement.
9. Is the right of servitude relevant and applicable to the current land holding system of Ethiopia? Why? Why not?

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

Unit Objectives

This unit introduces students to the right of recovery, right of preemption, promise of sale and prohibition of assignment and attachment of things. These institutions constitute a property right from their beneficiaries and restrictions on certain aspects of right of ownership.

At the end of the unit students are expected to;

- understand the nature and purpose of right of recovery,
- identify the source of right of recovery,
- identify the things in respect of which a right of recovery may exist,
- identify the group of persons who may have a right of recovery,
- understand the cases under which a right of recovery may be exercised and its effects
- define the concepts of promise of sale and right of pre-emption
- identify the things in respect of which promise of sale and right of pre-emption may be created
- identify the rights and duties of the parties
- understand contracts prohibiting assignment or attachment of certain things and the effects of such contracts
- understand how promise of sale, right of pre-emption and prohibition of assignment constitute property rights as well as restrictions on the right to dispose of the thing.

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 relation ship. 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, with in 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 whishes 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.

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.
Further more, 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.

In German law, one cannot impose restraints upon alienation, permanent or temporary, with real effects. Hence, the transferee will not be affected by such provision even if he has notice of it. In French law, on the other hand, one cannot impose permanent restraints with either real or personal obligatory effects. If such provisions are made, they shall not bind the transferee. However, one may impose temporary restraints that will bind the transferee whether he has notice of it or not.

The rationale behind, Roman and German law, not allowing such restrict ions is that the interests of commerce are best served by granting the owner the fullest freedom to dispose of his property and free circulation of goods. French law also accepts this principle, but makes an exception for a limited period where a serious interest is involved.

Ethiopian law also follows the same approach 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 with in two years from date of the assignment or from the expiry of the period fixed in the contract. See Arts 1442 (1) and 1441.
4. In cases of attachment, the person making the provision must exercise his right prior to the attached immovable thing being sold by auction where he has been informed of the attachment. However, where he is not informed of the attachment, he must exercise his right with in a period of two years from the sale of the immovable by action. See Art 1437.

REVIEW QUESTIONS

1. What is a right of recovery? Explain.
2. What is the source of right of recovery? Discuss
3. What are the two classes of persons who are given right of recovery? Explain
4. What are the rationales behind the right of recovery? Explain
5. Explain how a right of recovery constitutes a property right.
6. Explain how a right of recovery constitutes a restriction on the right of ownership?
7. Is a right of recovery possible in relation to the current land holding system in Ethiopian? Explain.
8. Rights arising from contracts creating a promise of sale and a right of pre-emption shall constitute a property right for the beneficiary and a restriction on the property of property of the owner. Discuss.
9. The rights arising out of contracts creating promise of sale and right of pre-emption shall not have effect for a period exceeding five years. Discuss the rationale behind the provision.
10. What are the things in relation to which promise of sale and right of pre-emption may be created with real effect?

11. What are the requirements for the validity of the contracts creating promise of sale, right of pre-emption and prohibition of assignment or attachment?
12. Identify the differences and similarities between promise of sale and right of pre-emption.

UNIT EIGHT-COLLECTIVE EXPLOITATION OF PROPERTY

UNIT OBJECTIVES

This unit deals with the concepts of public domain, expropriation and the requirements that should be complied with before a private property is taken by public authorities.

At the end of the unit, students will be able to;

-define the concept of public domain and distinguish it from the private domain of the state

- identify things forming part of the public domain and the state and the rules governing relations involving them
- identify the things forming part of the private domain of the state and the rules governing relations involving them
- define the concept of expropriation
- identify the requirements that the expropriating authority should be complied with before and during expropriation
- understand the procedures that should be followed during expropriation.

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.

Having said this much, by way of introduction, let us see the definitions provided by the Ethiopian Civil Code. 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 with out the authorization of a competent public authority. See Art 1456 of the Civil Code.

