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THE ROLE OF POSSESSION IN PROPERTY RELATIONS

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Abstract

The main objective of this paper is to examine the role of possession in property relations. In order for the role of possession to be explained, it is important to make a clear distinction between the exclusive physical control over movable or immovable things that is possession, and the direct exclusive legal power over movable and immovable things that real rights provide. From theoretical standpoint possession can be regarded as having a dual role. One being a category regulated by law independent from real rights since possession as such is not a real right, and the other being an ingredient of ownership since the right of ownership entitles the owner to possess, use and dispose of the object of ownership. This duality of roles creates a complex and interlaced relationship between possession and real rights which is subject to analysis in this paper. Leading with the notion that possession may or may not result from having a real right the paper addresses several issues such as: the importance of differentiating between possession and the right to possession and its practical implications in dispute resolution; the importance of possession as a legal category; the link between possession and the acquisition and exercise of real rights, and the issue of possessory versus petitory action. Ultimately, the goal of the analysis of such important issues is to evaluate how the role of possession has evolved in contemporary property law.

Key words: possession, property, real right.

I. THE CONCEPT OF POSSESSION

The importance of possession in property relations has been recognized by legal systems as early as the Roman law. In the Roman law possession was viewed as physical control over things (*corpus possessionis*). Possession as a legal category was afforded protection by possessory interdicts (*interdicti*) who in essence were praetorial orders prohibiting any acts by third parties that will impede the possessor to fully enact the physical control over the thing in his possession¹. *Interdicti* were also used to protect possession until such time that the ownership dispute over the thing in question has been resolved. In the beginning, the protection of possession was recognized in favor of *pater familias*, not just when he hold the possession

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¹R. Domingo 1, *The Law of Property in Ancient Roman Law* (June 12, 2017). Available at SSRN: <https://ssrn.com/abstract=2984869> or <http://dx.doi.org/10.2139/ssrn.2984869>.

personally, but also when possession was held by his subjects (*fili*) and his slaves. This was known as possession *in corpore alieno*. During the classical period of Roman law the concept of possession *in corpore alieno* was generally extended, but it still didn't include persons such as tenants and other lease holders who still didn't enjoy the protection of possession. Oddly enough, thieves on the other hand enjoyed protection of their possession. Later on, the concept of possession in Roman law has changed, and possession was viewed as legal category composed of two elements: physical control (*corupus*) and the intent of the possessor to act as the owner (*anumus domini*)². The Romans law also introduced *quasi-possessio* which was understood as a possession over rights other than ownership³.

The modern concept of possession recognizes the dual role of possession – possession as a separate legal category and possession as integral part of the content of the right of ownership⁴. The concept of possession as a separate legal category has been developed under the influence of two theories aiming to explain the nature of possession – the classical (subjective) theory for possession and the cotemporary (objective) theory for possession.

The classical theory of possession is attributed to the legal scholar Savigny. This theory posits that in order for possession to exist it is not enough to have physical control over a thing, also the intent of the possessor should be considered⁵. Judging from the actual intent of the person who has the physical control over the thing it can be determined if that person has possession or not. If the person has the intent to act as the owner of the thing that he possesses (*anumus rem sibi habendi*), he is the possessor. However, if the person enacts physical control over the thing in the name of another, than that person can't be considered as the possessor from view point of the classical (subjective) theory. Although elegant, the concept of the classical theory is ultimately flawed. The flaws become evident when the concept it posits gets practically applied. Since the classical theory values the existence of possession on the bases two elements the physical control and the intent of the possessor to act as the owner, the possessor will be compelled to prove the existence of the two elements when filing for protection of his or her possession. Proving physical control can be relatively easier then proving the existence of the intent to act as the owner because the intent is a psychological state of mind that can't be proven by tangible evidence. The classical theory falls short also in regard of the protection of the so called “*intermediary possessor*” like the lease holder, deponent and others that enact physical control over a thing belonging to another person. They have the intent to enact the physical control, not as owners, but rather as holders of other rights (lease, deposit and etc.). Since their intent is not of the required quality they won't be afforded legal protection. On the other hand, person enacting physical control with the intent to act as the owner who obtained that physical control in an illegal manner (a thief for example) will enjoy legal protection of such possession. This of course is unacceptable form legal point of view.

