

Procedural Protection Of Possession

A Comparative Ed Study

Ali Sultan Hamid Al Ali

Ajman University faculty of law
Program of Master Degree of Private law

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**Prepared by the researcher/ Ali Sultan Hamid Al Ali
University No./ 201911993**

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Acknowledgment

To my dear wife, the paradise of my eyes and the pulse that refreshes me, I dedicate this work to you to be a necklace that hangs from your neck and ripples in blind obedience, to declare my love and appreciation.

Introduction

Praise be to Allah, whose throne is in the sky, whose path is in the sea, and whose dominion is in the earth. Peace and blessings be upon the one who was sent as a mercy to the worlds, and upon his family, companions, and those who follow them in goodness until the Day of Judgment, and after that.

Given that the contemporary reality has produced many problems related to acquisition, we chose to deal with it in some details in the light of the UAE Civil Transactions Law and the Egyptian Civil Law, as the subject of this research, to be a serious attempt towards a correct understanding of that conduct.

We hope that this work will be pure for the sake of Allah, so that we do not seek anything but the truth through the research and do not fear anything but Allah in knowledge and science.

First: Definition of the Research Subject

Possession is deemed one of the most important issues that have been tackled by the UAE Civil Transactions Law, because of its implications on acquiring property. Its importance has increased due to the development within the UAE Society that has produced problems related to the issue of acquisition; consequently the jurisprudential disputes on this subject have increased.

The jurisprudences have emerged regarding the protection of that acquisition, so if the subject matter of the Case was an original right in rem on a real estate such as ownership, easement, use or usufruct, the Case shall be called the Claim of Right, but if its subject matter was nothing of that, as it was merely adhering to a actual position on the property, then the Case shall be called the Possession Claim, which is the Case in which the owner of the property requests determination of his right in possessing it and enable him to benefit from it.

Hence, we consider that it is necessary to tackle this subject due to its importance from the practical aspect on the one hand, and due to the large number of jurisprudential differences on this subject on the other hand.

In this research, we have tackled two chapters:

The first chapter: that sheds light on the concept of possession, its elements, and its relationship to ownership, and an explanation of the works on which possession is not based, the conditions of possession, and the defects that taint it.

The second chapter: that sheds light on the civil protection of possession through reviewing the types of possession claims, which are the Write of entry, the Action for Disturbance of Possession and the Case of new business

cessation, with an indication of the meaning of each Case, the conditions of its acceptance and the res judicata issued therein.

Finally, we reviewed the results of the research and the most important recommendations.

Second: Significance of the Research:

Tackling the issue of possession and ways to protect it through research and study is a very important jurisprudence, because the protection of possession - on the one hand - achieves the interest of society and achieves its stability, as it is de facto for which the public interest of society entails its protection, because the permissibility of aggression against it leaves the door wide open to conflicts and quarrels between individuals lead to undesired consequences and violence becomes the master of the situation, threatening the public security and social peace.

On the other hand, the protection of possession represents the protection of the right indirectly, as the possessor - often - is the owner of the right.

Although the Emirati legislator, like other legislators, included in his relevant legislation provisions that discussed possession, but we consider that these provisions did not discussed the possession in all its aspects to the extent that we may sometimes consider shortcomings therewith, and to manifest that shortcoming or not, we had to discuss in the search the comparison with one of the comparative legislations, which is the Egyptian Civil Code, to realize the similarities and differences between both of them, and complete the shortcomings, if any.

To enable the idea to be crystallized evidently and clearly within a correct legal framework, which we consider as important to everyone, especially to those who are working in the field of judiciary, given the large number of deliberated issues that are related to possession, which were produced by contemporary reality in various forms, which brought an urgent need to resolve the confusion and ambiguity between it and other terminology.

Therefore, we strived in this research to be an addition in the path of correct realization of a legal disposition that is branched and multiplied and was born from the womb of daily practices, so it has become a reality that requires setting a correct framework and indication within a clear and integrated legal framework that is resistant to ambiguity.

Third: The Research Problem

We have previously mentioned that the issue of possession and its bifurcations and overlapping with other rights raised clamor and confusion regarding it, which raised many important questions related to its legal characterization and is it deemed productive of it has its legal effects as soon as it occurs?

Or are there conditions so that it may be protected through the possession claims, so that it becomes a reason for gaining ownership, whether by itself or through the statute of limitations?

Has the Emirati legislator enact the legal provisions that guarantee the preservation of possession, or is there a deficiency that must be remedied due to the importance of the subject?

Fourth: The Research Objectives:

This research aims to achieve the following objectives:

- 1- Clarify the nature of possession in the Civil Transactions Law compared to the Egyptian Civil Law and resolve the confusion between it and ownership.
- 2- Resolve the confusion between the mediator, the accidental possessor and the actual possessor.
- 3- Specify the correct and integrated legal framework for possession as a reason for acquiring ownership.
- 4- Demonstrate the similarities and differences between the protection prescribed for possession in the Civil Transactions Law and the protection stipulated for it in the Egyptian Civil Law.
- 5- Identify the legal ground on which possession claims are based through clarifying their characteristics, scope, legality and parties.

Fifth: The Research Methodology

To achieve the desired goals from the research, and to develop an substantive answer to the raised problems, we adopted the descriptive, analytical and comparative approach as a method for the research, on the basis of considering the analytical approach as a basic approach, as tackling the elements of the subject of the research requires analyzing the legal provisions that discussed the issue of possession as they have clarified its elements how it was acquired, its abatement, its legality, ways of protecting it, and other related provisions, which are contained in the Civil Transactions Law of the United Arab Emirates, and we also relied in some places of research on the comparative approach through identifying the position of the Egyptian Civil Law on the same issue.

Sixth: The Research Plan

The First Chapter: The Nature of Legal Possession

The First Theme: The concept of possession

The First Requirement: The jurisprudential concept of possession.

The Second Requirement: The legal concept of possession.

The Third Requirement: The relationship between possession and ownership.

The Second theme: The elements of possession

The First Requirement: The material element (actual control)

The Second Requirement: The moral element (intention).

The Third Theme: The conditions of possession protected by law

The First Requirement: The continuity and non-intermittent

The Second Requirement: The calmness and non-coercion

The Third Requirement: The publicity and non-concealment.

The Fourth Requirement: The explicitness and non-ambiguity.

The Second Chapter: The Legal Protection of Possession (Possession Claims)

The First Theme: The nature of possession claims

The First Requirement: The wisdom of the legal protection of possession

The Second Requirement: The characteristics of possession claims

The Third Requirement: The scope of possession claims

The Second Theme: The writ of entry

The First Requirement: The definition of writ of entry, its parties and date for filing it

The Second Requirement: The legal characterization of writ of entry

The Third Requirement: The conditions for accepting the writ of entry

The Fourth Requirement: The judgment issued in the writ of entry and its res judicata

The Third Theme: The action for disturbance of possession

The First Requirement: The nature and conditions of disturbance

The Second Requirement: The parties of action for disturbance of possession and date for filing it

The Third Requirement: The conditions for accepting action for disturbance of possession

The Fourth Requirement: The verdict issued in action for disturbance of possession and its res judicata

The Fourth Theme: The case of new business cessation

The First Requirement: The definition of the case of new business cessation, its parties and date for filing it

The Second Requirement: The conditions for accepting the case of new business cessation

The Third Requirement: The verdict issued in the case of new business cessation and its res judicata

The Fourth Requirement: The relationship between the case of new business cessation and action for disturbance of possession

Results

Recommendations

List of references and sources

Chapter One

The Nature of Legal Possession

Preface

Possession is a material status that results from a person acquiring actual control over a right, whether this person is the owner of the right or not, as the actual control over the right shall be through using it via material actions required by the content of this right.

In case of the right of ownership, the right is mixed with the thing, the subject matter of the right, so it is said that the person has actual control over the same thing, the subject matter of the right of ownership, and the actual control here shall be through material actions, which are the actions usually performed by that the owner according to his use of the right of ownership, so he uses the thing, utilizes and disposes of it according to the disposition of the owner, as the person is the possessor of the right of ownership, or the possessor of the thing, the subject matter of this right, as long as it is used, with regard to him, the rights of the owner, for example, he inhabits or rents it if it is a house, cultivates or gives it to someone who cultivates it by lease or sharecrop if it is agricultural land, possesses it and benefits from it according to what its nature requires if it is a car, book, food or drink, and disposes of it by sale, gift, mortgage or by other dispositions accorded to the owner, all of that shall be realized whether this person actually owns the thing or does not own it. We are not discussing the matter of the right of ownership, but rather we are discussing the matter of material possession of this right.

That is, with regard to the process of using this right in actual use, and if the right, the subject matter of possession is not a right of ownership, as if it is a right of easement through passing, drinking, or a stream, for example, then its possession shall be through its actual use, so the possessor passes through the neighbor's land or takes water from an irrigator of his neighbor to irrigate his land or takes it from a public canal making it run through his neighbor's land until he reaches his land to irrigate it, all of this whether he has acquired the right of easement because of one of the reasons for his acquisition or he did not originally acquire it, and what is said about the right of easement is also said about the right of usufruct and in other rights.

According to the foregoing, possession as a very important legal subject was being generated out of the womb of the rapid societal development, and this is urgent matter entails to go into its corridors to manifest the details of its elements with clarification in a way eradicates any confusion or ambiguity, the matter which we review through this chapter through three themes, where we discuss in the first theme the concept of possession through three requirements. We clarify in the first requirement the jurisprudential concept of possession, while we tackle in the second requirement the legal concept of possession, then in the third requirement we deal with the relationship between possession and ownership to disengage disagreement and get rid of the misunderstanding between the two terms.

Thereafter, through the second theme, we review the elements of possession through discussing its material element represented in the actual control through the first requirement, then its moral element of intention, which is the element that differentiates between the philosophy of the Emirati legislator and the Egyptian legislator in the possession theory through the second requirement.

Finally, in this chapter, we review through the third theme, the conditions of possession that are protected by law, in order to differentiate between them and other situations that do not enjoy the legal protection, through four requirements, where we discuss in the first requirement the condition of continuity and non-interruption, and we tackle in the second requirement the condition of calm and non-coercion, then in the third requirement, we deal with the condition of publicity and non-concealment. After that, we present in the fourth requirement the condition of explicitness and lack of ambiguity, consequently we set a general framework for the concept of possession from the jurisprudential and legal point of view, and we clarified its conditions in an unambiguous manner.

The First Theme The Concept of Possession

In this study, we will discuss the definition of possession in the legal framework, its definition in the jurisprudential framework, then we will tackle the relationship of possession and ownership, in a serious attempt to resolve the overlap between them in a substitutive legal manner that terminates the imbalance and imperfection, as follows:

The First Requirement: The jurisprudential concept of possession

The Second Requirement: The legal concept of possession

The Third Requirement: The relationship between possession and ownership

The First Requirement

The Jurisprudential Concept of Possession¹

Due to the massive importance of the subject of possession, the jurisprudence tried hard to define it, as their jurisprudence diversified to emanate from it three main directions, even if one direction included differences in draft, but it revolved around the same meaning.

The difference of jurists in defining the possession is due to the different viewpoint in which each group considers possession. Some of them consider possession as a material status, but some of them consider it as the apparent aspect of exercising the right, while some jurists consider it as a material status with the intention of ownership².

The First Trend: Possession is an actual control over the thing:

In this viewpoint, there are many definitions, but they all revolve around one meaning represented in that possession is an actual control over something.

Some explainers of the law have defined it as “a realistic status that arises from a person’s control over a thing or a right, in his capacity as the owner of the thing or the owner of the right”.³

Some jurists defined it as "a material status represented in a person's actual control over something".⁴

It was also defined as “the material control of a person over a right, whether it is in kind (ownership, usufruct, easement), or a personal right”.⁵

It was also defined as "a realistic position represented in actual control over something".⁶

It is clear from dealing with these definitions that they consider the possession as a material status or a material fact lies in the actual control over the thing, and this control may be in conformity with the control of the right or it may not.⁷

Some jurists have adopted this viewpoint to say that possession is “an actual or realistic status and this status may be consistent with the legal status, considering the possessor of the thing is his owner or the owner of right in rem over it, and this legal status may be violated by the possessor not having any

¹ See: Muhammad Abd Al-Ghani Al-Sayyed Ghanem, Procedural Protection of Possession, Dar Al-Nahda Al-Arabiya, Cairo, 2121, p. 17 et seq.

² Ramadan Jamal Kamel, Legal Protection of Possession, the National Center for Legal Publications, Cairo, 2nd Edition, 2114/2115, p. 17.

³ Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, University Press, Alexandria, 2117, p. 144.

⁴ Mahmoud Hashem, Civil Judicial Law, Part 2, Dar Al-Fikr Al-Arabi, 1981, p. 111.

⁵ Muhammad Al-Munji, Possession, Al-Maarif Establishment, Alexandria, 4th Edition, 2115, p. 21.

⁶ Muhammad Ahmad Mahmoud Al-Nimr, Temporary Protection of Possession between Theory and Practice, Dar Al-Kutub Al-Qanuniyyah, 2114, p. 11.

⁷ Ramadan Jamal Kamel, *ibid*, p. 18.

right over the thing; however, possession regardless of its conformity with the legal status creates dangerous legal implications.⁸

However, this trend was criticized, as the definition of possession in this way is a definition that lacks the element of procuration, as all these definitions elaborated on manifesting the material element of possession represented in the actual control over the thing and neglected to mention the moral element represented in the intention of procuration, which leads to confusion between possession and adverse possession, in addition to the fact that the definition of possession is based on the legal consequences of the occurrence or the material status, considering this as a fault because the definition of a thing is by defining what its nature and essence, not through its consequences.⁹

The Second Trend: Possession is an apparent aspect of exercising a specific right:

Advocators of this trend agreed on the content of their definitions of possession, as they all revolve around defining the possession through its real appearance, although they differed in their wording.¹⁰

Some jurists defined it as “possession of a thing and benefiting from it, as the owner does in his possession; it is a material state that arising from the presence of money at the disposal of its possessor, and its appearance before him with all the manifestations of ownership.”¹¹

It was also defined as “adverse possession of something that is permissible to be dealt with, to be controlled effectively, to be benefited from and exploited in all possible material aspects”.¹²

This trend was criticized; because these definitions did not indicate the intention of the possessor, they do not indicate the moral element of possession, the matter which prompted some jurists to argue that these practices should ostensibly correspond to the exercise of a certain right, i.e. that the possessor who uses actual control intends to use a certain right.¹³

However, this congruence is not sufficient to define possession, as the definition still did not clarify the possessor’s intention to own. Rather, it can be said that it did not exceed a mere definition of the material element of

⁸ Ramadan Abu Al-Saud, *Al-Wajeez in Original In-kind Rights*, University Press, Alexandria, 1997, p. 368.

⁹ Muhammad Ahmed Al-Nimr, *Interim Protection of Possession between Theory and Practice*, *ibid*, p. 19.

¹⁰ Rahim Sabah Al-Kubaisi, *Legal Protection of Possession - A Comparative Analytical Fundamental Study*, New University House, Alexandria, 2015, p. 24.

¹¹ Muhammad Al-Ashmawy and Abd Al-Wahhab Al-Ashmawy, *Rules of Pleadings in Egyptian and Comparative Legislation*, Part 1, Library of Arts, The Typical Printing Press, 1958, p. 613.

¹² Muhammad Abdel Latif, *Possession and its Effects in the Egyptian Civil Law*, without publisher, 1951, p. 1.

¹³ Ramadan Jamal Kamel, *Legal Protection of Possession*, *ibid*, p. 19.

possession and did not go beyond it, nor did it tackle possession with the comprehensive one-size-fits-all definition.¹⁴

The Third Trend: Possession is control with the intention of procuration:

This opinion adopted a more specific approach for the meaning of possession that differs from the previous two approaches, as it added to the definition of possession a new element which is the intention of procuration¹⁵, according to which, the definition of possession according to such opinion is “the actual control of a person over something or his use of a right in rem as the possessor of the thing or the owner of the right in rem”.¹⁶

It was defined as “actual control over a thing, regardless of the reason for this control, the behavior of the possessor with regard to it, or his intention towards it”.¹⁷

It was also defined as “the actual control of a person over material things, with the direct intention or acquisition of a right in rem over it”.¹⁸

It was also defined as "an actual or real authority exercised by the possessor of something, so that in its outward appearance and in the intention of the possessor is an exercise of ownership or another right in rem".¹⁹

The possessor may be the owner of a right that gives him this control, such as the owner, for example, or he may not be; however he is deemed a possessor in both cases.²⁰

It is clear from the foregoing that possession, even if it represents an actual control over a thing, shall be accompanied by a direct intention or the acquisition of right in rem over it, so the mere material possession is not sufficient, but it must be reinforced by a moral element, and this is the logic of the personal theory adopted by the Egyptian Civil Law.²¹

¹⁴ Rahim Sabah Al-Kubaisi, Legal Protection of Possession, *ibid*, pp. 26, 25.

¹⁵ Muhammad Abd Al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, *ibid*, p. 2

¹⁶ Ramzi Saif, The Mediator in Explanation of the Law of Civil and Commercial Procedures, Dar Al-Nahda Al-Arabiya, 8th Edition, 1968-1969, p. 149.

¹⁷ Ahmed Muslim, Fundamentals of Proceedings, Judicial Organization, Procedures and Judgments in Civil, Commercial and Personal Matters, Dar Al-Fikr Al-Arabi, Cairo, 1971, pg. 357

¹⁸ Hassan Kairah, Summary of the Provisions of the Civil Law, original rights in rem, their provisions and sources, Manshaat Al-Ma'arif, Alexandria, 3rd Edition, 1994, p. 433.

¹⁹ Abdel Hakam Fouda, Provisions of Claims for Protection of Possession, Dar Al-Alfi, Al-Minya, p. 2.

²⁰ Wajdi Ragheb, Principles of Civil Judiciary, Dar Al-Fikr Al-Arabi, 1st Edition, 1986-1987, p. 141, and this actual control in possession may be based on a right recognized by the law for the possessor, when the possessor is the owner of the thing or has another right in rem over it, and this authority may not be based on a right, so possession is not an exercise of a right, as there is no inevitable correlation between possession and the existence of a right for the possessor. It is an exercise of a right if the possessor has a real right over the thing, but it is valid for it to exist without the possessor having any right, as the thief and usurper are deemed possessors. For more, see: Abdul Hakam Fouda, Provisions for Possession Protection Claims, *ibid*, p. 2.

²¹ Rahim Sabah Al-Kubaisi, Legal Protection of Possession, *ibid*, p. 2

In the Emirati Civil Transactions Law, it is clear from the definition of possession, that it adopts the material theory in possession²², because the definition did not show the element of intention in possession as is followed in the personal opinion in possession, so the existence of this intention according to the material theory in possession is not necessary, and according to the material theory in possession, it distinguishes between possession and acquisition, as the possessor acquires for his own account, while the holder acquires for the account of others. If the Civil Transactions Law did not abide by these terms, it classified for appropriate as one of the reasons for gaining ownership in the name of “achieving sales”, as achieving here means that the person seizes the permissible thing for the account of himself.²³

The evidence that the Civil Transactions Law adopts the material theory of possession is the provision of the third paragraph of Article 1309, which provides for (and the lessee, the beneficiary, the depository and the borrower or their heirs, may not claim the passage of time), as those persons enumerated by the provision i.e. the lessee, the beneficiary, the depository and the borrower or their heirs benefit from the protection provided by the law for possession, because they are deemed acquirers according to the material theory of possession, but possession for them is not a reason for acquiring ownership, because the presumption of ownership does not apply to their possession because their possession deed contradicts this presumption, and the persons enumerated by the provision are not limited to, but their judgment is taken by those who have the right to use and the right to reside.²⁴

The Second Requirement The Legal Concept of Possession

Although possession occupies an intermediate position between the Emirati Civil Transactions Law and the Civil Procedures Law, it has not received a complete and objective legislative definition. Therefore, in this requirement, we will discuss the position of legislation towards the definition of possession as follows:

First: The concept of possession in the Emirati Civil Transactions Law:

The Emirati legislator discussed the issue of possession in the Civil Transactions Law through Article 1307 and even Article 1316, as he defined possession in the first paragraph of Article 1307 as (possession is an actual control by the person himself over a thing or a right that may be dealt with).

²² (Possession, when its legal conditions were met, was a reason for acquiring ownership, the appellant's failure to provide evidence of his legal possession of the land, the subject matter of the Case, its effect: his request was received for establishing the ownership without a bond), Ras Al Khaimah Cassation, Appeal No. 35 of 8, Hearing dated 11/24 / 2113, L8.

²³ Abd Al-Khaliq Hassan Ahmed, The Right to Ownership, ibid, pg. 414.

²⁴ Abd Al-Khaleq Hasan, The Right to Ownership, ibid, p. 411.

According to this provision, whoever has actual control over a specific and certain thing shall be deemed an acquirer, such as someone who acquires a certain real estate. It is also permissible for possession to be based on a right other than the right of ownership, such as the right of usufruct or the right of easement, but it is required that the subject of possession to be one of the things included in the circle of dealings. As for things that are outside the scope of dealing, they are not subject to possession in this sense.²⁵

In the Egyptian legislation, the preliminary draft for the current Egyptian Civil Code No. 131 of 1948 includes a provision defining possession, which is the provision of Article 1398 of this draft, which provided for the following: (Possession is a material status in which a person has actual control over a thing, which may be dealt with or actually used as a right).

The explanatory memorandum of the preliminary draft in this regard states the following: (Possession is actual control over a thing or a right, so possession is permissible to acquire rights in rem such as the usufruct right, the easement right, and various mortgage rights, as well as the personal rights).²⁶

It should be noted that the canceled civil validation did not deal with the issue of possession in general, but it was limited to mentioning some of its effects, especially with regard to the statute of limitations and the appropriation of movables by possession, without dealing with these effects in a complete and integrated way.

With the issuance of the current Civil Law No. 131 for year 1948, the legislator tackled the subject of possession completely, so he devoted a special place to it, as he discussed its provisions in newly developed provisions, then he explained the consequences thereof, and perhaps the most important of which is the acquisition of ownership, thus possession was mentioned in the current civil law as one of the reasons for acquiring ownership, in Articles 949 to 984.²⁷

In contrast to the Emirati Civil Transactions Law, the current Egyptian Civil Law No. 131 for year 1948 did not set a definition of possession and canceled the provision proposed in the preliminary draft, leaving the task of defining possession to the jurists and law commentators.²⁸

If there is a jurisprudential opinion that considers that the definition contained in the preliminary draft can be taken from the jurisprudential point of view, as a

²⁵ Abdul Khaleq Hassan Ahmed, Property Right, Dubai Police Academy, Faculty of Law and Police Sciences, pp. 413, 414.

²⁶ Collection of Preparatory Works, Part 6, p. 448 in the Margin, p. 451. For more, see: Abd Al-Raziq Al-Sanhouri, Al-Waseet fi Explanation of Civil Law, Reasons for Acquiring Ownership, Publisher, Egyptian Bar Association 2117, Part 9, p. 789.

²⁷ Muhammad Abd Al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, ibid, p. 15.

²⁸ Abdel Moneim Al-Sharqawi, Al-Wajeez in Civil and Commercial Proceedings, Egyptian Universities Publishing House, Cairo, 1951, p. 51.

definition of possession with its characteristics that were regulated by the Civil Law.

Second: Evaluating the definition of possession in the Emirati Civil Transactions Law:

Through the definition of possession contained in the Emirati Civil Transactions Law, it is clear that any possessor, whenever he possesses for himself and the subject matter of possession is permissible to be dealt with, so he is entitled to benefit from possession claims. If he uses another right, such as a usufruct right or an easement right, then the material control over this right is by using it through the material actions over it by actually passing through the place where the right is intended to be used, or by actually taking water from the neighbor's irrigation. In the assumption that we are dealing with, there must be a positive action by which the possessor acquires possession over the thing. It is not enough to merely be able to possess, without actually possessing, and before the actual possession, it can't be said that the material element, which is the material control, has been achieved.²⁹

Accordingly, the lessee and the lender shall have the right to file a claim of possession, in his name, through a direct Case in accordance with the provision of Article 1307 of the Civil Transactions Law, because what is meant by possession according to this provision must be determined according to the material element, which is the actual control of the possessor over the subject of possession, and the provision of Article 1307 of the Civil Transactions Law did not stipulate - in contrast to the Egyptian Civil Law - that possession must have the moral element, which is the intention of ownership, and for this reason the provisions of possession according to the Civil Transactions Law provide protection for the accidental possessor and, and even more, provide the protection for the legal possessor in accordance with the division of the personal theory of possession.³⁰

However, confusion occurred to some legislator behind this definition, as they considered possession as a right, although according to this definition, possession is not a right in rem or a personal right, rather it is not a right in the first place, it is like preemption which is not a right, where it differs from preemption as preemption is a compound event.³¹ As for possession, its legal characterization is that it is a simple material occurrence that produces legal effects, and if we follow the personal opinion in possession, and we say that

²⁹ Al-Sanhouri, Al-Waseet, Part 9, *ibid*, p. 798.