8.2 EXPROPRIATION

8.2.1 DEFINTION

Various legal systems adopt various terminologies to refer to expropriation. Most Civil Law countries including Ethiopia use the term expropriation, while most Common Law countries including the US and the UK use terms such as eminent domain, compulsory sale or condemnation.

Generally, expropriation or eminent domain may be defined as the power of a sovereign state to take or authorize the taking of private property for public purpose or use with out 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 with out 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 under take such works with out 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.

EXERCISE:

1. Discuss the concepts of confiscation and nationalization and identify their differences from the concept of expropriation.
2. What do you understand by conditional expropriation under Art 1480 of the code? Explain.
3. What is an alignment proceeding under Arts 1450/2/-1453 of the code? Discuss by comparing it expropriation and indirect expropriation.

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 refers to.

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

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

is unlawful. Hence this view tends to limit the power of the government in expropriation private property.

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.

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

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

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

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

EXERCISE:

1.Which view has the civil code taken in determining what constitutes public purpose?

2.Can one invoke these provisions to demand public inquiry to be held before the competent authorities determine that a proposed project serves public purpose?

3. Can one extend the constitutional provisions requiring public consultation to cases of expropriation?

4. What do you think is the trend regarding the meaning and scope of the concept of public purpose? Discuss by comparing the positions taken in the laws discussed above.

8.2.3 EXPROPRIATION PROCEDURES UNDER THE CIVIL CODE

The first step in the expropriation procedure under the civil code is to determine as to whether the proposed project serves a public purpose or not as we have seen in the preceding section. The competent authorities that are authorized by law to expropriate private property make the determination 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.

According Article 1466, after the declaration of public interest, 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. They are entitled to express their views on the necessity of such expropriation with in a reasonable period of time. 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 o r encumberance, to the competent authority concerned. Art 1467 of the code.

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.

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.

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.

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.

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.

Where the expropriated person is to be given a replacement land, with or with out 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.

8.2.3 EXPROPRIATION PROCEDURES UNDER PRO NO 455/2005

Who has the power to expropriate?

Art 3 (1) of the proclamation provides that only a woreda administration, where the land to be expropriated is situated in rural areas, and a city administration, where the land to be expropriated is

situated in urban areas, shall have the power to expropriate land. Generally, a land holding may be expropriated only where the project for the implementation of which the land is required serves public purpose. According to Art 2/5/ a proposed project is said to serve a public purpose where it is in accordance with urban structure plan or development plan, brings about a sustainable socio-economic development and, directly or indirectly, benefits the public.

Expropriation order may be made where a woreda or city administration or higher federal or regional government organs, decides that the land holding in question is should be used for ‘ a better development project’ to be carried out by the government, public enterprises, private investors, co-operatives or other organs. Furthermore, expropriation order may be used to terminate a lease contract where the holder fails to comply with the obligations he under took in the contract of lease and the relevant laws. See Art 3/1/ and /2/.

The woreda or city administration, which decided to expropriate a land holding according to Arts 2/5/ and 3, shall notify, in writing, the landholder of the expropriation order. The notice must indicate the time when the holder must vacate the land and the amont of compensation to be paid to him. The period within which the holder must vacate the land may not be less than 90 days. The landholder who has been given notice of the expropriation shall vacate his land with in 90 days of the date of payment of compensation or from the date of deposit of the compensation a blocked account to be opened in the name of the organ issuing the order where the holder refuses to accept the compensation. However, where there are no crops, trees or other properties in the land to be expropriated, the holder must hand over the land with in 30 days of receipt of the expropriation order. The expropriating body may use police force to vacate and take possession of the land. See Art 4.

The implementing agency, w/c may be a federal or state organ or public enterprise, private investor, cooperative or any other organ intending to implement the project must prepare data relating to the land required for its use, its exact location and send to the woreda or city administration at least one year before commencement of the project and obtain the permission to use the land. It shall also pay compensation to the person whose landholding is expropriated. See Art 5.

