Intermediate Year

Sri Lanka Law College

Law of Property - II

Empowers Independent Learning

Independent Law Student Movement

Reviews, responses and criticism
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1. CLASSIFICATION OF PROPERTY

Under the Roman Dutch Law property could be mainly classified as,

- Res Intra Commercium
- Res Extra Commercium

Res Intra Commercium
This includes things which are capable of being owned or possessed by private persons. It includes all things in respect of which private commercial transactions are legally possible.

Res Extra Commercium
This are not capable of being owned or possessed Res Extra Commercium is divisible into several more specific categories:-

1) Res Sacrae

This includes things consecrated to god that are governed by Divine law.
Eg. offerings, sacred buildings

2) Res Religiosae

This subject possess both a sacred wand a hallowed quality.
Eg. burial grounds.

3) Res. Sanctae

These are inviolable things which have been defended and fortified against the wrongs of mankind.
Eg. City walls and gates.

4) Res Publicae

These are public things that belong by right of ownership to the whole people. The use of these things are common and they are occupied by the state.
Eg. Public roads shores, river banks.

5) Res Communes

These are things common by the law of nations, which are is use by all but owned by nobody.
Eg:- air, running water, sea.

Categories 1, 2, 3 are peculiar to Roman Law and Roman Dutch Law and are not useful for the modern Law. 4 & 5 find a place in the Sri Lankan Law.

Other classifications under Roman Dutch Law include Res Divini Iuris and Res Humani Iuris. Res Sacrae, Res Sanctae and Res Religiosae were treated as things res divini iuris while all other things could be classified as things humani iuris. This classification is altogether obsolete for purposes of modern law.

Owned and Unowned Things
The distinction lies between things which are 'actually' subject to ownership and those which are not.
The latter class of things were referred to as res nullius.
Eg. wild animals, abandoned property.

Res Corporales & Res Incorporales
The former are those which by nature can be touched, The latter are those which cannot be touched; & consists of rights such as servitudes, inheritances.

Res Fungibilies & Res Non Fungibiles
The former are things described in terms of weight number or measure. (quantities are looked at) The latter deals with bodies and masses rather than quantities.

Res Mobiles & Res Immobiles
These are movables and immovable things.

The Roman Dutch Law applies the distinction between movables and immovable not only within the area of corporeal property but also within incorporeal property. Therefore a fourfold classification is warranted under this head,
i) Corporeal Movables
ii) Corporeal Immovable
iii) Incorporeal movables
iv) Incorporeal Immovable

i) Movable Property (Corporeal Movables)
It means property of every description not permanently attached to the earth.
Eg. clothes, furniture, vehicles, currency, severed fruit, animals.

ii) Immovable Property (Corporeal Immovable)
Immovable property denotes land and whatever is adherent there to. It includes lands, incorporeal tenements & things attached to the earth or permanently fastened to anything, which is attached to the earth.

Growing trees, standing crops, hanging fruits, Minerals still forming a part of the earth are also immovable property. But as soon as they are detached from the ground, or cut down, they become movable properties.

Fructus Naturales and Fructus Industriales

The gist of the distinction between these two classifications is that, Fructus naturales are products of nature, while fructus industriales are brought into being by human endeavour and industry. The former is generally classified as immovables, while the latter is classified as movables.
In **Lee Hedges & co. v. James Seville**
Burnside CJ. observed that Fructus naturals are the natural growth of the soil such as grass timber or fruit tree which at common law are part of the soil while fruits produced by manual labour in sowing planting, reaping and gathering are fructus Industriales.

Examples of Fructus naturales are Timber, apples, coffee, standing crops of cinchona.

With regard to standing crops of cinchona it was observed by Dias J that,
"When the cinchona tree is planted out, it draws its nourishment entirely from the soil, & though care & cultivation may help its growth the artificial and bestowed on it by the hand of man can hardly be distinguished from the natural growth of the tree; the extra aid which it receives from the industry of man is very slight when compared with the nourishment which it receives from the soil".

Examples of Fructus Industrials are corn, paddy, chilies chena crops and standing crops of tobacco.

The court in **Perera V Ponnatchi** treated a standing crop of tobacco as fructus industrials.
In **Thambipillai v Kandiah** Jayathilleke J stated annually. It is produced essentially by the labour of man and must be considered as fructus industrials" .

The distinction is of practical importance in two respects,
a). The benefit of crops treated as movables may go to the possessor while crops which are held to be immovable are the property of the owner of the soil.
b). Growing crops if Fructus naturals are part of the soil before severance and an agreement in respect of them is governed in Sri Lanka by section 2 of the prevention of Fructus ordinance. Growing crops if fructus Industrials are chattels and an agreement in respect of them is foverned by the Sale of Goods Ordinance.

Fixtures

Movables, affixed to land or building acquire the quality of immovables, by reason, not alone of their being affixed but of their being affixed with the intention of permanently remaining.

Voet sets out the principle that immovables may become immovables by virtue of some special provision of the legislator or an account of design or act of the owner Voet observes,

> *"As for the act of the owner, when things which before were movable, whether beams or columns or movable, have been attached to a house with the object not of temporary but of permanent use they forthwith belong to the house and are thus immovable"*

The same theory must apply if they have been removed with the intention of putting them back again.

According to Voet everything which is inserted and included in the building and intended for the purpose of the use of the house, as if it were a part of it are regarded as a fixture. For example painting on the plasters, marble facings, hooks and keys although not attached to the soil are permanent fixtures.

The decision in,
Abeysundara V Hinnihamy
declared that the term "*Fixture*" has no precise legal meaning and that a great deal depends on the circumstances of each case. Thus, it is difficult to determine whether an article originally movable has become immovable through annexation by human agency. The Supreme Court of Transvaal in,

In **Olivier V Haarhof,**
The court laid down the elements that should be considered in this regard:-
a). the nature of the particular article
b). the degree and manner of its annexation
c). the intention of the person annexing it

a). ***the nature of the particular article-***
The essence of the first requirement is that the thing must be in its nature capable of according to realty.

In the case of **Abeysundara V Hinnihamy** the question arose was whether a certain wooden screen found in a house sold by the defendant's husband to the plaintiff was to be regarded as a movable chattel or a fixture. It was a large carved Jak wood screen intended to permanently partition the centre hall of the house into two rooms. It rested on its own bare

feet, and apparently to wedged in between the walls so far as to be held firm thereby by means of lateral pressure.

The Supreme Court held that the District Judge's finding was correct in holding that it was a fixture in the sense of being fixed in to the ground or attached to the walls. Since the owner of the building intended that to be a permanent partition of the main hall of the building, the fixture is passed to the purchaser of the building. Thus, it was held to be an accession to realty.

b) The degree and manner of its annexation-
The gist of the second element as was laid down in **Gault V Behrman,** is that there must be some effective attachment, whether by mere weight or by physical connection.

Broadie V AG
In this case it was held that fixtures are articles which by being affixed or let into the ground or annexed or attached to buildings, acquire the character of immovables and pass in to the building. when a "land and building" were put up for sale and purchased by the crown through its agent, who some days after the sale was alleged by the owner of the land and building to have agreed with him to take certain fixtures therein at a valuation, it was held that, even if such an agreement was entered into, the crown could not be made liable to pay for what was already its own.

It was further observed that counters, cooking range, water tanks, electric bells, batteries and indicators, baths and lavatory etc, fixed by bolts, screws and other ways, were fixtures which in the absence of a special agreement, passed with the building.

c) the intention of the person annexing it-
The third element is the crucial and determining factor in most situations. The intention as to permanency is clear in cases where the article is actually incorporated in the realty, or the attachment is so secure that separation would involve substantial injury either to the immovable or to its accessory.

In the south African case of, **New Castle Collieries Co. Ltd v. Borough of Newcastle**
a private railway line was built on a land which had been leased for a period of 21 years, with a right of renewal for further periods. The lessor had a right to terminate the lease upon certain eventualities as stipulated in the agreement.

The lessee too could do so by giving six months prior notice. The lessee had a right to remove all railways erected on the premises upon the expiry of the lease or surrender before the expiry. The railway line so built was ballasted together. The rails were fixed to sleepers and by fish plates bolts and nuts, and the sleepers were embedded in stone ballast. The culverts and bridges were built in stone and cement. The line two had been worked for 25 years and was likely to continue to be so worked.It was held that the annexation afforded strong evidence of an intention that the railway should remain permanently "in situ."

