

RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic- Legal Rights and Duties

Lecture Notes by- Indra Bhushan Singh

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Possession

Salmond on Possession

Salmond said that in the whole of legal theory there is no conception more difficult than that of possession. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. The transfer of possession is one of the chief methods of transferring ownership.

Salmond also said that possession is of such efficacy that a possessor may in many cases confer a good title on another, even though he has none himself.

He also made a distinction between possession in fact and possession in law.

1. Possession may and usually does exist both in fact and in law. The law recognizes as possession all that is such in fact, and nothing that is not such in fact, unless there is some special reason to the contrary.

2. Possession may exist in fact but not in law. Thus the possession by a servant of his master's property is for some purposes not recognized as such by the law, and he is then said to have detention or custody rather than possession.

3. Possession may exist in law but not in fact; that is to say, for some special reason the law attributed the advantages and results of possession to someone who as a matter of fact does not possess. The possession thus fictitiously attributed to him is termed *constructive*.

In Roman law, possession in fact is called *possessio naturalis*, and possession in law as *possessio civilis*.

Corporeal and Incorporeal Possession

Corporeal Possession is the possession of a material object and Incorporeal Possession is the possession of anything other than a material object.

Corporeal possession is termed in Roman law *possessio corporis*. Incorporeal possession is distinguished as *possessio juris*, the possession of a right, just as incorporeal ownership is the ownership of a right.

Salmond further said that “*corporeal possession is clearly some form of continuing relation between a person and a material object. It is equally clear that it is a relation of fact and not one of right*”.

What, then, is the exact nature of that continuing *de facto* relation between a person and a thing, which is known as possession?

According to Salmond, *the possession of a material object is the continuing exercise of a claim to the exclusive use of it.*

It involves two distinct elements, one of which is mental or subjective, the other physical or objective.

The mental element comprises of the intention of the possessor with respect to the thing possessed, while the physical element comprises of the external facts in which this intention has realised, embodied, or fulfilled itself.

The Romans called the mental element as *animus* and the subject element as *corpus*. The mental or subjective element is also called as *animus possidendi*, *animus sibi habendi*, or *animus domini*.

The *Animus Possidendi* - The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. Salmond made following observations in this regard.

1. It is not necessarily a claim of right.
2. The claim of the possessor must be exclusive.
3. The *animus possidendi* need not amount to a claim of intent to use the thing as owner.
4. The *animus possidendi* need not be a claim on one's own behalf.
5. The *animus possidendi* need not be specific, but may be merely general. It does not necessarily involve any continuous or present knowledge of the particular thing possessed or of the possessor's relation to it.

The *Corpus Possessionis* – The claim of the possessor must be effectively realized in the facts; that is to say, it must be actually and continuously exercised. The *corpus possessionis* consists in nothing more than the continuing exclusion of alien interference, coupled with ability to use the thing oneself at will. Actual use of it is not essential.

Immediate and Mediate Possession

The possession held by one man through another may be termed *mediate*, while that which is acquired or retained directly or personally may be distinguished as *immediate* or *direct*.

There are three kinds of Mediate Possession:

1. Possession that is acquired through an agent or servant who claims no interest of his own.
2. The direct possession is in one who holds both on the actual possessor's account and on his own, but who recognizes the actual possessor's superior right to obtain from him the direct possession whenever he choose to demand it.
3. The immediate possession is in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for

whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end.

Concurrent or Duplicate Possession

1. Mediate and Immediate Possession co-exist in respect of the same thing as already explained above.
2. Two or more persons may possess the same thing in common, just as they may own it in common. This also called as *compossessio*.
3. Corporeal and Incorporeal Possession may co-exist in respect of the same material object, just as corporeal and incorporeal ownership may.

Incorporeal Possession

In Incorporeal Possession as well, the same two elements required, namely the *animus* and the *corpus*. In the case of incorporeal things, continuing non-use is inconsistent with possession, though in the case of corporeal things it is consistent with it.

Incorporeal possession is commonly called the possession of a right, and corporeal possession is distinguished from it as the possession of a thing. The distinction between corporeal and incorporeal possession is clearly analogous to that between corporeal and incorporeal ownership.

Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right. In essence, therefore, the two forms of possession are identical, just as the two forms of ownership are.

Hence, Possession in its full compass and generic application means the continuing exercise of any claim or right.

Paton on Possession

Paton said that even though Possession is a concept of law still it lacks a uniform approach by the jurists. Some jurists make a distinction between legal and lawful possession. Possession of a thief is legal, but not lawful. In some cases, where possession in the popular sense is meant, it is easy to use some such term as physical control. Possession is also regarded as *prima facie* evidence of Ownership.

According to Paton, for English law there is no need to talk of mediate and immediate possession. The Bailee and the tenant clearly have full possession: Salmond's analysis may be necessary for some other systems of law, but it is not needed in English law.

Oliver Wendell Holmes and Von Savigny on Possession

Savigny with other German thinkers (including Kant and Hegel) argued that **possession, in the eyes of the law, requires that the person claiming possession intend to hold the property in question as an owner rather than recognize the superior title of another person, so that in providing possessory remedies to lessees, Bailees, and others who lack such intentions, *modern law sacrifices principle to convenience.***

To this Holmes responded that he “*cannot see what is left of a principle which avows itself inconsistent with convenience and the actual course of legislation. The first call of a theory of law is that it should fit the facts. It must explain the observed course of legislation. And as it is pretty certain that men will make laws which seem to them convenient without troubling themselves very much what principles are encountered by their legislation, a principle which defies convenience is likely to wait some time before it finds itself permanently realized.*”

Holmes also criticised Savigny and other German theorists by saying that “they have known no other system than the Roman”. In his works, Holmes proved that the Anglo-American Law of Possession derived not from Roman law, but rather from pre-Roman German law.

One of Holmes's criticisms of the German theorists, signally including Savigny, is that they "have known no other system than the Roman, ' .6 and he sets out to prove that the Anglo-American law of possession derives not from Roman law, but rather from pre- Roman German law.