Where utility lines, such as water, sewerage, telephone, electric or gas lines cross over or under the land required for the project, the implementing agency shall request, in writing, the owner of the lines to remove them. The request must indicate the exact location of the lines. The owner of the lines who received the request must determine the cost of removal and reinstallation of the lines and send details of its evaluation to the implementing agency with in a period of 30 days. The agency shall pay the compensation with in a period of 30 days from the date of receipt of valuation. The owner of the lines shall remove the lines and vacate the land with in 60 days of receipt of compensation. See Art 6.

A. VALUATION OF COMPENSATION

Where the property to be expropriated is located in rural areas, the compensation tobe paid shall be assessed by the committee consisting of not more than five experts having the relevant qualification and assigned by the woreda administration. However, where the land to be expropriated is situated in urban areas, a committee composed of experts with relevant qualification and assigned by the urban administration shall valuate compensation. Where the assessment of compensation requires special knowledge and experience, the woreda or urban administration shall experts having such special qualification. See Art 10.

A party dissatisfied with the amount of compensation determined by the committee may lodge his compliant to a tribunal established for the purpose or to a regular court having jurisdiction, where such tribunal does not exist in that urban center or where the land to be expropriated is situated in rural areas. The tribunal or the court before which such compliant is lodged shall give its decision with in the period of time to be determined by the region. Where a party is not satisfied with the decision of the tribunal or a court, he may appeal, with in 30 days of the date of decision, to the regular appellate court. The decision of the appellate court shall be final. However, the person whose land is expropriated must prove that he has handed over the land to the woreda or city administration to be able to appeal. See Art 11.

B. PRINCIPLE AND AMOUNT OF COMPENSATION

A landholder whose holding is expropriated shall be entitled to,

1. Compensation for the property he produced on the land by his finance, labor and for permanent improvements he has made to such land. Such compensation shall be equal to the replacement cost of the property. However, compensation for permanent improvement on the land shall be equal to value of capital and labor expended.
2. The cost of removal, transfer and re-erection, where the property can be re-erected and resume its service such as floor mills, machinery and other type of property. See Art 7.
3. Displacement compensation, for a person whose rural landholding is permanently expropriated, which is equal to ten times the average annual income he earned during the last five years preceding the expropriation. However, where it is temporary expropriation of rural land holding or expropriation of communal holding, the displacement compensation shall be equal to the income he has lost because of the expropriation. The loss shall be calculated based on the average annual income he has earned during the five years preceding the expropriation. The compensation shall be payable for the period until the holding is returned to the holder. However, this compensation shall not exceed the amount payable in cases of permanent expropriation. Furthermore, where an appropriate replacement land, which can be easily cultivated and yield a comparable amount of produce, is granted to the holder displacement compensation shall be equal to the average annual income the holder generated during the five years before expropriation. See Art 8/1, 2 & 3/.
4. Displacement compensation for an urban holder shall be equivalent to the estimated annual rent of the house, or he shall be allowed to live in a comparable house, owned by the city administration, free of rent for a period of one year. He shall also be provided with replacement plot of land for the construction of a dwelling or business house. The size of replacement land shall be determined the urban administration concerned. See Art 8/4 & 5/.
5. Displacement compensation for a person whose urban leasehold is expropriated is paid in the form of a replacement land/ leasehold/ for a remainder of the lease period under the original lease contract. Where the person is not willing to accept a substitute land, he shall receive the lease price he has paid minus the price of the period he has used the land. See Art 8/6/.
Note that displacement compensation is payable in addition to what is payable under Art 7.