The objective theory of possession is attributed to the teachings of Jhering. Basic premise of the theory is that the law shouldn't distinguish whether a person has or doesn't have possession on the bases of the person's intent to act as owner. This theory leads with the assumption that all

² More on the concept of possession in Roman law see: Henri et Léon Mazeaud, Jean Mazeaud, François Chabas, Tome II/deuxième volume, *Biens, Droit de propriété et ses démembrements*, Montchrestien, Paris, 1994, т.1410, 188. R. Kovačević Kuštrimović, M. Lazić, *Stvarno pravo*, CIP PUNTA, Niš, 2004, 37, 39. Ph. Simler, *Les Biens*, Presses Uniersitaires de Grenoble, 1996, 14/2, 21-22.

³ See: R. Kovačević Kuštrimović, M. Lazić, *op.cit.*, 35.

⁴ A. Clarke, P. Kohler, *Property Law, Commentary and Materials*, Cambridge University Press, 2005, 259-260.

⁵ Henri et Léon Mazeaud, Jean Mazeaud, François Chabas, *op. cit.*, т.1423, 195-196

persons enacting some type of physical control over a thing have the intent to keep that control in their hand. Therefore, they have “a will to hold on to possession” – *animus tenendi*⁶. On the bases of the assumption that all possessors have intent to keep their possession, the law should afford all of them adequate legal protection regardless whether they act as owners, or lease holders or holders of other rights. The only persons that this theory doesn’t view as possessors are those who enact physical control on the request of others, such as the house keeper, employee and etc. They are not considered as possessor because they have no vested interest to hold on to the physical control they enact.

Legal systems base their regulation of possession as a separate legal category leaning toward the classical (subjective) theory or toward the objective theory.

The legal systems that base their regulation of possession on the subjective theory do so by implementing certain modifications in order for the protection of possession to be available to possessors who enact physical control but with intent other than to act as owners (lease holders for example). This is the case with the French Civil Code where the subjective theory for possession was accepted, but modified so it would include all types of possession. As for the objective theory, this theory is accepted in German law (German Civil Code - § 854/1), Swiss law (Swiss Civil Code - art. 919/1), Croatian law (Zakon o vlasništvu i drugim stvarnim pravima - čl.10/1⁷), Slovenian law (Stvarnopravni zakonik – čl. 24⁸), Montenegro law (Zakon o svojinsko-pravnim odnosima - čl.385⁹) and other.

The Macedonian legal system falls into the group of legal systems that accepted the objective theory of possession, and regulates possession accordingly in the Law of Ownership and Other Real Rights¹⁰. In the text that follows the regulation of possession in Macedonian law will be closely analyzed.

II. POSSESSION IN MACEDONIAN LAW

Macedonian Law of Ownership and Other Real Rights regulates possession as a separate legal category in order to make a clear distinction between the possession as factual control over things and the real rights that provide exclusive legal control over things.

The Law of Ownership and Other Real Rights doesn’t have a general definition of what is possession, however when regulating the manner in which possession is enacted the Law states that the possession exists from the moment when the possessor has taken factual control over the thing regardless whether the control is taken unilaterally or by transfer on part of the previous possessor (art. 173/1). It is clear from this provision of the Law that the only requirement for existence of possession is for the possessor to have factual control over the thing, regardless whether that person has any legal right to take possession. Considering the provision of the law scholars rightfully conclude that “any factual control over a thing based on a certain right or not

⁶ Henri et Léon Mazeaud, Jean Mazeaud, François Chabas, *op. cit.*, т.1424, 196.

⁷ Narodne novine, Sl. list R. Hrvatske, NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14.

⁸ Uradni list R. Slovenije, št. 87/02, 91/13 in 23/20.

⁹ Sl. list CG", br. 19/2009.