³⁰ Abd Al-Khaleq Hassan Ahmed, *The Right to Ownership*, *ibid*, pg. 4

³¹ Preemption as a reason for gaining rights in rem is a complex occurrence, in which the commonality, neighborhood, or other material connection existing between the preempted property and the coupled preempted property, and this is a material fact, is associated with the sale of the preempted property, and this, in relation to the preemptor, is another material fact, by which the preemptor declares his will to take the preemption, and this is unilateral legal action. These compound serial facts predominate in the material fact, not the legal disposition; consequently the preemption can be included in the scope of the material fact. For more, see: Abd Al-Raziq Al-Sanhouri, Al-Waseet in *Explanation of Civil Law*, *ibid*, p. 432.

there is a moral element for possession which is the intention - the intention to dispose as an owner or, the intention to use the right – the subject matter of possession – then what is meant here is not the will of acquiring the right, the subject matter of possession³², but what is meant here is that the material actions performed by the possessor shall be accompanied by the intention to use a certain right, and this means that the actions of the possessor are intentional actions, and this does not deviate them from being purely material actions, which are optional actions by which its owner intends to bring about their legal effects, but if we say with the material opinion that the intention is focused on the material possession itself, then this would be the strongest indication that the intention does not deviate the actions of the possessor from being purely material actions, consequently the possession in each of the two opinions is a simple material occurrence that would produce legal effects.

Accordingly, the concept of possession in the Emirati legislation is that it is a Substantive position represented by a person's material or actual control over a thing (property or movable), which may be dealt with whether this control is based on a right (personal, principal real encumbrance, or consequential real encumbrance) or it is not based on a right.³³

Therefore, it is not permissible for the object of possession to be something outside the circle of dealing, so it is not permissible to possess things owned by the state and allocated for the public benefit, just as the object of possession must be a physical thing, as non-physical things are not suitable to be a subject of possession, such as mind production and inventions.³⁴

And if it happens that a person takes effective control of something owned by the state, then this possession does not entail any effect from a legal point of view.³⁵

On the other hand, it is concluded from the definition of possession contained in the Egyptian Civil Code, that possession is a physical situation that results from a person having effective control over a right, whether that person is the owner of the right or not.

And the actual control over the right is by using it through physical actions required by the content of this right. If it is a right of ownership, then the right is mixed with the thing that is the subject of the right, so it is said that the person

³² Otherwise, the will here is a legal disposition, and even if we accept that, we can say that the legal disposition has been mixed with a material fact that is material possession or actual control, so that possession is a mixed fact in which the element of the material fact is dominant, so it falls within the scope of material facts. For more, see: Abdel-Raziq Al-Sanhouri, Al-Waseet in Explanation of Civil Law, *ibid*, margin, p. 791.

³³ Ahmed Abu Al-Wafa agrees with this definition, as he believes that possession is a material situation in which a person has actual control over something that may be dealt with, or a right may be used. For more / see: Civil and Commercial Pleadings, *ibid*, p. 144.

³⁴ Muneer Abdel Ati, Civil and Criminal Protection of Possession, Dar Al-Arabi for Distributing Legal Books, 1st edition 2003, p. 11, 12.

³⁵ - Abdel Khaliq Hassan Ahmed, The Right to Ownership, previous reference, p. 405.

has effective control over the same thing that is the subject of the right of ownership, and the actual control here is through his physical actions, which are the actions that the owner usually carried out by the owner in his use of the right of ownership, so he uses the thing, exploits it, and disposes of it in the manner of the owner.

A person is possessor of the right of ownership, or of the thing subject to this right, when he uses the rights of the owner with regard to him, so he lives in it, for example, or rents it if it is a house, and cultivates it or gives it to someone who cultivates it by rent or by sharecropping if it is agricultural land, and possesses it and benefits from it according to what its nature requires if it is a car. Or a book, food or drink, and dispose of it by sale, gift, mortgage, or other such disposals that are permissible for the owner, and all of this whether this person actually owns the thing or does not own it, we are not in the matter of the right of ownership, but in the matter of the physical possession of this right. i.e in the matter of the process of using this right in actual use, and if the right subject of possession is not a right of ownership, as if it is a right of easement with passage, drinking, or a stream, for example, then its possession is by actually using it, so the possessor passes through the neighbor's land or takes water from an irrigator for his neighbor to irrigate his land or takes it From a public canal and he makes it run through his neighbor's land until he reaches his land to irrigate it, and all of that is whether he has earned the right of easement because of one of the reasons for his earning or he did not earn it at all, and what is said about the right of easement is also said about the right of usufruct, and about other rights than the right of easement and the right of usufruct³⁶.

From the sum of the foregoing, it is clear that the UAE Civil Transactions Law in its definition of possession takes the physical theory of possession, because the definition of possession contained in the UAE Civil Transactions Law did not show the element of intent in possession as it is followed in the personal doctrine of possession that was embraced by the Egyptian Civil Law.

Accordingly, the presence of intent in possession according to the UAE Civil Transactions Law is not necessary, and therefore any possessor, when he possesses for himself and the subject of possession is permissible to deal with, can benefit from possession claims, since Article 1307 of the Civil Transactions Law did not stipulate in possession the availability of the element The moral, which is the intention to own, in contrast to the Egyptian Civil Law, which stipulated in possession the availability of the intention to own, according to the personal doctrine of the possession that the law has Adopted it.

³⁶ As-Sanhouri, Al-Waseet, previous reference, p. 790.

Accordingly, I believe that UAE Civil Transactions Law is the most comprehensive in protecting possession from any usurpation, as long as the possessor is in possession of physical possession that makes his ownership connected to the property in an actual connection, regardless of the availability of the intention to own or not, and what proves my point of view is that although The Egyptian Civil Law required the intention to own property according to the personal theory of possession. However, the Egyptian judiciary repeatedly protected actual possession without requiring it to be associated with the intention of owning, and it is a judiciary that is consistent with what the UAE Civil Transactions Law went to in its definition of possession³⁷.

³⁷ - (It is decided - in the Court of Cassation's judgment - that if the claim for recovery of possession was legally based on the response of the unlawful assault, as it proceeded to protect the possessor from acts of usurpation, and then its acceptance was contingent on the claimant having a current physical possession that makes his ownership connected to the real estate in an actual connection so that it is Under his direct disposal, and that this contact exists in the event of usurpation. It is not required that this possession be associated with the intention of owning, but it is sufficient for it to be quiet and apparent), Appeal No. 6998 of Judicial Year 74, Civil Chambers - Session 12/04/2014, Egyptian Court of Cassation.

The Third Requirement

The Relationship between Possession and Ownership

To clarify the relationship between ownership and possession, we will first make a comparison between each of the possession lawsuits and the ownership lawsuits. Then we will discuss in some detail the position of the possessor and the owner in order to discern the difference between them and learn about the rights and obligations of each.

First Branch: Possession lawsuit and Property lawsuit:

Firstly: Comparing between Possession Lawsuit and Property Lawsuit:

In addition to possession lawsuits, which we will explain later, there are ownership lawsuits, and the difference between a possession lawsuit and an ownership lawsuit is that the possession lawsuit only protects possession in itself, and it has nothing to do with ownership, i.e. the subject matter of the right, while the ownership lawsuit, on the contrary, protects ownership, i.e. the subject matter of the right and it has nothing to do with possession except where possession is a reason for gaining ownership³⁸.

The three possession lawsuits are matched by three ownership lawsuits, so the possession recovery lawsuit is matched by the ownership recovery lawsuit, and this is the entitlement lawsuit, and the lawsuit for preventing exposure to possession is matched by the lawsuit for preventing exposure in ownership, and the lawsuit for stopping new works in possession is matched by the lawsuit for stopping new business in ownership, and it is worth mentioning The UAE Civil Transactions Law and its counterpart the Egyptian Civil Law did not explicitly mention ownership lawsuit, just as they mentioned possession lawsuit, and contented themselves with the general rules in this regard³⁹.

Possession claims only require that the plaintiff prove his possession fulfills its conditions, while property claims require that the plaintiff prove his ownership of the thing, which is much more arduous than proving mere possession, so the owner usually resorts to possession lawsuit to protect his possession, and does not incur the hardship of proof, but rather Whoever claims ownership has to file a lawsuit for entitlement against the possessor, and he, without the

³⁸ - As-Sanhouri, Al-Waseet, previous reference, p. 965.

³⁹ - The preliminary project for civil rationing included a text enumerating ownership claims, so Article 1165 of this draft stipulated that "the owner of a thing may recover it from whoever has possessed or acquired it without right, and to demand that the person who has been jumped a claim to it refrain from interfering with it, and if he fears jumping a claim, he has the right to demand preventing that." This text was deleted by the review committee, in order to satisfy the general rules. See: Preparatory Works Group 6, previous reference, p. 22 in the margin.

possessor, bears the burden of proving ownership, which is a daunting burden, as previously said. Then, possession lawsuit at work replaced ownership lawsuit, and dispensed with them in many cases⁴⁰.

Secondly: Proof of possession:

According to the Civil Transactions Law and its counterpart, the Egyptian Civil Law, it is sufficient to prove possession by proving the element of physical possession⁴¹.

Since physical possession is a physical fact, it is permissible for someone who insists that he is the possessor of a specific right to prove this possession by all means of proof, and includes evidence in that, so the judge may refer the case for investigation, and the judge may also accept another way of proof other than evidence, so he concludes from the facts of the case Papers and inspection prove physical possession or not, and the possession plaintiff must also prove that it is free from defects, and that it is a continuous, public, quiet, unambiguous possession⁴².

Thirdly: Proof of Ownership:

Both the UAE Civil Transactions Law and its counterpart, the Egyptian Civil Law, established a legal presumption, as it made possession of the right a presumption of ownership. Both laws considered possession as one of the reasons for acquiring ownership, but the presumption is not conclusive, as it stands in favor of the possessor, until his opponent, the claimant of ownership, establishes evidence to the contrary that he is the owner, and the methods of proving ownership may be definite, such as registration, prescription, and possession, and their significance may be presumptive, and they are judicial evidence that proves likely possibilities, such as the title deed, for example, and the methods of proof may conflict. If each of the two litigants in the ownership claim presented methods of proving it and these methods conflicted The priority in proving his ownership is for the one who owns a registered contract, because the proof here was done in a certain way⁴³.

⁴⁰ - As-Sanhouri, Al-Waseet, previous reference, p. 966, 967.

⁴¹ - Article 1311, paragraph 1 of the Civil Transactions Law states: "If several persons dispute the possession of one thing or right, it is considered temporarily that its possessor is the one who has physical possession, unless it is proved that he has obtained this possession in a defective manner." Corresponding to it is Article 963 of the Egyptian Civil Code, which states: "If several persons dispute the possession of one right, it shall be considered provisionally that its possessor is the one who has the right to physical possession, unless it appears that he has obtained this possession in a defective manner."

⁴² - for more: See: Mohammed Abdel Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 85 et seq.

⁴³ - for more see: - As-Sanhouri, Al-Waseet, previous reference, p. 969.

Since it was established in the provisions of the Islamic Sharia, the glue and the law alike, that the reasons for gaining ownership of the property are specified in the framework represented in the contract and possession, and although the Islamic Sharia decided the right of the individual to revive the land and urged its revival, but that is conditional on the permission of the administration, the authorities and the ruler, according to the words of the Prophet, may God's prayers and peace be upon him Peace and blessings of Allah be upon him, "There is no right for an unjust race, and a person has nothing but what the soul of his imam pleased with." Absolutely corruption, and therefore the ruler's permission was prior and obligatory with his entitlement to recover the real estate for the public interest and preemption, which is only in the real estate, and the guarantee, and it was detailed in Article 1218 of the Civil Transactions Law , inheritance, inheritance, will, communication and its types of contact with real estate naturally and by human action and are governed by the adhesion rules set forth in Article 1262 and what follows of the Civil Transactions Law, and there is no lesson except for quiet, continuous and stable legal possession, and that ownership of real estate and the consequential rights arising from it or the rights deriving from the right of ownership are not transferred Whether it is between the contracting parties or in the right of third parties, except by registration, and registration in the register is binding and conclusive evidence of the ownership of the property and the ancillary real rights or such. Deriving from the right of ownership, and accordingly, the characteristics of real estate ownership in the UAE for government lands that are not registered for individuals is that the state, represented by the ruler and the local authorities, is the original owner of lands in the emirate, unlike lands registered with freehold ownership for individuals, which are assigned to them by inheritance, purchase, or allocation, and who have the freedom to dispose In it, within the framework drawn by the legislator, and the state is the one that monitors the land for public service in its various aspects, and considering the registration of real estate disposals with the Land Registration Department as the primary means to give the disposal a legal legitimacy, and that real estate registration is the only way to invoke real estate ownership towards others, given that the land registry is the only way to publicize This ownership and the consideration of judicial rulings as a means for registering real estate dispositions in the Land Registry and as a tool for

announcing the ownership of the registration applicant for the land to be registered, and for announcing his right to register this property.

It is also decided in the Supreme Federal Court's judiciary that the trial court has full authority to obtain an understanding of the reality in the case and to assess the evidence, including written evidence, including official or customary documents, witness testimony and presumptions, and there is no censorship over them as long as it bases its judgment on plausible reasons that are sufficient to carry it after being informed. With all the related circumstances, and that it is not obligated to follow the opponents in their various statements and aspects of their defense, nor to respond independently to every statement or defense they raised when it was in the establishment of the truth in which it was convinced and provided its evidence for the implicit response to those statements and arguments⁴⁴.

Fourthly: Inadmissibility of combining possession lawsuits and ownership lawsuits:

There is an important rule regarding the relationship between the possession lawsuit and the ownership lawsuit, and it stipulates that it is not permissible to combine the two lawsuits. It is a rule that obliges the plaintiff and obliges the defendant and obliges the judge, and the ruling issued in the possession case does not have an authenticity in the property lawsuit, or the case of the subject of the right. Even with regard to the possession itself, the judge of the subject matter of the right is not bound by the judgment of the possession judge with regard to proving the physical acts constituting the possession.

Two matters are excluded from the foregoing, the first is if the possession judge decides in the ownership case or in the case of the subject matter of the right despite his lack of jurisdiction, and there is no open way to challenge this ruling, then the ruling has the force of the final order, and the second matter: If the opponent obtains a judgment from the possession judge that he is the possessor, this judgment is an argument proving possession for him, so he is the defendant in the ownership lawsuit or the subject-matter suit, and he is not obligated if he was in good faith to return back the favor except from the time of filing this last lawsuit⁴⁵.

⁴⁴ - Appeal No. 434 of 2018 Civil, Session 24/9/2018

⁴⁵ - Al-Sanhouri, previous reference, p. 982, 983, Abdel Hakam Fouda, Provisions for Possession Protection Lawsuits, previous reference, p. 47, 48.

Second Branch: The Relationship between the Possessor and Owner

The possessor may be the owner and this is often, yet the possession itself may be a reason for the possessor to acquire the ownership, as in case of appropriation, and the bona fide possessor's acquisition of the movable and benefits, as applicable in the limitation, in which the possessor acquires the ownership by limitations. However, it may appear that the possessor is not the owner, and that he did not acquire the ownership, whether by possession, or by other means of acquiring the ownership, and should the owner submit a claim for entitlement against the possessor and recovered his property from him, it may be necessary for the possessor to recover from the owner the expenses that he might have spent on the thing when it was under his possession. This may also require the possessor's liability for the destruction or damage of the thing under his possession, as we will explain whether in the UAE Civil Transactions Law or its counterpart in the Egyptian Civil Law.

First: The Possessor's Recovery of the Expenses:

The UAE Civil Transactions Law agreed with the Egyptian Civil Law in that should the owner recover his property from the possessor, he shall return to the latter the expenses incurred, and such expenses vary according to whether they are necessary expenses, useful expenses, or luxury expenses. The necessary expenses are the expenses that must be spent to preserve the thing, and they shall be entirely refunded, while the beneficial expenses are subject to the provisions of easement, and they are the expenses that the possessor spends not to preserve the thing or to protect it against destruction, but rather to improve it, increase its value and multiply the ways of utilization thereof, such as providing power or water, or providing irrigators in the agricultural lands. Should the possessor spend those expenses in good faith, then the owner shall him the expenses that have been actually incurred. As for the luxury expenses, they are not refunded, and they are expenses that do not bring much benefit to the premise itself, rather they are incurred to beautify the premise as the possessor deems for his personal enjoyment, such as building a fountain, erecting statues in the garden, painting or papering the walls, and therefore the possessor may not claim the reimbursement of such expenses. It is only possible for the possessor to remove the decorating facilities, provided that he shall reinstate the premise at his expense, and the owner may request the

retention of those facilities, provided that he shall pay their value to the possessor.⁴⁶

It is worth mentioning that he shall refund the expenses not only to the possessor who incurred them, but also to the successor of such possessor if the latter had paid his predecessor the expenses incurred by him.⁴⁷

Second: The Possessor's Responsibility for Destruction or Loss of the Premise:

The UAE Civil Transactions Law agreed with its Egyptian Civil Law in the possessor's liability for the loss or destruction of the thing, provided that a distinction shall be made between whether the bona fide possessor who shall not assume the consequences of the destruction of the thing, and should he act in bad faith, then he shall assume such responsibility.⁴⁸

For the bona fide possessor who believes that the thing is owned by him just as the owner benefits from his property, then he may use or exploit the same, and if the value of the thing decreases due to the use or exploitation, he shall be held liable towards the owner for the deterioration, and if he gains the fruits of that thing, he is not committed to return them to the owner. In general, he does not assume the responsibility towards the owner for any compensation due to his utilization of the thing. In the event that the thing is destroyed due to a foreign cause or without a mistake on the end of the possessor, then the latter is only responsible to the extent of the benefit he gained due to such destruction. In the event that the thing is destroyed due to his fault, the general rules must be applied, and the possessor shall be held liable for the compensation.

For the bad faith possessor, he shall assume the responsibility towards the owner for the use or exploitation of the thing, and in case the value thereof is decreased due to such use or exploitation, he must pay a compensation, and should he gain the fruits, he shall return them to the owner, being liable for destruction of the thing, whether due to his mistake or for a foreign cause.⁴⁹

Section Two Elements of Possession

⁴⁶) Refer to Article 1329 of the UAE Civil Transactions Law, and Article 981 of the Egyptian Civil Law.

⁴⁷) Refer to Article 1331 of the UAE Civil Transactions Law, and Article 981 of the Egyptian Civil Law.

⁴⁸) Refer to Articles 1331 and 1332 of the UAE Civil Transactions Law, and Articles Nos. 983 and 984 of the Egyptian Civil Law.

⁴⁹) Al-Sanhouri, Al-Waseet, previous reference, p. 991 and onwards.

It is clear from the definition possession in the Civil Transactions Law, as we have already mentioned, that it adopts the materialistic theory in possession, as such definition did not include the intent element in possession as applicable in the personal doctrine, which is adopted by the Egyptian Civil Law, and despite of the absence of definition of the possession in the Egyptian Civil Law, yet the personal doctrine is the prominent one in Egyptian jurisprudence, as the possessions mainly depends on the ownership intention.

In addition, the draft memorandum of the Egyptian Civil Law stipulated that for the presence of possession requires the fulfillment of a moral element, which is the intention to acquire one of the rights. Accordingly, the Egyptian Court of Cassation established that (the ownership intention must be protected for whoever seeks to protect his possession in possession cases, as the incidental possession is not enough, while the exception given to the tenant, as an incidental possessor, according to Article 575 of the Civil Law to file possession cases is an exception from the general rule).⁵⁰

This means that the possession in the Civil Transactions Law is established for the one who has the actual control over the thing or right, and therefore the possession consists of the actual control element over the thing or right with the possessor's intention to acquire the possession per se, and it is not required for the possessor to have the ownership intention, unlike the provisions of the Egyptian Civil Law, which requires the fulfillment of the possessor's ownership intention, according to personal doctrine in the possession.

For the Civil Transactions Law, it adopts the materialistic theory of possession, and the materialistic theory of possession requires the fulfillment of the possession intention on the end of the possessor; i.e., the intention to carry out material actions that enable him take over the actual control over the thing, so that the actions that are carried out by the person to guarantee him the actual control shall be intentional voluntary actions. Accordingly, the prisoner does not possess the cuffs in his hands, as he does not mean the possession. The intention in the Civil Transactions Law, according to the materialistic theory of possession, is not considered an independent element from the element of material control, unlike the Egyptian Civil Law according to the personal theory, which considers the possession intention an independent element from the actual control over the thing. According to this concept, both of tenant, lender,

⁵⁰) Civil Cassation, Hearing dated 12/04/1958, Set of Cassation Judgments, Year 9, No. 9, P. 109. For more details, refer to Samir Hamed Al Gamal and Mohammed Al Sayed Al Desouki, Explanation of the Original In-Kind Rights in the Civil Transactions Law, Bright Horizons Library, P. 253.

trustee, and custodian are considered possessors, and they are entitled, according to the Civil Transactions Law, to protect their possession by resorting to possession cases directly, as we have previously explained.⁵¹

Accordingly, the possession elements vary in the UAE Civil Transactions Law from those in the Egyptian Civil Law because the first adopts the materialistic theory of possession, while the second adopts the personal theory of possession. Therefore, the Civil Transactions Law sufficed with the fulfillment of a single element of possession, which is the physical element represented in the physical control, with the presence of the possession intention, which is not considered an independent element from the material control element, while the Egyptian Civil Law required the necessity of fulfilling two elements of possession, which cannot be fulfilled without them; i.e., the physical element and the moral element, and therefore we have to discuss the two elements of possession, as follows:

⁵¹) Abd Al-Khaleq Hassan, *The Right to Ownership*, previous reference, P. 409 – 410.

First Requirement Material Element (Actual Control)

The material element is the element required by the Civil Transactions Law to protect the possession, regardless of whether the moral element is fulfilled or not, and the material control may be fulfilled from the beginning, and such control may be fulfilled by the virtue of a transfer from the third party, and a person may exercise the material control by himself, and this is the general rule, and he may exercise it through the others, It is also permissible to exercise the material control over in common, and once the material control is fulfilled, the possessor must retain it.

We will these successively address those issues by defining the material element and its conditions, as well as forms of the material control.

First Branch: Material Elements & its Conditions

First: Definition of the Material Element:

The material element indicates the actual control over the thing; the material control by carrying out the actions that the rightful holder usually assumes. The way of demonstrating such actual control varies depending on the things under the possession. For the agricultural land, the material control over it is by cultivating it, and for the housing, the material control over it is by staying therein, and for the easement, the material control over it is by moving through the attached property.⁵²

Such material control may be achieved for the possessor from the beginning and may be transferred from him to the third party, as if a person sells a house to another person and hand it over, and then possessing the house shall be transferred to the latter, even if he is not the owner thereof, and it would be suffice to utilize the house, following the handover thereof, without obstacle.⁵³

Second: Conditions of the Material Element:

⁵²) A set of the preparatory works of the Egyptian Civil Law, Part 6, P. 69.

⁵³) Al Gamal and Al Dasouki, Explaining the Original n-Kind Rights, previous reference, P. 25.

The material activities carried out by the possessor must be abundant and important, so that they are sufficient for the possessor to act as the rightful owner of the subject matter of the possession, according to what is customary with regard to the subject matter of the possession, such as cultivating the agricultural land, living in a house, or building on vacant land.

Although the possession is also expressed by placing the hand, this does not mean that it is required in all cases that the thing under the possession be under the possessor's possession, rather the matter differs according to the content of the right under the possession.

If the exercise of the powers conferred by this right requires that the thing be under the hand of the rightful owner, then the thing, in order to meet the material element in the possession, be under the possession of the possessor or under the hands of another person who works for his account, and this applies to the most rights in rem, which are ownership, usufruct, use, housing, monopoly, and possessory mortgage, as exercising such rights requires the thing to be under the hand of the rightful owner. Exercising the right under the possession may not require that the thing be under the hand of the rightful owner, as in case of the right of easement, as this right involves a burden on the attached property for the interest of the beneficial property, and such burden does not require that the attached property be under the hand of the person exercising the easement right. Therefore, for the fulfillment of the material element in such case, the possessor of the attached property shall carry out the material actions permitted by the easement, such as traffic, and the property shall remain under the hand of the owner thereof.⁵⁴

Second Branch: Forms of the Material Control

The material control may take several forms. Such control may be achieved from the beginning, or it may be achieved upon a transfer from the third party. A person may exercise the material control by himself, or he may exercise it through the others. The material control may be exercised in common, as follows:

First: The Material Control from the Beginning:

54) Abdel Hakam Foda, Provisions of Claims for Protection of Possession, previous reference, P. 1.

In this regard, we hereby address the hypothesis in which the individual exercises a material control over the thing without transferring such control to him from the third party, as he controls that thing from the beginning, whether the thing is owned by another person or is not owned by anyone, and whether it is immovable or movable, and the possessor possesses and controls the thing without deriving such control from anyone, and the material control is achieved in such hypothesis when the possessor possesses the thing materially, and takes the material actions just as he acts in his own property.⁵⁵

Second: The Material Control after a Transfer from the Third Party:

In this case, the person does not control the thing from the beginning, but the material control is transferred to him from another person who had the material control of the thing, and then he transferred it, as in case of selling a movable or immovable under his possession and delivering the sold object to the purchaser. In such case, the material control is transferred to the purchaser, even if the seller is the owner, and in such case the actual possession of the thing is not required, and the material control is initially required, rather it is enough to take over the possession, and if the thing is a house, the material control is transferred by transferring the keys or placing them under his possession without a need for the actual takeover thereof, and if the object sold is a movable such as jewels, securities, or bonds, the possession is transferred to him by handing over the key of the safe in which the movable is kept; however, the full actual control must be for the possession transferor.⁵⁶

⁵⁵) If the thing is a house, he shall stay therein, take the possession thereof, and live there or rent it for another one, and then he controls the same through the tenant, and if the thing is an agricultural land, he shall occupy and cultivate it by himself or through another farmer or tenant, and if the thing is movable such as a car or a book, he shall take over the movable and carry out the material actions just as the owner performs, and all of that if the possessor uses the property right over the thing, and in case he uses another right such as usufruct or easement, the material control over such right may be demonstrated by using it through the material works, such as passing through the place in which the right to be exercised. For more, refer to Al Sanhoury, Al Waseet, previous reference, P. 798.