REVIEW QUESTIONS

1. Define the concept of public domain and distinguish it from the private domain of the state.
2. What are the criteria used to classify things as things forming part of the public domain? Discuss.
3. Enumerate things, which are considered as public domain by nature.
4. Enumerate things, which are considered as public domain because of their purpose.
5. Define expropriation and indirect expropriation and discuss their differences and similarities.
6. Discuss the concept of public interest under the civil code and proclamation no 455/2005.
7. Discuss the procedures to be followed during expropriation under the civil Code and proclamation no 455/2005.

UNIT NINE- REGISTRATION OF PROPERTY

UNIT OBJECTIVES

This unit briefly discuss as the registration of properties, the types of registration, the things that are required to be registered, the purposes of registration and the economic importance of registration.

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

- understand the nature and types of registration of property;
- identify the types of property required to be registered;
- understand the purpose of registration of property;
- understand the legal and economic significance of 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.

Prior to the emergence of use of documents in contracts, people tried various techniques intended to ensure security of property rights. For instance, the seller of land used to transfer ownership and guarantee the buyer by handing over a handful of earth from the land to the latter in the presence of neighbors. Similarly, Owners of land used to declare their right to it using various signs, such as enclosures and inscriptions on trees. With the emergence and prevalence of documents, people tried to ensure security by developing customs, which require the deposit of acts creating or transferring rights on immovable things.

Today, the majority of states have put in place a comprehensive system of registration of immovable and some special movable things. The state, trough its agencies, is responsible for its management and guarantee a person who may suffer financial loss due to lack of proper management of the system.

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

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

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

The requirement of registration applies to immovable things and special movable things, because of their high economic and social value and they are easily identifiable, and various acts, public or private, which are intended to recognize, create, modify, transfer or extinguish rights related to them. This is because registration of every thing that can be the object of property is impossible and even if it is possible to do so, commercial transactions will be greatly affected as a buyer has to check registers to be sure that he is transacting with the owner of the thing. The law addresses this concern by presuming a possessor of a chattel to be a lawful owner and by allowing a person who acquires a chattel in good faith to become an owner even where the transferor was not the lawful owner of such chattel. See Arts 1193 and 1161-1167 of the Civil Code.

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

9.3.1 IMMOVABLE THINGS

Art 1553 of the Civil Code provides that keepers of registers of immovable property shall keep registers of immovable property in Awradja Guzat. Each area of conservation and each district shall keep two types of registers, i.e., a register of property and a register of mortgages. However, where the district does not have a cadastral survey plan, which allows the adoption of such systems, there shall be a register of immovables. Furthermore, where there is no cadastral survey plan, which allows the adoption of register of immovables, the district shall have a register of owners. In other words, a register of property and a register of mortgages and register of immovables shall depend on the existence of appropriate type of a cadastral survey plan in the district. See Arts 1553-1558.

A. REGISTER OF PROPERTY

Register of property is a register in which all acts, i.e., contracts or wills, or judgments, or compromises, intended to recognize, create, transfer, modify or extinguish the right of ownership, usufruct, use, habitation, servitude of one or more persons on an immovable, are registered. Legal actions intended to obtain a judgment recognizing, transferring ownership or other property rights over an immovable shall also be registered in the register of immovable. It is also a register in which acts by which an heir accepts a succession or legacy, a contribution is made in a partnership, a dwelling house or apartment is leased for a period exceeding five years, creating restriction of right of ownership or usufruct…etc are registered. See Arts 1567-1572.

C. REGISTER OF MORTGAGES

This a type of register in which all acts intended to create, modify, or extinguish a right of mortgage, or to transfer a debt secured by a mortgage or assign the right of priority arising from mortgage are entered. Legal actions, by the mortgagee or any other creditor, for the attachment of immovable things shall also be registered in the register of mortgages. See Arts 1573 and 1574.

D. REGISTER OF IMMOVABLES

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

Under this type of registration, all immovable things situated in a district shall be registered in the register of immovables under its number in the cadastral survey plan and a separate leaf shall be assigned to it. The register shall contain a summary of the description of the immovable in question on each of its leaf. The registration and descriptions should be in conformity with the indications and measurements of the immovable in the cadastral survey plan. It shall also contain a brief description of all acts, which are required to be registered. See arts 1575-1582.