In the case of **Thissera V Thissera,**
action was filed for the declaration of title to the three fourths (3/4) of a mill. It was created from funds contributed by the 1st and 2nd plaintiffs, the father of 3rd, 4th and 5th plaintiff and 1st defendant who were all brothers and was situated on land belonging to the 1st defendant.
He sold, transferred, conveyed, granted, assigned set-over to the 2nd defendant the mill and leased the land on which the mill stood to the 2nd defendant.

It was held that the various structures which constituted the mill, became part of the land on which they stood and that they passed to the second defendant by virtue of the bill of sale. Howard CJ observed,

"The manner in which the venture started and the made in which the mill was operated over a number of years indicated only two clearly that the brother intended that the mill should remain permanently affixed to the building in which it was installed. There is no evidence to indicate that its removal was ever contemplated by the partners.

In these circumstances I am of the opinion that it became permanently fixed to the soil in 1925. The result in the case hinged on the intention of the parties."

Other relevant cases in this respect are,

- **Victoria Falls Power Co. Ltd V Colonial Treasurer**
- **Mc Donald Ltd. V Rodin, N.O. and the Potchetstroom Dairies and industries Co. Ltd.**

iii). Incorporeal Movables

By a fiction of law several categories of incorporeal are treated as movables.

Eg. 1). Servitudes over movables
2). actions in personam
3). shares in companies
4). patents, trademarks and copyrights
5). The goodwill of a business

iv) Incorporeal Immovables

The Prescription Ordinance defines "immovable property" as including

"all shares and interests in such property, and all rights, easements and servitudes there unto belonging or appertaining".

An incorporeal right is movable or immovable according to the nature of the corporeal thing to which it pertains.

Eg:- * praedial or personal servitudes over immovable property.

- a grant of rights in respect of minerals
- leases of immovable property.
- charges on land.

Legal principles governing:-

The sea

The right of every member of the public to fish in the sea has long been recognized by the courts of Sri Lanka. Under the common law every member of the public has an equal right to fish in any part of the open sea.

It has been accepted that such rights may be curtailed, regulated or even abrogated by statute. The Whaling Ordinance No.2 of 1936 provides protection for certain species of whales. Provision is also made by this Ordinance for the grant of whaling licenses.

The Pearl Fisheries Ordinance No. 2 of 1925 declares that the *"exclusive right of fishing for and taking pearl oysters off the coasts of Ceylon and in all bays and inland waters of Ceylon is vested in the Crown"*

A prohibition is imposed on fishing for pearls without a license, while the right of fishing on pearl banks and anchoring on pearl bank is restricted.

Sea shore

The sea shore is not "*land at the disposal of the crown*" but is 'res communes': the use of which is open to the whole community though the crown has right to control on behalf of the public. Further in, **Attorney General V Pitche,**

It was observed that the use of the sea shore is common to all. The right to use the sea shore between high and law water marks belongs to the public, and the Government has no right to its exclusive use. The right of the government in respect of the sea shore is to secure the public its privileges on the spot between high and low water mark. The government is required to protect such rights to the utmost verge of the law without interrupting such privileges.

Rowel Mudaliyar V Pieris
This case dealt with the need and importance of appointing agents to grant licenses to fishermen to spread their nets on the sea-shore or on land belonging to the crown adjacent to the shore.

With regard to a definite interpretation to the word *'sea-shore'* it was held in the South African case of, **Pharo V Stephan** that under Roman Dutch law the boundary of the sea-shore is the furthest line reached by the sea during the ordinary winter storms" with ordinary south-west monsoon storms, excluding exceptional or abnormal floods. In applying this decision it was observed in **Fernando V. Kalutara Police**, that in Sri Lanka although there is no winter season, there is another particular season, namely the southwest monsoon and therefore the furthered line reached by the sea during the ordinary southwest monsoon storms, excluding exceptional or abnormal floods, would be the limit of the seashore.

The *'fore-shore'* as defined in the Crown Lands Ordinance means the shore of the island of Ceylon between the high and law water mark.
Part VIII of the Crown Lands Ordinance No.13 of 1949 and chapter II of the Tourist Development Act No.14 of 1968 deals with the administration custody and management of the fore-shore. The Tourist Development Act provides that,
"For so long, and so long only as any order (under the previous provision) is for the time being in force in respect of any part of the fore-shore, the administration, control custody and management of that part of the fore-shore shall vest in the Board instead of in the crown"…..

Lakes

The Crown Lands Ordinance defines a "lake" as including,

> *"a lagoon swamp or other collection of still water, whether permanent or temporary not being water contained in an artificial lake"*

The right to the use and flow and to the management and control of the water in any public lake or public stream shall subject to restrictions shall, rest in the crown. It provides the need for the beneficial use of water and its protection from pollution.

Public Rivers

The Crown Lands Ordinance specifically provides that the bed of a public stream is the property of the crown.
Fernando Vs Fernando (22 N.L.R.260)was a case filed by residents of Aluthwatta in Chilaw town asking for a declaration against the defendants that they are entitled equally with the

defendants to a right of fishing for prawns with "*Kattu del*" (*issan del)* at two modaras of Chilaw and Deduru Oya where the mouth of those rivers empty themselves into the sea.

The defendants, who were also residents of Pitipana Street, Chilaw resisted the claim on the ground that they have acquired along with the Sea Street people by prescription or by custom, the exclusive right of fishing at the spot. Bertram C.J. held that the defendants' claim was not one which was capable of being acquired by prescription, nor was it one which could be supported on the ground of custom.

It was held, that all King's subjects have rights to fish in the waters of the sea and in all tidal estuaries connected therewith. A fluctuating and uncertain body of people such as the inhabitants of a district or a section of the District cannot by prescription acquire a right of fishing against any individual member of the community and still less against the public itself. The right of a section of the public to fish in the sea or tidal waters are not governed by prescription, but may be regulated by custom. A custom to be recognized by the Court must be a reasonable custom; a custom which deprived of a section of the community of its common law right in the very matter which the custom was supposed to regulate is not a reasonable custom.

2. OCCUPATIO

Occupatio or lawful seizure is defined by Voet as,

"Taking hold of corporeal things……..
with the intention of becoming the owner and whereby that which belongs to no one is vouchsafed by natural reasons to the first taker"

The essential elements of occupatio:-

1). Taking or the seizure of the property should be lawful.
2). The seizure should take place in respect of a corporeal thing
3). The thing seized be capable of ownership
4). At the moment of the seizure the thing should be res nullius or belong to no one.
5). The person taking the property should intend to become the owner.

(The acquisition of ownership by occupatio is confined to movable property in the modern law, since the ownership of lands has devolved today on private individuals or corporations or on the state).

The following categories of things are capable of being acquired in modern law by occupatio.
i). Wild Animals
ii). Lost Property
iii). Abandoned Property Or Wreckage
iv). Treasure Trove
v). Mines and Precious Stones.

Wild Animals

Grotius defines wild animals as,
"Such as never yet been captured or having once been captured, have recovered their former liberty".

In **Appuhamy V Babun** the plaintiff alleged that he had chased and shot a wild boar which fell down in the defendant's premises, but did not allege that the boar was his property or died there. The defendant objected to the plaint. Berwick J held that the commissioner was wrong to non suit the plaintiff on the ground that the plaint disclosed no cause of action without hearing any evidence or examining the parties to ascertain the material facts on which the application of the law of ownership depended.

Brewick J further held; that

"The ownership of a wild animal belongs to the first captor as long as it remains in his custody; for if it regains its natural liberty by either escaping out of the captor's sight or, while remaining in his sight, by becoming difficult of re-capture, it ceases to be his. It makes no difference in whose land it was captured or killed. And if it has been so captured by one in a trap, net noose or other instrument under his control, that it cannot escape therefore, it matters not whether he has corporeally apprehended it or not for such capture is deemed equivalent to a corporeal seizure, because the animal itself has thus been reduced to his control and power, and therefore becomes his property as the first occupant On the same principle it would appear to follow that if it has been killed by the captor, the carcass becomes his property."

Grotius observes that animals are understood as having recovered their liberty when their owner has lost sight of them. Such animals then become the property of any person by possession (i.e. capture) unless such capture is prohibited by law.