⁵⁶) Mohammed Abdul Nabi Al Sayed Ghanem, Procedural Protection of the Possession, previous reference, P. 4.

In this regard, the UAE Civil Transactions Law is similar to the Egyptian Civil Law, regarding the stipulation in their provisions on this matter explicitly, and each of them presented the image of transfer of possession without physical delivery, in line with the spread of these images in practice, and then legalizing them with a legislative provision became an issue. praiseworthy in accordance with the requirements of keeping pace with the development in practice.⁵⁷.

Third: Physical control of community:

If it is permissible for the ownership to be in common, then it is also permissible for the possession to be in common, for example, a house or agricultural land that is owned by two people in common, so they live in the house together, or cultivate the land together and rent it together, and they may divide it between them in an appropriate division, whether it is spatial, so each of them is independent with a residence, a floor, or a temporal division, and each of them benefits from it for a specific period in succession.⁵⁸

Accordingly, possession in common is a possession shared by two or more persons, each of whom possesses the right in common with all its partners, and therefore it is not permissible for two persons to possess one thing except on the basis that they possess it in common, or on the basis that each of them possesses a separate part of this thing, or on the basis that each of them possesses a right to the thing other than the right that the other possesses, so one of them possesses, for example, the right of usufruct and the other possesses the right of absolute ownership, but for each of them to possess the whole thing purely for himself, this is not permissible, because the possession of one of the whole thing is purely for him prevents the possession of the other for the same thing on this matter.⁵⁹

Although the Civil Transactions Law did not stipulate to this image, the Egyptian Civil Code did stipulate it in the preliminary draft law for the civil law, and then

- Article 1310 of the Civil Transactions Law states: (Possession is transferred from the possessor to another if they agree on that, and the one to whom⁵⁷ the possession is transferred is able to control the thing or the right subject to possession even if it is not handed over). Article 925 of the Egyptian Civil Code stipulates: (Possession is transferred from the possessor to another if they agree on that, and the one to whom the possession is transferred is able to control the right under possession even if there is no physical delivery of the subject matter of this right). Article 953 thereof also stipulates that: (Possession may be transferred without material delivery if the possessor continues to have adverse possession for the account of his successor, or the successor continues to have adverse possession but for himself). For more, see / Mustafa Majdi Harja, Brief in the New Legal Regulation of Possession Disputes, The Legal Library, 1993 edition, pg. 64 et seq.

- Munir Abdel-Aty, Civil and Criminal Protection of Possession, previous reference, p. 16.⁵⁸

- Al-Sanhouri, Al-Wasit, previous reference, pp. 808, 809⁵⁹

the review committee deleted it. However, the deletion of the provision does not prevent the possibility of its application and act upon it, especially since it is a realistic image whose occurrence has become widespread.⁶⁰

Fourth: Mediated physical control:

The possessor may exercise actual control over the thing subject of possession by itself, or it may exercise it through others, and in this case it is called “possession by mediation.” This possession is valid provided that the mediator exercises it in the name of the possessor, and that the mediator is connected to the subordinated person (the possessor) in a connection that obliges it to follow its orders with regard to this possession, and subject to its authority and supervision, and that is if it is subordinate to it, such as a servant or a driver.⁶¹

Article 1307/2 of the Civil Transactions Law in this matter agrees with Article 951/1 of the Egyptian Civil Code.

Article 1307/2 of the Civil Transactions Law states: (2- Possession by mediation is valid when the mediator deals with it in the name of the possessor and it is connected to it in a way that obliges it to obey it with regard to this possession), and its equivalent in the Egyptian Civil Code is Article 1/951, which states: (Possession by mediation is valid when the mediator deals with it in the name of the possessor and is connected to it in a manner obliging it to obey its orders in relation to this possession).

It is permissible for the non-discerning person to acquire possession through its legal representative, which is agreed upon in the UAE Civil Transactions Law and its counterpart in the Egyptian Civil Law.⁶² But if the possessor is a legal person, then the one who exercises the physical control is the one who represents him legally.⁶³

- Article 1402 of the preliminary civil law bill dealt with this case, stating: (If two or more persons possess a thing or they all acquire one right, it is 60 permissible for each of them to perform the actions that result from the possession of the thing or the right, provided that this does not prevent the rest of the partners from doing what is permissible for them of those actions). Commenting on this provision, the explanatory memorandum to the preliminary bill stated: (Just as ownership is common, possession is also common, as two or more people may acquire land in common, and each person in common possession may carry out the acts of possession, provided that this does not prevent his partners from carrying out these works), but the Review Committee deleted this article to avoid details because the provision is nothing more than a detailed application of general rules, see / Collection of Preparatory Works for Civil Law, Part 6, previous reference, margin, p. 454.

Al-Jammal and Al-Desouki, explaining the original rights in rem, previous reference, pp. 250, 251. ⁶¹

- See Article 1307/3 of the UAE Civil Transactions Law, and Article 950 of the Egyptian Civil Code. ⁶²

⁶³ - Al-Jammal and Al-Desouki, explaining the original rights in rem, previous reference, pp. 251

Second Requirement

Moral Element (Intentional)

The moral element is the second element of possession required by the Egyptian Civil Law without the UAE Civil Transactions Law, as previously mentioned, in order to prevent repetition.

Section I: Moral Element:

The moral element is the element of intent in the personal theory that the Egyptian legislator espouses without its Emirati counterpart, that the possessor performs the material actions of possession with the intent of using the material right it wants to possess⁶⁴, or appearing as the landlord or holder of the real right⁶⁵, so the possessor shall have the intent to act as an owner⁶⁶.

According to the Egyptian Civil Law, without this intention, possession is not legal or real, producing its well-known effects, despite the actions that may be available for the material element⁶⁷.

This intention is derived from possessing the thing or the in-kind right as the owner, but if the safekeeper does not possess with the intention that he is the owner or the holder of a real right, then he is not considered a possessor of legal possession according to the Egyptian Civil Law, but rather he is considered a possessor of accidental possession such as the tenant, the depositary, the borrower and the guard⁶⁸. The existence of the moral element does not necessitate that the possessor knows precisely the extent of the right that he possesses. Whoever possesses a library with the intention of owning all the works in it, his possession extends to all these works, even if he is ignorant of their type or amount⁶⁹.

- Al-Sanhouri, Al-Waseet, previous reference, p. 810.64

- Wajdi Ragheb, Principles of Civil Judiciary, previous reference, p. 172.65

- Muhammad Abd al-Nabi al-Sayed Ghanem, Procedural Protection of Possession, previous reference, p. 50.66

- Hassan Kaira, original in-kind rights, previous reference, p. 443.67

- Mahmoud Hashem, Civil Judicial Law, previous reference, p. 115.68

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 200. 69

It is worth noting that, according to this vision, it is assumed that the possessor has the moral component. Whoever exercises physical possession is assumed to have the intention to work for himself, and Article 951/2 of the Egyptian Civil Code stipulates this assumption, as it says that (in case of doubt, it is assumed that the person who exercises possession he only possesses for himself). If several people dispute possession, then this assumption is based in favor of those of them who exercise physical possession, so he is considered a possessor until someone else establishes evidence to the contrary⁷⁰.

Accordingly, it is clear that the Civil Transactions Law, which embraced the materialistic theory, permitted the protection of the holder for the account of others by claims of possession, but there were those who considered that the tenant who possesses for the account of others (the lessor) was protected by possession claims, while the personal theory did not protect him⁷¹, but this opinion has faulted that the lessee has his own contract and is not considered a possessor at all.

Departing from that, we can say that the Egyptian civil law initially adopted the personal theory, but it expanded it by borrowing from the material theory its most important results, which is the extension of possession to personal rights and not being limited to real rights. Accordingly, it extracted the most important practical application, which is considering the tenant a holder of his personal right and protected his possession in all cases of possession, which is what the UAE Civil Transactions Law adopted in the aforementioned manner, to prevent recurrence⁷².

Which makes it clear that the Egyptian civil law took from the personal theory the need for the moral element to be available, which is the intention to use one of the rights, and took from the material theory its most important results, which is the protection of the possessor for the account of others, such as the tenant, and distinguished between possession and material possession,⁷³ in contrast to the UAE Civil Transactions Law, which adopted the theory physical

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 201. 70

- Munir Abdel-Aty, Civil and Criminal Protection of Possession, previous reference, p. 2171

- Article 575/1 of the Egyptian Civil Code states: (The landlord does not guarantee the tenant the material exposure if it was issued by a foreigner as 72 long as the objector does not claim a right, but this does not prejudice the right of the tenant to file a claim for compensation and all seizure claims in his name against the objector). For more see / Mounir Abdel-Aty, Civil and Criminal Protection Possession, previous reference, p. 22.

- Munir Abdel-Aty, Civil and Criminal Protection of Possession, previous reference, p. 32. 73

possession, where it considered the intention to possess an element of actual control that is not independent of it⁷⁴.

Section II: Possession is not based on permissive acts:

Possession is not based on a work that a person does as a mere license of permissible things, or a work that is tolerated by others as a matter of tolerance in order to preserve the relationship, and taking into account the good neighborliness.⁷⁵

So, with such tolerance, the intention of the owner of material possession cannot be the intention of appearing as the owner of the right to the thing, and yet it is permissible for the actions by which a person uses a license from the permissible things, or that he performs as a matter of tolerance from the neighbor, to be turned into valid possession actions that have the material and moral element of possession, so the character of these actions changes, and after they were actions that are not carried out by possession, they become actions by which possession takes place and produces its effects. This is achieved when the neighbor who uses the license or performs acts of forgiveness comes with a material act that is considered opposition to the right of the owner, and makes him feel that he possesses a right and that he intends to use it. So, his possession of this right becomes a valid possession in which the material and moral element is available, and produces its legal effects. For example, the owner of the low land who receives rain water from the high ground and proceeds with the license to use it, puts pipes in the high ground from which the water is transmitted to him, thus indicating his intention that he does not proceed with a license, but rather uses a right, and his possession becomes valid and complete⁷⁶.

- See / Abd al-Khaleq Hassan Ahmed, the right of ownership, previous reference, p. 409. 74

- Muhammad Abd al-Nabi al-Sayed Ghanem, Procedural Protection of Possession, previous reference p. 51.75

- Al-Sanhouri, Al-Waseet, previous reference, p. 829. In the same sense, see / Al-Jammal and Al-Desouki, Explanation of the original rights in rem, 76 previous reference, p. 254.

The UAE Civil Transactions Law agrees with its Egyptian counterpart in not recognizing possession that is based on a person's work as mere permissiveness or an act tolerated by others as a matter of tolerance⁷⁷.

Accordingly, the possession shall be transitive control, not just a license or an act accepted as a matter of tolerance, so whoever passes through his neighbor's land and the neighbor has authorized him to do so, not on the basis that he has the right of easement, is not considered a holder of the right of passage, and whoever opens overlooking a vacant land to his neighbor, so he left the overlooking neighbor as a matter of tolerance, as he does not bother him as long as his land is a space that is not considered a holder of the right of the overlooking⁷⁸.

Third Research:

Terms of possession protected by law

The availability of the material element of possession according to the Civil Transactions Law is not sufficient, nor is the availability of the two elements of possession (material and moral) according to the Egyptian Civil Law. Rather, several conditions shall be met in order for the possessor to enjoy the protection prescribed for it in the law.

The UAE Civil Transactions Law is similar to its counterpart, the Egyptian Civil Law, in that these conditions shall be met, as Article 1308 of the Civil Transactions Law stipulates: (If the possession was accompanied by coercion, occurred hidden, or was ambiguous, it shall have no effect towards the person who was coerced, or from whom the possession was concealed, or whose matter was ambiguous, except from the time when these defects are removed). In the same sense, the provision of Article 949/2 of the law Egyptian civil stipulates that.

Accordingly, it shall be noted that the conditions of possession shall be met in addition to being free from the defects of possession represented in the defect of non-continuity, the defect of coercion, the defect of concealment and the

- Article 1307/4 of the UAE Civil Transactions Law states: (Possession is not based on a work that a person performs as mere permissiveness or an act 77 tolerated by others as a matter of tolerance). Corresponding to it is Article 949/1 of the Egyptian Civil Code, which states: (Possession is not based on a work that a person does as a mere license of permissible things, or a work that is tolerated by others as a matter of tolerance).

- Mustafa Harja, Summary of the New Legal Organization for Possession Disputes, previous reference, p. 57, and in the same sense, see / Abdul 78 Khaliq Hassan Ahmed, the right of ownership, previous reference, p. 408.

defect of confusion or ambiguity, in order for the possession to have its effects⁷⁹.

Below, we shall indicate the conditions of possession that are protected by law.

- Muhammad Abd al-Nabi al-Sayed Ghanem, Procedural Protection of Possession, previous reference, draft p. 58.79

First Requirement

Continuity and non-interruption

Possession must be continuous, i.e. the actions constituting the possession continue in a manner consistent with the nature of the subject matter of possession, and it is not required for the possessor to use the subject matter of possession without interruption, but rather it is sufficient for him to use it as the owner usually uses it and at close regular intervals. If the claimant of possession uses it from time to time, contrary to what the right holder usually does, they are not considered possessors⁸⁰. The criterion for determining how to regularly use a thing, in a way that achieves the meaning of continuity in possession, depends on determining the nature of this thing. There are things whose nature necessitates that they be used for frequent periods, such as the use of houses for residence, while there are other things whose nature necessitates that they be used at a specific time and then left without use, such as cultivating agricultural land at a specific time⁸¹.

The UAE Civil Transactions Law agrees with its counterpart, the Egyptian Civil Law, in that if the cessation of using the thing is due to force majeure, as long as this impediment does not result from a new possession, then this is not considered a cessation of possession, as in cases of floods, torrents and earthquakes, but it expires if this impediment lasted a full year, and it arose from a new possession that took place against the will of the possessor or without his knowledge⁸².

First: Continuity of Possession is Matters of Fact:

Estimating the condition of whether the possession is continuous or not is one of the issues of fact that the trial judge is independent of, and there is no oversight on him in that by the Court of Cassation, and it follows from that that the trial judge does not have to investigate the defects of possession defect by defect to exclude every defect from it, but rather it is sufficient for him to decide in general that the conditions for possession are met and that they are valid.

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, ps. 24, 25.80

- Al-Jammal and Al-Desouki, explaining the original rights in rem, previous reference, pp. 259.81

- Article 1315 of the UAE Civil Transactions Law states: (1/ Possession does not expire if a temporary impediment prevents the actual control over the 82 thing or the right. 2/ The claim is not heard if this impediment lasted a full year, and it arose from a new possession that took place against the will of the possessor or without his knowledge). Article 957 of the Civil Code stipulates: (1/ Possession does not expire if a temporary impediment prevents actual control over the right. 2/ However, possession expires if this impediment continues for a full year, and it arises from a new possession that took place against the will of the possessor or without his knowledge.....).

And if the litigant argues that the possession is tainted by a certain defect, the trial court shall respond to this argument, and base its judgment in that on valid reasons. If it does not respond to this plea with valid reasons, the Court of Cassation may overturn its ruling for lack of reasoning⁸³.

Second: The defect of non-continuity of possession is an absolute defect:

Which means that every party in interest may hold on it. If it turns out that the possession is non-continuous, so this would be defective and makes it unsuitable as it produces its effects as previously mentioned. Then its protection is not permitted via possession claims. Also, this defect besides other possession defects is considered to be an absolute defect for every party in interest hold on it, this by possession be non-continuous in itself regarding all of people. All parties in interest have to hold on non-continuous because it is non-continuous for him as they are non-continuous for others. It wouldn't be relied upon by, however other possession defects are relative defects. We will also find out that the hidden possession shall not have effect on who had hidden from him the possession alone.

Actually, the possession marred by force will have no effect by whom was forced and the possession marred by force will have effect by who had been confused. But possession non-continuous defect will disappear if the continuous possession turns in the manner previously simplified. At that time, the possession will be free of defect and will produce its effects. But at the time this defect disappears, the possession will be continuous.⁸⁴

Third: discontinuity of possession:

Actually, discontinuity of possession or interruption interspersed with unusual breaks thus discontinuity long period sensing that the possessor has abandoned his possession. This means that the possession doesn't exist based on emeriti civil transactions law and therefore will be unreliable due its non-existence. Therefore, the possessor has to conduct the business that

- Mounir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, p. 39, Ramadan Abu Al-Saud, Al-Wajeez in Original In-kind Rights, 83 previous reference, p. 394.

⁸⁴ Al-Sanhouri, Al-Waseet, previous reference, P.845

⁸⁴ Abdel-Khalik Ahmed Hassan, property rights, previous reference, P. 416 and 417. View/ Al-Gamal and El-Disouki, principal real encumbrance explanation, previous reference, margin of P.259 and 260.

requires the actual control of the thing frequently. These periods shall not be interspersed with unusual discontinuity periods, because the interspersed with unusual discontinuity periods means that there is no actual control of possession place for unusual periods. In this case, the possession during these periods have completely disappeared. During these periods, the possessor can't invoke by his possession before other. This is clear in the text of the first paragraph of item no. 1309 of the civil transactions law as it provides for "the possession will be considered continuous beginning from its usage and the right to ordinary use regularly". Actually, civil transaction law doesn't consider discontinuity of possession one of its defects, but it considers discontinuity of possession as a failure. That is because civil transaction law separated between continuity of possession and possession defects within continuity of possession condition in the first paragraph of the law no. 1309. However, possession defects were illustrated separately in the previous item no. 1308.⁸⁵

In the Egyptian civil law, item 2/949 stipulates that the possession must be free of any disputes, obvious and clear. Thus, this text misses the fourth aspect to be a continuous possession. Despite the current civil law preliminary draft stipulates that: (the possession not based on interrupted work), though this sentence was omitted without mentioning the cause of omission. However, the explanatory memorandum stated that (the possession must have certain conditions which is continuity, free of any disputes, obvious and clearness as the continuity of possession, possession by force, hidden possession and ambiguous possession (such as inheritor possession) will not be considered proper possession⁸⁶.

If the civil transaction law considers the discontinuity of possession and its discontinuity due to financial element as previously mentioned, so the Egyptian civil law considers that a defective possession as the law embrace the school of law that considers the discontinuity of possession a defective one⁸⁷.

It follows from the foregoing that if there is any continuity element like what was previously mentioned, so it was not regarding the possession in the proper sense because its default and its financial being⁸⁸.

Second requirement

Free of any disputes and freedom from coercion

The possession must be free of any disputes⁸⁹ or free of violence or force or disturbance⁹⁰. Neither the civil transaction law nor the Egyptian civil law

mentions the force which is considered one of possession defects. When defining force, we refer to special regulations of force in the legal action as one of the management defects and apply it on possession.⁹¹

It should be noted that if the possession is a subject of several claims, never settled to its owner or was possessed by force and the possessor still uses it, so it will be defective and beneath protection⁹² But if the possession was gained by force and later became free of disputes so it will become valid upon becoming free of disputes.⁹³

Consequently, till possession become legally enforceable it must be free of disputes untainted by force or not free of disputes. So, if the possessor initially obtained the possession by force and maintains it without ceasing force or threat, his possession tainted by force as long as force or threat remain uninterrupted. Also, the possession will be considered marred with duress, if the possessor gets possession through cheating and collusion through fraudulent ways. Moreover, possession is considered marred with duress, if the possessor responds to the force or threat and hands over the property reluctantly.

It is not required that the possessor must be the person used force to get possession, where possession is considered marred with duress, if the force or threat is exercised by the possessor's assistants or persons acting on his behalf .

Moreover, it does not matter whether force or threat is exercised against the real owner to get his property or against a previous possessor (other than the owner) to deprive him of possession .

Upon the foresaid, it is concluded that duress should be used initially for getting possession and should be remained exercised without interruption to maintain the same. Therefore, if duress ceases and if the possessor still keeps his possession, then such possession shall be a quiet possession that is free of duress defect. As a result, such possession shall be valid and effective even if the possessor has afterwards to use force if he believes that his possession is endangered, as long as possession is not taken from him and limitation does not cease accordingly .

Duress, spoiling possession, does not mean the use of material force only, but it is realized by using the moral duress, such as threatening or frightening .

First: Duress and lack of quietness are a relative defect:

The duress and lack of quietness defect is a relative one, unlike the non-continuity that is an absolute defect. This means that this defect can be invoked only by the person suffered from duress, in other words, the person from who possession was taken by force or threatening .

Therefore, if the person from whom possession was taken is not the owner, then he shall not protest against the possession usurper for duress because he suffered from no duress. But the person suffered from duress whose possession was taken due to such duress may file a lawsuit to recover possession as long as the requirements of such lawsuit are met.

Evaluation of the availability of the condition for quiet possession is a factual matter that the competent judge is authorized exclusively to consider with no control by the Court of Cassation, as long as the conclusion he made is reasonable .

Second: Duress is a provisional defect:

Duress defect is a provisional one because if duress ends and possession becomes a quiet one, then duress defect will disappear and possession will produce its legal effects and consequences. This is clearly stated in article 1308 of the UAE Civil Transaction Law that provides for the following" Possession obtained by duress has no effect, as regards the person against whom the duress is exercised, except from the time that such defect has ceased to exist". This is because if duress ceased to exist, then the possessor from whom possession was taken may claim for recovering his possession .

For this meaning, Article 949/2 of the Egyptian Civil Law states that if possession is obtained by duress, then it shall have no effect on the person who suffered from duress, except from the time that such defect has ceased to exist

¹ Preparatory work group, previous reference, section 6, P.451, Mounir Abdel-Ate, civil and penal defense for possession, previous reference, P.37

¹ See/ El-Gamal and El-disouki, principal real encumbrance explanation, previous reference, P.259, for more see/ El-Sanhouri, El-Waseet, previous reference, 854 and after.

¹ Mahoud Hashim, civil justice, previous reference, P. 118

¹ The Egyptian Court of Cassation sentences has settled on (free of disputes means the possession gaining ownership, which don't couple with force by the possessor at the time of commencement. If the possessor lay hands free of disputes, so the aggression occurs during possession and prevented by the possessor as this possession remains free of disputes despite that) see: appeal no. 557 of 39 S, session 14.1.1975, 26 O, P.153, referred to in El-Sanhouri, El-Waseet, previous reference, margin 862.

¹ Force means threaten to harm someone or honor or money in order to force a person to do not something thus doing it without his consent, see: federal supreme sentence, session 14/12/2003,

appeal no. 530 and 551 of 23 S, referred to in El-Gamal and El-disouki, principal real encumbrance explanation, previous reference, margin P. 255.

¹ Abdel-Khalik Hasssan Ahmed, property rights, previous reference, P.412

¹ The Egyptian Court of Cassation sentences has settled on (merely claiming in a form of issue warning to the possessor including possession disputes will not be considered a reason to banish free of disputes reason from the possession), see: civil appeal, session 17/6/1965, appeal sentences group, year 17 S, P. 737, no. 122, referred to in Mohamed Abdul Nabi El-Sayed Ghaneim, possession procedural protection, previous reference, margin P. 61.

¹ Wagdi Raghieb, civil justice principles, previous reference, P.149, Mahmoud Hashim, civil justice law, previous reference, P. 118.

Section Three Publicity and Non-Concealment

Possession shall be apparent, and this means to be known in public⁸⁵. In other words, the material control of the possessor shall be apparent in public and known to the people, in order to be evident to and noted by anyone who may be affected by such possession, so that he is enabled to challenge the same⁸⁶. Therefore, possession is not required to be known by the owner for sure, but it must be known to the public so that he can learn about it⁸⁷. Moreover, possession is not required to be evident to all people, but it must be evident enough to be seen and known by the concerned persons⁸⁸.

It is easy to conceal the possession of movable property, where the possessor can hide security or furniture...etc. However, it is hard to conceal the possession of real estate property, where it is difficult for the possessor to hide his possession over a flat he occupies or a farmland he cultivates or rents⁸⁹.

However, let us imagine that a person expands a cave beneath his house through a tunnel dug under the piece of land of his neighbor without the latter's knowledge and with no evident signs on the existence of that tunnel under the neighbor's land. In such case, the possession of the person who dug the cave over the tunnel is a concealed one, which cannot be invoked against the neighbor, whether through filing lawsuits regarding possession or through owning by limitation. Therefore, the concealment of possession shall have no effects thereon if this was done intentionally by possessor or in the case of his bad faith, even if the possessor seized a small strip of his neighbor's land in good faith while believing that he did not go beyond the border of his property⁹⁰.