E. REGISTER OF OWNERS

This register, as we have seen earlier, is used where the district does not have a cadastral survey plan that is needed to implement the three types of registration discussed above. It is a register that contains, in alphabetical order, the name of owners of immovable things situated in the district. Where several persons jointly own an immovable thing, a separate leaf shall be assigned to each owner in the register. On the hand, where a person owns several immovable things, separate leaves shall be drawn for each immovable he owns. The register shall also contain a brief description of the acts that are required to be registered and that involve the immovable in question. See Arts 1583-1386.

F. REGISTRATION PROCEDURES

Registers of property and mortgages shall consist of files made up of printed forms that are prepared and supplied, free of charge, by relevant state organ to the keepers of registers. The forms are made available to persons requesting registration. Any interested person may make a request for registration up on payment of the prescribed fee. The request shall be made by filling out the forms, in two copies, with necessary information and signing it. Up on receipt of the completed and signed forms, the keeper shall assign a serial number to the request that corresponds to the register. The keeper shall countersign and seal the forms with the seal of the place of conservation and return one copy to the person requesting registration. The other copy of the form shall form part of the register to which it is related. The insertion of the forms in the register shall be made in the order in which they are made. See Arts 1587-1601.

However, Art 3363 of the Civil Code provides that the provisions of the civil code we have discussed so far 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 immovables, i.e., Arts 1353-1646 have not come in force. However, various municipalities have been registering immovables and issuing title deeds.

EXERCISE

Try to assess the practice in the city in which you live and determine the legal basis of the activities of the municipalities in this regard.

9.3.2 SPECIAL MOVABLE THINGS

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

Ships- According to Art 45/3/ of the Maritime Code, every Ethiopian ship should be registered at the port where her owner is domiciled or has his address for service. Registers shall be kept at ports designated by the Ethiopian government for the purpose of registration Ethiopian ship. See Arts 45-52 and 1-8 of the Maritime Code. Moreover, mortgages and rights in rem that may exist in relation to ships shall be entered in the register of ships. See Arts 36, 37 and 45 of the Maritime Code.

Vehicles- Art 3/9/ of the Road Travel and Transport Proclamation No 256/1967 defines a vehicle as any wheeled vehicle constructed or adapted for use and used primarily on roads and includes carriages, bicycles, motor vehicles, semi-trailers, trailers and trains.

A motor vehicle, according to Art 3/9/ of the same proclamation, is a vehicle propelled mechanical or electrical power and may be a commercial vehicle, motor cycle, private motor car, public service vehicle, hackney or truck tractor.

Art 6/1/ of the same proclamation provides that no vehicle, except a bicycle, may be driven or operated unless it has been registered at the Road Transport Authority. Furthermore, the Motor Vehicles and trailers Identification, Registration and Inspection Regulations No 360/1969 as amended by Regulation No 74/2001 prohibits the use or operation of motor vehicles or trailers in Ethiopia with out a valid annual registration sticker which has to be properly displayed on the motor vehicle or trailer. See also Art 42-45 of the same regulation.

Currently, the Federal Road Transport Authority registers vehicles engaged in cross country road transport services, vehicles owned by diplomatic missions and vehicles owned by the federal government. Similarly, Regional Trade, Industry and Transport Bureaus register vehicles engaged in road transport services with in the region and vehicles owned by the regional government. See Art 50 of the Regulation cited above and Art 14/19-22/ of Proclamation No 9/ 1996/7 of the Regional State of Tigray.
Ministry of National Defense may also register it owns as per delegation from the Federal Roads Transport Authority. See Art 51 of the Regulation cited above.

Aircrafts- Art 7/14/ of the Civil Aviation Re-establishment Proclamation No 273/2002 provides that the authority shall have the power to register all civil aircrafts and any right related thereto. Art 20 the same proclamation provides that the Registration of Aircrafts Regulations No 306/1965 /as amended/ shall continue in force.