¹⁰ Закон за сопственост и други стварни права, Службен весник на Република Македонија, бр. 18/2001, 92/2008, 139/2009 и 35/2010.

constitutes possession”¹¹. The intent of the possessor is not mentioned in the Law of Ownership and Other Real Rights as a requirement for enacting possession, which is not unusual since the Law bases the provisions regulating possession on the objective theory. Legal scholars on the other hand, point out that the possessor should have some intent to use the thing that is the object of possession in his or her personal interests. The intent of the possessor doesn’t have to be of such quality that will require for him or her to act as the owner, it is sufficient for the intent to be directed in realizing any kind of personal economical benefit for the possessor¹². This so called “basic intent” needs to exist so that we could distinguish possession from detention as a factual control over a thing in the name of another person with no benefits for the person enacting the control. Scholars hold the opinion that the only possible way to underline the difference between the possessor and the keeper (*detentor*) is by evaluating the intent of the person enacting the factual control. If on part of that person there is a intent to use the thing in his or her personal interest, that that person is considered as possessor, however if there is no such intent, if the use is for the sake of another, then that person is a mere keeper (*detentor*). Considering all implications we have to agree that even though the Law of Ownership and Other Real Rights doesn’t require intent for possession, it is still necessary for the intent to be evaluated if and when the question arises whether the person enacting the physical control is a possessor or a mere keeper (*detentor*).

Making the distinction between possession and detention is relevant in court proceedings initiated for protection of possession, since the Law of Ownership and Other Real Right doesn’t afford keepers (*detentors*) judicial protection. Keepers (*detentors*) are only authorized to protect their factual control by use of self-protection. Prerequisites for self-protection are: existence of an immediate danger, self-protection to be the only available recourse and the means of defense to be proportional to the present danger¹³.

The distinction between *possession* and *detention* is also relevant for evaluating the legal effect and consequences that rise from enacting factual control over things. When the factual control is in the form of possession it may lead to acquisition of real rights by prescription, it is required as condition for acquisition of ownership on the base of certain administrative act, it could afford priority in favor of the possessor in case of collision of rights, in some situations the possessor could be found as liable for damages or be obligated to pay compensation to the owner for the use of the thing he or she is in possession of and etc. None of mentioned legal effects and consequences, with exception of the liability for damages, can be attributed to detention.

As a factual control over things possession shouldn’t be viewed as a right of any sort. We point this out because the term “right of possession” is used in some provisions of the Law of Ownership and Other Real Rights (art. 181/1, 188). The term “right of possession” is not to be understood as alluding to a separate type of right. When the term “right of possession” is used in the Law of Ownership and Other Real Rights, it refers to the legal power (entitlement) to possess a certain thing derived from the content of a real right or from the content of an obligation. For example the owner is entitled to possess the thing that he or she owns, the lease holder is entitled to possess the real estate leased to him or her and etc. It is not uncommon to encounter situations in the legal practice where the person entitled to have possession over a certain thing doesn’t

¹¹ А. Групче, Имотно (*Граѓанско*) право, втор дел, *Стварно право, второ допол-нето издание*, Култура, Скопје, 1985, 212. Р. Живковска, *Стваро право*, Европа 92, Скопје, 2005, 231.

¹² А. Групче, *op. cit.*, 212. Р. Живковска, *op. cit.*, 232.

¹³ Art. 189, Law of Ownership and Other Real Rights...

have the factual control over that thing and in the same time the person having the factual control is not the one entitled to have possession.

Whether a person is entitled to have possession or not has no bearings on the existence of possession, because the existence of possession is a matter of fact and not a matter of rights and entitlements. It is important to bare this in mind with respect to the issue of protection of possession. According to the Law of Ownership and Other Real Rights, possessors can protect their possession before the courts by filing a possessory action (art. 183). Subject to protection are all types of possession, including the possession that was enacted in an illegal fashion¹⁴. A possessory action may be filed in a period of 30 days from the moment when a person has become aware that he or she has been obstructed or deprived of possession, but no later than a year since the act of obstruction or deprivation has taken place¹⁵.

The courts examine the possessory action in a special court proceedings know as proceedings for obstruction and deprivation of possession. These proceedings are of urgent and summary nature. Urgency requires that the entire proceedings are conducted efficiently in a short period of time that by law shouldn't exceed 6 month¹⁶ from the moment that the possessory action was filed¹⁷. Since the proceedings are intended to be of summary nature, the court is limited only to examine the facts and circumstances that strictly relate to the act of obstruction or deprivation of possession. The Law of Civil Procedure explicitly states that in the proceedings for obstruction or deprivation of possession matters such as the quality of possession, the legal base for possession or claims for damages, are not to be examined (art. 412).