R.V. Mafhola
It was held in this South African case that as the wounding of the Koodos had not had the effect of reducing the animal into the possession of the complainant the ownership of the animal belongs & to the captor, and not the complainant who wounded it.
Occupatio as a mode of acquiring ownership of animals has significant limitations. A threefold classification of animals is made in this respect,

1). Animalia mansueta - animals naturally tame. E.g.:- cows and sheep
2). Animalia mansuefacta -animals naturally wild, but make tame by custom such as deer.
3). Animalia Fera - animals entirely wild by nature .E.g.:- wild boar
The practical importance of the threefold classification set out above is illustrated by the case of,
Miguel V Arumokottar.
In this case the plaintiff owned two domestic cows, which five or six years before action, had strayed from his premises and roamed ever since uncontrolled in some plains several miles from the plaintiff's premises. The cows produced two heifers which, with their calve, herded and roamed at large with the uncontrolled cattle, until such heifers and calves were caught by the defendant and claimed by him by right of occupancy. It was held that the plaintiff, having done no act to disclaim his ownership of the animals, remained the owner of two cows, all their offspring and that title by occupancy could only be acquired in animals *ferae naturae and mansuefacta*, but not in those that are *mansuaeta,* such as domestic animals.

Creasy C.J. in the course of his judgment observed as follows:-
"It is unquestionable that before the cows strayed away they were the plaintiff's" property, and they were naturally and in fact tame and domestic animals mansueta to all intents and purposes. This being the case, the plaintiff did not lose his property in them, however far they strayed, and however thoroughly they may have lost animus revertendi to his fold. The doctrine of animus revertendi applies exclusively to animals that are mansuefacta, that is, animals which are naturally and originally wild, but which have been practically reclaimed and made tame by custom. When such creatures as they stray away, and lose all habit of returning (whence it is inferred that they have lost all intention of returning) their temporary owner's property in them ceases, and they become the property of the first person who takes them. But with regards to creatures naturally tame (mansueta) the case is different, and their owner's property in them continues, however far they may stray".

The Common Law in regard to the acquisition of property in wild animals by occupatio has been significantly modified in Sri Lanka by statutory provisions, such as

- The Fauna and Flora Protection ordinance
- The Elephant Kralls Ordinance
- The Felling of Trees (Control) Act
- The Fisheries Ordinance

The Right of Fishing in the Sea

The right to fish on the coasts of Sri Lanka is available to all members of the public.
Don Louis V Veyado
It was held in this case that, the fact that one particular kind of net has been used in a particular place for a long period of time, does not prevent the use of any other kind of net in that same place.

Denishamy V Davith Appuhamy
Endorsed the principle that a person who is in possession of property though he may not have come by it legally, can maintain trespass against all persons except the true owner.

Arunkam V Tampaiya
Lawrie A.C.J. acted on the principle that a party enclosing a shoal of fish within a net in the high seas, although he has not actually captured them, has adequate possession of them to entitle him to maintain trespass against one who had behaved as the defendant had done.

Packier Tamby V Siman
Facts in this case was identical to that in **Arunakam** V **Tampaiya** Based on the facts the courts was of the opinion that the plaintiff had the fish under his coercion and, but for the acts of the defendants, he would have reduced them under his actual possession.

Lost Property

The common Law rule was that lost property continued to belong to its owner or his representatives and that a finder did not become owner until prescription had run in his favour.

Section 2 of the Lost Property ordinance provides that,
1). Any person throughout Ceylon who may find any money or goods of whatsoever description the same may be do and shall bring the same forthwith to the constable or police headman of the division or village in which the same maybe found.

2). The said constable or police headman shall forthwith report the circumstance to the nearest magistrate.

3). The Magistrate shall cause public notice to be given of the same.

4). and the finder shall if no fraud appear to have been by him committed in the matter, receive from the person who may substantiate, within Six months a right to the property so found, one tenth ($1/10^{th}$) of the value there of,

5). and if no claimant shall appear or prove his right to the property within the period of Six month, then the Magistrate shall cause the same to be sold, if the same be not money and shall pay one half (1/2) of the proceeds, or of the money to the finder and the remainder into the treasury to the credit of the consolidated fund.

6). Section & prescribes punishment for breach of this provision.

Abandoned Property

The essential difference between lost property and abandoned property is that in regard to the former the owner entertains the required animus or the intention of continuing as owner, *"While the latter category of things are those which "the owner has thrown away or discarded with the intention of relinquishing his ownership"*

The Merchant Shipping Act makes detailed provisions in regard to wreck & salvage.

Treasure Trove

For the purpose of our law "treasure trove" is declared to mean,
"money coin, gold, silver, plate, bullion, precious stones or anything of any valve founded hidden in or in anything affixed to the earth and the owner of which is unknown or cannot be found but shall not include any "antiquity" as defined in the antiquities ordinance.

The Antiquities Ordinance declares in,
Section 2
All treasure trove is the absolute property of the state

Section 3(1)
A duty is imposed on the finder and on any person who acquires possession of treasure trove to report the fact to a Magistrate or a police officer.

Section 70
Provision is made for a reward to the finder or possessor.

Section 2(1)
"No antiquity shall, by reason only of its being discovered in or upon any land in the ownership of any person, be or deemed to be the property of such person"

Thus the relevant provisions under this topic are contained in the Antiquate Ordinance and the Treasure Trove ordinance.

Mines and Precious Stones

As Voet Says
"As regards newly discovered mines or metals, jewels which have been dug up, quarries and other things like gem, there used to belong indeed by the Roman Law to those on whose farms they were. Thus, when a farm has been sold, such mines for metals, whether opened up or still closed, and quarries would pass also to the purchaser, and usufructuary was able to work them by right of his usufruct."

In **Silva V Fernando** the Crown conveyed land to the plaintiff reserving to itself the right and title to the mines and minerals in or upon the land, together with full power of entry for the same. After the institution of an action by the plaintiff against the defendant for the value of the plumbago wrongfully removed from the land the Crown by letter waved its right to such plumbago Lord Merscy delivering the opinion of the Judicial Committee of the privy Council asserted the principle that no retrospective effect can be given to the letter so as to vest in the plaintiff a title at the commencement of the action.

In the case of ***Silindahamy V. Pieris*** the Crown sold in 1892 a piece of land reserving mining rights. Out of several shares the plaintiff became entitled to a share, and the fifth defendant to another. On an mining lease from several co-owners, the plaintiff opened a pit for plumbago, and after the expiration of the lease continued to work it with the tacit consent of all the co-owners.

The sixth defendant, who took a lease from the fifth defendant, dispossessed the plaintiffs and worked the pit. The Plaintiffs sued for recovery of possession and damages.

De Sampayo J. held as follows:

"Though the Crown had reserved mining rights, the plaintiffs were entitled to maintain the action. The possessor of a thing may maintain an action against the wrong doer, though not against the true owner. The plaintiffs were entitled to the plumbago though they have to account for it to the Crown. Where co-owner carries on mining operation on the common land, he is entitled to appropriate to himself the whole out put, less the ground share of the other co-owners".

3. ACCESSION

This is the process by which one thing accedes or becomes added to or incorporated with another in such a way that it is regarded as forming part and parcel of the latter, and becomes by such process the property of the owner of the same.

– Walter Pereira

Balasingham states that accession comprises the following modes of acquisition:-
1). increment by birth of young animals
2). alluvion
3). accession of part of neighbor's land when detached from by the force of a river,
4). island rising in a river
5). change of river bed.
6). specification (specificatio)
7). industrial attachments. (Adjunction)
8). confusion of liquids (commixitio or confusio)
9). planting
10).sowing
11). perception and separation of fruits

The mode of acquisition of property may be treated under two heads:-
1). Natural Accession, which is due to the action of natural causes.
2). Artificial or Industrial Accession which is due to the labour of man.

Increment by birth of young animals, alluvion, accession of a part of neighbor's land when detached by the force of river, island rising in a river, change of river bed fall within the category of natural accession while the rest of the categories fall within artificial industrial accession.

Under the Roman-Dutch law a rule prevailed that whatever is built or cultivated on land becomes part of the land. This rule applied equally to a situation where a person building on his land with the materials of another and to that of a person building on another's land with his own materials. The effect of this rule was however, tempered by the equitable principle that no one should be enriched unjustly to the detriment of another.

In the Dutch law the owner of property was entitled to claim the improvement only subject to the obligation to compensate a person who had improved the property in the belief that it was his own, and in this manner the rights of the parties were equitably adjusted.

Improvements made to immovable properties are divisible into three classes:-
1). Necessary Improvements
2). Useful Improvements
3). ornamental Improvements.

Necessary Improvements
means expenses that is necessary to be incurred so as to preserve the property, or to save it from being lost to the owner, or wrecked or ruined.

Useful Improvements

means that as result of useful expenses incurred to the property the value of such property is increased.

Ornamental Improvements
These are improvements which merely contribute to the adornment of property but do not increase profits or permanently enhance its value.