It is worth mentioning that some of the rights in rem naturally accept no possession but the non-continuous or the concealed one, such as the non-continuous easements like: easement of access, easement for drinking or the non-apparent easement, such as no-build easement. In such cases, possession shall not be protected under possession lawsuit. However, the only exception to this rule is if the possession is established in an agreement or legal document⁹¹

Therefore, we urge the Emirati legislator and his Egyptian counterparty to address this deficiency through the inclusion of the non-continuous easements

⁸⁵ Wagdy Raghib, *The Principles of Civil Justice*, ibid, page 149, Mahmoud Hashim, *The Civil Justice Law*, ibid, page 119.

⁸⁶ Ramzy Saif, *Al Waseet in the Explanation of the Procedural Law*, ibid, page 154.

⁸⁷ Ramadan Abu Al So'oud, *Al Wajeez in the Principal Right in Rem*, ibid, page 394 and 395.

⁸⁸ Mohammed Abdul Nabi Al Sayed Ghanim, *The Procedural Protection for Possession*, ibid, page 63.

⁸⁹ Monier Abdul Atti, *The Civil and Criminal Protection of Possession*, ibid, page 41.

⁹⁰ For further information, please see: Al Sanhoury, *Al Waseet*, ibid, page 857 and 858.

⁹¹ Mohammed Abdul Nabi Al Sayed Ghanim, *The Procedural Protection for Possession*, ibid, page 63 and 64, and Abdul Hakam Fouda, *The Judgments of Possession Protection Lawsuits*, ibid, page 27.

of concealed possession into these provisions of possession, in order to be covered by the legal protection prescribed by the possession lawsuits.

It is worth mentioning that the defect of concealment is of provisional and relative nature same like the duress defect. Concealment defect is provisional because if the possessor exercises his possession in public, then the legal consequences will arise out over this possession as of the time at which he started exercising his possession in public⁹²

Regarding the assumption that the possession was evident and known in public then it became concealed afterwards, such possession shall be taken into account as valid and effective during the period in which it was evident, but no effects or consequences shall be taken into account since it became concealed⁹³.

Moreover, the concealment defect is a relative one, where possession is marred with concealment for the person from whom it was hidden. But for the person from whom possession was not hidden, possession is not concealed and it, therefore, shall be valid and effective towards this person⁹⁴.

There is a view that the concealment defect is an absolute one, where possession is considered effective only if it is evident and apparent to all people, and if it is hidden from some people, then it shall be considered as marred with concealment defect, even if it is apparent to the right holder himself. The person possessing a right shall be able to use it as the right holder himself does, and the right holder exercises his right in front of people. Moreover, more toleration should be shown, if possible, towards the condition for concealment and not to require possession to be concealed and unknown to all people, but to be concealed and unknown to the right holder only. For owning by the way of limitation, such toleration should not be taken into account, where possession should be concealed and unknown to all people, where any person wants to hold a right by the way of limitation shall appear before all people that he is the right holder. However, this view has not prevailed, where the first one, telling that concealment defect is a relative defect, is the view prevailed⁹⁵. The UAE Civil Transaction Law and the Egyptian Civil Code have adopted the first view explicitly.

⁹² Abdul Khaliq Hassan Ahmad, *The Right of Ownership*, ibid, page 414.

⁹³ Al Gammal and Desouki, *Explanation of the Principal Rights in Rem*, ibid, page 257.

⁹⁴ Refer to Article 1308 of the UAE Civil Transaction Law and the corresponding Article 949/2 of the Egyptian Civil Code.

⁹⁵ Al Sanhoury, *Al Waseet*, ibid, page 859.

Section Four Clarity and Non-Equivocalness

The legally considered possession shall be clear and apparent without any ambiguity or confusion. If possession is ambiguous, then it is considered defective. Possession is marred with ambiguity and confusion, if it is associated with the non-clarity of the moral element – the intention element, and if this element is surrounded by confusion of ambiguity, then possession shall be considered as defective⁹⁶.

The defect of equivocalness should be interpreted in the light of the materialistic approach of possession, which requires that the possessor should have the intention of having possession for himself. But if the intention is for having possession for others, then possession shall be by proxy, and this is realized in the case of the follower's possession in favor of the followee.

An example of the possession marred with equivocalness is that when a person dies and his servant keeps possessing movable property that are owned by his master, then can this servant possess these movable property for himself? Or he should possess the same as a part of the estate of his deceased master⁹⁷.

This means that it should be clear that the possessor performs the material activities forming the possession as the right holder. Therefore, if a person died and left a real estate property possessed by one of the heirs who keeps possessing this property, then this possession shall be considered ambiguous. This is because it is unknown whether the heir possesses the property as a part of the estate or in his personal capacity as an owner thereof. In case of the joint possession by two persons, possession is usually ambiguous, where it is not known accurately whether each of them holds possession for himself or for the other person also. However, this does not mean that possession of common property may not be protected, where the owner of a jointly-owned real estate property who put his hand on a partitioned part of the property may protect his possession against any infringement, whether by others, the other co-owners or the person from whom possession was transferred to him⁹⁸.

However, if the ambiguity usually associating with such possession ceases to exist and if it is clearly revealed that the partner or the heir denies the right of the other partners or heir and precludes any relation between them and the thing he possess, then his possession shall be valid and effective⁹⁹.

⁹⁶ Al Gammal and Desouki, *Explanation of the Principal Rights in Rem*, *ibid*, page 258.

⁹⁷ Abdul Khaliq Hassan Ahmad, *The Right of Ownership*, *ibid*, page 415, Mahmoud Hashim, *The Civil Justice*, *ibid*, page 119

⁹⁸ Abdul Hakam Fouda, *The Judgments of Possession Protection Lawsuits*, *ibid*, page 28, Ramzy Saif, *Al Waseet in the Explanation of the Procedural Law*, *ibid*, page 154. Likewise, the partner's possession is an ambiguous one due to the doubt arising out around the intention of his possession, whether he possesses the property as an owner or as a representative of the remaining partners. For further information, please see: Wagdy Raghieb, *The Principles of Civil Justice*, *ibid*, page 150, Mahmoud Hashim, *The Civil Justice Law*, *ibid*, page 120.

⁹⁹ Please see: Mohammed Abdul Nabi Al Sayed Ghanim, *The Procedural Protection for Possession*, *ibid*, page 65.

It is noted that most of the cases of ambiguous possession arising out with regard to the common real estate ownership¹⁰⁰.

First: Defect of equivocalness is relative:

Equivocalness defect is of relative nature, where the possessor does not insist on his possession in front of the person experiencing ambiguity over whether the possessor possesses the property for himself or for others. But for the person who experiences no ambiguity, the possessor can insist on his possession before this person, where the heir possessing an object, owned jointly by him and the other heirs, cannot argue that he possess the object for himself in front of the heirs, but he can do so before others other than the heirs¹⁰¹.

Second: Disappearance of Equivocalness Defect:

Equivocalness Defect is a provisional defect that ceases to exist by the disappearance of the ambiguity or confusion. Therefore, ambiguity or confusion ceases to exist if the possessor, the possession of whom is marred with equivocalness, disposed intentionally of the property in a way reflecting clearly without any confusion or ambiguity that he possesses the property for himself not for others or for himself and others at the same time¹⁰².

For the heir, ambiguity ceases to exist when he declares that he is the sole owner of the deceased person's estate and that the moveable property is owned by him alone. Likewise, the equivocalness defect ceases to exist at the time when the possessor of the property possessed jointly becomes the sole possessor thereof with no partners, and if a partner attempts to have possession over the property, then he shall be able to prevent him from doing so. In the previous two cases, the defect of ambiguity or confusion disappears when the possessor's possession becomes clear and free of ambiguity or confusion. Hence, the possessor's possession becomes valid and effective with regard to filing possession lawsuit or owning by the way of limitation¹⁰³.

Upon the foregoing, the rule is that possession shall be valid and free of defects, and the possessor shall not bear the burden for proving that he enjoys quiet, clear and apparent possession according to the aforesaid principles, but he only has to prove his material control over the property until others suppose that the possessor's possession is legal and meets all requirements, and the

¹⁰⁰ Ramadan Abu Al So'oud, *Al Wajeez in the Principal Right in Rem*, ibid, page 394 and 396.

¹⁰¹ Abdul Khaliqe Hassan Ahmad, *The Right of Ownership*, ibid, page 415 and 416.

¹⁰² Monier Abdul Atti, *The Civil and Criminal Protection of Possession*, ibid, page 48.

¹⁰³ For further information, please see: Al Sanhoury, *Al Waseet*, ibid, page 870 and 871, and Monier Abdul Atti, *The Civil and Criminal Protection of Possession*, ibid, page 48 and 49.

person alleging the existence of any of the defects of possession shall bear the burden of proof¹⁰⁴.

Evaluation of whether the conditions for possession are fulfilled or not is a substantive issue. Therefore, the competent Court has full authority to verify whether possession conditions are met or not without control by the Court of Cassation, as long as the competent Court's decision is based on reasonable and sound grounds¹⁰⁵.

¹⁰⁴ Wagdy Raghieb, *The Principles of Civil Justice*, ibid, page 150, Mahmoud Hashim, *The Civil Justice Law*, ibid, page 120.

¹⁰⁵ Please see: Mohammed Abdul Nabi Al Sayed Ghanim, *The Procedural Protection for Possession*, ibid, page 66.

Chapter (2)

The legal protection for occupation

(Occupancy claims)

The Emirati Civil dealing Law, and its similar Egyptian Civil law paid attention to property occupancy adding protection thereof as long as the dispute arising herein isn't considered a crime either through the three claims of occupancy (recovery claim, action of complaint, and case of stopping the new actions) ¹⁰⁶ even though this attention was variable different from legislation to another, as if we compared between the Emirati Civil dealing Law, and its similar Egyptian Civil law in that respect, we shall discover that the Egyptian Civil law was distinguishable to the Emirati Civil dealing law, especially in adding protection to the property occupancy through the explicit and clear stipulation for the three actions of property occupancy. If this was only a mere outset, the occupier shall be entitled to prevent its completeness depending on the action of stopping any new actions under the provisions of Article (962) of the Egyptian Civil Law and if the aggression was completed, the occupier shall be entitled to defuse the action of complaint under provisions of Article (961) of the Egyptian Civil Law ,while if the aggression reached to the limit of seizing the property occupancy, the occupier shall be entitled to conduct the procedure of property occupancy recovery under the provisions of Article (958) of the Same law ¹⁰⁷.

In comparison, we find that the Emirati Civil Dealing Law didn't stipulate explicitly and clearly on the claims of property occupancy except for actions of complaint and action of stopping any new actions through the provisions of Article (1316) of the Emirati Civil Dealing Law, while we benefited from the provisions of Article (1315) of the same law, the entitlement of the occupier to refer the action of property recovery or action of complaint but in an impeded way and not explicitly in the article, so if the Egyptian Civil Law has provided an evident, clear provisions regarding the three claims of property occupancy, we would find that the Emirati Civil Dealing Law was not clear or explicit in its provisions except in the action of stopping any new actions, but as for the two actions of complaint and property recovery, the semantics of the text was impeded and not explicit as in the same Egyptian Civil Law, therefore appears from the context the entitlement of the occupier to refer the action property recovery or the action of complaint.

¹⁰⁶- Monir Abd El Atty, the civil and criminal protection for property occupancy, previous reference, page (68).

¹⁰⁷ - Mohamed Abd El Naby Al Said Ghanem, operational protection for property occupancy, previous reference, page (69).

Consequently, there is a necessary and urgent need- especially with the quick development of life and the appearance of legal problems relating to the property occupancy- for the Emirati legislator to cope with this development and fulfill the requirement of that need and wake on the same route of its Egyptian counterpart, to provide explicitly in the Civil Dealing Law the two actions of property recovery and that of complaint, without any ambiguity or confusion and cut the way of diligence through explicit provisions that set defined provisions and regulations for these claims.

Hereupon, we shall review in this chapter in its first topic the nature of property occupancy actions in order to illustrate the aim of the legal protection given to property occupancy as well as showing its characteristics and its scope.

In the second topic, we shall discuss the action of property recovery by indicating its definition, parties herein, its date of filling, indicating its legal adoption, terms of acceptance then indicating the binding force of the issued judgement.

In the third topic, we shall deal with the action of complaint through indicating the nature of complaint and its cases, parties of litigation hereof, its date of filling, acceptance provisions then showing the binding force of the issued judgement herein.

Finally, we shall discuss in the fourth topic the action of stopping any new actions through indicating its definition, the parties hereof, its date of filling, indicating the terms of its acceptance, the binding force of the issued judgement herein then showing the relation between the action of stopping any new actions and that of complaint.

The First Topic

The Nature of Property Occupancy claims

Introduction:

Property occupancy claims are the procedural method set by the legislator to protect the occupancy in itself, without consideration whether the occupier is an owner for the property he holds or not, as the occupier for a land, the one who holds the right of property for this plot of land is protected by property occupancy claims and is not required in his assume for these claims except to prove his occupancy for the plot under the provisions that must be fulfilled for the occupancy via the same above-mentioned way in order to prevent recurrence.

The occupier of a property isn't required to prove that he is an owner for the land, as ownership can be a subject for entitlement, and it is a kind of possession action not property occupancy claim, as it is different from the claim of property occupancy by its long, complicated procedures, and its difficult methods of proof other than the methods of proving occupancy, whether the occupier of a plot an owner hereof or not, whenever he proves the occupancy and holding hereof, he shall be entitled to protect his property occupancy under the action of tenures so, he can recover his property if it was seized by force or in underhanded way. While in case of not seizing the occupancy but exposed to aggression or threat, he can refute this violation or threat under the action of complaint, and if his occupancy didn't expose to aggression or threat but is close of this expose due to outset of works but unfinished yet, he can demand the suspend these actions upon the action of stopping any new actions.

It worth mentioning that the origin of property occupancy action is referred to the cannon law, and appeared for the first time in the medieval in the form of three claims: action against possession and cases of restitution of repossession, and action of stopping any new actions, of which the oldest one is the action of restitution or property recovery as it is first mentioned was set in the contexts of the canon law, and all jurists has concluded the action of property repossession or recovery in order to protect who was dispossessed by force, then it was followed by the action against possession which appeared in the thirteenth century in the old habits to protect who ever faces action against his possession lasts for a whole year, then appeared the action of stopping any new actions, as set on the same formula of Roman claim for protecting the occupier of a property from any new actions committed by his neighbor, that may threaten his occupancy or possession. The two actions of

restitution of a possession and action against property possession were incorporated since the fourteenth century in one claim ¹⁰⁸ .

Although all these claims were set to protect the occupancy or possession of a property, there is some sort of distinguish between each other, as there is a fundamental difference between the action of restitution from one side and the action against repossession from the other side and the action of stopping any new actions from a third aspect, while the two last actions protect the occupancy or possession after its settlement, and after lasting for a whole year, and they are intended to refute action against this stable possession, we find that the action of restitution gives each occupier, as we would see, even if he is an occasional occupier and his occupancy didn't last for one year, and even his occupancy didn't last even for one day or less, as long as this possession was seized by force or in underhanded way. Also, the action against possession is distinguished from the action of stopping any new actions in that the first refute any real aggression against possession or occupancy, while the action of stopping any new actions protects the occupancy, not a real occurring aggression, but from any close aggression or inevitable offense if the outset of actions were completed ¹⁰⁹ .

In witness whereof, it appears that property estate possession protects the immovable real estate tenure and has the characteristic of urgency which recognizes it from occupancy claims.

Hereinafter, we shall discuss in the first demand the goal for which the project has imposed protection over property estate, also we shall review in the second demand the characteristics of property estate claims, then we shall discuss in the third demand the scope of property estate claims.

The First Demand

Goal of the legal protection for property estate

Presumably that each issued resolution must have goal and intention to be achieved, as without this goal, this resolution shall be useless and worthless.

Therefore, the legislator, either the Emirati or his Egyptian counterpart, has added the legal protection to the property estate in confronting any violation throughout the three claims of property estate, for achieving its aimed target,

¹⁰⁸- Al Sanhoury, Al Wasait, previous reference, page (917).

¹⁰⁹- Al Sanhoury, Al Wasait, previous reference, page (918).

therefore, this protection wasn't meant to be useless and aimless, but was intended upon the resolutions of the Emirati legislator in the Civil Transaction Law, and upon his Egyptian counterpart in the Civil Law, for the intended aim and target which is:

Firstly: the legislator made the property estate linked with the property possession, so whoever has the right of possession shall be his owner, or until the evidence proves the contrary, as mostly whoever has the right of possession is the owner, and in other cases in which the one who has the right of possession for a thing or right is not the owner, he is entitled under the law to seize his property (whether a thing or a right) from the one possessing it after giving evidence for his right of possession throughout the claim of deservedness or entitlement, as protecting the tenure is some kind of protecting the property itself, even it was a temporary protection till find the evidence that the occupier isn't the owner of the thing or the right in which he occupies.

110

Secondly: the protection of property estate has in its content the meaning of public safety and stability conservation in the society. The occupier is the one who totally actually dominates and controls the thing under his possession therefore, the other isn't allowed to trespass this possession even the owner was the aggressor as this means allowing that owner to act as the judge by himself so, he shall be the litigant and the judge at the same time, which may result in arising disputes between the owner and the occupier considerably encourages them to commit the most despicable crimes which may disturb the safety and stability of the society, therefore, the law protects the property estate in itself and at the same time, levels the legal road before the owner to regain his right and possession as we mentioned before ¹¹¹

In witness thereof, the public interests require not to violate the existing real situations, as if the offender who claims a right transgresses these situations is given the right to seize this tenure by force, he shall always be threatened to

¹¹⁰ - Monir Abd El Atty, the civil and criminal protection for property estate, previous reference, page (68), under the same meaning, the legislator protects the tenure in itself regardless the occupier is the owner or not the owner for the estate of limitation under tenure. Property estate claims is filled against the offender even he was the real assailant, as the legislator protects the property in itself for being a manifestation of property, as in most cases the occupier is the owner so, tenure then is linked with the property possession. In other cases, in which the occupier is not the owner, the legislator protects the tenure in order to ensure the stability and safety. For more information, review, Mohamed Abd El Naby Al Said Ghanem, operational protection for property estate, previous reference, page (5) and the following pages.

¹¹¹ - Monir Abd El Atty, the civil and criminal protection for property estate, previous reference, page (68), Mahmoud Hashim, Civil Law, previous reference, page (111), Ramadan Abu Al Saud, Al Wagiz in the original real rights, previous reference, page (415).

be dispossessed. This could result in some sort of chaos, disturbance and instability so, whoever claims this right must resort to law for getting his right, and this action would lead to the protection of property estate, even it isn't based on a right recognized by the law for the occupier of the holder. But bear in mind that, in all cases, it is a temporary protection, so if the actual owner succeeded in proving his right, the occupier or the holder must give that right back to his owner ¹¹² .

Thirdly: There is another consideration with an economic importance and giving reasons behind the target or the aim of the legal protection for property estate, as the legislator prefers the occupier or the holder who is keen on making use of the possessed unit or thing, providing the existence of special provisions, than the owner who doesn't make use of his property considering here the national interest of the economy such as what is relevant to the stability of dealing, as one of the factors that help in this stability is to maintain the deal between the other and the occupier thinking that the last is threatened to be dispossessed for the behalf of the real owner ¹¹³ .

Therefore, the owner who doesn't occupy what he possesses is a negligent, in a way depriving the society from gaining interests. This could result in an economic harm to the whole society ¹¹⁴ .

¹¹² - Abe El Hakim Fouda, property estate claims, previous reference, page (3).

¹¹³ - Abe El Hakim Fouda, Property estate claims provisions, previous reference, page (4).

¹¹⁴ - Ramadan Abu Al Saud, Al Wagiz in the original real rights, previous reference, pages (369- 370).

The Second Demand

Property estate claims' properties

Property estate claims have distinguished properties such as the protection of property estate in itself, the protection of the property estate but not the immovable real estate, in addition to being claims of an urgent characteristic as they come under the competence of the magistrate.

Firstly: Property estate claims protect the property per se.

These claims were stipulated to protect the property in itself regardless, the occupier is the owner of which he holds or not, so the one who holds a plot, as having the right to make use of this land, is protected under property claims, and isn't required, in handling these claims, except to prove his entitlement to hold that land under the provisions that must be provided as we mentioned and simplified hereinbefore. He isn't required to prove that he is the owner of the land, as ownership is a subject for entitlement, and it is a possession claim not tenure one, as the first is distinguished from tenure one by its long and complicated procedures, and more difficult and hard evidences other than the evidences of tenure claims. Whether the holder of any plot of land was its owner or not, whenever he proved his attainment for that land, he shall be entitled to protect his property under the claims of tenures so he can retain his tenancy, if it was seized from him by force or in an under handed way upon the claim of retaining tenancy. In case the tenancy wasn't seized but exposed to violation or threat, he is entitled to defuse this violation or threat under the claim of disturbance of possession and in case of not being really under violation or threat but impeding to expose to this violation or threat as a result of unfinished actions, he is entitled to demand the stoppage of these actions under the right of suspending new works. Also, Property possession protects the right of usufruct, common right, pawn or tenancy right so the occupier herein is not required except to prove his possession for that right consequently, his property is protected without being demanded to prove that he is the actual owner hereof and then he shall be entitled to recover his property under the entitlement of recovering the property and to stop the violation or the threat under the action of complaint, and to request the stoppage of new actions that may threaten his possession under the action of new works suspension ¹¹⁵.

¹¹⁵ - Al Sanhoury, Al Wasait, previous reference, page (912).

Secondly: Tenures claims protect real estate possession not the possession of the movable objects:

Presumably that possession claims protects, in the first place, the possession of the property without the possession of the movable, as for the property is stable, consistent and with which tenures is distinguished from possession, not like the movable which doesn't have this characteristic, as the occupancy of the movable things in a good faith is in itself an evidence for the possession of a property, therefore we find that possession claims protects the possession of property under discussion, other than the protection of other real rights to which he is entitled as the right of; usufruct, use, inhabitation, of common and monopoly .. etc. ¹¹⁶

As the usage of the occupier for the movable things mixes with the usage of the owner, the occupancy herein mixes with the real ownership therefore, the claim of property protected both the occupancy of the movable objects and their possession, as the holding of the movable in a good faith became in itself an evident for the possession, and as the movable isn't protected under the claims of holding, what is collected from money, as inheritance, is not protected, as the holder of some money is the same as the inheritor, so he protects the property under his occupancy from that totality, and doesn't protect in his occupancy the total of money in itself, as what is collected from money doesn't accept being under possession ¹¹⁷.

Thirdly: Possession Claims has an urgent characteristic:

Possession Claims has an urgent characteristic as it protects the occupancy in itself, therefore it doesn't expose to the property, and in this we find that it is quite similar to the urgent claims in which it isn't allowed to discuss that object, consequently it is under the competence of the magistrate, whatever the value of that property even it exceeded the quota of the judgement, the issued resolutions can be appealed whichever the issuing court. As for the internal competence, the legal competence subjects to the court in which department the property situated or any part thereof, if is located in different court administrations, except that the magistrate competence to reconsider the

¹¹⁶ - Monir Abd El Atty, the civil and criminal protection for property estate, previous reference, page (69).

¹¹⁷ - Al Sanhoury, Al Wassait, previous reference, page (913).

claims of possession, doesn't take away the mandate of trial judge to reconsider these claims as the claimant may wish to get considered judgement – especially the provisions of the urgent judge is of a temporary evidence- so in this case, the claimant is allowed to refer its claim before the trial judge and here the competence of court shall depend on the value or the property or the possession right under dispute ¹¹⁸.

As the Supreme Federal Court has settled that the urgent matters judge is competent to suspend the new and novel actions as if they are completed shall impact a scheduled, stable right under the law or agreement or the traditions plus preventing an actual harm that can't be avoided in the future due to the missing of features of the subject under dispute and the property, and not proving the right due to the lapse of time and losing the effects and traits which come under the claims of occupancy over property and concentrate on the right of protecting the real property estate over the premises and not exposing to the occupier based on legal cause ¹¹⁹.

¹¹⁸ - Monir Abd El Atty, the civil and criminal protection for property estate, previous reference, page (70).

Emirati Ministry of Justice, Judges of the Supreme Federal Court, recourse no. 222 for 2021. Civil- session dated on 10/ 5/ 2021.

¹¹⁹ - Recourse no. 222 for 2021 civil, session dated on 10/ 5/ 2021.

Topic 3

Scope of possession claims

The legislator (Emirati or Egyptian) protects, with possession claims, only the in-kind rights contained in the property, and thus entails the scope of possession claims as follows:

First: Possession claims protect in-kind rights and do not protect personal rights:

Protection of possession is not limited to the original rights in rem, but also includes accessory rights in rem, which require the creditor to protect the thing loaded with the right, such as the possessory mortgage, while accessory rights in rem that do not require the creditor to possess the thing loaded with the right, such rights are not valid to hold 138.

If possession claims protect only the rights in rem, by paying the assault on the possession regardless of whether the holder is the holder of the right in rem who claims to have it or not.

Personal rights cannot be the subject of a claim of possession even if they relate to a property. The reason of this is that possession is the actual control of a specific thing. Personal right is merely a legal link between two persons. It does not give its holder physical control over a certain thing. Personal rights do not accept physical control, which is an essential element of possession 139.