Appeal process should also be conducted in a short period of time which is why the time for filing an appeal is 8 days upon receiving the decision of the court in first instance¹⁸. The Appellate court is obligated to render a decision on the appeal in 30 days upon receiving it¹⁹.

As plaintiff, in the proceedings for obstruction or deprivation of possession, may appear only the person who last held an uninterrupted and peaceful possession. In the possessory action the plaintiff must state the facts and circumstances that attest to the fulfillment of these legal requirements. Proving uninterrupted and peaceful possession might seem like a burdensome task, however the Law of Ownership and Other Real Rights lightens the burden for the plaintiff by introducing the legal assumptions that the person who took factual control over the thing is in continuous (uninterrupted) possession from that moment on, so whoever claims the opposite is obligated to prove such a claim (art. 180). What this provision does is shift the burden of proof from the plaintiff on to the defendant who in order to defend himself or herself needs to prove that the plaintiff was not in fact the person who last held uninterrupted possession. As for the requirement for the plaintiff to have peaceful possession, this is a fact that could be assumed or proven depending on the circumstances. Since the law protects all types of possession it could be assumed that the person who has factual control is in peaceful possession that no one should

¹⁴ By law the unlawful possessor may protect his or her possession against all persons, with the exception of the person that he or she has unlawfully deprived of possession but only until the deadline for filing a possessory action hasn't expired for the person unlawfully deprived of possession. After the expiration of the deadline the unlawful possessor can protect his or her possession even against the person that he or she deprived of possession. Art. 182, par. 2, Law of Ownership and Other Real Rights...

¹⁵ Art. 183, par. 1, Law of Ownership and Other Real Rights...

¹⁶ Art. 411, Law of Civil Procedure (Закон за парничната постапка, Службен весник на Република Македонија, бр. 79/2005, 110/2008, 83/2009, 116/2010 и 124/2015).

¹⁷ In reality these types of proceedings are known to last up to two years or more.

¹⁸ Art. 414, par. 2, Law of Civil Procedure...

¹⁹ Art. 411, par. 5, Law of Civil Procedure...

obstruct or interrupt, not even the person that considers him or herself to have a stronger right of possession²⁰. However, if the plaintiff has taken possession in an unlawful manner, the peacefulness of his or her possession could be disputed, but only on part of the defendant who was unlawfully deprived of his or her possession by the plaintiff. In this case the defendant will have to prove that the time period for protection of his or her possession hasn't expired, and therefore the plaintiff's unlawful possession has not yet become peaceful and merits no protection against that defendant.

As we have demonstrated in the text the courts in proceedings for obstruction or deprivation of possession afford protection only to the factual control that is possession. The decisions of the courts in these types of proceedings have no bearing on issues concerning the rights of the interested parties or even if the possessor is the person entitled to have possession. Disputes regarding the right of the interested parties versus the possessor can only be resolved in a regular civil procedure by filing appropriate lawsuit depending on the right in question. The issue regarding who is entitled to have possession (who has the right to possession) or who has the stronger right to possession is also resolved exclusively in a regular civil procedure.

With respect to the possessory action we would also like to note that it is often used by owners in their attempts to protect their right of ownership by way of protecting their possession. It is so due to the fact that for the owners, who also have possession over the things they own, it is more practical to file possessory petition. They will get protection of their possession in faster and relatively less burdensome proceedings and by way of protecting their possession they will in fact protect their right of ownership as well.

III. THE IMPORTANCE OF POSSESSION IN RELATION TO THE RIGHT OF OWNERSHIP AND OTHER REAL RIGHTS

Possession exists in Macedonian law as a separate legal category, and as such is regulated and protected primarily by the Law of Ownership and Other Real Rights. However, possession plays an important role in relation to the right of ownership and other real rights that reflects in the acquisition and exercise of those rights.

1. Regarding the acquisition of ownership and other real rights possession appears among the required condition for acquiring right of ownership and other real right originally, by derivative transfer and on the bases of a decision of government entities.

Concerning the original manners for acquiring ownership possession is a condition for acquiring ownership by occupation and by prescription.

Occupation is an original manner of acquiring ownership on abandoned movable things. According to the provisions of the Law of Ownership and Other Real Rights, the right of ownership by way of occupation is acquired by the person that has taken possession of the abandoned thing with the intent to own it (art. 133). Evident from the provision is that the Law posits two legal requirements first being the possession as factual control over the abandoned thing, accompanied with the intent to become an owner as the second requirement.