Businesses- Art 5 of the Commercial Registration and Business Licensing Proclamation No 67/1997 provides that a person may not engage in any commercial activity in the country with out being registered in the commercial register and after receiving license from the Ministry of Trade and Industry/ where the business is undertaken at a federal level/ or the Trade and Industry Bureau /where the business is undertaken at a regional level/. See also Arts 3 and the following of the Federal Government Commercial Registration and Licensing Council of Ministers Regulation No 13/1997. Art 171/3/ of the Commercial Code requires the registration of contracts creating mortgage on businesses. However, there is no clear provision requiring registration of other contracts in relation to businesses such as sale and lease. See Arts 142-147 and Arts 164-170 of the Commercial Code.

Televisions are also treated as special movable things, which are required to be registered. Try to assess the rationale behind and the legal basis of their registration.

9.4 LEGAL AND ECONOMIC SIGNIFICANCE OF REGISTRATION

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

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

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

Registration of properties also plays significant economic roles by facilitating commercial transactions and creating capital necessary for investment and economic development. In legal systems with developed, organized and all inclusive property registration systems, properties are used, in addition to their natural purposes, as a means of generating or creating wealth or capital and contribute a great deal in their over all development. In countries with proper property registration systems a house or a building, for example, is used, in addition to its use as a shelter or a business place, as a security or collateral for borrowing money for further investment or expansion of existing investments which creates more jobs, increases production. In such a way properties are used to serve dual purposes. It is common that a lender want to be sure that the money he lent is returned on time and hence, would require a security in the form of pledge or mortgage of property that he can attach if the borrower fails to repay loan recover its money. The lender will not be willing to lend his money against mortgage or pledge of property unless he is sure that the property belongs to the person who is mortgaging or pledging it or if it is already mortgaged or pledged. Therefore, the existence of an all inclusive property registration system creates a conducive atmosphere for such transactions by creating a system in which owners of particular properties can be easily ascertained.

The following part is taken from a book entitled The Mystery of Capital, written by Hernando Desoto and explains the significance of an all inclusive and effective property registration system.

QUESTIONS FOR GROUP DISCUSSION

QUESTION ONE

Ahmed, who owns a truck with a carrying capacity of 200 quintals, is engaged in the business of transportation of goods. Last year, as a result of the food shortage caused by drought and the consequent government call for foreign aid, a great bulk food aid arrived at the port of Djibouti. This increased the demand for transportation service and created a tremendous opportunity for persons and companies engaged in the sector. Intending to exploit this opportunity by increasing the carrying capacity of his truck, Ahmed hired a trailer which has a carrying capacity of 150 quintals from Nesibu. Later on, he decided to expand his business and borrowed Birr 1,000,000.00 from a bank by mortgaging the truck and bought additional trucks. However, he failed to repay the debt and hence the bank began preparation to foreclose the mortgaged truck.

What is the kind of relationship created between the truck and the trailer? Explain its nature, effects, validity and the status of the trailer exhaustively.

What are the rights and defenses / if any / available to Nesibu? Explain.

QUESTION TWO

Alemu lost his golde watch on Hidar 21, 1986 while he was visiting Axum Tsiyon.Two years later on the same date, Kiflom found it almost buried under dirt. The latter, being a religious and a law-abiding person announced his find through the church and the local news paper and personally tried to find the owner but in vain. Giving up the hope of finding the owner, Kiflom gave the watch in pledge to Hagos to secure his debt. Alemu heard of the finding of his watch this year when he came to Axum Tsiyon and claimed restitution of the watch, however, Kiflom couldn't do so since he has already pledged it. So he went to Hagos's house and took it by force.

1. Who is the owner of the watch? Explain the legal and factual grounds of his ownership.

2. Who is the possessor? Explain the legal and factual grounds of his possession.
3. What are the rights and remedies available to Hagos? Explain exhaustively.