Substantive requirements of the action for compensation
a). The factum of possession
b). The required animus.

a). The Factum
It is necessary that there should have been either direct or derivative possession by the improver.

Appuhamy V Doloswela Tea & Rubber Co.
The essence of the requirement in regard to the factum of possession is that the necessary elements in respect of the improvers intention should be accompanied by an immediate physical connection with the property improved, in the form of occupation on the basis of the purported rights.

b). The Required Animus
This contains two important elements that forms the animus in the improver:-
1). civilis possession
2). Bona Fide
"Our law compels the owner of land to compensate a bona fide possessor who has improved it under the belief that the land was his own"

Thus, as was observed in **Wijeysekera V Meegama,** first it must be considered whether the improver had civilis possession and next whether such possession was bona fide or mala fide.

i). Applicability of the Concept of Civilis Possessio

Civilis possessio denotes the belief that the property is one's own. According to the traditional view the requirement of civilis possessio is fundamental and provides the foundation of the equitable claim.

Mudiyanse V Sellandyar
It was held in this case that Civilis possessio is an essential ingredient in all claims which the Roman Dutch law recognizes when awarding compensation for useful improvements.

Oosthuizen V Oosthuizen
In this case the improver had paid regularly a proportion of the crops to his father. The court defined *"a possessor"* for the purpose of the law of compensation as "one who occupies as an owner and exercises on his own behalf rights of ownership."
Therefore, it was held that the son was not entitled to compensation since he did not claim to be owner himself. This can be regarded as an instance where compensation has been disallowed for lack of civilis possession.

Meyer's Trustee V Malan
It was said in this case that a bona fide possessor must have the intention of holding as owner.

The case, **Whipplinger V. Wax** defined a 'bona fide possessor' as one who holds under the belief that the seller was and that now he is the true owner.

In **Mohideen V Soysa** and
Brundsons Estate V Brundsons Estate
A lessee's claim for compensation has been rejected for he is not a bona fide possessor and lacks civilis possessio as he knows that the property is in his lessor.
It was held in the latter case that an usufructuary locks civilis possessio "as he knows that he is dealing with the property of another".

Exceptions to the Application of Civils Possessio

Compensation may be allowed for useful improvements to categories of improvers to whom civilis possessio is not attributable. Such instances are as follows:-

(1). Where the improver with the knowledge that the property is yet in another acts in expectation of formal title which be believes is certain to be conferred on him subsequently has been allowed compensation.

In **Gevernment Agent Central Province V Letchiman Chetty** a government agent who caused structures to be erected on land which he intended to acquire shortly according to prescribed statutory procedure was allowed compensation.

Marthelis Appu V Jayawardene
In this case improvements were effected on the faith of a verbal unenforceable promise by the owner to execute a conveyance of the land in favour of the improver. Compensation was allowed.

Muttiah V **Clements**
Compensation was allowed in this case for the plaintiff, who was induced to improve the land by the owner's informal undertaking to grant a lease.

2). Compensation is also allowed where the improver occupies the land with the leave and license of the owner.

Nugapitiya V **Joseph**
In this case the improver was awarded compensation on his ejectment although the acknowledged the title of another. The improver was held not to be a bona fide possessor, for his possession, cannot possibly be said to be 'detention animo domini'.

Mohamadu V Babun
The equitable claim was successful in this case where the defendant in an action for declaration of title and ejectment, pleaded that he had built a house and cultivated crops with the express permission of the court.

Fernando V. **Cooray**
Compensation was allowed in this decision where the plaintiff's father had allowed the managers of a school to build a structure of his land.

(3). Compensation has allowed in cases where a person, who improves land under an inoperative planting agreement with the owner, is sought to be evicted later by the owner or by a subsequent transferee.

Saibo V Baba
i). De Sampayo J held that a person who purports to occupy land on the footing of a 'planter's share' "has a sufficient interest in the land to constitute him a bona fide possessor in respect of improvements outside the actual planting'.

ii). This interest cannot derive from imputability of animus domini to the planter whose recognition of the owner's proprietary is the basis of his agreement.

*(4). Where **"A"** mistakenly believing that he is erecting a building on a land which he had leased from **"B"** in fact improves the property of **"C", "A"** is entitled to recover compensation from **"C".***

Fletcher & Fletcher V Bulawayo water works Co.
The plaintiff in this case, having secured a lease of land, sank wells and constructed a plant by which water was to be pumped beyond the boundaries of the leased land. The court up held the right to compensation although the improver did not purport to possess the land pro domino.

Bellingham V Blommetje
Similarly, in this case the court upheld the right to compensation even though the improver did not purport to possess the land pro domino, where a dam and buildings had been erected by the plaintiff outside the limits of the land in respect of which he had obtained a lease.

(5). In circumstances where the plaintiff having effected improvements of the land which he believed he had leased from the owner is evicted before the expiry of the contemplated period has been allowed to recover compensation.

Rubin V Botha
The owner exploited the informal character of the lease to evict after a period of three years an improver who had put up a building which he was declared entitled by the invalid agreement to occupy free of rent for 10 years. Compensation was allowed to the improver.

Parking V Lippert
The lease was terminated by operation of law on the insolvency of the lessee who was thus deprived of the right of possession of structures which he had expected to enjoy for the duration of the lease. Compensation was allowed to the lessee.

In both the above two cases no more than a temporary interest in the land was claimed by the improvers who anticipated that the building they had erected would ultimately become the property of the owner of the land; and therefore compensation was allowed.

(6). It has been held recently in Sri Lankan cases that a person who had paid a sum of money to have land released from seizure for non- payment of estate duty by an executor, is entitled to recover the money from compensation payable in respect of the land under statutes governing acquisition of land.

Daluwatte V **Senanayake**

In such instances the fact that the plaintiff was not strictly a bona fide possessor is immaterial.

The rationale or the general basis of awarding compensation for useful improvements to persons who could not have claimed civilis possessio in exceptional situations:-

(1). **Government Agent V Letchiman Chetty**

Betram CJ emphasized that the determining tests under the Roman Law cannot be justly applicable as determining tests in the various combinations of fact which present themselves in modern life.

> *"We are I think, entitled to develop the legal principles handed down to us in connection with new situations which arise in our own civilizations".*

According to his Lordship since the principle involved was originally on equitable principle it is more in accordance with the spirit of that principle that we should administer it equitably rather than upon strictly rigorous lines.

Thus, a liberal judicial attitude was recommended in determining the limits within which improvers lacking civilis possessio maybe allowed compensation. But this should be done within an adequate theoretical frame work.

(2) **Nugapitiya V Joseph**

The Court attributed the development of the law to the extension and application of another rule, where an owner who agrees in making of improvements is estopped from disputing the right of the improver to be compensated on the same footing as a bona fide possessor.

It is also an established principle in modern law that a mala fide possessor who effects improvement while the owner, with knowledge that the improvement is being made, stands by is entitled to all the privileges accorded to a bona fide possessor.

(3) **Rubin V Botha**

In this case the absence of animus domini was obvious. The judgment in this case accepted the concept of "occupation" as a means of providing equitable relief to an improver who, although lacking civilis possession , had effected the improvements in expectation of a temporary or limited interest in the land which on account of unforeseen circumstances, fails to devolve on him.

(4) **Hassanally V Cassim**

- The Privy Council dealt with the right of a putative lessee to compensation in this case.
- Its importance for the development of the law lies in the acceptance of the bona fides of the improver as an adequate foundation for his claim.
- A general test of the improver's good faith was adopted in the area of compensation for improvement.

Facts:-

In **Hassanally Vs Cassim** the right of an improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity. Accordingly, a person who occupies land Bona Fide and improves it in the mistaken belief that he has a lease of the property has the same right to compensation as a bond fide possessor. An improver who lawfully occupies under lease and in that capacity makes improvements is entitled to compensation if his term of lease is prematurely terminated by operation of law.

R.U. held certain land subject to a fidei commissum created in 1871 in favour of her descendants. She died in 1921 leaving as he heirs two daughters U.S. and Z.U., each of whom became entitled to a half share of the property subject to the fidei commissum. U.S. died in March, 1938 leaving as heirs her four children, one of whom was the plaintiff in the present action.

On the 11th December 1945, Z.U. who was entitled to 4/8th shares of the property, granted to the fifth defendant a lease of the property for thirty years. One of the conditions of the lease was that, apart from paying the yearly rent, the 5th defendant should erect on the land at his own expense, within a reasonable time certain buildings which at the expiration of the lease were to become the property of the lessor without payment of any king whatever. Z.U., held herself out as the sole owner of the land and the 5th defendant constructed the buildings in the Bona fide belief that Z.U. was in fact the sole owner.