Prescription is the other original manner of acquiring ownership where possession is one of the necessary conditions for the right to be acquired. Possession that is required for prescription by quality needs to be bona fide, lawful, proprietary, uninterrupted and undisputed. Bona fide possession is defined as a possession when the possessor is not aware nor could have been aware

²⁰ Art. 181, Law of Ownership and Other Real Rights...

that he or she has no right to possession²¹. Lawful possession is the possession acquired on the bases of a valid legal document²². The requirement for the possession to be proprietary is not explicitly stated in the Law of Ownership and Other Real Right, however it is implied since only the person who believes to be the owner and acts as such may acquire ownership by prescription. Persons who hold possession, but lack the conviction that they are owners can't acquire ownership by prescription. The possession also needs to be uninterrupted, which means that it must last from the moment that the possessor has taken possession right up to the moment of expiration of the time period for prescription²³. Possession should be undisputed, meaning that the possession mustn't be subject of legal actions by third parties that dispute it. If the possession lacks the mentioned qualities, with the exception of its lawfulness²⁴, it would be a legal impediment for the possessor to acquire right of ownership even if all other legal conditions are met.

Servitudes as real rights can also be acquired by prescription where possession is one of the required legal conditions. However, in these cases the type of possession that is required is the quasi-possession over the right of servitude. The person that in a continuous, undisputed and peaceful manner exercises a right of servitude over real estate for time period of 20 years acquires real servitude by prescription²⁵. As for acquiring personal servitudes by prescription the Law of Ownership and Other Real Rights state that the condition for acquiring ownership by prescription are adequately applicable (art. 213, par. 3).

Possession also appears as relevant condition in derivative transfer of ownership and other real rights.

When the right of ownership of movable things is acquired on the bases of legal agreement, a transfer of possession needs to occur in order for the right to be considered as fully acquired. The transfer of possession can be performed in any way that entitles the successor to take possession over the thing that is the object of the right of ownership. The transfer of possession could be physical, symbolical or fictitious²⁶. Physical transfer is performed by directly enabling the successor to gain physical control over the thing that is the object of ownership. Symbolical transfer is when the possession is considered to be transferred by giving the successor a part of the thing that symbolizes its transfer in entirety (giving the key of a car symbolizes transfer of possession of the car). Fictitious transfer is when the transfer of possession is not in fact performed, it is only considered as performed and that the successor has taken possession of the thing. The fictitious transfer takes place in three situations: when the successor already has possession on a different legal base, when the previous owner keeps possession of the thing but on a different legal base, not as the owner, and when the thing is in possession of a third party on the base of a valid agreement.

Acquiring the right of pledge on movables is sometimes performed by transferring possession on to the pledge creditor. According to the provisions of the Law of Ownership and Other Real

²¹ Art. 179, par. 3, Law of Ownership and Other Real Rights...

²² Art. 179, par. 1, Law of Ownership and Other Real Rights...

²³ Art. 125, par. 1, Law of Ownership and Other Real Rights...

²⁴ Lawfulness of possession is not crucial when referring to possession as a condition for prescription. However, if possession is lawful it will enable the possessor to acquire ownership by prescription in shorter periods of time - 3 years for movable things and 10 years for immovable things. Art. 124, par 1 and 2, Law of Ownership and Other Real Rights...

²⁵ Art. 202, Law of Ownership and Other Real Rights...

²⁶ Art. 145, Law of Ownership and Other Real Rights...

Rights contractual pledge on movables could be acquired by concluding the pledge contract accompanied with transfer of possession of the pledged movable on to the pledge creditor (art. 226/2). This type of pledge the Law names as unregistered pledge. The Law of Contractual Pledge²⁷ also prescribes that pledge on movables can be acquired by transfer of possession over the pledged movable on to the pledge creditor (art. 3). The Law of Contractual pledge calls this type of pledge a possessory pledge.

Possession is set forth as a condition in some cases when the right of ownership is acquired on the bases of decisions of government entities such as the acquisition of the right of ownership under special circumstances according to the Law of Construction Grounds²⁸.