QUESTION THREE

Muluneh died two years ago on January 1, 2002, leaving his house, which is leased to Abraham for an indefinite period, to Aster, his only daughter and heir. Two years later, Aster wanted to move into the house and terminated the contract and required Abraham to leave the house. However, the latter refused to do so. So she is preparing to institute an action to force Abraham out of the house and seeks your advice.

Advise her of the kind of action she has to institute and prepare a statement of claim setting out all the relevant legal and factual grounds of her claim.

QUESTION FOUR

Hailu bought various auto-spare parts from his friend, Ayele but failed to take possession of them. Hence, Ayele stored and locked the sold parts in a separate room and gave the only key of this room to Hailu, so that he can take them at any time he wants to. A week after the key is given to Hailu, the room in the parts are stored is destroyed by fire together with the parts. Based upon this hypothetical case, answer the following questions.

1. Who is the possessor the parts before they are destroyed by the fire? Explain.
2. How would you apply the corpus requirement to this case?

QUESTION FIVE

Mohammed, who is preparing to build a new residential house, bought all the necessary materials such as bricks, cement, nails corrugated iron-sheets, windows and doors and stored them in Ahmed's compound because he does not have sufficient space in his house. A month later, Mohammed came back to take the materials and learned that Ahmed, who intending to construct service rooms in his large compound, had already used all these materials to construct the service rooms.

Based upon this case, answer the following questions.

1. Who is the owner these materials which are already used in the construction of the service rooms? Explain.

2. What is the effect of Ahmed's action on the status of the materials as object of property? Explain.
3. What is remedy available to Mohammed?

QUESTION SIX

Selam owns a house in Mekelle. However, she left it unattended and started living abroad with her fiancé since June 1, 1994 G.C. On July 1, 1994 G.C, Hailay, who happens to know that she is not around, broke in and started living the house. Ten years later, she returned to Mekelle and found out that is occupied by some one.

Answer the following questions based upon the above case.

1. What is/are the remedy/ies available to Selam to recover the house?
2. Can she use the protections provided Art.1148 &1149 0f the Civil Code? Explain.
3. Will the provisions of the law of property be applicable if Hailay started to live in the house with her consent, for example as a result of contract of lease concluded between her and hailay? Explain.

CASE SEVEN

Mohammed was a possesser of a land situated in kebelle 11 in Mekelle city on which he had constructed a residential building and had been living in it since February 1, 1995 G.C. On February 1, 2004 G.C. Kedir, who also possesses a plot of land adjacent to the land possessed by Mohammed, demolished part of the concrete wall fence constructed by Mohammed and which separates the two lands alleging that it was constructed on the land he possesses. On July 1, 2004 Mohammed transferred his possession of the land and the ownership of the building through contract to Abraha.

Now Abraha is intending to do something about Kedir's action and the demolished fence and has approached you for legal advice as to what to do. Provide him with your reasoned advice on the following issues.

1.1 His right/possession/ over the land, the building and the fence.

1.2 The measure/s he may take to ensure the protection of his interests and the legal bases for such measure/s.

1.3 The possible defences that may be raised by the defendant.

1.4 Assuming that Kedir's claim that the fence was constructed on the land possessed by him is true, what would Kedir's status be with regarded to the land he claimes? Would his act be legal, justifiable? What type of legal action he could have instituted to satisfy his claim.

CASE EGHIT

Tibebu, who has a great interest in arts buys and collects paintings by renowned painters, and has a large number of paintings in his collection. On February 1, 1990 G.C. his servant, Alemitu, who was illiterate and hence could not understand the meaning and contents paintings, found one of these paintings while she was cleaning the house and getting rid-off unwanted papers and other similar items threw it, believing that it is a garbage, with other garbage in a garbage can put at the disposal of the public. Tibebu, found out that the painting is missing and searched for it but he could not find it. On January 1, 2005 he learned that the painting is in the possession of Mesfin who found it thrown in the garbage-can the same day 15 years.