The plaintiff brought the present action under the provisions of the Partition Act No.16 of 1951 claiming a declaration of title to the property and a sale under the Act . He made defendants not only the persons (including Z.U.) who were interest with him under the fidei commissum but also the fifth defendant. It was not disputed that the fifth defendant's interest was such that he was a proper and necessary party to the suit. The privy Council held that upon the sale of the property in terms of the partition Act the fifth defendant was entitled to be paid out of the proceeds of sale and in priority to the beneficial interests of other parties, compensation for the buildings erected and other improvements effected by him. **Soysa** Vs **Mohideen** (17N.L.R. 279) partly overruled,

Necessary Qualifications to the right to recover compensation

(1) **Lydenburg Properties Ltd. V Minister of Community Development**
In this case the applicant company which had been formed with the intention of constituting an European Company, had subsequently accepted that in law it was always an Asiatic Company. It sought compensation for improvements which it had made on property belonging to the state.
The Court held that, *"even if this mistake is genuine it is nevertheless based on a mistake of law"* and disallowed compensation.
It is an established limitation on the remedy that a mistake of law operated to prevent recovery of compensation.
Thus, where the improver believed that writing and notarial execution are not required for transfer of ownership in land, no compensation is available.
On the other hand if the improver was aware that these requirements were imposed by law but believed that the owner would accept a moral obligation to execute a valid transfer, the mistake is one of fact, and compensation may be claimed.

Levy V Maresky
The purchaser of a house believed that he had also bought a shed on an adjoining site. He believed he was the owner of the shed, and this is a case of ignorance rather than a mistake of law.

Erasmus V Mittel and Reichman
While holding that the mistake involved was one of fact the court further observed that if the mistake under which the plaintiffs laboured had been one of law the case might have been different, for knowledge of law must be presumed.

(2). It is not sufficient that the improver believed in good faith that he was or would be, entitled to enjoyment of the property since it is a requirement that the improver's belief should be based on reasonable grounds.

Levy V Maresky
Lydenburg Properties Ltd. V Minister of Community Development

(3). The minimum requirement in regard to the animus of the improver in the modern law is genuine belief that his occupation of the land, although not supported by any legal right, would not in fact be disturbed by the owner.

Nugapitya V Joseph
Mohamadu V Babun

ii) The Requirement of Bona Fides

The emphasis on good faith is the most significant feature of the development of the equitable remedy of compensation in modern law.
The traditional view that,

"The natural test of conscientiousness was belief by the possessor in the validity of his title. . . If the possessor had conscientia rei alienae he was a mala fide possessor; if he had no such conscientia he was a bond fide possessor".

However, differing from the above approach the modern law view in this regard rests on the basis that,
"Bona fides refer to every possible ground of detention; whosoever conceives himself to have a lawful ground for detention which he is exercising is called a bona fide possessor".

Government Agent V Letchiman Chetty

The cases which have construed the requirement of bona fides are divisible into three categories:-
a). those where the claimant considers that he has a legal right to possess the property. **Rubin V Botha**
Hassanally V Cassim

b). cases where the claimant has a mere well-founded expectation of possessing it.

Government Agent V Letchiman Chetty
Marthelis Appu V Jayawardena

c). cases which do not seem to be connected with the possession or occupation of land at all.

Daluwatte V Senanayake

The element of bona fide is satisfied in modern law in several distinct situations involving genuine belief by the claimant, that
i). he is owner
ii). he has some right which entitles him to possess the property

iii). he will be able to remain in possession of the property.

- The minimum requirement is belief in good faith by the improver that he is legally entitled to or will in fact be permitted the enjoyment of the property improved. Intention to possess the land as owner is not necessary.

- The mistake of the improver, whether pertaining to a legal right or to an assumption of fact, must be reasonable.

- The hazardous character of occupation by the improver may negative good faith on his part.

- An erroneous impression of the improver's rights arising from a mistake of law precludes relief.

  In **De Beer's Consolidated Mines Vs London and South African Exploration Co.** it was held that a bona fide possessor of land retains his ownership in materials affixed by him to the land of another until he has given up possession of the land and may resume the materials again if he can do so without any serious damage to the land, unless indeed the structure is erected for the necessary protection or preservation of the soil or the buildings thereon, in which case its removal would necessarily imply damage.
  Male fide possessor who has incurred useful expenditure has a right to recover it, provided that he has done so with the knowledge and acquiescence of the owner because it would be fraud in the owner to permit it to be incurred without intending to repay it.

  In the case of **Jasohamy Vs Podihamy** the Supreme Court held that, a usufructuary who has made improvements with the consent and acquiescence of the owner is entitled to compensation. Where the improvement is conveyed a claim to compensation may be asserted in a partition action.

Further the Court considered the following principle laid down by 'Wille' on "Principles of South African Law".

"A person who expends money or labour in improving property, intending to do so for his own benefit thinking either that the property belongs to himself, or that he has the right to occupy it for some substantial period, whereas in fact he has no such right or title to the property and in consequence the improvements are acquired by the owners of the property, is entitled to claim from the latter the amount by which the property has been enhanced in value. Even a person who has made improvements on another person's property mala fide, that is knowing he has no title to the property is entitled to claim the same measure of compensation if the owner stood by and allowed him to make the improvements without objection'.

Lydenburg Properties Ltd. Vs Minister of Community Development
It was held in this case that the applicant company was not entitled to succeed in its action for compensation since it was aware that a conflicting claim had been asserted by the crown when the improvements were made.

Hevawitarane V Dangan Rubber Co. Ltd.
The Court holding a different view stated that,
"Mere notice of an advance claim is not sufficient to establish bad faith against the appellant"

However, in **Anglo-Ceylon and General Tea Estates Co. V Abusalie**

Where the occupier ignored firm proof of title which had been placed before him by the owner, the court characterized the occupier's subsequent belief that he had title to the land as a 'reckless opinion' A mere hope on the improver's part is insufficient.

The Right of Retention

In modern law the improver may himself take the initiative in suing for compensation.
London & South African Exploration Co. V Muller
It was held that an improver is entitled,
1). either to use for the recovery of the sum
2). or to retain possession until payment.

The Sri Lankan Position:-
Civilis possessio continued to be insisted on for a long period as a requirement for enjoyment of the right of retention after it had been abandoned as an element of the action for compensation. Thus in,
Meegama V Wijesekere Keuneman J held,

> *"…….. under our law the right of retention in only granted to persons who have the civils possessio and to certain special classes of persons whose position has been held to be akin to that of a possessor's"*

In this case the occupier had made a plantation on the basis of an informal agreement with the owner, but the "ius retentionis" was denied although the improver was awarded compensation.

However, in South African law, expansion and scope of the ius retentionis followed as a corollary to the development of the law in respect of compensation. This approach has now been adopted in Sri Lanka in cases such as, **Dharmaratne V Perera**
Fernando V Cooray

The Right of Removal

This requires several necessary qualifications:-
a). The nature, of the improvement must be such that it is capable of removal without damage to the land. **Baschof V R.& S.Syndicate**

b). After detachment of the improvement from the land, the materials, in that condition, must be of potential value to the improver. **Fletcher and Fletcher V Bulawayo Water Works Ltd.**

c). The owner's consent is not conclusive. If removal affects the rights of third parties, the improver is entitled to insist on compensation. **Nzannah V Uitenhage Town Council.**The 'ius tollendi' (ivW ÀÝmt a#ñ aûñy) is a permissible alternative to payment of compensation only in circumstances where its exercise provides both a physically & a legally practicable remedy. In some respects, there has been an extension in modern law of the scope of the ius tollendi beyond its legitimate limits.

4. TRADITO (DELIVERY & TRANSFER)

'Traditio' is a mode of acquiring property. It means a transfer of property; or giving from hand to hand.

Esufboy V Jeevojee
"Delivery" means voluntary transfer of possession from one person to another. It may be actual or constructive.

Lee states that five conditions have to be fulfilled for delivery to operate as means of acquiring ownership:-

1). **The Transferor must have the intention of transferring ownership**

Commissioner of Customs & Excise V Randles Brothers Hudsons Ltd.

- It was held that if the parties desire to transfer of ownership & contemplate that ownership will pass as a result of the delivery, then they in fact have the necessary intention & the ownership passes by delivery.
- The contention that passing of ownership should depend on the voidability or voidness of the underlying contract was rejected in this case.
- Ownership will pass when both parties agree to transfer ownership even where the underlying contract is null & void or non-existent.