The possibility for acquiring the right of ownership under special circumstances is part of the process of transformation of the socially owned, and later state owned construction grounds into private ownership. In larger part the transformation is conducted under the provisions of the Law of Privatization and Lease of the Construction Grounds Owned by the State²⁹. Privatization is afforded to previous owners³⁰ and holders of the right of use³¹ and their successors. However, there is a rather large number of persons who couldn't acquire private ownership by way of privatization because they weren't previous owners and hadn't acquired right of use over the construction ground in the way dictated by the socialist legislation. We refer to persons who concluded sales contract with the previous owner for purchase of construction ground after it has been nationalized. On the bases of the concluded sales contract the previous owner had transferred his or her possession on to the buyer. What the previous owners couldn't transfer on to the buyer was the right of ownership since the construction ground was already nationalized, and also wasn't allowed to transfer the right of use if the construction ground was vacant. That left the buyer with having only factual possession over the construction ground. This category of persons are able to acquire right of ownership on the construction ground owned by the State under special circumstances regulated by article 91 of the Law of Construction Grounds. The two basic legal requirements for this type of acquisition of the right of ownership are for the person to have a sales contract concluded with the previous owner and to have uninterrupted possession of the construction ground for more than 20 years from the day the sales contract was concluded.

2. Possession also plays an important role in the exercise of the acquired right of ownership and other real right. This is due to the dual role that possession has in legal relations. On one hand, as it was stated, possession is factual control over things, but on the other hand it appears as an integral part of the content of the right of ownership. According to the provisions of article 8, paragraph 1 of the Law of Ownership and Other Real Rights *the owner is entitled to possess, use and dispose of the thing he or she owns, as long as it isn't contrary to the law or the*

²⁷Закон за договорен залог, Службен весник на Република Македонија, бр. 5/2003, 4/2005, 87/2007, 51/2011, 74/2012, 115/2014, 98/2015, 215/2015 и 61/2016.

²⁸ Закон за градежно земјиште, Службен весник на Република Македонија, бр. 15/2015, 98/2015, 193/2015, 226/2015, 31/2016, 142/2016 и 190/2016 и Службен весник на Република Северна Македонија, бр. 275/2019.

²⁹ Закон за приватизација и закуп на градежно земјиште во државна сопственост, Службен весник на Република Македонија“ бр. 4/2005; 13/2007; 165/2008; 146/2009; 18/2011; 51/2011; 27/2014; 144/2014; 72/2015; 104/2015; 153/2015; 23/2016; 178/2016 и 120/2018.

³⁰ The term “previous owner” refers to persons who owned the construction ground before it was nationalized and turned into social ownership.

³¹ Holders of the right of use were all persons that were afforded the right of use over construction grounds in social ownership.

rights of another person. The definition of ownership in the Law is based on the roman concept of ownership - *Proprietas est ius utendi et abutendi re sua quatenus iuris ratio patitur*³². However, the Law of Ownership and Other Real Rights in the content of ownership, alongside the power to use (*ius utendi*) and the power to dispose (*abutendi*) with the object of ownership, also includes possession. This is due to the fact that for effective enjoyment of the right of ownership the owner needs to be entitled to have physical, as well as legal control over the thing that is the object of ownership. The owner is also entitled to transfer the possession (the physical control) over the object of ownership without transferring the right of ownership itself, and by doing so, to make the most of the physical and economical use of the object of his or her right of ownership. When the owner is obstructed or deprived of possession, he or she can protect his or her possession by filing for possessory action. The owner can also protect his or her possession by petitory actions. Usually as a last resort, the owner who missed the deadlines for filing possessory action can procure protection by filling lawsuits for protection of the right of ownership, such as the lawsuit for recuperation of the thing that he was dispossessed of (*actio rei vindicatio*)³³ or the lawsuit against harassment (obstruction) of ownership (*actio negatoria*)³⁴ used to prevent ongoing nuisance or trespass.

Although it is not explicitly stated in the Law of Ownership and Other Real Rights, we have to point out that possession has a role in realization of servitudes. According to the provisions of article 192, paragraph 1 of the Law of Ownership and Other Real Rights, *servitude is a real right on a thing belonging to another that entitles its holder to use that thing in a certain scope and manner, and the owner is obligated to endure it, and remain passive.* Servitudes are real when they are encumbering one real estate for the need of use of another real estate or personal when encumbering movable or immovable things for the needs of a certain person that has particular relationship with the owner. Both real and personal servitudes can't be effectively enjoyed as rights by their holders if they don't have possession of the thing that these rights encumber. The possession that the holder of the real or personal servitude has over the thing belonging to another is of course not proprietary possession. This type of possession is limited only to physical control that is absolutely necessary for realization of the right of servitude in the scope and manner it was afforded.