Based on this hypothetical case, answer the following questions.

2.1 What was the status of the object on the day it was found by Mesfin?

2.2 Can Tibebu recover it from Mesfin, and what is the type action he may resort to?

2.3 Was Mesfin under the obligation to report or publicize his find?

2.4 What are the defences /if any/ available to Mesfin and the bases / the legal grounds of such defences?

BIBLIOGRAPHY AND REFERRENCE MATERIALS

BOOKS

1. Larry May, Nancy E. Snow and Angela Bolte, Legal Philosophy, Multiple Principles. Mayfield Publishing Corporation, London, 2000.

2. Robert C. Ellickson, Carol M. Rose and Bruce A. Ackerman ,Perspectives on Property Law, Aspen publishers Inc, second edition 1995.

3. Joseph William Singer, Property Law, Rules, Policies and Practices, Aspen Publishers Inc 1997

4 A.W. Paton, Jurisprudence, Third Edition.

5 K.W. Rayn, an Introduction to the Civil Law.

6. Aubry and Rau, Droit Civil Francais, Volume II Seventh Edition by Paul Esmein, West Publishing Corporation 1966.

8. G.W.F. Hegel, Elements of Philosophy of Rights, edited by Allen W. Wood, Cambrige University Press 1991

9. Amos and Walton, Classification of property. (Unpublished)

10. Cylke, Own, Property Law, Introductory Sources, Vol.I and II. Law School Publications.

11. Dunning, H.C, Property Law of Ethiopia (Materials for the study of book III of the Civil Code).

12. Kruser Fr. Vinding, the Right of property, London: Oxford University Press (1939)

13. Lawson. E.H. Introduction to the Law of property, London: Oxford University Press (1958)

14. Planiol, M Treatise on the Civil Law, Vol. I part, II 12th ed.

15.Yianno-poulus, Louisiana Civil Law Treatise, Vol.II. West Publication company (1967)

16. Bililign Mandefro, the Unofficial Translation of Book III of the Civil Code of Ethiopia, 1960 (Unpublished, AAU)

17. Hernando Desoto, The Mystery of Capital.

LAWS

1. The Constitution of the Federal Democratic Republic of Ethiopia 1995.
2. The Civil Code of Ethiopia, Proclamation No. 165/1960.

3. The Commercial Code of Ethiopia, Proclamation No. 166/1960.
4. The Condominium Proclamation No 370/2003.
5. Antiquities Protection and preservation Proclamation No 229/1966.
6. Forest and Wild Life Conservation and Development Proclamation No 192/1980.
7. Government Ownership of Urban Land and Extra Houses Pro No 47/1975.
8. Government Ownership of Rural Land Proclamation no 31/1975.
9. Re-enactment of Urban Land Lease Holding Proclamation No 272/2002.
10. FDRE Rural Land Administration and Land Use Proclamation No 89/1997.
11. Ethiopian Water Resources Management Proclamation No 197/2000
12. Expropriation of Land Holdings For Public Purposes and Payment of Compensation Proclamation No 455/2005.
13. Payment of Compensation for Property Situated on Landholdings Expropriated for Public Purposes Council of Ministers Regulations No 137/2007.
14. Ethiopian Civil Aviation Authority Re-establishment Proclamation No 273/2002.
15. Commercial Registration and Business licensing Proclamation No 67/1997.
16. Federal Government Commercial Registration and Licensing Council of Ministers Regulation No 13/1997.
17. Forest Development, Conservation and Utilization Pro No 542/2007.
18. Research and Conservation of Cultural Heritage Pro No 109/2000.
19. Ethiopian Wild Life Development and Conservation Proclamation.
20. Ethiopian Wild Life development and conservation Authority Establishment Pro No 575/2008.