Some jurists see the possibility of possession over personal rights, as in the case of the apparent creditor who owns the debt in fact, but the debt is in his possession 140, but we believe that this situation in the case of the apparent creditor does not involve possession in the technical sense, and if the law protects this situation for the apparent creditor, it is only down to the theory of the apparent situation.

Second: Possession is related to material things:

If possession serves as a source of rights in rem in general in the original, and rights in rem only dismisses tangible things, then it follows that possession must also dismiss tangible things, real estate or movables, and therefore it is inconceivable that possession should dismiss moral rights, which are intangible property, because it dismisses something intangible that is the result of the idea, imagination or activity, for example the right of the author in his scientific works, the right of the artist in his artistic creations, the right of the inventor in his industrial inventions, the right of the merchant in the trade name and trademark and the confidence of customers 141.

Thus, if possession is limited to rights in rem, then it follows that possession is also limited to tangible things, in the sense that the holder exercises his powers

over a certain material thing, and therefore legal possession is not restored, as we have already mentioned, to the legal group of funds, such as the estate or a realistic group of funds, such as the commercial place, because this or that group of funds is not entirely suitable for possession, but rather for a certain material thing of them to be solely subject to possession, with the important result that if the holder exercises his authority over some of the objects of the estate, he cannot claim possession of other objects that were not subject to this authority 142.

Third: Possession claims protect the possession of real estate and do not protect the in-kind rights contained in the movable:

This part has already been discussed and we are in the process of reviewing the characteristics of possession claims, as the legislator does not protect the rights in rem on the movable in violation of the possession claims of real estate, because in real estate the possession is distinct from the right itself, the possession may be for a person and the right is for another, while the possession in the movable is often mixed with the right, because the movable is not like a stable immovable property with which it is easy to distinguish protection from the property in its regard, so the holder of the movable is mixed with the owner, and then the possession in the movable is mixed with the property 143.

Fourth: Failure to protect funds that is not accepted to be the object of real right:

If the legislator protects only the possession of real estate rights in rem, this requires that the property subject of the right be one of the properties accepted to be the subject of the real right, and if the property is not capable of being the subject of the real right claimed to be in possession, it may not be protected by the claim of possession, such as public and private funds owned by the state, or public legal persons, public institutions, or public bodies on which a real right may not be earned, and lands occupied by the armed forces as military zones 144.

The reason for this prohibition is that possession is originally protected by virtue of the fact that the holder is often the holder of the right, and it follows that possession claims do not arise for real estate that is considered to be the property of Allah Almighty, such as mosques or those owned by the State or by one of its bodies 145.

In addition, it is not permissible to own these funds by prescription, and the majority of jurists believe that the property in order to protect its possession must be of the right to be owned by prescription, that is, it may be dealt with and its ownership may be acquired by the passage of the period, because the possession protected by law in private cases is the possession that leads to

the acquisition of property by the passage of the period, as the public property of the state may not be protected for those who claim it, as for the state, it has the right to file all claims of possession for these funds 146.

Real estate rights in rem that can be acquired by prescription, such as the right of ownership, the right of usufruct and the right of easement, may be filed in connection with this lawsuit by the availability of the conditions of appearance and continuation, but unexposed or non-continued easement rights such as the right of easement not to build or pass may not be protected by this lawsuit 147, because it is not acquired by prescription as its possession is tainted by the defect of invisibility, or by the suspicion of usufruct as a form of tolerance unless the invisible easement is prescribed by the agreement of the litigants or by the text of the law to eliminate the suspicion of invisibility or tolerance 148.

Fifth: Possession claims may be filed against the property by privatization:

The real estate by privatization shall be subject to the protection of the possession claim as long as it has the status of a real estate, because the movable that becomes a property by privatization shall be subject to all the provisions related to the real estate, including the protection of its possession through the initiation of possession claims, as in the case of the real estate itself 149.

However, if the movable loses the status of the property by privatization and becomes a movable, that protection shall be removed, because the condition that the property by privatization is protected by possession claims is that the exposure is obtained by the possession of the original property, to which the funds is allocated 150.

Sixth: Possession claims are not considered compensation claims:

Possession claims are not intended to compensate for damage caused by the exposed or rapist. They are not based on the wrong act, nor is it a condition for accepting it. They are also not required to implement the obligation to compensate for it. To accept a possession claim, it is not necessary to have the bad faith of the exposed or the rapist, or whoever carries out new work on the property, and the fault that causes harm to the holder can be the subject of another lawsuit related to the possession claim in which compensation for the damage is requested. The possession lawsuit itself is sufficient to accept it by usurping or subjecting to possession or carrying out work if it ends up as an exposure to the holder 151.

138 - Wajdi Ragheb, Principles of Civil Justice, op. Cit., P. 167

139 - Mahmoud Hashim, Civil Justice Law, op. Cit., P. 112

140 - Ramadan Abu Al-Saud, The Brief in original in-kind rights, op. Cit., P. 373

- 141 - Hassan Kira, Original In-Kind Rights, op. Cit., P. 437, Ramadan Abu Al-Saud, The Brief in Original In-Kind Rights, op. Cit., P. 374
- 142 - Ramadan Abu Al-Saud, The Brief in Original In-Kind Rights, op. Cit., P. 415, Mohammed Al-Ashmawy and Abdul-Wahab Al-Ashmawy, Rules of Procedure in Egyptian and Comparative Legislation, op. Cit., P. 620, 621
- 143 - Mahmoud Hashim, Civil Justice Law, op. Cit., P. 113, Ramadan Abu Al-Saud, The Brief in Original Real Rights, op. Cit., P. 415
144. Mohamed Abdelnabi Elsayed Ghanem, Procedural Protection of Tenure, op. Cit., P. 29
- 145 - Mohamed Al-Ashmawy and Abdul Wahab Al-Ashmawy, Rules of Procedure in Egyptian and Comparative Legislation, op. Cit., P. 621, Mahmoud Hashim, Civil Justice Law, op. Cit., P. 113
- 146 - Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, op. Cit., P. 143, Ramzi Saif, Mediator in Explaining the Law of Pleadings, op. Cit., P. 115
- Mohammed Al-Ashmawy and Abdul Wahab Al-Ashmawy, Rules of Procedure in Egyptian and Comparative Legislation, op. Cit., P. 621
147. Mohamed Al-Ashmawy and Abdul Wahab Al-Ashmawy, Rules of Procedure in Egyptian and Comparative Legislation, op. Cit., P. 622
- 148 - Ramzi Saif, Mediator in Explaining the Law of Pleadings, op. Cit., P. 155, Mahmoud Hashim, Civil Justice Law, op. Cit., P. 114
149. Mohamed Abdelnabi Elsayed Ghanem, Procedural Protection of Tenure, op. Cit., P. 31
- 150 - See: Mohamed Abdelnabi Elsayed Ghanem, Procedural Protection of Possession, op. Cit., P. 31
151. Abdel Moneim Al-Sharqawi, The Breif in Civil and Commercial Pleadings, op. Cit., P. 58

Second Research

Possession Recovery Suit

A lawsuit for recovery of possession has been legislated to protect the owner of the property if he loses possession, but this is conditional on several conditions that shall be met in order for that lawsuit to be admissible before the courts.

Accordingly, we shall discuss in this study, through four demands, the statement of what is meant by the claim of recovery of possession, the knowledge of its parties and the date of its filing, the statement of its legal adaptation, the statement of the conditions for its acceptance, and then the statement of the authoritativeness of the ruling issued in it.

The first requirement

First Requirement

Definition of a claim for recovery of possession, its parties, and the date for filing it

Preamble

It is established that the claim for recovery of possession is based on the response to the unlawful assault, and it is sufficient for its acceptance that the claimant has a current physical possession that makes him connected to the property with an existing actual connection in the event of usurpation, and then it is required that this usurpation lead to the establishment of this claim that it takes place as a result of an illegal action. Therefore, if the execution is carried out forcibly until the loss of possession, then the one who lost possession as a result of this execution does not have a claim to recover possession because that lawsuit arises as a result of exposing the possession to usurpation through an illegal act.

Accordingly, we are examining through this requirement the definition of the claim for recovery of possession and the statement of its parties and the date of its filing.

Section I

Definition of Possession Recovery Suit

The lawsuit for recovery of possession is the lawsuit filed by the possessor against the one who expropriated possession from him by force or usurpation, publicly or covertly, requesting the recovery of his possession, and the force here is not required to be a criminal act punishable by a criminal offense, it is sufficient for it to be an illegal act from a civil point of view¹²⁰.

Some jurists define it as “the case in which the plaintiff clings to his possession that was stolen from him, requesting a ruling obligating the defendant to hand over the property to him.”¹²¹ In a similar sense, the claim for recovery of possession was defined as “the claim in which the possessor asserts his possession (physical or legal), requesting that the defendant be obliged to return it to him.”¹²². The jurists define the usurpation of possession as “the usurpation of all or part of the property with the establishment of material obstacles in order not to return the possessor to it.”¹²³.

It is clear from this definition that the claim for restitution of possession is a substantive one that takes the form of a binding action, in which the plaintiff alleges an assault on possession, and requests a ruling for the penalty for this assault, which is an in-kind penalty represented in returning the thing to its original state by handing over the property¹²⁴.

That is why the claim for recovery of possession was initiated to protect the possessor from acts of usurpation and to recover his possession from the one who stole it from him¹²⁵.

The basis of this lawsuit is the protection of security and order, given that the person who seized the property by violence shall first of all return what he seized, even if he is worthy of possession, as people may not claim their rights themselves¹²⁶.

- Munir Abdel-Aty, Civil and Criminal Protection of Possession, previous reference, p. 71. 120

- Wajdi Ragheb, Principles of Civil Judiciary, previous reference, p. 194.121

- Mahmoud Hashem, Civil Judicial Law, previous reference, p. 127.122

- Abdul Moneim Al-Sharqawi, Al-Wajeez in Civil and Commercial Procedures, previous reference, p. 73. 123

- Wajdi Ragheb, Principles of Civil Judiciary, previous reference, p. 194. 124

For more, see: Muhammad Abd al-Nabi al-Sayed Ghanem, Procedural Protection of Possession, previous reference p. 105. 125

- Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, previous reference, p. 150. 126

Section II

Parties to a Possession Recovery Suit

First: Plaintiff:

The plaintiff in the claim for recovery of possession is the owner of the property, and he shall prove that at the time the possession was confiscated from him, he was in possession of the property without defects, i.e. continuous, public, calm and unambiguous possession, in place of the aspect that we have simplified in the foregoing¹²⁷.

It is not necessary in a claim for recovery of possession, and this is what distinguishes it from all other claims of possession, that the possessor be the original possessor, that is, a holder for himself, so the accidental possessor, who is the holder for the account of others, may be a plaintiff in a claim for recovery of possession, and demand recovery of possession of the right of ownership, whereas he is a usufructuary, mortgagee, tenant or judicial receiver, i.e. a possessor of the right of ownership is an occasional possession for the account of the owner¹²⁸. This provision is implicitly stated in Article 1307/2 of the UAE Civil Transactions Law, as it states: "Possession by mediation is valid when the mediator deals with it in the name of the possessor and is connected to him in a manner that obliges him to obey him with regard to this possession." While Article 958/2 of the Egyptian Civil Code expressly stipulates the same provision, as it states: "Possession may also be recovered by someone who possessed it on behalf of someone else".

And just as the accidental possessor may be a plaintiff in a claim for recovery of possession, it is also permissible for someone whose possession is based on an act of tolerance, and he, like the accidental possessor, is devoid of the element of intent in possession and has only material control, to be a plaintiff in a claim for recovery of possession¹²⁹.

The plaintiff in the claim for recovery of possession is also the one who obtained a license from the administrative authority to use real estate within the public domain, even if his possession of the public domain is liable to disappear at any time as soon as the administrative authority returns the

¹²⁷ - Al-Sanhouri, Al-Waseet, previous reference, p. 921, 922-127

¹²⁸ - Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, ps. 156, 157-128

¹²⁹ Vide: Munir Abdel-Aty, Civil and Criminal Protection of Possession, previous reference, p. 72-129

license. Both the possessor by way of tolerance and the possessor under an administrative license may recover possession on the claim of recovering possession, even from the owner who permitted possession by way of tolerance¹³⁰.

It is not necessary to file a lawsuit for recovery of possession that the possessor be in good faith, for the possessor may file this lawsuit even if he was in bad faith, and finally it is not necessary to file a lawsuit for recovery of possession that the possessor had been in possession for a full year before losing possession as required in a lawsuit to prevent Exposure and a lawsuit to stop the new business. Any possession is sufficient, even if it was a possession that lasted only one day or less¹³¹.

It is worth noting that the plaintiff may not file a claim for recovery of possession if he is bound by a contract with the defendant, and the expropriation of possession falls within the scope of this contract. In this case, the plaintiff shall resort to the claim of the contract, not to the claim of recovery of possession, to compel the defendant to observe the terms of the contract¹³².

If possession of the usurped property is transferred from the usurper to a third party, whether the third party is a general successor such as the heir, or a private successor such as the buyer, then the successor of the usurper to whom the possession has transferred is the defendant in the claim to recover possession, and the plaintiff can recover possession of the property from him through this lawsuit, even if the successor was well-intentioned, not knowing that his predecessor had usurped possession of the property¹³³.

Second: Defendant:

The defendant in a claim for recovery of possession is the person who seizes possession from the possessor by force, or by coercion, publicly or covertly. Therefore, it is required that the act issued by the defendant be an act of aggression, and this aggressive act may be one of the acts that are considered

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 157. 130

- Al-Sanhouri, Al-Waseet, previous reference, ps. 926, 927.131

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 160.132

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 160.133

a crime in the criminal law, but not it is necessary for it to be so, and it is sufficient for it to be an illegal act from a civil point of view¹³⁴.

Accordingly, the aggressive act by the defendant - which is the reason for the establishment of this lawsuit - has conditions as follows:

(1) The act of aggression by the defendant is a positive assault on the possession of the possessor, and it is liable to disturb the peace, disturb public security, and justify the right of legitimate defense, so the defendant, in doing this act, is in the position of one who takes his right without resorting to the judiciary. This is the axis on which the claim for recovery of possession revolves, as it is a rightful punishment for this act of aggression as much as it is an effective protection for the possessor in his possession, and it is not necessary for the aggressive act to involve force and violence, even if this is the majority, but rather it is sufficient for the aggressor to seize the property by force, or by stealth without the knowledge of the possessor, so that he creates an obstacle in front of the possessor in his possession that he cannot overcome if he resorts to violence¹³⁵.

(2) This act of aggression shall also have taken place in the property itself, which is in the possession of its owner, although it is sufficient to file a lawsuit to prevent interference or a lawsuit to stop the new works.¹³⁶

(3) Finally, this act of aggression shall have resulted in the expropriation of possession from the possessor, so that it is not possible for the possessor to regain this possession without this act standing before him as an obstacle to that¹³⁷.

It is not required that the defendant be in bad faith. It is possible that he be in good faith, that is, believing in his good faith, such as if the property that was expropriated is owned by him, and instead of resorting to the judiciary, he expropriated the right himself,¹³⁸ and then his expropriation of possession is an aggressive act that requires before every other matter to return possession belongs to the possessor, and then it is considered, by the means decided by

- Munir Abdel-Aty, Civil and Criminal Protection of Possession, previous reference, p. 72.134

- Al-Sanhouri, Al-Waseet, previous reference, p. 927.135

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 159.136

- Al-Sanhouri, Al-Waseet, previous reference, p. 928.137

- Munir Abdel-Aty, Civil and Criminal Protection of Possession, previous reference, p. 73.138

the law, which of the two parties has the right to own the property, or has the right to possess it¹³⁹.

It is worth noting that the co-owner may be a defendant, as the possessor may file a lawsuit against the co-owner with whom he owned the property in common, but he usurped his possession and now monopolizes possession of the entire property, and some landlords resort to usurpation of possession by leasing the leased property to another tenant. It intends to confiscate possession from the first tenant in possession, so there is no doubt that it is permissible for the first tenant to file a claim of possession against the usurping tenant, and in this case it is not permissible to include the landlord in the lawsuit because he has a contractual relationship with the possessor and it is not permissible to file a lawsuit against him, like any contractor. If he wants to litigate the lessor, he has no choice but to file the claim of handing him over the leased property or enabling him to have it in implementation of the lease contract. He may also request with this application that the lessor be obligated to compensate him for the damage he suffered due to the dispossession of possession, and the basis for compensation here is the contractual liability as well¹⁴⁰.

Section III

Deadline for filing a claim for recovery of possession

A claim for recovery of possession shall be filed within one year from the time of expropriation of possession from the possessor, if this expropriation was by force or usurpation publicly, as in this case the possessor is aware of the time of expropriation of possession from him, but if the expropriation of possession took place surreptitiously without the possessor being aware of it at the time its occurrence, the year during which a claim for recovery of possession must be filed shall apply from the time this is revealed, i.e. from the time the possessor becomes aware of the seizure of possession from him,¹⁴¹ pursuant to the provisions of Article 1315/2, 3 of the UAE Civil Transactions Law, which states:

- Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 160.139

- Ezzedine Al-Nasuri and Hamid Okaz, Commentary on the Law of Procedures, Part One, Eighth Edition, 1994, without publisher, p. 289. 140

- Al-Sanhouri, Al-Waseet, previous reference, p. 930.141

(2- The claim is not heard if this impediment lasted a full year, and it arose from a new possession that took place against the will of the possessor or without his knowledge.

3- The year is calculated from the time the new possession began if it was declared, and from the time the first possessor became aware if it began secretly. If there is a substantial impediment to filing a lawsuit, the year is counted from the time of being able to file it).

It is the same period stipulated in Article 958 of the Egyptian Civil Code, which stipulates:

(The owner of the property, if he loses possession, may request during the year following its loss to return it to him. If the loss of possession was hidden, the year begins from the time this was revealed. Possession may also be recovered by someone who was in possession on behalf of someone else).

This period of one year is a period of forfeiture, not a period of prescription. If a claim for recovery of possession is not filed during it, it is not permissible to file it after the end of the year, and a claim that is filed after the expiration of this period may not be accepted¹⁴².

The second demand

Legal adaptation of the claim for restitution of tenure

From the foregoing, it is clear that the nature of the claim for restitution of tenure is a real-estate claim, because it is intended to restitution of tenure of the real-estate right, rather than compensation for the act of usurping, and because the legislator (Both Emirati and Egyptian) consider it a tenure claim, which is real estate in kind, and all the rules applicable to other tenure claims, It is within the jurisdiction of the court in whose district the property is the subject of the clam. As well as that he may lift it on the person to whom the usurped property was transferred, if the latter were well-intentioned, then, like the no-exposure procedure, the property in the hands of the person to whom it is entitled to own it, even if it is in good faith¹⁷⁵.

Consequently, tenure claims have been initiated to protect tenure per se and are fluctuating between liability claims and illegal action penalty claims.

The claim for restitution of tenure shares liability claims, as this appears in several aspects:

First: It returns tenure to the accidental possessor, who does not possess it for his own account but rather for the account of others. It is sufficient for a person to have mere physical control over the property. If this control is taken from him, this is an illegal act; his penalty is to return this control to whoever had it before through a claim for restitution of tenure¹⁷⁶.

Second: The same is the case if tenure is based on an act of tolerance or an administrative license that may be retracted at any time. We are not concerned with tenure in the correct form, but rather with mere physical control. However, if this control was taken away from its owner, this was also an unlawful act. It is legitimate, and this control may be returned to the one who had it before, through a claim for restitution of tenure¹⁷⁷.

Third: If the tenure is completed, it becomes legal, but it has not stabilized enough, but it has not lasted for a full year, then its expropriation by force is also considered an illegal act, and the claim for restitution is also a penalty for the force used in the expropriation of tenure, the restitution of tenure to its owner in this imposition as close as the penalty for an unlawful act is the force used than to be a protection for a tenure that has not been settled and has not lasted for a sufficient period¹⁷⁸.

From the foregoing, it is clear that the claim for restitution of tenure shares liability claims in that it returns tenure to the accidental possessor, who does not possess it for his own account but rather for the account of others and also returns tenure to the possessor based on an act of tolerance or an administrative license that may be retracted at any time and it shares with the lawsuits for the penalty of unlawful work that if the elements of possession are complete, and they are taken from him by force, then the possessor has the right to recover them if his possession is more deserving of preference. Thus, the claim for recovery of possession involves something that is in-kind, so it is permissible for the possessor to recover his possession from a third party, even if this third party was of good faith¹⁴³.

Concerning the claim of regaining possession is connected to the claims of possession, this also appears in several aspects:

First: Possession, if taken without force, is not returned unless it has lasted a full year, i.e., it was stable possession that lasted for a sufficient period. The case here is closer to being a claim of possession, protecting stable possession, than being a penalty for liability¹⁴⁴.

Second: Possession is not returned if it was taken without force, even if it did not last an entire year, from the person who seized it, and he had possession that was preferable to the possession of the plaintiff. It is then one of the possession cases that protect the most preferable possession, rather than being a penalty for liability¹⁴⁵.

Third: A case may be filed against the one to whom the possession of the usurped property was transferred from the usurper of possession, even if the first was in good faith¹⁴⁶.

¹ Abdul Hakim Fouda, Rulings of Tenure Protection Claims, Previous Reference, p. 166

¹ Mounir Abdel-Aty, Civil and Criminal Protection of Tenure, Previous Reference, p. 82

¹ Al-Sanhouri, Al-Waseet, Previous Reference, P. 936

¹ Al-Sanhouri, Al-Waseet, Previous Reference, P. 936

¹⁴³ - Munir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, p. 82.

¹⁴⁴ - Al-Sanhouri, Al-Waseet, previous reference, pg. 937

¹⁴⁵ - For more: see Muhammad Abd al-Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 11

¹⁴⁶ - Al-Sanhouri, Al-Waseet, previous reference, pg. 937

The Third Requirement

Conditions for Accepting a Case for Recovery of Possession

You may not see the benefit of deciding on a separate case for recovery of possession, since the possessor can always file a claim to prevent exposure to the recovery of this possession. However, theft of possession is the most severe form of exposure to possession and the most dangerous to order and public security¹⁴⁷. So, it is decided to facilitate the conditions for accepting this case because of what it includes of the most severe and dangerous forms of exposure to possession. Some jurists expressed such a matter by saying: "In this case, the practical interest takes a serious form of assault, up to the point of completely seizing possession. That is why the legislator assigns special rules to it in which the legislator tolerates the elements and conditions of possession that is worthy of protection."¹⁴⁸

It was said, in the justification for facilitating the terms of this case, that the looting of possession by force or the like is the most severe form of exposure to possession and the most dangerous to public security. So, the purpose of the case is not only to protect legal possession but also to ward off the unlawful assault that disturbs security and public order¹⁴⁹.

The essential difference between the case for recovery of possession and other cases of possession is that it is granted to every possessor, even if he is an accidental possessor, even if his possession did not last for a full year, and even if it lasted a day or more, as long as his possession was taken from him by force or lost secretly. Concerning other possession cases, they aim to protect possession after it has settled, and therefore may only be filed by a possessor whose possession has lasted for at least one year¹⁵⁰.

Accordingly, the conditions for accepting a claim for recovery of possession are as follows:

The first condition: is that the plaintiff is in possession of the property whose possession has been seized, and it is sufficient for him to possess physical possession, such as the custodian of a deposit and the mortgagee in possession¹⁵¹.

Consequently, the legislator did not require that the plaintiff is in possession of legal possession to accept a case for recovery of possession, but rather that he has physical possession, so it is permissible to file a case by the possessor

¹⁴⁷ - Muhammad Abd al-Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 11

¹⁴⁸ - Wajdi Ragheb, Principles of Civil Justice, previous reference, p. 19

¹⁴⁹ - Muhammad Abd al-Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 11

¹⁵⁰ - رمضان أبو السعود ، الوجيز في الحقوق العينية الأصلية ، مرجع سابق ، ص 415 ، 416

¹⁵¹ - Abdel Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, p. 16

for legal possession and from the possessor of mere (accidental) physical possession¹⁵².

Therefore, it is not required that the possession be legal, meaning that the claim for recovery of possession does not require the moral element required by the Egyptian Civil Law as mentioned above, which is the intention to own, and the physical element, that is, the actual control over the property, is sufficient for permission, while this control is free from the three aforementioned defects, namely: invisibility, ambiguity, and violence, which is in complete agreement with the point of view of the UAE legislator in the Civil Transactions Law, which limited the element of possession only to actual control without requiring the intention to own property as mentioned above to prevent repetition.

Consequently, material or accidental possession is sufficient to accept the restitution Lawsuit, provided that it shall be a clear and calm phenomenon, since the purpose of the restitution Lawsuit is to response for violence, and therefore this Lawsuit is not accepted by those who have acquired possession of an act of violence¹⁹⁰.

If the possession was accompanied by coercion and then this defect was removed and it then settled quietly for a reasonable period, and the Possessor retained it without violence, so it shall be protected on the grounds of restitution Lawsuit ¹⁹¹.

It is inconceivable that moral possession can be the subject of takeover, and the possession restitution Lawsuit for the assault on the possession of an easement of moral possession, as if the Aggressor had demolished a watering can on its own land and the neighbor irrigated its land from it¹⁹².

In the opinion of some jurists, the rationale for not protecting these rights is not in fact due to the idea of a lack of material element, but rather to a lack of clarity of possession, as it may be feared that this right is merely one of the acts that others bear as a matter of tolerance. Therefore, if this right is based on a legal or agreement basis, it shall be protected under this Lawsuit¹⁹³.