The role of possession with respect to the exercising real right extends also in the area when collision of right occurs. The collision of rights is a state where several persons aim to exercise a certain right, but by law only one can do so, or if one person aims to enjoy several rights, but by law can enjoy only one of those rights³⁵. Collision of rights in Macedonian law is resolved by giving priorities under conditions prescribed by law.

In Macedonian property law there are few situations when priority is afforded to the person who holds possession over a thing when there is a collision of real rights. Such is the case of the multiple transfer of ownership on part of the same owner. When the owner transfers his or her right of ownership over the same movable thing to several different people separately, then the

³² Digest V 3.25.11. See: S. Romeo, *L'appartenenza e l'alienazione in diritto romano, tra giurisprudenza e prassi*, Giuffrè Editore, 2010, 59. M. vte. Febrer Romangu, *El concepto de propiedad inmueble en el derecho comun y su influencia en los fueros valencianos*, GLOSSAE. REVISTA DE HISTORIA DEL DERECHO EUROPEO 5-6. Instituto de Derecho Común Europeo. Universidad de Murcia, 1993-94, 392. F. Escobar Córdoba, *El derecho romano de la propiedad en la doctrina civil colombiana*, Criterio Jurídico, Santiago de Cali, V. 6 2006, 313

³³ Art. 160, Law of Ownership and Other Real Rights...

³⁴ Art. 161, Law of Ownership and Other Real Rights...

³⁵ P. Живковска, *Ониот дел на граѓанското право*, Европа 92, Скопје 2011, 132.

right of ownership will be actually afforded to the person who first came into possession over the movable thing³⁶. When multiple transfer of ownership over real estate by the same owner to several different persons separately has taken place, then according to the provisions of the Law of Ownership and Other Real Rights the right of ownership will be acquired by the person who managed to be the first to register his or her right. However, if another person was in possession of the real estate on the bases of a contract for transfer of ownership concluded with the owner, then the person who is in possession may file a lawsuit demanding for the registered right of ownership in favor of another to be deleted, and his or her right of ownership to be registered instead. The plaintiff will have to prove that the defendant (the person who's right is registered) was acting in bad faith because in the moment when he concluded the contract with the owner was fully aware that the right of ownership is already transferred to another person who is now in possession of the real estate³⁷. Another situation when having possession gives priority is the situation where several persons aim to acquire the right of ownership over the same thing on different bases. The Law of Ownership and Other Real Rights states that if several persons are considered to be presumed owners³⁸, the person having the stronger legal base will become the actual owner. As stronger the Law considers the legal base under which the right of ownership was transferred with compensation, rather than the legal base under which this right was transferred without compensation. However, if the legal bases are of equal strength, the right of ownership is recognized in favor of the person who is in possession of the thing that is the object of the right of ownership³⁹.

IV. CONCLUSIONS

Contemporary civil doctrine recognizes the dual role of possession – possession as a separate legal category and possession as integral part of the content of the right of ownership.

The concept of possession as a separate legal category has been developed under the influence of two theories aiming to explain the nature of possession – the classical (subjective) theory for possession and the cotemporary (objective) theory for possession.

Legal systems base their regulation of possession as a separate legal category leaning toward the classical (subjective) theory or toward the objective theory.

The Macedonian legal system falls into the group of legal systems that accepted the objective theory of possession, and regulates possession accordingly.

Macedonian Law of Ownership and Other Real Rights regulates possession as a separate legal category in order to make a clear distinction between the possession as factual control over things and the real rights that provide exclusive legal control over things

As a factual control over things possession shouldn't be viewed as a right of any sort. When the term "right of possession" is used in the Law of Ownership and Other Real Rights, it refers to the legal power (entitlement) to possess a certain thing derived from the content of a real right or from the content of an obligation.

Subject to protection are all types of possession, including the possession that was enacted in an illegal fashion. Decisions of the courts in these types of proceedings have no bearing on issues

³⁶ Art. 146, par. 1, Law of Ownership and Other Real Rights...