" Habilis causa" (or appropriate cause- serious or deliberate agreement showing an intention to transfer) is an important element to be considered ,which can exist independently of the contractual foundation of the transaction. Evidence of an intention to pass & acquire ownership is important.

- The question whether ownership has passed depends on the intention of the parties and such intention could be proved in various ways.

2). Legal competence of Transferor to alienate.

- Minors cannot transfer ownership under the law.
- Alienation in fraud of creditors maybe set aside at the instance of the creditors who sustain prejudice.

3). The thing transferred must be legally alienable by Delivery.

This excludes res extra commercium & res incorporales.
However, it was observed in, **Mitchell V Fernando,**
In regard to the delivery of an incorporeal right that although it is incapable of physical delivery the possession may be given by cession (surrender) of the right.
Eg. Servitudes are included in the Prescription Ordinance as immovable property.

4). Intention & competence of the transferee

In **Weeks V Amalgamated Agencies Ltd,** it was held that the ownership of a property sold upon a contract of sale does not pass to the purchaser, unless in addition to giving delivery the seller has the intention of transferring the property & the purchaser has the intention of becoming the owner.
Consent of the minds of both contracting parties to the transfer of the property is necessary in addition to delivery was upheld in **Greenshields V Chisholm.**

5). **Ownership of the Transferor**

The general rule is that the transferor should be the owner at the time delivery is made. However, an important qualification lies to this rule under the Roman-Dutch common law regarded as,

"exceptio rei venditae et traditae"

"Exceptio rei venditae et traditae"

The effect of this rule is that where a vendor/transferor sell without title but subsequently acquires one, this title adds to the benefit of the purchaser & those claiming through him.

(The invalid title of the transferee is confirmed from the first moment of the acquisition of the dominium by his vendor).
This was discussed in the early case of, **Kadira Velupulle V Pina**

In **De Silva V Shaik Ali**
Whither J. explained this rule as :-
"If **A** sells for value and delivers to me a land which does not at the time belong to him, if he acquires it after wards and brings an action to re-vindicate it, I may defeat him by saying.

> But you sold & delivered it to me.
> I may plead delivery with equal effect against the true proprietor who inheriting the land from my vendor, seeks to re-vindicate it & this plea is available to those to whom I sell for value & their assigns"

Is this rule in contravention with section 2 of the Prevention of Frauds Ordinance?

Section 2 holds that no sale purchase, transfer…… shall be valid unless t is in writing and signed by the party making the same in the presence of licensed notary public and two witnesses.

After the enactment of the Prevention of Frauds Ordinance (1840) some doubts were expressed by our courts in regard to the application of the principle exception rei venditae et traditae.

In **Carolis V Jamis**
Mohamed Bhoy V Lebbe Marikar
Wakista V Munasinghe
the court held that the Prevention of Frauds Ordinance abrogated the principle exception reo venditae et traditae. It was also suggested that even if available it could be taken only as a defence to claim for eviction from possession, & that it could not form the basis of an action.

In the important case of **Rajapakse V Fernando**

- The Supreme Court held that where **A** without title sells to **B**; & **A** subsequently acquires title, that title accrues (adds) to the benefit of **B**, without a further deed from **A.**
- The argument that the doctrine had been abrogated by the prevention of Frauds Ordinance was rejected by the Supreme Court.
- Section 2 of the prevention of Frauds Ordinance enumerates only personal transactions.
- It does not include in its scope the transmission of property by operation of law and since the "exceptio rule" vested good title in the transferee by operation of law, the statute was considered to be inapplicable in this situation.

Transmissions by operation of law includes:-

- transmission of property on death to heirs,

- or on an order of the court to the Fiscal or the auctioneer.
- Thus the Supreme Court held that the doctrine was not abrogated by the Prevention of Frauds Ordinance.

In this case De Sampayo J. held that what passes to the purchaser by reason of the common law doctrine is not an actual title but a right,
If *defendant* - to protect himself by an equitable exception or
If *plaintiff* – to recover the property by an action based on a legal fiction.

Betram CJ. in the same case observed that no distinction should be drawn between the case of a person defending his possession and that of a possession of a person claiming possession of a property.

Deliver of the deed to the purchaser is,
i). sufficient to transfer ownership
ii). ensure that the title is acquired by the transferor.

- Held that this rule has not been abrogated by the prevention of Frauds Ordinance.

Perera V Perera
* Held that where, during the pendency of a duly registered seizure of immovable property, the judgment debtor sells the property by private alienation prior to the Fiscal's sale, the vendee is entitled to the benefit of the 'exceptio" rule if the judgment-debtor or his nominee buys the property subsequently from the person who purchases it at the Fiscal's sale.
Under the doctrine of exception rei venditae et traditae, the title which the judgment debtor obtains from the execution-purchaser enures to the benefit of the person to whom the judgement-debtor had previously transferred the property by private alienation, pending the seizure.

- Expanded the scope of the exceptio' rule to include instances where the title conveyed had been defeasible though not void ab inito at the relevant date.

Perera V Kirihonda
- The supreme Court observed that, where several vendors join in conveying a land or a portion of a land, it cannot be presumed that the deed of sale was a conveyance by them in equal shares, particularly if the rest of the evidence shows that they were never considered as owning the land in equal shares.

Instances under which the exception rei venditae et tradiate plea is not applicable:-

1). This doctrine is not applicable to a title acquired under the Land Settlement Ordinance.

Periacaruppen Chettiar V Proprietors & Agents Ltd.
- In 1928 '**G**' sold a land to the first defendant company the title to which he expected to obtain subsequently by virtue of a settlement under the Land Settlement Ordinance.
  In 1933 '**G**' was declared as entitled to the property in terms of this Ordinance.
  The plaintiff became the successor in title to '**G**' in 1938 by bona fide purchases of the Land. The deed of sale to the first defendant company was not registered but the settlement order of 1933 & the deeds of the plaintiff were duly registered.

- Held that the exception plea was not available to the first defendant as against the plaintiff and that the settlement order made in favour of '**G**' did not enure to the benefit of the first defendant.

2). Title acquired under the final decree in a Partition Action.

Mudalihamy V Dingiri Menika

It was held in this case that:-

- The Final decree in a partition action is good & conclusive against all persona.
- The title derived by the vendor (1st defendant) under this decree extinguishes any claim of title which he may have had prior to the passing of that decree.
- The vendor in this instance had acquired new title by the final decree.
- The exception rei venditae et traditae' doctrine does not deal with such a 'new title'

Facts:- **Mudalihamy V Dingiri Menika**

A sold his undivided interest in a land to **B**, **C** who was also entitled to an undivided interest in the same land, field a partition action in respect of that land. As **C** was unaware of the transaction between '**A**' & '**B**'; '**B** (the purchaser) was not made a party to the partition action. **A** was subsequently allotted a share in the land.

It was held that the decree in the partition action barred any claim by the purchaser to the land & that the plea of exceptio rei venditae et traditae was not available to him.

3). Forced sales as distinct from private alienations

The principle exceptio rei venditae et traditae does not apply to forced sales such as:-

- sales held under execution
- sales under the Insolvency Ordinance

Oliver Hughes V Perera
Stuart V Senanayake

(the subsequent acquisition of title by a judgment-debtor does not enure to the benefit of a purchaser at the execution sale)

4). Pretended sales.

'**A**' sells a land to '**B**' (**A**'s title is vested in **B**).
'**A**' sells the same land to '**C**' (in this instance **A** no longer has a title to the land).
Consequently '**A**' purchases the said land from '**B**' (now '**A**' has recovered the title to the land)
A thereafter sells the land to '**D**' .
In terms of the exceptio' doctrine the moment '**A**' purchases the land from '**B**' the title of the land enures to the benefit of '**C**'. Thus when '**A**' sells the same land to '**D**; this no longer entitled to the title of the land.
If '**D**' succeeds in proving that the transaction between '**A**' and '**C**' does not amount to delivery & transfer but is a mere pretended sale '**D**' will obtain title to the land.

Siyadoris V Peter Singho

- It was held that the 'exceptio' plea cannot be setup by a party who relies on a pretended sale.
- The transaction must be genuine & not merely illusory or simulated.
- It is not sufficient that the parties call the transaction a sale; the circumstances must show that the parties in reality entered in to a trae contract of sale.
- Even where there has been a genuine contract, the exception is available only if there has been an act which may be deemed equivalent to the Roman Traditio.