The second requirement: continuation of the possession for a period of not less than one year:

The general rule for the possession restitution is that the possession of the Aggressor shall last at least one year, meaning that the Plaintiff's possession lasted at least one full year without interruption¹⁹⁴. Nevertheless, the Egyptian legislator has derogated from this rule by explicit and clear legal provisions,

¹⁵² - Muhammad Abd al-Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 11

distinguishing in this regard than the UAE legislator who did not come up with similar texts to resolve the problem contained in this exception or deviation from that rule. Accordingly, the Egyptian legislator has authorized the filing of the possession restitution Lawsuit to a person whose possession has not expired for one year upon loss of possession, in two cases provided for in Article No. (959) of the Egyptian Civil Law, as follows:

First Condition: If possession is forcibly lost:

If possession is forcibly lost, the Possessor may file Lawsuit for restitution of possession from the Aggressor, even if a year has not passed since the possession according to Article No. (959), paragraph 2, of the Egyptian Civil Law, which acknowledged that by saying: "If the possession has been forcibly lost, the Possessor may in any event reconstitute the possession during the following year from the Aggressor". Accordingly, the Possessor may file Lawsuit for restitution of possession, even if its possession for example for two months, as long as the possession has been taken away forcibly ¹⁹⁵.

189- Muhammad Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, Page No. 116.
190- Ahmed Abu Al-Wafa, Civil and Commercial Procedural Law, previous reference, Page No. 167.
191- Ramzi Saif, The Mediator in Explanation of the Procedural Law, previous reference, Page No. 167.
192- Abdel Hakam Fouda, Possession Protection Lawsuits Provisions, previous reference, Page No.161, Ahmed Abu Al-Wafa, Civil and Commercial Procedural Law, previous reference, Page No. 127.
193- Muhammad Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, Page No. 108.
194- Munir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, Page No. 74.

The first situation: if possession is lost under duress:

If possession is lost under duress, then the possessor may file a lawsuit for restitution of his possession from the aggressor, even if the possession did not last for a year in accordance with article 959, paragraph 2, of the Egyptian Civil Code, which stated that: "If the possession has been lost under duress, the possessor may in any event recover during the following year from the aggressor.". The possessor can, therefore, file a lawsuit for restitution of his possession, even if his possession was for a period of for example two months, as long as the possession has been lost under duress ¹⁹⁵.

If the Egyptian legislator explicitly stipulates this situation in the Egyptian Civil Code as above-mentioned, the UAE legislator implicitly refers to it, which is used in article 1308 of the UAE Civil Transactions Act, which stipulates the following:

"If possession was accompanied by duress, occurrence under covered or was ambiguous, it shall have no effect on the person who was under duress, or from whom the possession was concealed, or from whom it was ambiguous, unless from the time that such improvements have been resolved."

Accordingly, the text of this article reflected the improvements of possession and made it clear that there was no effect on those improvements – which include coercion or the usurping of possession under duress – except at the time of its resolving and thus the text of this article indicates that the aggressor's right to restitution is lawful, open in the lawsuit for restitution of possession and not pending on the term requirement for the fact that the possession has been coerced under duress. In order to resolve confusion and to clear ambiguity, we believe that the UAE legislator shall state with explicit articles on this situation in the UAE Civil Transactions Act, similar to its Egyptian counterpart, Especially, the existence of the law prevent to diligence, difference and overlapping issues.

It should be noted that the Egyptian legislator, by explicitly recognizing this exception, has found a desire to drive duress back to its position and to distance itself from the means of violence and coercion against the possessor, whatever the basis and arguments of those who use it in order to breach of security, public order and tranquility within society ¹⁹⁶.

The second situation: if the plaintiff's possession is better than the aggressor's possession:

If the loss of possession occurred without the use of duress or coercion, the legislator has taken into account that in the event of complete dispossession,

that we are in fact face two possessors: The first possessor is the plaintiff who claims restitution of possession, and the other possessor is the defendant who took possession under duress, so if the plaintiff's lawsuit for restitution of possession had been rejected because the plaintiff's possession did not last for a year, this shall be considered a preference for the defendant, although his possession also did not last for a year ¹⁹⁷.

In view of this situation, the law differentiates between two possessions and protects the plaintiff if its possession is better than that of his opponent's possession. However, the UAE Civil Transactions Act establishes a standard of differentiation in the text of article 1311, paragraph 1, which is material possession, which stipulates the following: -

"If the possession of a single object or right is disputed by multiple persons, the possessor of which is provisionally shall be deemed to possess material possession unless it is established that he has acquired such possession in a defective method."

The means that the UAE Civil Transactions Act, had expressly stipulated in this article the criterion of differentiating between two possessions, namely material possession, by considering that the possessor is the real possessor of material possession.

However, the Egyptian Civil Code, had established a criterion distinguishing and preference, considering the possession of the possessor shall deem to be more deserving of preference than the aggressor's possession in two forms: -

195 Ramzi Saif, The Mediator (Al Wassit) in Explanation of the Procedural Law, previous reference, page 169.

196 Wagdi Raghieb, Civil Justice Principles, previous reference, page 195.

197 Mohamed Abd al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, previous reference, page 109, Wagdi Raghieb refers that if the possession of the aggressor reaches a full year and fulfills its terms and conditions of possession, he becomes a legal possessor of valid legal possession protected by the law with a suit of possession, and in this case he has the right to respond to a lawsuit of restitution with a lawsuit for restraining interference with possession, and then the judge rules on the previous possessor to prevent for restraining interference lawsuit with possession to the aggressor in his legal possession, Wagdi Raghieb, Civil Justice Principles, previous reference, page 196.

First: if the plaintiff's possession is based on a legal basis while the aggressor's possession is lacking of this legal basis:

This means that if the plaintiff had submitted a legal basis such as a sale contract or lease contract, his opponent had not submitted a document for his possession, the plaintiff's possession shall be deemed better ¹⁹⁸, accordingly the winning bidder's possession shall deem to be more deserving of preference than mortgagee's possession, since the legal basis document of the first party grants him legal possession as an owner and the legal basis document of the second party grants him only occasional possession. And also, the tenant's legal basis document, which is a lease contract shall deem to be more deserving of preference than the custodian's legal basis document, since the legal basis document of the first party grants him possession for occupancy, and the legal basis document of the second party grants him only management ¹⁹⁹.

And if the mortgagee usurps possession from the winning bidder, or the real estate guard (custodian) usurps possession from his tenant, then both the winning bidder and the tenant shall have the right to restitute their possessions even if it had not lasted for a year prior to the duress incident ²⁰⁰.

Second: if the plaintiff's possession is the earliest date:

If, in terms of existence or non-existence, possession is equivalent in terms of legal basis documents, in the sense that each is based on a legal bases granting its possessor the possession, or neither is based on a legal bases granting its possessor the possession, the possession is most deserving of preference is the earliest in date ²⁰¹.

This is recognized by the Egyptian legislature in article 959, paragraph 2, of the Egyptian Civil Code as stipulated: "If the person who has lost possession has not passed from one year at the time of its loss, possession may only be restituted from a person who is not based on a possession that is more deserving of preference. The possession that is more deserving of preference is the possession based on a legal basis document. If none of the possessors had a legal basis document or their documents are equivalent, then the possession is most deserving of preference is the earliest in date."

198 Mohamed Abd al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, previous reference, page 110, Izz al-Din al-Nasuri and Hamid Akaz, Commentary on Procedural Law, previous reference, page 290.

199 For more information, see Wagdi Raghieb, Civil Justice Principles, previous reference, page 196, Et seq.

200 For more information, see Mohamed Abd al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, previous reference, page 110, Et seq.

201 Ramzi Saif, The Mediator (Al Wassit) in Explanation of the Procedural Law, previous reference, page 169. Izz al-Din al-Nasuri and Hamid Akaz, Commentary on Procedural Law, previous reference, page 290.

However, it remains problematic that Egypt's Civil Code has not addressed its solution, namely, if the position of both possessions in the legal basis document is identical whether or not, both possessions concluded at the same time, so neither one has precedence over the other.

What is the criterion on the basis of which possession is preferred over the other?

Here comes the criterion adopted by the UAE Civil Transactions Act, through Article 1311 Paragraph 1, which is material possession, and considering the possessor materially as the possessor to solve this problematic when the document is similar and the date unites, therefore we consider that the criterion which adopted by the UAE Civil Transactions Act in preference is the best and capable of addressing the problematics raised by contemporary and modern realities.

The third condition: the dispossession of possession:

This means the usurpation of the property, all or part of it, with the establishment of material obstacles in order to the possessor's return to it ²⁰³.

It also means that the possessor is deprived full access to possession ²⁰⁴. Any exposure to the possessor without full deprivation of use does not justify filing the lawsuit ²⁰⁵.

The total loss of possession is required by removing the possessor from the property and seizing it by another person. This is not intended to deprive the possession of the property in its entirety, but it may obvious at the first instance, filling this lawsuit, if the possessor is removed from the property or apart thereof, i.e., the complete demise of the possession for a part or all of the property. Intermittent and temporary assaults and violation on the possession shall be considered an exposure to justify filling prohibiting claims against possession and lawsuits of restitution of possession ²⁰⁶.

202 Ahmed Abu Al-Wafa, Civil and Commercial Procedure, previous reference, page 168. Al-Sanhouri, Al-Wassit, previous reference, page 933.

203 Abdel Hakam Fouda, provisions of lawsuit for protection of possession, previous reference, page 163. Ahmed Abu Al-Wafa, Civil and Commercial Procedure, previous reference, page 168.

204 Ahmed Abu Al-Wafa, Civil and Commercial Procedure, previous reference, page 168

205 Ramzi Saif, The Mediator (Al Wassit) in Explanation of the Procedural Law, previous reference, page 167.

206 Mohamed Abd al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, previous reference, page 112.

The dispossession may take several forms as follows:

Apparent form: if the dispossession under duress, such as the defendant's assault on the possessor or the taking of an act of aggression, such act does not require the use of force to be penal punishable, and the meaning of force is also achieved if the possessor can prevent the violation only if he resorts to violence ²⁰⁷.

The dispossession by force is not intended to be by the use of material force and to be accompanied by a fight and bloodshed, but it is sufficient to obtain the involuntarily of the possessor, despite its unavoidable objection to its prevention ²⁰⁸.

The dispossession may be by trickery and deception, using a means of seizing the property against the possessor's wish, if there is no violence or use of force, but there is a requirement to circumvent the dispossession, the means of dispossession is manifestly lawful and in fact illegal. The clarification of this is that the aggressor obtains a collusion judgment against a person other than the possessor obliging him to hand over the property, and then implements that judgment against the possessor ²⁰⁹.

It should be noted that the defendant is not required to be the one who committed the assault and violation himself, but it is sufficient that it was ordered to be committed by the defendant's workers, employees or relatives ²¹⁰.

Hidden form: as if the possessor allows to another person to enter a property under its possession with tolerance and the other person's intention is to usurp the property, in this situation, the property usurpation is hidden, so the period of one year specified and prescribed for the filing of the lawsuit starts from the day of the appearance of the dispossession ²¹¹.

207 Mounir Abdelatei, Civil and Criminal Protection of Possession, previous reference, page 75.
208 Mohamed Abd al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, previous reference, page 112.
209 Mohamed Abd al-Nabi Al-Sayed Ghanem, Procedural Protection of Possession, previous reference, page 113.
210 Izz al-Din al-Nasuri and Hamid Akaz, Commentary on Procedural Law, previous reference, page 288.
211 Mounir Abdelatei, Civil and Criminal Protection of Possession, previous reference, page 76. Ramzi Saif, The Mediator (Al Wassit) in Explanation of the Procedural Law, previous reference, page 168.

Consequently, it became clear from what we mentioned above that dispossession is achieved by the dismissal of the occupier from the property he possesses and taken over by the other. This kind of dispossession that entitles filling action of property recovery, should be conducted by illegal methods, so when the occupier willingly assigns his possession, this act can't be considered dispossession¹⁵³. According to the provisions of Article (1314) on the Emirati Civil Transactions Law which state that: "Property possession or occupancy comes to an end if the occupier refrains his actual domain over the object or the right or missed thorough any other way," and this was mentioned also in the provisions of Article (956) of the Egyptian Civil Transaction.

The abductor who committed that aggression on possession is not necessarily to be of mala fid, he may act in a good faith and come to his mind, and may be true in his thought, that the property he seized in owned to him, but we can't neglect that he has mistaken and committed illegal act, as he willingly dispossessed what he thought under his ownership by himself without reference to the competent jurisdiction for retaining his right. So, his dispossession shall be considered an illegal civil assault that entitles firstly, to give the property back to its occupier or owner then reconsider through the legal methods set by the law which litigant of the two parties of the dispute is entitled to possess the property or to occupy¹⁵⁴.

The Fourth Provision: The lawsuit must be brought within a year from the date of dispossession:

In all other lawsuits of possession, it is provided that the claimant must bring his lawsuit within a year following the date of dispossession, and if it occurred in underhanded way, the year of activation starts since the date of discovery hereof¹⁵⁵.

It worth mentioning that if the dispossession occurred by force and violent actions which may last for a long period, the year starts at the end of these violent actions. If the aggressor, for example retained the occupier by the means of kidnapping or retention, the yearly period starts from the date of his exit from retention, the same case if there was a clash in order to take the property over and lasted for example for two weeks, the yearly period starts from last day of in which that clash ended up¹⁵⁶.

¹⁵³ - Mahmoud Hashim, Civil Judgement Law, previous reference, page (127).

¹⁵⁴ - Mohamed Abd El Naby Al Said Ghanem, operational protection for property estate, previous reference, page (115).

¹⁵⁵ - Abe El Hakam Fouda, Property estate protection claims provisions, previous reference, page (164), Ezz El Din Al Nassori, Hamed Oqaz, Comments on Code of legal Procedures, previous reference, page (289).

¹⁵⁶ - Mohamed Abd El Naby Al Said Ghanem, operational protection for property estate, previous reference, page (116).

As we mentioned before, the period of the year is an abatement and not a prescription period, as if the lawsuit is brought a year after the dispossession under force or after a year from the acknowledgement of the claimant by his dispossession in case of being done in underhanded way, the judge shall pass his judgement after the allowance of the lawsuit as it was brought after its scheduled date, and the occupier or the possessor shall be considered a protected holder under all lawsuits of possession as it lasted for a whole year¹⁵⁷.

The aim of approving the bringing of a lawsuit of property recovery within a year of dispossession is to encourage the occupier to initiate the refute of aggression afflicting his possession, some jurists state that property possession or occupancy is considered a realistic center that affected by the true considerations, so if more than a year passed since the dispossession, this usually means that the assaulter has continued in occupying the property during that year so in comparison with the first neglected possessor, he is entitled to be privileged¹⁵⁸.

The Fourth Demand

The sentence in lawsuit of possession recovery and its binding force

If the provisions and terms for the allowance of possession recovery lawsuit are existing and the claimant proved his real possession of the property, the judge shall pass his judgment concerning the subject matter of the suit which shall bind the defendant to give the possession back to the claimant¹⁵⁹, and this sentence shall subject to the forced execution whenever it became final or enforceable judgment¹⁶⁰.

This judgement entitles the binding force of the matter under dispute, not other matters outside the limitation of this suit, For that reason that point is not taken into consideration if the possessor brought the lawsuit of prohibiting claims against possession later, as the lawsuit of property possession recovery requires even the existing of accidental possession and there is no need for continuation in occupying the property for a whole year while law requires in action of prohibiting claims against possession the legal occupancy for at least one year¹⁶¹.

¹⁵⁷ - Monir Abd El Atty, the civil and criminal protection for property estate possession, previous reference, page (76).

¹⁵⁸ - Mohamed Abd El Naby Al Said Ghanem, operational protection for property estate, previous reference, page (116).

¹⁵⁹ - Abd El Monam Al Sharkawi, Al Wagiz in the Civil and Commercial Procedures, previous reference, page (75), Mahmoud Hashim, Civil Judgement Law, previous reference, page (140).

¹⁶⁰ - Mohamed Abd El Naby Al Said Ghanem, operational protection for property estate, previous reference, page (117).

¹⁶¹ - Wagdi Ragheb, Principles of Civil Jurisdiction, previous reference, page (200).

Consequently, the issued judgement in action of property possession recovery shall have the binding force of the sentenced object as for the property possession. If it is issued for the benefit of the possessor, he may bring a lawsuit of prohibiting claims against possession in order to gain the acknowledgement of the legal possession and the assaulter may bring this lawsuit also ¹⁶².

Therefore, the issued resolution judging to recover the possession is limited to the realistic recovery to the claimant temporarily, without the settlement of the dispute concerning who is entitled for the legal possession herein, since then, the defendant may, after giving the possessed property to the claimant, to re-bringing the lawsuit of property possession recovery against the defendant providing be brought within a year, and to prove that the claimant has before dispossessed him ¹⁶³.

Some jurists see that the failure of the possessor to bring the lawsuit of property possession recovery due to his disability to prove the existing of any kind of dispossession is considered a provision and vice versa; the failure of the possessor in lawsuit against possession doesn't prevent him from bringing the lawsuit of property possession recovery in case his failure in the first case is referred to the lack of any terms required by the law for the allowance of the lawsuit herein but not necessary for the allowance of the lawsuit of property possession recovery ¹⁶⁴.

The significance of the adaptation of the lawsuit is that meant from the submitted demands not subject to the words in which these demands were written so, it is not allowed to consider this lawsuit one of lawsuit of property possession recovery even if the verbal demand was the prohibition of claims against possession and vice versa ¹⁶⁵.

The possessor may demand the recovery of property possession and prohibition of claims against possession providing each demand shall be based on its justifications, which means that is allowable to combine between the various lawsuits of possession even in one complaint unless otherwise stated by the law ¹⁶⁶.

The Possessor or occupier is also allowable to change the description of his lawsuit during the litigation such as refraining from the demand of property possession recovery and vice versa ¹⁶⁷.

¹⁶² - Ahmed Abu Al Wafa, the Commercial and Civil legal procedures, previous reference, page (171).

¹⁶³ - Ezz El Din Al Nassori, Hamed Oqaz, Comments on Code of legal Procedures, previous reference, page (290).

¹⁶⁴ - Abe El Hakam Fouda, Property estate protection claims provisions, previous reference, pages (165, 166) and Ahmed Abu Al Wafa, the Commercial and Civil legal procedures, previous reference, page (171).

¹⁶⁵ - Ahmed Abu Al Wafa, the Commercial and Civil legal procedures, previous reference, page (156).

¹⁶⁶ - Mohamed Abd El Naby Al Said Ghanem, operational protection for property estate, previous reference, page (118).

¹⁶⁷ - Ahmed Abu Al Wafa, the Commercial and Civil legal procedures, previous reference, pages (170, 171).

The Third Topic

the Action for disturbance of possession

the Action for disturbance of possession is the main possession lawsuit, as it protects possession in itself and is the original possession without the accidental possession, and therefore it is distinguished from the lawsuit for recovery of possession. as we found that this last lawsuit protects accidental possession, as well as the original possession, and that it ranges from being a personal lawsuit from the liability lawsuits to an independent lawsuit from the possession lawsuits. As for Action for disturbance of possession that we are dealing with, it only protects the original possession, provided that it settles for a full year at least, and therefore it is a possession lawsuit, or the optimal possession lawsuit¹⁶⁸.

Accordingly, what is meant by the Action for disturbance of possession, is the lawsuit filed by the possessor with the intention of preventing an attack that occurred to them in their possession¹⁶⁹, and some jurists define it as the lawsuit in which the plaintiff clings to their legal possession that has been disturbance of it by the defendant, requesting a ruling to prevent this interference and remove its manifestations¹⁷⁰.

Accordingly, we discuss the action for disturbance of possession - as we discussed the case for recovering possession - the nature and cases of disturbance, its parties and the date for filing it, then we discuss the conditions for its acceptance, and finally we discuss the authoritativeness of the ruling issued in it.

¹⁶⁸ - As-Sanhouri, Al-Waseet, previous reference, p. 938.

¹⁶⁹ - Mohammed Abdel Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 71.

¹⁷⁰ - Mahmoud Hashem, Civil Judiciary, previous reference, p. 125, and Wajdi Ragheb, Principles of Civil Judiciary, previous reference, p. 200.

First Requirement

The Nature and Conditions of Disturbance

Introduction

The possessor's possession may have been exposed to a disturbance by third parties, but he cannot protect his possession legally in the face of this disturbance, because the disturbance in question with them under the pretext of preventing disturbance is a specific and conditional disturbance that does not include all cases of disturbance, and the disturbance may be material through every physical action that would disrupt the benefit of the possessor's possession, and the disturbance may be legal through every legal action directed against the possessor involving a claim of a right to deny or dispute the possession of the possessor.

Accordingly, we review through this requirement what is meant by disturbance that is suitable for filing a lawsuit to prevent disturbance of possession, and then we review the forms of disturbance, whether it is physical or legal.

Firstly: What is meant by Disturbance of Possession

The exposure that is suitable for filing an anti-interference suit means everything that is directed against the appropriator, whether it is a physical act or a legal disposition, direct or indirect, that includes a claim of a right that contradicts the right of the appropriator, regardless of whether or not the plaintiff suffered damage¹⁷¹.

Whoever enters land without the permission of its possessor is considered to be a disturbance of possession, even if the matter then comes to expelling the plaintiff from their land. Nevertheless, the matter falls within the scope of an action for disturbance of possession and not to recover possession, because this last mentioned one entails the confiscation of possession by force, usurpation, or covertly, as well. It is considered to be a disturbance of possession if the defendant executes a judgment against a person who was not a party to the litigation¹⁷².

¹⁷¹ - Mouner Abdel Ati, Civil and Criminal Protection of Possession, previous reference, p. 88.

¹⁷² - Mouner Abdel Ati, Civil and Criminal Protection of Possession, previous reference, p. 89.

Second: Forms of Exposure:

Exposure shall have two forms, it may be Physical and it may be legal.

First: Physical Exposure:

Physical Exposure shall be each Physical action that would disturb the possessor's use of his possession. Physical exposure shall occur by a Physical act that deprives the possessor of possession of the property or completely or partially¹⁷³ nullifies his use of possession, provided that it includes a denial of such possession¹⁷⁴.

Physical exposure may take place directly, as if a person erected a building on the possessor's land, cultivated it, or prepared it for cultivation by plowing, irrigating it, or digging watering therein, otherwise infringement of the a crop with it, such as reaping fruits, cutting down existing trees, preventing the possessor from planting, irrigating, or plowing the land, or preventing him from living in a house owned thereby as well as fencing a vacant piece of land for the owner, or divide it and erect buildings on it, or prevent the owner from building on it, or opening overlooks on it without a bond from the right of easement¹⁷⁵.

Physical exposure may be indirect, as if a person does actions that prevent the possessor from exercising the right of easement on his real estate, such as the real estate having a right of easement on another property adjacent to him, so the owner of the property performs works on his real estate that would benefit his neighbor from directing his right to easement¹⁷⁶.

¹⁷³ Ramzi Seif, *The Mediator in Explanation of the Law of Procedures*, previous reference, P. 156.

¹⁷⁴ Ahmed Abu Al-Wafa, *Civil and Commercial Pleadings*, previous reference, P. 155.

¹⁷⁵ Mohamed Abd Al-Nabi Al-Sayyid Ghanem, *Procedural Protection of Possession*, previous reference, P. 75.

¹⁷⁶ Mohamed Abd Al-Nabi Al-Sayyid Ghanem, *Procedural Protection of Possession*, previous reference, P. 75.

An example of this is opening a window overlooking a property in the possession of the neighbor, because this action includes claiming the right of easement overlooking it, which nullifies the full use of the eye, as it is free from easement rights or blocking a window in a building for the neighbor, and this work is considered exposure to the neighbor as a holder of the right of easement overlooking the open window¹⁷⁷. That is, the acts of Physical exposure that a person performs may fall on his real estate, and not on the property of the possessor, if the work is considered exposure to possession¹⁷⁸.

Accordingly, it is possible that the physical action takes place in real estate owned by the defendant. However, the plaintiff has the right to file a case to prevent exposure, such as the defendant erecting a wall in his land, blocking the plaintiff's roof with it. Likewise, if there is a corridor between several partners, and one of them erects walls around his property that narrow the corridor to a large extent, then this act is considered exposure to the rest of the partners¹⁷⁹.

Physical exposure to possession is required to be intermittent in order for a case to prevent exposure to be accepted, because continuous physical exposure may lead to looting of possession. Hence, the scope of the case shall transfer to another case which is the recovery of possession and not the case for restraining interference with possession¹⁸⁰.

Exposure to possession shall have taken place illegally. It is not considered an exposure that a third party places certain tools on the land of the possessor with his consent or with his permission. Actions taken to implement a court

¹⁷⁷ Ramzi Seif, *The Mediator in Explanation of the Law of Procedures*, previous reference, P. 156.

¹⁷⁸ Mahmoud Hashem, *Civil Judicial Law*, previous reference, P. 125& 126.

¹⁷⁹ Mounir Abdel Ati, *Civil and Criminal Protection of Possession*, previous reference, P. 89.