³⁷ Art. 152, Law of Ownership and Other Real Rights...

³⁸ The term "presumed owner" refers to the person who has acquired a thing on a valid legal base and in a lawful manner not knowing that the right of ownership wasn't fully transferred.

³⁹ Art. 160, Law of Ownership and Other Real Rights...

concerning the rights of the interested parties or even if the possessor is the person entitled to have possession.

Possession plays an important role in relation to the right of ownership and other real rights that reflects in the acquisition and exercise of those rights.

Regarding the acquisition of ownership and other real rights possession appears among the required condition for acquiring right of ownership and other real right originally, by derivative transfer and on the bases of a decision of government entities.

Possession also plays an important role in the exercise of the acquired right of ownership and other real right. This is due to the dual role that possession has in legal relations.

The role of possession with respect to the exercising real right extends also in the area when collision of rights occurs. In Macedonian property law there are few situations when priority is afforded to the person who holds possession over a thing when there is a collision of real rights.

Bibliography

1. Clarke, P. Kohler, *Property Law, Commentary and Materials*, Cambridge University Press, 2005;
2. Групче, Имотно (Граѓанско) право, втор дел, Стварно право, второ допол-нето издание, Култура, Скопје, 1985;
3. Р. Живковска, *Опит дел на граѓанското право*, Европа 92, Скопје 2011;
4. Р. Живковска, *Стварно право*, Европа 92, Скопје, 2005;
5. F. Escobar Córdoba, *El derecho romano de la propiedad en la doctrina civil colombiana*, Criterio Jurídico, Santiago de Cali, V. 6 2006;
6. H.Mazeaud, J. Mazeaud, F. Chabas, Tome II/deuxième volume, *Biens, Droit de propriété et ses démembrements*, Montchrestien, Paris, 1994;
7. M. vte. Febrer Romangu, *El concepto de propiedad inmueble en el derecho comun y su influencia en los fueros valenclanos*, GLOSSAE. REVISTA DE HISTORIA DEL DERECHO EUROPEO 5-6. Instituto de Derecho Común Europeo. Universidad de Murcia, 1993-94;
8. Ph. Simler, *Les Biens*, Presses Uniersitaires de Grenoble, 1996 A. Clarke, P. Kohler, *Property Law, Commentary and Materials*, Cambridge University Press, 2005;
9. R. Domingo I, *The Law of Property in Ancient Roman Law* (June 12, 2017). Available at SSRN: <https://ssrn.com/abstract=2984869> or <http://dx.doi.org/10.2139/ssrn.2984869>;
10. R. Kovačević Kuštrimović, M. Lazić, *Stvarno pravo*, CIP PUNTA, Niš, 2004;
11. S. Romeo, *L'appartenenza e l'alienazione in diritto romano, tra giurisprudenza e prassi*, Giuffrè Editore, 2010;
12. Zakon o svojinsko-pravnim odnosima Sl. list CG", br. 19/2009;
13. Zakon o vlasništvu i drugim stvarnim pravima Narodne novine, Sl. list R. Hrvatske, NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14 Stvarnopravni zakonik Uradni list R. Slovenije, št. 87/02, 91/13 in 23/20;
14. Закон за градежно земјиште, Службен весник на Република Македонија, бр. 15/2015, 98/2015, 193/2015, 226/2015, 31/2016, 142/2016 и 190/2016 и Службен весник на Република Северна Македонија, бр. 275/2019;
15. Закон за договорен залог, Службен весник на Република Македонија, бр. 5/2003, 4/2005, 87/2007, 51/2011, 74/2012, 115/2014, 98/2015, 215/2015 и 61/2016;
16. Закон за парничната постапка, Службен весник на Република Македонија, бр. 79/2005, 110/2008, 83/2009, 116/2010 и 124/2015;
17. Закон за приватизација и закуп на градежно земјиште во државна сопственост, Службен весник на Република Македонија“ бр. 4/2005; 13/2007; 165/2008; 146/2009; 18/2011; 51/2011; 27/2014; 144/2014; 72/2015; 104/2015; 153/2015; 23/2016; 178/2016 и 120/2018;
18. Закон за сопственост и други стварни права, Службен весник на Република Македонија, бр. 18/2001, 92/2008, 139/2009 и 35/2010.