5). Cases of Donations

The gift of property by a person who is not the owner of it does not convey title to the donee even if the donor subsequently acquires title to the property. **Thissera V William**

Don Mathes V Punchi Hamy

In this case '**A**' although was entitled a share of the land donated the entire land to '**B**'. Subsequently '**A**' obtained title of the whole land. When '**B**' filed action for title of the entire land the court held that:-

> *"The conveyance being merely a voluntary (gratuitous) one, we are disposed to think that siman's subsequently acquired title cannot be availed of by the plaintiff & that the plaintiff must take the subject-matter of the gift as it stood at the date of his conveyance".*

The equitable plea of exception rei venditae et traditae is not applicable to a transfer of property by gift.

Kanapathipillai V Vethanayagam
Piyadasa V Piyasena

5. POSSESSORY REMEDIES

The possessory action serves the basic purpose of enabling a person who had possession of property to recover possession which had been unlawfully interfered with.

The requisites of a Possessory Action

In **Silva V Dingiri Menika**
It was held with regard to the elements of a possessory action that what the plaintiff is required to prove is that he was in possession and that he was dispossessed otherwise than by process of law.
A similar view was made in, **Dingiriya V Payne**
In **Scholtz V Faifer**
It was observed that a person who applies for such relief must satisfy the court upon two points:-
1). that he was in possession of the property at the date of the alleged deprivation.
2). and that he was illicitly ousted from such possession.

Further, **section 4** of the Prevention of Frauds Ordinance provides that any person who has been dispossessed of any immovable property otherwise than by process of law it shall be lawful for him to institute proceedings against the person dispossessing him at any time within one year of such dispossession.

The Underlying Legal Policy of the Possessory Action

Greyling V Estate Pretorius
The Principle,

"Spoliatus ante Omina restituendus est"

Means that before the court will allow any enquiry into the ultimate rights of the parties the property which is the subject of the act of spoliation must be restored to the person from whom it was taken irrespective of the question as to who is in law entitled to be in possession of such property.

This case while referring to the rationale underlying the possessory remedies observed that when people commit acts of spoliation by taking the law into their own hands, they must not be disappointed if they find that courts of law take a serious view of their conduct.

The reason for this very drastic and firm rule (spoliatus ante omina restituendus est) is plain & obvious. The general maintenance of law & order is of indefinitely greater importance that mere rights of particular individuals to recover possession of their property.

Wilsnach V Vander Westhuizen & Haaz
The foundation of the rule for the restoration of property taken possession of in this way is,

- to prevent a spoliator from taking the law into his own hands.
- to cause a person taking the law in to his own hands to restore the property.
- & establish his rights thereto in a peaceful manner in a court of law.
  A liberal approach to the scope of the possessory action has been adopted in the Sri Lankan cases of,

  Changrapillai V Chelliah
  Sameen V Depp
  Edirisuriya V Edirusirya

The Sri Lankan Law governing possessory remedies is contained in section 4 of the Prescription Ordinance:-

The law governing possessor remedies in Sri Lanka is contained in the Prescription Ordinance No.22 of 1871. **Section 4** states that,
"Any person who has been dispossessed of any immovable property otherwise than by process of law is entitled to institute proceedings against the person dispossessing him, at any time within one year of such dispossession under this Act.
On proof of such dispossession within one year before the action is brought the plaintiff will be entitled to a decree against the defendant for the restoration of such possession without proof of title."

The proviso to Section 4
"Nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases".
In view of the proviso the major substantive elements of the Roman Dutch common law pertaining to possessory remedies continue to the applicable in Sri Lanka.

The effect of modern South African law is that possessory relief is available in respect of both movable & immobile property.**Nino Bonino V De Lange**
However, it was showed in, **Ponnambalam V Sinnatamby,**
that the court of Ceylon have adopted a narrower approach to this aspect of the law governing possessory actions. It was held that this action is peculiarly one which applies to immovable property.

However, it is submitted by Prof.G.L.Peiris that the decision in **Ponnampalam V Sinnatamby** warrants re-examination, especially because it is manifestly incompatible with the salutary policy objectives laid out in **Changrapillai V Chelliah** in regard to possessory actions.

The two elements essential for the possession which is protected against spoliation:-
1). The Corpus of Possession
2). The Animus of Possession

The Corpus of Possession

It is the concept of detention that is involved in the corpus of possession. Several features of this concept are as follows:-

1). ***The degree of control***
The person seeking possessory relief should have had control over the property concerned prior to the alleged spoliation.
The degree of control depends on the circumstances of the particular case for it cannot be defined in the abstract.

Scholtz V Faifer
The appellant in this case was a contractor. The appellant had contracted to erect certain buildings for the respondent on condition that the latter supplied the materials and paid for the work as it progressed every two weeks.
The appellant applied for an order reinstating him in possession of the building then partially erected, alleging that the respondent had unlawfully taken possession of the party constructed building & placed another contractor in charge of the work.
One of the questions which arose was whether the appellant had sufficient physical control or detentio of the building, to be declared entitled to possessory relief.

It was observed in the course of the course of the judgment in this case that:-

- When a house had advanced so far towards completion that the doors are placed in position, it may be locked up & possession of the key would be equivalent to possession of the building.
- But the position in regard to a partially constructed building is more difficult.
- Mere temporary absence of the contractor for a short time would not destroy the physical element which is necessary to constitute possession.

E.g. Where a builder goes away every night; he still has the detentio of the work which he is in course of erecting and mere absence at night does not deprive him of it.

- But where work is suspended for a considerable time, and if the builder desires to preserve his possession he must take some special step, such as placing a representative in charge of the work, or putting hoarding around it, or doing something to enforce his right to its physical control.
- If he chooses to leave the work derelict, then no matter what his intention maybe, the physical element is absent.
- Thus in such a situation the builder loses possession even though he may say he intended to resume it or never intended to abandon it.
- Thus, it was held in this case that the builder lacked detentio of the half-finished structure.

2). ***Derivative or Indirect Possession***

Scholtz V Faifer

It was observed that for the purpose of possessory relief physical possession of the property could be held either personally or by a representative.

Therefore, it is clear that derivative possession can be relied upon to establish the corpus of the requisite possession.

3). ***Quiet & Peaceful Possession***

In **Abdul Aziz V Abdul Rahim (1909) 12 NLR 330**

It was held that the Roman-Dutch law requires the plaintiff in a possessory action to have had *"quiet & undisturbed possession. Thus quiet & peaceful possession is an important element for corpus possession."*

4). ***Exclusive Possession***

Abdul Aziz V Abdul Rahim

The Court considered that the essence of the physical element of possession was *"the power to deal with the property as one please, to the exclusion of every other person"*

Nienabar V Stuckey

It was observed in this case that there may be different rights vested in different persons in respect of the some piece of land. All of them are entitled to the protection of spoliation proceedings.

There is no reason as to why the relief should not be available merely because the person who has been despoiled does not hold exclusive possession.

The Animus of Possession

Most judicial decisions emphasize that the mental element required in a possessory remedy is 'possession ut dominus' various interpretations have been given in respect of the meaning of the term ut dominus'.

In cases such as,

Perera V Perera

Mac Carogher V Baker
Thissera V Costa
Alim Saibo V Cadersa Lebbe
Sadirisa V Attadasi Thero
the courts held that 'ut dominus' or the intention of holding the property as the owner is essential to maintain a possessory action and that the plaintiff would not be entitled to a possessory decree if the possession was not ut dominus.

However, consequently the view that civilis possessio (intention to hold as the owner) is indispensable as the foundation of relief under the possessory action changed with the development of the law 'ut dominus' was thus interpreted by courts as holding property 'as if it is his own' (holding the property as if he had the sole control of it whether he is really the owner or not) to the exclusion of others.

This view could be emphasized in two instances:-
1). Where the plaintiff, a contractual or a statutory tenant possess the land not as the owner but on the footing of a more limited beneficial interest, he would be competent to maintain a possessory action.

Perera V Sobana
Fernando V Fernando
Banda V Hendrick
Sameem V Depp

2). where persons who are in occupation of land under no contract & no beneficial interest whatsoever but with the intention of remaining in effective control of the property has the right to bring possessory actions.

Perera V **Perera**
Edirisuriya V **Edirisuriya**

In cases such as,

Changrapillai V Chelliah
Abdul Azeez V Abdul Rahiman (Privy Council)
Where the plaintiff derived no benefit from the occupation of land but held property solely in the capacity of a manager or agent of someone else was considered as competent to maintain a possessory action.