¹⁸⁰ Mahmoud Hashem, *Civil Judicial Law*, previous reference, P. 126.

ruling against the possessor or the implementation of an executive bond against it shall not be deemed as exposure¹⁸¹.

The exposure is not required to have taken place by means of violence or coercion¹⁸². It need not be a beneficial or harmful act as long as it involves a denial of the possessor's possession. The occurrence of the exposure in and of itself is sufficient to file this case, even if it does not result in any harm to the holder at all, but even if the exposure resulted in a benefit to the holder by tilling, cultivating and cultivating the land¹⁸³. Also, the work may be harmful, and yet it is not considered exposure, such as stealing crops from the land of the possessor at night¹⁸⁴.

It is worth noting that the action of complaint shall not be a case of liability, but rather it aims to protect possession, and as a result of this, damage is not a necessary condition, nor is it a sufficient condition. It is not a necessary condition in the sense that the realization of the interference is sufficient for the emergence of a case to prevent the interference, even if no harm occurred to the possessor. It is not a sufficient condition in the sense that realization of the damage is not sufficient alone for the emergence of a case to prevent interference, unless there is exposure in the aforementioned sense. If there is both exposure and damage, two cases may arise: a case to prevent exposure and a case for personal liability if its conditions are fulfilled¹⁸⁵.

¹⁸¹ Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, previous reference, P. 155.

¹⁸² Wajdi Ragheb, Principles of Civil Judiciary, previous reference, P. 202.

¹⁸³ Ramzi Seif, The Mediator in Explanation of the Law of Procedures, previous reference, P. 157.

¹⁸⁴ Mahmoud Hashem, Civil Judicial Law, previous reference, P. 126.

¹⁸⁵ Mohamed Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, P. 77.

Second: Legal Exposure:

Legal exposure is every legal act issued by the defendant that would oppose the possessor in his possession¹⁸⁶. That is, each legal proceeding brought against the possessor involves a claim of a right to deny or dispute the possession of the possessor¹⁸⁷.

The legal exposure permission is a written action that is why verbal statements and threats are not sufficient to constitute a legal exposure, and it is not required that the procedure be directed to the possessor personally. Rather, it is sufficient to address the possessor on behalf, such as a warning to the lessee not to pay the rent to the landlord and to pay it to the warner. Accordingly, it can be said that the legal exposure to possession does not, according to origin, raise the possibility of the use of force or violence, as in its usual cases it takes the form of a civil dispute over possession that raises the application of its objective provisions. It may also take the form of a civil dispute over the ownership of the property to which possession is returned¹⁸⁸.

There are two forms of legal exposure:

It may be a judicial exposure, which is in the form of litigation before the judiciary, such as filing a case involving a dispute over possession, such as possession cases. Initiating one of these disputes is considered an exposure to the possessor in his possession, such as the previous possessor filing a claim to recover possession against the current possessor. In this case, the current possessor may file a case to prevent exposure, because the claim for recovery of possession includes a denial of his possession¹⁸⁹.

The legal exposure may be a non-judicial one, which does not occur in the context of an existing dispute before the courts. Rather, it is a prelude to its establishment, such as the warnings that are directed to the possessor and include exposure to him in his possession, such as a warning not to build on the property that he possesses, or not to make any modification to it, or to raise it up, or to block a skylight in it that overlooks the property of the objector. It is also considered a non-judicial exposure to rent or sell the possessor's property to third party¹⁹⁰.

¹⁸⁶ Mounir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, P. 89.

¹⁸⁷ Ramzi Seif, The Mediator in Explanation of the Law of Procedures, previous reference, P. 156.

¹⁸⁸ Mohamed Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, P. 79.

¹⁸⁹ Wajdi Ragheb, Principles of Civil Judiciary, previous reference, P. 203.

¹⁹⁰ Wajdi Ragheb, Principles of Civil Judiciary, previous reference, P. 203.

Second Section

Parties of the case of restraining interference and date of filing it

Preamble

It is decided that the parties of the case of restraining interference, whether the plaintiff or the defendant, shall fulfill conditions in each of them in order to acquire capacity in that case and be a party to it. The plaintiff in that case is the owner of the property, original possession, not accidental possession, free from defects, while the defendant in this case is that person who performs the act of exposure against the plaintiff in his possession.

Given that these conditions for acquiring the status of the plaintiff or defendant in the anti-interference case are essential, the purpose of this requirement was to review in some detail the parties to that case, and the date of filing it until it is accepted in terms of form.

First Branch

Parties of the case of restraining interference

There is no doubt that the case of restraining interference is filed by the possessor and it is filed against the objector himself from whom the acts of intrusion were issued, even if he was working for someone else or was ordered by him. If the exposure is issued by the lessee or the agent by order of the lessor or the principal or for his benefit, then he will be the original opponent in the case. The plaintiff may enter into the action of the lessor or assignee as a guarantor. In case of the death of the objector, his heirs shall replace him on the grounds that they are his general successor, and the case shall be addressed thereto¹⁹¹.

Accordingly, the parties of the case of restraining interference shall be the plaintiff and the defendant. This shall need a presentation without elaboration as follows:

First: the plaintiff in the case of restraining interference

The plaintiff in the case of restraining interference shall be the possessor of the property, and he shall prove here, as we have seen, he shall prove in the possession recovery case, that at the time of the exposure to him he was in possession of the property, free of defects, i.e. continuous, public, calm and unambiguous possession¹⁹².

¹⁹¹Ezzedine Al-Danasoori and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 311.

¹⁹² Al-Sanhouri, Al-Waseet, previous reference, P. 939.

He shall also prove, contrary to what we decided in the claim for recovery of possession, that his possession is original possession and not accidental possession, meaning that he possesses it for his own account and not for the account of third party.

It is not permissible, if an exposure to the property right is made, to be filed with the case of restraining interference by someone who has not possessed the property for himself. Accordingly, it is not permissible to file a case to prevent interference in this case from the owner of the usufruct right, the owner of the right of servitude, the mortgagee in possession, or the tenant. All of them are accidental possessors of the right of ownership, because they only possess this right for the account of third party, who is the owner. They may file the case of restraining interference if the exposure falls on the right that he proceeds to use for his own account, as he possesses it for his own account and not for the account of the owner¹⁹³.

It is not required to file a case to prevent interference, just as it is not required to file a case to recover possession that the possessor be in good faith, so the possessor may file a case to prevent interference, even if he was in bad faith¹⁹⁴. If it is decided that the case to prevent exposure is more in kind than the case to recover possession, and the latter case may be filed against a third party in good faith. This matter is applied from a fortiori to the case of restraining interference¹⁹⁵.

The joint partner may file a case to prevent interference against others without the need for his partners in common with him to intervene in the case because his possession is original and the intention of ownership. Rather, it is permissible for him to file this case against his partners themselves if they were subjected to his possession in common by actions that conflict with this possession¹⁹⁶.

Second: The defendant in the case of restraining interference:

The defendant in the case of restraining interference shall be the person who is subject to the plaintiff's possession, and the exposure issued by the defendant is either a physical exposure, or an exposure based on a legal act. In all cases, it is not permissible to resort to a case to prevent exposure to implement a contract linking the plaintiff and the defendant. The origin is that the case of restraining interference shall be filed against the defendant himself

¹⁹³ Al-Sanhouri, Al-Waseet, previous reference, P. 941.

¹⁹⁴ Abdel Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, P. 112.

¹⁹⁵ Ezzedine Al-Danasoori and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 311.

¹⁹⁶ Mounir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, P. 85.

and from whom the exposure was issued, and it may be filed against others, even if it was in good faith¹⁹⁷.

It is considered an infringement that permits the filing of a case every material act or legal disposition that includes, directly or indirectly, a claim by which the defendant opposes the possession of the plaintiff. It is sufficient for the defendant to contest the plaintiff's right of possession for there to be a factual opposition from the defendant. It is not required that the exposure has caused damage to the plaintiff, or that the exposure is based on an established right of the defendant. Even if the defendant relied in his objection on an established right for him, he is nevertheless ruled to prevent the objection, because the possession judge has nothing to do with the subject matter of the right. It is also not required that the defendant be in bad faith, or that the acts of exposure took place directly in the real estate owned by the plaintiff, as these acts may take place in real estate owned by the defendant, or in real estate owned by third party. It is also not required that the acts of exposure were associated with violence or committed in public, as these acts may not have been associated with any violence or they may have been committed surreptitiously and in secret from the plaintiff and remain, however, an exposure that may be repelled by the case of restraining interference¹⁹⁸.

Second branch

Time to file the case of interference

The case of restraining interference shall be filed within one year from the time the exposure occurred. If the exposure is successive acts, the period of one year shall run from the date of the first of these acts clearly indicating that it includes an opposition to the possession of the plaintiff. In case the successive acts of exposure have occurred independently, meaning that each of them is considered a stand-alone exposure, or if they were issued by different persons, each of these acts is considered a stand-alone exposure, and there are multiple claims to prevent exposure with the multiplicity of these acts. In this case, the duration of the year begins with respect to each of them from the occurrence of the work that established it. Therefore, the validity of this period for the last case starts from the time of the last independent act of exposure¹⁹⁹.

The duration of the year is a period of forfeiture, not a statute of limitations, and therefore it applies to the incompetent and the absent, and it is not suspended

197 Abdel Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, P. 114.

198 Al-Sanhouri, Al-Waseet, previous reference, P. 946, 947& 948.

199 Ezzedine Al-Danasoori and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 311.

or interrupted. This has already been explained when talking about the period of one year during which the claim for recovery of possession is filed²⁰⁰.

Third Section

Conditions for accepting the case of restraining interference

The case of restraining interference shall be the main possession case, or as some commentators call it the optimal possession case, because it protects possession in itself, which is the original possession without accidental possession, provided that it settles for at least a full year, which is a purely objective claim in nature²⁰¹. Therefore, it shall fulfill the following conditions.

First condition: the plaintiff's possession of the real estate:

In order to accept the case of restraining interference, what is required to accept possession cases in general is the availability of legal possession in both its material and moral elements mentioned above, that the plaintiff has legal possession, with his actual control over the thing as an owner or holder of in kind right over it²⁰². Accidental possession is not protected by law through the case of restraining interference²⁰³.

The possessor shall prove that his possession is original and not accidental. Likewise, it is not permissible for the lessee to file a case to prevent an offer against the lessor as long as he is bound by a contract. Rather, he may ask the lessor to implement what he was obligated to do in the contract and the consequences of the contract. The rule is that it is not permissible to resort to a case to prevent exposure if the dispute arose in connection with a contract concluded between the two parties. If the possession is based on an act of tolerance, then the possessor may not file the case of restraining interference against the owner as his possession is nothing more than accidental possession²⁰⁴.

There shall be no ambiguity or ambiguity with regard to the availability of the two pillars of possession by the possessor, that is, the actions constituting the possession shall clearly disclose the intention of the possessor, and if it is likely

200 Al-Sanhouri, Al-Waseet, previous reference, P. 955.

201 Ezzedine Al-Danasouri and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 306.

202 Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, previous reference, P. 148 et seq.

203 Wajdi Ragheb, Principles of Civil Judiciary, previous reference, P. 201.

204 Ezzedine Al-Danasouri and Hamed Okaz, Commentary on the Law of Procedures, previous reference, P. 306& 307.

that these actions will lead to another interpretation, the intention is considered ambiguous, and then the possession is tainted. An example of possession tainted with ambiguity is when a person dies and leaves his property in the possession of one of his heirs, then the heir claims ownership of him. In this case, possession is tainted with ambiguity and vagueness²⁰⁵.

Accordingly, in order to accept the case of restraining interference, it is required that possession fulfills its legal conditions, calmness, appearance, clarity, and continuity and to respond to a real estate or right in kind that may be owned by the lapse of time, and that the possession continues for at least one year²⁰⁶.

Second condition: the occurrence of exposure in possession:

We have previously presented in detail the images of exposure and then referred to it to prevent repetition, but we confirm what we have previously referred to in this regard that it is required that the plaintiff has been subjected to being subjected to possession. Exposure, as we have previously indicated, is every physical act or legal procedure that would impede the plaintiff's benefit from his possession, provided that it includes a denial of such possession²⁰⁷.

Accordingly, the plaintiff shall have an exposure in his possession, i.e. an infringement that justifies the filing of the case, whether it is a physical or legal exposure, and the exposure issued by the defendant is not required to have caused damage to the plaintiff. It is also not required in the exposure that the plaintiff bases it on a right that is not established for him, just as it is necessary that the defendant have bad faith, just as it is not required in the acts of objection that they were associated with violence or were committed in public²⁰⁸.

Third condition: Filing the case during one year as of the date of the occurrence of exposure:

It is stipulated that the case of restraining interference shall be filed within one year from the date of the occurrence of the exposure. If the plaintiff neglects to file the case within one year, his right in the case shall be forfeited²⁰⁹, even if the defendant had not acquired a right to protect his possession, it would have continued for a full year²¹⁰. This forfeiture does not depend on the objector

205 Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, P. 102.

206 Mohamed Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, P. 73.

207 Abdul Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, P. 102.

208 Ezzedine Al-Danasouri and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 308 & 309.

209 Mohamed Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, P. 82.

210 Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, previous reference, P. 159

acquiring the right to protect his possession by continuing to possess the property for a period of one year²¹¹. However, if a hidden exposure occurred that the possessor was not aware of, he is not held accountable in this case for his negligence in filing the case²¹².

Noting that the one-year requirement differs from the other year of possession, because the continuation of possession for a year before the exposure differs a priori from filing a case before a year has passed since the occurrence of the exposure, as the first year precedes the exposure and the second year follows it²¹³.

The wisdom of this short period is that the passage of a year without filing a case to prevent interference is carried as consent from the possessor. If the possessor does not rush to file a case, then his delay indicates that the objection to his possession is not dangerous until he disturbs peace and security, in addition to the continuation of the objection for a period of one year that would earn the objector, as a new possessor, the right to use the possession cases including the case of restraining interference against the old possessor if this possessor fulfills the legally required conditions for possession and among them is that his possession had continued quietly for a year preceding the exposure. If the exposure was achieved by a single immediate act during the year, the year is calculated from the date of the occurrence of this assault. The day on which the assault took place is not calculated, but rather starts from the next day and ends with the end of the last day of the year²¹⁴.

If the exposure is successive acts, the period of one year shall run from the date of the first act of these acts clearly indicating that it includes an opposition to the possession of the plaintiff, and in the event that the successive acts of objection took place independently, in the sense that each of them is considered a stand-alone exposure, or was issued by different persons. Each of these actions is considered a self-contained objection, and there are many claims to prevent interference with the multiplicity of these actions, and in this case, the period of one year begins with respect to each of them since the

211 Ramzi Seif, *The Mediator in Explanation of the Law of Procedures*, previous reference, P. 158.

212 Abdul Moneim Al-Sharqawi, *Al-Wajeez in Civil and Commercial Procedures*, previous reference, P. 68

213 Mohamed Abd Al-Nabi Al-Sayyid Ghanem, *Procedural Protection of Possession*, previous reference, P. 82.

214 Mohamed Abd Al-Nabi Al-Sayyid Ghanem, *Procedural Protection of Possession*, previous reference, P. 82& 83.

occurrence of the act that created it. Thus, the validity of this year for the last case starts from the time of the last independent act of exposure²¹⁵.

Fourth section

The judgment issued in the case of restraining interference and the res judicata thereof

If the conditions for a case to prevent interference are met in the way that we have mentioned, the plaintiff, who is the owner of the scorpions, is ruled to remain in his possession and prevent interference with him in this possession, and that ruling may require the removal of works that have been completed, the demolition of a building that has been erected or the erection of a building that has been demolished, and the return of the thing to its origin. In this regard, it is the case that the acts of interference took place in the real estate of the plaintiff, or in the real estate of the defendant, or in the real estate of third party²¹⁶. If the defendant builds a wall in a road loaded with the right of a traffic easement, the possessor has the right to prevent him from passing, and the ruling to prevent interference requires demolishing this wall so that the possessor can pass in the manner prior to the interference. If the defendant fences off a land owned by the plaintiff, the ruling to prevent interference requires the removal of this fence²¹⁷.

Accordingly, the nature of the judgment issued in the case of restraining interference differs, depending on whether the exposure was material or legal, as follows:

First: If the exposure is physical:

The judge rules in the case of prevention of intrusion by removing the manifestations of infringement, and for this reason removal is considered as restoring the situation to what it was before the intrusion occurred by removing the effects of the material actions that the intruder carried out, such as moving

215 Ezzedine Al-Danasoori and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 310 &311.

216 Al-Sanhouri, Al-Waseet, previous reference, p.956

217 Ezzedine Al-Danasoori and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 312.

things whose very existence is considered an infringement of possession or demolishing the wall that blocks the view. The judgment issued in this case is considered an obligatory judgment subject to compulsory execution, whether it becomes final or subject to expedited enforcement²¹⁸.

Second: If the exposure is legal:

The judgment issued by the judge shall be a declarative judgment confirming the possession of the plaintiff vis-à-vis the objector, and denying the latter's right to take the action he has taken²¹⁹.

Accordingly, when the judgment has the power of the decisive order, it is binding on both parties to the dispute. Either of them may not file a second case with the same requests, and this authority is from the public order. If a second case is filed by the same litigants and with the same requests, it is decided that it is not permissible to consider it because of the previous decision therein²²⁰.

Fourth topic

Suspension of new works case

The case to prevent exposure does not differ from the case to prevent new works, except that it was legislated to protect the possession of what is expected to happen to it from the acts of aggression, as it is not intended to prevent an existing exposure. Rather, it is intended to prevent its occurrence in the future. The case for suspending new works shall be one of the possession cases by which the possessor requests the cessation of emergency works if they were affected his possession and were exposed to them²²¹.

The basis of this case is the availability of an existing interest for the possessor to prevent the disturbance before it occurs, because it is not conceivable to

218 Mohamed Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, P. 86

219 Wajdi Ragheb, Principles of Civil Judiciary, previous reference, P. 215, Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, previous reference, P. 163 & 161, Mahmoud Hashem, Civil Judicial Law, previous reference, P.140.

220 Mounir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, P. 98.

221 Muhammad Abd A-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 88, and al-Sanhouri affirms that the case for suspending new works is distinguished from the case for recovering possession in that possession is not taken away from the possessor, and from the case for preventing exposure that the works in which it is issued by the defendant are not By acts of exposure that actually took place, rather they are actions that would be exposure if they took place, for more: see: Al-Sanhouri, Al-Waseet, previous reference, p. 959

deprive the possession of protection until the assault has occurred on it completely. Exposure here is contingent and has not occurred yet, so it was said that this case is a preventive case²²².

The UAE legislator organized this case by expressly stipulating it in the Civil Transactions Law, as Article 1316 stipulates:

(If the possessor institutes a case to recover his possession, he may request that the defendant be prevented from constructing buildings or planting trees in the disputed real estate during the filing of the case, provided that he submits sufficient insurances to guarantee the damage that may befall the defendant if it appears that the plaintiff is not right in his case.)

The Egyptian legislator also organized the same case by stipulating it in the civil law, as Article "962" of the Egyptian Civil Code stipulates:

"Whoever acquires real estate and continues to possess it for a full year and fears, for reasonable reasons, that it will be exposed to it as a result of new works that threaten his possession, he may refer the matter to the judge requesting the cessation of these works, provided that they have not been completed and a year has not passed since the commencement of the work that would cause harm."

Accordingly, in this section, we will deal with the case for suspending new works by explaining its definition, parties, and the date for filing it, indicating the conditions for its acceptance, and indicating the authoritativeness of the ruling issued therein. Then we shall present the relationship between the case for suspending the business and the case for restraining interference.

First Section

Definition of the case of suspending the new works, its parties and date of filling it

Preamble

The possessor may be exposed to the start of works by others, which would represent an exposure if they were completed, and then to protect his possession from those works, he shall file the case for suspending new works. Hence, in this case, possession has not been taken away from the possessor,

²²² Muhammad Abd al-Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 88.

just as the actions that are issued in it are not acts of exposure that have already occurred, but rather they are acts that would be exposure if they were done.

Accordingly, we discuss in this requirement the statement of what is meant by this case to clarify its distinction and the difference between it and the rest of the possession claims, and to indicate its parties, whether the plaintiff or the defendant, and the date of filing it in order to be acceptable in terms of form.

First branch

Definition of the case for suspending new works

The case for suspending new works shall be filed by the possessor of real estate or the possessor of another right in rem against the one who initiated a work that, if it was completed, would have become an actual exposure to the possession of the possessor in his possession²²³, whether it was by construction or by removal, and it has not yet reached the point of being an assault that actually took place on possession, and the purpose of this case is not to prevent an assault that actually took place, but rather to avoid the assault before it happened. Thus, the case for suspending new works shall be preventive²²⁴. The damage in this case did not actually occur due to the non-occurrence of the interference, but rather it is likely to occur due to the presence of signs indicating it, which is the commencement of work, so the person has an interest in avoiding it before it occurs²²⁵.

An example of this case is that a person has a right of easement with the view on his neighbor's property, so the neighbor started building a wall that, if it were raised, would block the light and air from the view, which would constitute an exposure to the plaintiff's possession of the right of easement, so the possessor would then have a claim to stop these works²²⁶.

Neither the Emirati legislator nor his Egyptian counterpart adhered to a specific criterion in which he determined the nature of the new works that threaten the possession of the plaintiff when they are completed until the judge decides to

²²³ Ramzi Seif, *The Mediator in Explanation of the Law of Procedures*, previous reference, p. 159

²²⁴ Wajdi Ragheb, *Principles of Civil Judiciary*, previous reference, p. 216, Mahmoud Hashem, *Civil Judicial Law*, previous reference, p. 129

²²⁵ Muhammad Abd al-Nabi al-Sayyid Ghanem, *Procedural Protection of Possession*, previous reference, p. 89

²²⁶ Mahmoud Hashem, *Civil Judicial Law*, previous reference, p.129

stop them, as he shall examine each case separately and estimate the seriousness of the work.. If it appears to him from the circumstances and the circumstances surrounding the case that this work may threaten the possession of the plaintiff, he shall order to stop it, but if the evidence is unanimous that there is no danger to the possession of the plaintiff when this work is completed, the case shall be dismissed²²⁷.

Second Branch

Parties of the case for suspending new works

First: The plaintiff in the case for suspending new works

The plaintiff in the case of suspending new works is the same plaintiff in the case of preventing interference, as he is the owner of the property in original and not accidental possession, that is, he possesses the thing for his own account and not for the account of others, possession free of defects. If the possession is based on an act of tolerance or on a license from the management authority that may be retracted at any time, then the possession is not accidental except with regard to the tolerant owner or the licensed management entity. Therefore, the possessor in these two cases may not file a case to stop the new works against them, but other than these two cases, his possession is original, allowing him to file a case to stop the new works, and the possessor is not required to have good faith²²⁸.

Second: The defendant in the case for suspending the new works

The defendant in the case for suspending the new works shall be the person who starts works that have not yet reached to be an exposure that actually took place on the possession of the plaintiff, but there are reasonable reasons to believe that if these works had been completed, they would have been a complete exposure to the possession of the plaintiff. Two conditions shall be met in the works that shall be stopped under the pretext of suspending new works:

²²⁷ Ezzedine Al-Danasoori and Hamid Okaz, Commentary on the Procedure Law, previous reference, P. 334.

²²⁸ Munir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, p.101

The first matter: that these works have started, but they have not been completed, because if they were completed, the interference would have actually occurred, and the duty in this case would not be to file the case for suspending new works, but rather to file the case of restraining the interference.

The second matter: that these works, which the defendant started, took place in his own real estate, not in the plaintiff's real estate or in the real estate of third party²²⁹.

Third branch

Date of filing the case for suspending new works

The plaintiff files a case to stop the new works, provided that it has not been completed, and a year has not passed since the start of the work that would cause damage, so the case to stop the new works shall be filed first before the completion of the new works, as if these works were completed, the interference would have actually occurred and a case to prevent the interference had to be filed, not a case to stop the new works, as previously said. It shall be filed again within a year from the time of starting these works, and then the year shall apply from the time of starting the new works as we have mentioned. If they were successive works, the period starts from the time of starting the first work of them. If the year lapsed without the case being filed, and it was filed after that, it would not be accepted even if the new works were not completed. In this case, the plaintiff shall wait until these works are completed and the interference actually takes place on his possession, and then he may file a case to prevent the interference within one year from the time of the occurrence of the interference, i.e. from the time of completion of the new works. The period of one year is a period of forfeiture, not a statute of limitations, and then it applies to the incompetent and the absentee, and it is not suspended or interrupted²³⁰.

Second section

Conditions for accepting the case for suspending new works

²²⁹ Abdel Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, P. 150, 151 & 152

²³⁰ Abdel Hakam Fouda, Provisions of Claims for Protection of Possession, previous reference, P. 152 & 153.

It is required to file a case to stop new works that the plaintiff be in possession of real estate, and that the defendant initiates works that, if completed, would have become an objection to the plaintiff's possession. The case shall be filed within a year from the date of commencement of the business, which we will present as follows:

First Condition: The plaintiff shall be in the possession of real estate:

The plaintiff shall be in possession of a property of valid legal possession. In the UAE Civil Transactions Law, the material element of possession is sufficient, which is the physical control of the property. As for the Egyptian civil law, legal possession requires the availability of its material and moral elements represented in the intention to own, as previously mentioned in order to prevent repetition, in addition to the need for possession to be free from defects and to be an original and not accidental possessor. If the possession is based on an act of tolerance or on a license from the management authority, the possessor is an accidental possessor in relation to the owner through tolerance or the licensed management authority. Hence, it is not permissible for him to file a case to stop the new works against them, but he may file it against third party²³¹.

It is required that the case to stop the new works be based on possession and not on a contract linking the plaintiff and the defendant, because in this latter case the plaintiff may not resort to possession cases, but he may resort to the contract case. If the lessor started to conduct new works that, if they were completed, would have decreased the benefit of the lessee, then in this case the lessee may not resort to a case to stop the new works, but he may resort to the case of the lease contract that binds him to the lessor²³².

Second Condition: Initiating the works, if completed, would become an exposure to possession:

The case for suspending new works shall be deemed as preventive, which is based on the possibility of assault on possession, and then it is required for its acceptance to be the existence of new works, whether they have actually started or are imminent. Works shall be deemed as new, even if it has gone a

²³¹ Munir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, p. 102

²³² Munir Abdel Ati, Civil and Criminal Protection of Possession, previous reference, p. 102

long way, as long as a year has not passed since it started, which is the legal time limit for filing a case²³³.

It is also required that work has begun on the real estate of the infringer himself, the defendant, and not on the real estate of the possessor, the plaintiff or the real estate of third party as if it appeared on the property of the possessor, then the mere commencement of it is considered an immediate exposure to possession, which establishes the right to the case of restraining interference²³⁴. If the work takes place on the property of others and he is satisfied with these works or complicit with the aggressor in carrying out these new works, then the third party is considered a partner of the aggressor in these works²³⁵.

However, it should be noted that the UAE legislator did not stop the action to stop the new works on the fact that the work had begun on a property other than that of the plaintiff. However, he allowed the plaintiff to file a case, even if new works were completed on his real estate and he is in the process of filing a case to recover possession, provided that he pays sufficient insurance to guarantee the damage that may befall the defendant if it appears that the defendant is not right in his case in accordance with the provisions of Article 1316 of the Civil Transactions Law²³⁶.

It is also required that the works lead to exposure to the possession itself, and not to mere harm to the possessor, because in this latter case we are dealing with a regular compensation case, not a case to prevent exposure or suspend the new works²³⁷.

It is also a condition that these actions should not have been completed, because if they were completed and ended, then the matter does not deviate from one of two assumptions. The first: that the exposure to possession is achieved, and then a case is filed to prevent the exposure, because the assault is immediate, the second: that there is no exposure to possession and there is no fear of an exposure in the future. There is no need for either of the cases

²³³ Mahmoud Hashem, Civil Judicial Law, previous reference, p. 129

²³⁴ Ramzi Saif, The Mediator in Explanation of the Procedure Law, previous reference, p. 160, Ahmed Abu Al-Wafa, Civil and Commercial Procedures, previous reference, p. 164

²³⁵ Muhammad Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, P. 94

²³⁶ Article 1316 of the UAE Civil Transactions Law stipulates: (If the possessor files a case to recover his possession, he may request that the defendant be prevented from constructing buildings or planting trees in the disputed property during the case, Provided that he submits sufficient insurances to guarantee the harm that may befall the defendant if it appears that the plaintiff is not right in his claim.

²³⁷ Abdel Moneim Al-Sharqawi, Al-Wajeez in Civil and Commercial Procedures, previous reference, p. 73

because in this case there is no realistic interest in the possession case²³⁸. It shall also be feared, for reasonable reasons, that these works, when completed, may lead to exposure to the possession of the plaintiff, and the assessment of these reasons is a matter of discretion for the trial judge²³⁹. In this regard, the court may seek assistance from inspection, and it may seek the assistance of experts.

Accordingly, the case is not admissible simply because these actions, if they were carried out, would lead to harm to the possessor or to his interest, as long as they do not lead to exposure to possession and damage to it. Accordingly, the claim to stop the new works is not accepted simply because this work is detrimental to the owner's interest when it is completed. Rather, this interest shall be based on a legal or conventional status, otherwise it is due to mere tolerance. Based on this, the claim is not accepted for a request to stop building a wall erected by a neighbor who prevented him from building a beautiful view, blocking the skylights that he opened to his property, or affecting the rental value of his real estate. A case filed by one person against another requesting the cessation of work in a well that may cause damage if the water of his well is depleted is not accepted²⁴⁰.

Third condition: Filling the case during one year as of the date of starting exposure:

238 Abdel Moneim Al-Sharqawi, *Al-Wajeez in Civil and Commercial Procedures*, previous reference, p. 73

239 Mahmoud Hashem, *Civil Judicial Law*, previous reference, p. 129

240 Muhammad Abd Al-Nabi Al-Sayyid Ghanem, *Procedural Protection of Possession*, previous reference, p. 95

The case of suspending the new works shall be filed within one year as of starting the exposure works. In case of the passage of one year without filling this case, it shall not be filed thereafter, even if the works are not completed. However, the possessor, in such condition, shall wait till the completion of these works. The case for restraining interference shall be filed if its conditions are fulfilled²⁴¹, even this does not prevent the possessor to file the subjective case pursuant to the right he may have²⁴².

Third requirement

The issued Judgement in the suspension of the new works and its authenticity

Preface

The judge's decision in the Lawsuit of the suspension of the new works was not to cancel the new works that it initiated, as it would have ruled if the Lawsuit had been a disturbance of possession, but to suspend such works without cancelling them.

Therefore, the question arises about the authenticity of the issued Judgement in this Lawsuit. Is it a provisional Judgement associated with the issued Judgement in the Lawsuit of possession or in the Lawsuit of the subject matter of the right, or vice versa?

Does this Lawsuit have a guarantee decided by the legislator to protect the Defendant in charge of works from any damage it may suffer in the event that the Plaintiff is not right in its Lawsuit to suspend the new works?

Is this guarantee permissible or mandatory, and whether or not the obligation in the UAE Civil Transactions Law differs from its counterpart in the Egyptian Civil Law?

All of these are fundamental questions that are required by the circumstances of being in possession to investigate the Lawsuit for the suspension of the new works, which we will answer through this requirement.

300- Wagdi Ragheb, Principles of Civil Justice, previous reference, page No. 208.

301- Muhammad Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, page No. 96

241 Wajdi Ragheb, Principles of Civil Judiciary, previous reference, P. 208.

242 Muhammad Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 96

First: The issued Judgement in the suspension of the new works and its authenticity

The issued Judgement in the suspension of the new works does not deviate from two things:

First thing: The issuance of the judgment in favor of the plaintiff - possessor - to suspend the new works, in which case the Defendant shall refrain from continuing such works.

Second thing: The issuance of the judgment in favor of the Defendant, so and it is permitted to continue with these works 302.

It should be noted that the Court's decision to suspend the new works is a provisional decision and its authority depends on the judgment in the lawsuit of the possession or in the Lawsuit of the subject matter of the right. If the judgment is issued in either of them in favor of the Defendant, it shall be entitled to proceed with such works until they are completed, but if the Judgement is issued in favor of the Plaintiff and the Judgement becomes final, the judgment of the suspension of the new works shall not be eliminated 303.

Second: Guarantee in the Lawsuit of the suspension of the new works:

Both the UAE legislator and its Egyptian counterpart were interested in protecting the Defendant from any damage it may suffer in the event that the Plaintiff was not right in its Lawsuit to suspend the new works, but there are substantial differences between the legislators in guarantee damages that may affect the Defendant as follows:

(a) Guarantee in UAE Civil Transactions Law:

Article No. (1316) of the UAE Civil Transactions Law stipulates as follows:

(If the possessor submitted a lawsuit of adverse possession for restitution of its possession, it may request that the Defendant be prevented from constructing buildings or planting trees in the disputed property during the course of the lawsuit, provided that it provides sufficient insurances to ensure the Defendant's possible damage if the plaintiff appears to be unfounded in its Lawsuit).

Through the stipulation of this Article, it is clear that the guarantee is mandatory and not permissible. If the Plaintiff requests the suspension of the new works, it shall provide an insurance to ensure the Defendant's possible damages if the plaintiff appears to be unfounded in its Lawsuit.

(b) Guarantee in the Egyptian Civil Transactions Law:

Article No. (962) of paragraph No. (2) of the Egyptian Civil Law stipulates that: (the judge may prevent or authorize the continuation of the works. In both cases, the judge may order to submit an appropriate guarantee, in the case of judgment with the suspension of works to ensure that the damage arising from such suspension is remedied, where it is found by final Judgement That the objection to its continuation was unfounded, and in the case of a ruling to continue the works, to guarantee that all or some of these works are removed in order to repair the damage that befalls the possessor if they obtain a final judgment in their favor).

Through the text, it is clear that the guarantee is a guarantee that the court orders to be deposited in the court's treasury, and it remains in the treasury until the court decides on the matter finally, i.e. in the case related to the origin of the right²⁴³.

Accordingly, the guarantee or warranty in the Egyptian civil law makes it permissible for the judge to order it or not to order it, as it is subject to his discretion, unlike the guarantee in the UAE Civil Transactions Law, which is compulsory, and the judge does not have the ability of deciding whether or not, and we see that the position of the Emirati legislator Making the guarantee compulsory is the correct position to ensure the seriousness of the plaintiff in their claim and to preserve the right of the defendant to compensation for the damages they sustained, if the defendant was not right in their claim.

The fourth Requirement

The Relationship between Case for stopping new actions and the Action for disturbance of possession

It is decided that both Case for stopping new actions and the Action for disturbance of possession fall under the umbrella of possession lawsuits, however, we can explain the relationship and distinguish between the two lawsuits through the following points:

(1) Case for stopping new actions differs from the lawsuit for preventing interference in the nature of the work affected by it. If this work is completed and finished, the lawsuit is (Action for disturbance of possession), And if it started and was not completed and was based on the property of the plaintiff

²⁴³ - Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, previous reference, p. 165, and Wajdi Ragheb, Principles of Civil Jurisdiction, previous reference, p. 209.

and is likely to cause damage on his behalf, but no damage actually occurred from it, then the lawsuit is (Case for stopping new actions)²⁴⁴.

((2) A lawsuit was initiated to Case for stopping new actions to protect the possession from an action that, if it was done, would have become a disturbance, if it is intended to prevent the completion of this action, because the possessor has an existing interest in averting the disturbance before it occurs, and because it is not conceivable to deprive the possession of the protection that the assault falls upon in full disturbance.²⁴⁵

(3) The action on which this lawsuit is based does not take place on the plaintiff's property, otherwise it would be a disturbance, but rather it falls on another property, because if it occurred on the possessor's property, that would be considered a disturbance, which is suitable for filing a lawsuit to prevent disturbance²⁴⁶, but the UAE Civil Transactions Law allowed the plaintiff to file this lawsuit, Even if the business is on a property that belongs to him, as we have previously explained.

(4) An anti-disturbance action protects possession from a disturbance that has already occurred, while a Case for stopping new actions protects possession from a potential or future disturbance that is about to occur²⁴⁷.

(5) It is stipulated that the action has not been completed at the time of filing the lawsuit, because if it was done, it would have become a disturbance in the full sense of the word, and then there is no room for filing a lawsuit to stop the new actions, but rather a lawsuit to prevent the disturbance must be filed²⁴⁸.

(6) A lawsuit for stopping new actions shall be filed within a year starting from the date of commencement of the action, and not from the date of its completion, because if it was completed, it would have become an actual disturbance. Acceptance does not prevent the possessor from filing a lawsuit to prevent disturbance, if these actions have been completed and become an

²⁴⁴ - Mohammed Abdel Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 101.

²⁴⁵ - Mohammed Abdel Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 101.

²⁴⁶ - Ahmed Abu Al-Wafa, Civil and Commercial Pleadings, previous reference, p. 164.

²⁴⁷ - The basis for the Action for disturbance of possession is that what the defendant has done is considered disturbance already in the possession of the plaintiff, but in the case for stopping new actions its basis is that what the actions that defendant did, if it was completed, would have become disturbance, for more see: Izzel Din al-Danasoori and Hamid Okaz, Commentary on the Procedure Law, previous reference, p. 337.

²⁴⁸ - The case for stopping new actions is distinguished from the case for preventing disturbance in that the actions issued in it by the defendant are not acts of disturbance that actually took place, but rather they are acts that would be disturbance if they were done, for more see: - As-Sanhouri, Al-Waseet, previous reference, p. 959.

disturbance to possession, and in this case he has the right to file a lawsuit within one year of completing the new actions²⁴⁹.

(7) The recognized discretion of the judge. The judge who is examining a Case for stopping new actions has the right to rule not to continue with the new actions, if it appears to him that their completion will lead to disturbance to the possessor in his possession. He also has the right to authorize its continuation if he deems otherwise²⁵⁰.

302- Muhammad Abd Al-Nabi Al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, page No. 96.

303- Ezz AlDin Al-Danasouri and Hamid Okaz, Commentary on the procedural law, previous reference, page No. 336.

²⁴⁹ - Mohammed Abdel Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 102.

²⁵⁰ - Mohammed Abdel Nabi al-Sayyid Ghanem, Procedural Protection of Possession, previous reference, p. 102.

Research Results

From the foregoing, we concluded several results, which are as follows:

- 1- The UAE Civil Transactions Law adopts the physical theory of possession, where legal possession does not require the availability of the moral element, which is the intention to own, and the presence of this intent according to the physical theory of possession is not necessary, and according to the physical theory of possession distinguishes between possession and ownership, as the possessor possesses for their own account, As for the owner, they possesses for the account of others, and if the Civil Transactions Law did not abide by these terms, then it was populated for appropriation as one of the reasons for acquiring ownership under the name of “achieving sales.” What is meant by attainment here is that the person puts his hand on the permissible thing for himself, as for possession according to the law Even if it is an actual control over something, it must be accompanied by a direct intention or the acquisition of a real right over it. Mere physical possession is not enough, but it must be reinforced by a moral element, and this is the logic of the personal theory adopted by the Egyptian civil law.
- 2- UAE Civil Transactions Law is the most comprehensive in protecting possession from any usurpation, as long as the possessor is in possession of physical possession that makes his ownership connected to the property in an actual connection, regardless of the availability of the intention to own or not, and what confirms this is that although The Egyptian Civil Law required the intention to own property according to the personal theory of possession. However, the Egyptian judiciary repeatedly protected actual possession without requiring it to be associated with the intention of owning, and it is a judiciary that is consistent with what the UAE Civil Transactions Law went to in its definition of possession.
- 3- The criterion adopted by the UAE Civil Transactions Law through Article 1311/1, which is material possession, and considering the material possessor as the possessor is better than what was embraced by his Egyptian counterpart in Article 959/2 of the Egyptian Civil law, where he embraced two criteria for preference, which is legal support and precedence, because the criterion Physical possession solves the problem that appears, when the bond is identical and history is united, and then the criterion adopted by the UAE Civil Transactions Law in preference is the best and is able to address the problems raised by contemporary reality.

- 4- the difference between a possession lawsuit and a ownership lawsuit is that the possession lawsuit only protects possession in itself, and it has nothing to do with ownership, i.e. the subject matter of the right, while the ownership lawsuit, on the contrary, protects ownership, i.e the subject matter of the right and it has nothing to do with possession except where possession is a reason for gaining ownership.
- 5- Possession is not based on an action that a person performs on the grounds that it is merely a license of permissible things or an act that is borne by others as a matter of tolerance in order to preserve the relationship, and in observance of good neighbourliness. The UAE Civil Transactions Law agrees with its Egyptian counterpart in not recognizing possession that is based on a person's action as mere permissiveness or an act tolerated by others as a matter of tolerance.
- 6- The legal possession protected by the law is required to be continuous and calm, not tainted by violence or coercion, and a clear and unambiguous phenomenon, which is an agreed position in the UAE Civil Transactions Law and its Egyptian counterpart.
- 7- That the Emirati legislator, as well as his Egyptian counterpart, has bestowed legal protection on possession in the face of any encroachment through the three possession lawsuits (a lawsuit to recover possession, Action for disturbance of possession, and case for stopping new actions), in order to protect ownership, even if it is a temporary protection until evidence is established that the possessor do not own the thing or the right in his possession, and in order to maintain public security and public tranquility in society.
- 8- That there is an essential difference between the claim for recovery of possession on the one hand, and the action for disturbance of possession, and the case for stopping new actions on the other hand, while the last two lawsuits protect the possession after it has settled down and after it lasts at least one year, and they are intended to pay the exposure for this stable possession, if the claim of recovery It is given to every possessor, even if he was an accidental possessor, even if his possession did not last for one year, or even if his possession did not last for more than one day or less, as long as this possession was taken from him by force or he lost it secretly.
- 9- The lawsuit for recovery of possession is a substantive lawsuit that takes the form of a compulsion lawsuit, in which the plaintiff alleges an assault on possession, and requests a ruling to punish this assault, which is a real penalty represented in returning the thing to its original condition by handing over the property.
- 10- The action for disturbance of possession is distinguished from the case for stopping new actions in that the first lawsuit defends possession from an assault that has already occurred, while the case for stopping

new actions protects possession, not from an assault that has already occurred, but rather from an assault that is about to occur, and it will inevitably occur if it takes place. business started.

- 11- Possession lawsuits have characteristics that distinguish them, as they are lawsuits that protect possession in itself, and they are also lawsuits that protect possession of real estate without possession of the movable, and they are lawsuits that carry an urgent nature and fall within the jurisdiction of the partial judge.
- 12- The accidental possessor may be a plaintiff in a claim for recovery of possession. Likewise, a person whose possession is based on an act of tolerance, who, like the accidental possessor, is devoid of the element of intent in possession and has nothing but material control, may be a plaintiff in a claim for recovery of possession.
- 13- It is required that the act of aggression that justifies filing a lawsuit for recovery of possession be a positive assault on the possession of the possessor, and that this act of aggression has taken place in the same property, which is in the possession of its possessor, and that this act of aggression has resulted in the expropriation of possession from the possessor, so that it is not possible for the possessor to regain this possession without this action obstructs them.
- 14- It is not required that the defendant in possession claims be in bad faith, as it is possible that they may be in good faith, that is, believing in their good faith, as if the property that was expropriated belonged to them, and instead of resorting to the judiciary, they extracted the right themselves.
- 15- Possession lawsuits protect real rights and do not protect personal rights. Possession also refers to material things. Possession lawsuits protect real estate possession and do not protect real rights over the movable. Likewise, it does not protect funds that do not accept to be the object of a real right, such as public funds and private funds owned by the state. Or for public legal persons, or public institutions, or public bodies over which a real right may not be acquired, and the lands occupied by the armed forces as military zones.
- 16- The period of one year required to file possession claims during it is a period of forfeiture and not a period of aging. If the lawsuit is filed after one year from the date of loss of possession by force, or after one year from the date of the plaintiff's knowledge of the loss of his possession in the event of his loss by stealth, or after one year from the date of acts of exposure or making new works, passed after accepting the lawsuit to file it after the deadline, and the expropriator of possession becomes a possessor whose possession is protected by all possession lawsuits because it lasted a full year.

Recommendations

After studying the position of the UAE Civil Transactions Law and its Egyptian counterpart on the issue of possession and legal protection that has been legislated for, we find it urgent to highlight some of the recommendations that we hope will be considered by the Emirati legislator, which are as follows:

First: Despite the interest of both the UAE Civil Transactions Law and its counterpart in the Egyptian Civil Law in possession and gave it protection, the Egyptian Civil Law has distinguished itself from its counterpart in the UAE Civil Transactions Law, in the degree of granting protection to possession by explicitly and clearly stipulating the three possession claims. If it is a lawful right, the holder has the right to prevent its completion and its means of doing so through a lawsuit to stop the new business under the Article 962 of the Civil Code. If the assault taken place, the holder's means of payment shall be the lawsuit to prevent exposure under the Article 961 of the Egyptian Civil Code. If the assault reaches the limit of dispossession, the holder's means shall be the lawsuit to recover possession under the Article 958 of the Egyptian Civil Code

By comparison, we find that the UAE Civil Transactions Law did not explicitly and clearly provide for possession claims except for the claim of preventing or stopping new business through the Article 1316 of the UAE Civil Transactions Law, while the Article 1315 of the same law makes use of the right of the holder to file the claim of restoring possession or the claim of preventing exposure, but implicitly and not explicitly in the article. If the Egyptian Civil Law came with clear texts regarding the three possession claims, we find that the UAE Civil Transactions Law was not clear and explicit in its texts except for the claim of preventing or stopping new business. As for the claims of preventing exposure and restoring possession, the text is implicit and not explicit as in the Egyptian Civil Law, and then the content of the text takes advantage of the holder's right to file the claim of restoring possession or the claim of preventing exposure.

Consequently, we find that the need is urgent and necessary - especially with the development of life and the emergence of legal problems related to possession - for the Emirati legislator to keep pace with that development and meet that need and follow the example of - his Egyptian counterpart, to explicitly stipulate in the Civil Transactions Law the calls for the recovery of possession and the prevention of exposure, in an unambiguous manner to cut the way of jurisprudence with clear texts that set out specific regulations and provisions for these claims.

Second: If possession is forcibly lost, the holder may file a lawsuit to recover his possession from the aggressor, even if it has not been in possession for a period of one year, in accordance with Article 959, paragraph 2 of the Egyptian

Civil Code, which recognized this by saying: "If the possession is forcibly lost, the holder may in all cases recover it within the following year from the aggressor." Accordingly, the holder may file a lawsuit to recover the possession, even if his possession was for a period of two months, for example, as long as the possession has been forcibly taken away.

If the Egyptian legislator has explicitly stipulated this case in the Egyptian Civil Code as mentioned above. However, the Emirati legislator has implicitly referred to it, which is what is implied by the Article 1308 of the UAE Civil Transactions Law, which stipulates:

"If the possession is accompanied by coercion, if it occurs covertly or if it is ambiguous, it shall have no effect on the person against whom the coercion has been imposed, or if the possession has been concealed or confused except from the time when these defects cease to exist."

Accordingly, we find that this article has shown the defects of possession, and explained that there is no effect of these defects - which include coercion or usurpation of possession by force - except from the time of its disappearance, and therefore it is clear from this article that the right of the rapist to recover his possession legally, is open in the case of the recovery of possession and is not suspended on the condition of the period because the usurpation of possession was done by coercion, and hence until we overcome the confusion and be free from ambiguity, we believe that the Emirati legislator must come with explicit provisions on this case in the UAE Civil Transactions Law similar to its Egyptian counterpart, especially since the existence of the text cuts the way on diligence, disagreement and overlap.

It is noteworthy that the Egyptian legislator, by explicitly approving this exception, has mastered it out of a desire to repel the force in its wake, and to refrain from means of violence and coercion against the holder, whatever the basis and arguments of those who use it, in order to violate security, public order and tranquillity within society.

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Index

No.	Index	Page No.
1	Chapter One: The nature of legal possession	8
2	The first Section: the concept of possession	9
3	The first Topic: the jurisprudential concept of possession	10
4	The second Topic: the legal concept of possession	13
5	The Third Topic: Relationship between possession and ownership	18
6	The second Section: Elements of possession	22
7	The First Topic: Physical Component (Actual Control)	24
8	The second Topic: the intangible element (intent)	27
9	The Second Section: Conditions of possession protected by law	30
10	The first Topic: continuity and uninterrupted	31
11	The second Topic: calm and non-coercion	33
12	The third Topic: publicity and non-concealment	36
13	The fourth Topic: clarity and unambiguity	38
14	Chapter Two: Legal Protection of Possession (Possession Claims)	40
15	The first Section: the nature of possessions claims	42
16	The first Topic: the wisdom of legal protection of possession	43
17	The Second Topic: Characteristics of possessions claims	45
18	The Third Topic: Scope of possessions claims	47
19	The second Sections: the claim of repossession	50
20	The first Topic: Definition of the claim of repossession, its parties and the date of filing	50
21	The second Topic: Legal adaptation of the claim for repossession	55
22	The Third Topic: Conditions for Accepting the Claim of repossession	57
23	The Fourth Topic: The judgment issued in the case of repossession and its authority	64
24	The third Section: the lawsuit to prevent exposure	66
25	The first Topic: The nature of exposure and its conditions	67
26	The second Topic: Parties to the lawsuit to prevent exposure and the date of filing	71
27	The Third Topic: Conditions for Acceptance of the case of prevention of exposure	73
28	The Fourth Topic: The judgment issued in the case of prevention of exposure and its opposability	76
29	The fourth Section: the lawsuit for the suspension of new works	77

30	The first Topic: Definition of the lawsuit for the suspension of new works and its parties and the date of filing	78
31	The Second Topic: Conditions of Acceptance of the lawsuit for the suspension of new works	81
32	The third Topic: The judgement issued in the lawsuit of suspension of new works and its opposability	83
33	The Fourth Topic: Relationship between the lawsuit for the suspension of new works and the Prevention of Exposure Case	85



ALI SULTAN BIN QADIB An Emirati lawyer and writer

He has Master's Degree of Private Law - College of Law - Ajman University. He has many articles published in Arab newspapers, as well as many legal books, including (Positivity Towards Self - Preventive Role of Banks in Countering Money Laundering Operations in Light of Federal Law No. **20** of **2018** on Anti-Money Laundering and Countering the Financing of Terrorism and Illegal Organizations - Medical Liability - Procedural Protection (of Possession, Comparative Applied Study