Therefore, the position in Sri Lanka with regard to the required animus in this context is not necessarily 'animus domini' or the intention of holding as the owner but the fact that the plaintiff,

- Was in effective control of the property
- & had the deliberate intention of not parting with that control.

The only qualification necessary is that possession in a very inferior or subordinate capacity such as that of a servant or care taker is inadequate to establish competence to maintain a possessory action.

Eg. **Thissera V Costa** (Possession of a coretaker/servant) as distinguished from **Changrapillai V Chelliah** (possession by a manager/trustee).

A survey of cases which dealt with the nature of the animus of possession in possessory action,

Mascoreen V Geny

This dealt with a possessory action by a priest against a man who had turned him out of possession of a church.

The Supreme Court held:-

- That the defendant ought to have proved that he turned the plaintiff out by order of the Bishop & that as he had not done so, he was a mere wrongdoer, Thus, the plaintiff could maintain the action.
- This decision implies that civilis possessio or possession ut dominus on the part of the plaintiff was not necessarily required as a condition of being allowed to bring a possessory action.
- The court referred to certain authorities as establishing that precarious possession (insecure) on the part of the plaintiff was sufficient as against strangers.
- It was further observed that possession *virtute offici* such as that of the plaintiff in this case, a Roman Catholic Priest, came under the category of precarious possession.

Mac Carogher V Baker

- A different view was taken in this case.
- A plaintiff who had been in occupation of an estate as Manager & agent for the owner was held not to be entitled to maintain a possessory action.
- It was further stated that such a person clearly lacked the attribute of possession 'qua dominus' although he was more than a superintendent & discharged the duties of an agent with plenary powers.

Thissera V Costa

- The plaintiff in this case was muppu appointed by the priest, & in that capacity he kept the key of the church, recited prayers in it, received offerings & the produce of the church grounds, expended the money for church purposes, & generally supervised the affairs of the church under the direction of the priest when there was one.
- It was held that his possession was essentially that of an agent or caretaker, & that he could not maintain a possessory action.

Sadirisa V Attadasi Thero

"What the plaintiff in a possessory action had to prove was possessio civilis, or in other words, possession animo domini; so that all that the Roman Dutch Law requires is such possession as the evidence would indicate that the plaintiff regarded himself as the sole owner of the land he was possessing".

Alim Saibo V Cadersa Lebbe

- The plaintiff had been the officiating high priest of a mosque for 35 years. He had administered its revenue, appointed subordinate officers & executed contracts & leases for & on behalf of the congregation.
- The defendants had forcibly dispossessed him. They pleaded that before the ouster the congregation had interdicted him from officiating.
- The court held that the plaintiff's possession was not ut dominus & therefore he could not maintain possessory action.

Perera V Sobana

The Court held:-

- That a lessee can maintain a possessory action against his lessor on being forcibly dispossessed by his lessor during the continuance of the lease.

- An agent by & through whom the owner possesses cannot have a possessory action, because he does not 'possess' but only holds as agent of another.
- But a tenant for a term, who has exclusive possession as against his landlord & everyone else during the term can maintain such an action.

Fernando V Fernando (1910) 13NLR 164

Held that:-

- In a possessory action a person who has entered into bona fide possession under a lease, even though that lease may be technically defective, has his remedy where he can prove the fact of ouster by the defendant.
- He has to prove possession 'ut dominus' as this term was defined in **Abdul Aziz V Abdul Rahim**

  * He (plaintiff) must have possessed no alieno nomine but with the intention of holding & dealing with the property as his own".

Fernando V Fernando (1911). 14 NLR 166

- (a different case from the above)
- In this case the plaintiff who were members of the Dhoby community residing at Polwatta argued that before ouster the had been in possession of the land, using the land in dispute for drying clothes on it. They asked for a possessory decree.
- It was held that he plaintiffs were not entitled to a possessory decree since their possession was not ut dominus.

Possession was held to mean not mere user or occupation of the land. It must be ut dominus.

It was further observed that,

"the claim here seem to be not of the possession of a dominium vested in the plaintiffs to hold for themselves ut dominim, but rather the assertion of a communal right of user on land, the property of no one".

Banda V Hendrick
Sameem V Depp

In both these cases the plaintiff possessed the land not as owner bit respectively as a contractual or statutory tenant and a usufructuary mortgagee. Thus, they possessed the land on the footing of a more limited beneficial interest.
Nevertheless, the plaintiff in both cases was considered competent to maintain a possessory action.

Edirisuriya V Edirisuriya

The court referred to the need to prove possession ut dominus,

Changrapillai V Chelliah

- The plaintiff was, as the District Judge found, the manager of a Hindu Temple & its property.

The Supreme Court was of the opinion that:-

- If the plaintiff, who was called the manager, had control of the fabric of the temple and of the property belonging to it, his possession was such as to entitle him to maintain the possessory action. He was only a trustee for the congregation who worshipped there.
- The case was sent back for evidence as to the exact nature of the plaintiff's interest.

- This case was distinguished from the previous case of **Thissera V Costa** in which,

  " The muppu who appears to be a kind of beadle, has no control over the fabric of the church, & was only a caretaker entrusted with the custody of certain movables, or very subordinate servant, whose duty it was to keep the church clean, but who had no sort or kind of possession either on behalf of himself or anybody else".

Abdul Aziz V Abdul Rahim (1909) 12 NLR 330- ***Supreme Court Decision***

- The plaintiff was a person appointed by the congregation of a Muslim mosque as a 'trustee' for a term of years whose duties & powers were defined by the rules framed by the congregation. He was controlled in the exercise of his power by an 'assembly' elected by the congregation.
- The Supreme Court held that he was not entitled to maintain a possessory action.
- The Court further declared: that this rule should be applied as it is stated by Grotius & other authorities on Roman-Dutch Law.

We may give it a liberal rule or a narrow construction but only the Legislature can 'enlarge' it in the sense of extending it to cases which it does not cover.

A Lessee under a valid lease from the owner is dominus or owner for the term of his lease. He is owner during that term against all the world, including his lessor.

Similarly it is possible that the trustee maybe owner for the term of his trusteeship. He may have a good title to possession during that term as against all the world, including those who appointed him.
But it is a question of fact whether he is in that position or not, it depends on the terms & conditions under which he holds as trustee.

Abdul Azeez V Abdul Rahiman (1911) 14 NLR 317
(*Privy Council decision***)**

- Up to 1911, the consensus of judicial opinion in Ceylon was in favour of the view that civilis possessio or possession ut dominus was indispensable as the foundation of relief under a possessory action. This is evident upon a survey of the case law up to 1911.
- However, a significant change in the development of the law is effected by the decision of the Privy Council in this case which had a considerable impact on the molding of contemporary judicial attitudes in Sri Lanka with regard to the facts that needs to be proved in a possessory action.
- The Privy Council approved the decision of the Supreme Court in **Changrapillai V Chelliah.**
- Lord Shaw quoting a passage on possession from a work on Roman Law held that:-

*"**A**" enters on land possessed by '**B**' but neither '**A**' nor '**B**' asserts that the land belongs to him by any investitive fact. Then there is nothing unreasonable in saying that '**B**' should be protected in his possession against '**A**'.*
*Between '**A**' & '**B**', '**B**' has the better right to possession. In a controversy between them, it is immaterial that '**B**' does not claim to have any right of property founded on any investitive fact, for '**A**' is in the same position."*

- Therefore it seems undeniable that this constitutes a sound rationale for dispensing with the requirement of civilis possessio by the plaintiff, in the context of a possessory action in circumstances such as those envisaged in this case.

- However even after the ruling by the Privy Council in **Abdul Azeez V Abdul Rahiman** the element of civilis possessio on the part of the plaintiff in a possessory action, has been insisted upon in some decisions.

The Requirement of Dispossession

The plaintiff in a possessory action must prove not only that he was in possession but also that he was dispossessed by the defendant.

a). The better view is that disturbance of possession, as opposed to physical dispossession is sufficient for the purpose of invoking possessory remedies under our law.

Perera V Wijesuriya

Therefore, it was established n this case that under our law the proposition that *'trespass without ouster'* may in appropriate circumstances amount to dispossession within the meaning of **section 4** of the Prescription Ordinance.

In **Rowel Appuhamy V Moises Appu**

It was held that proof that the defendant carried away nuts lying on the ground without giving a share to the plaintiff & that the defendant disputed the plaintiff's right to the produce of the land, was sufficient to justify a possessory action.

But a contrary view was observed in,

Pattrigey Carlina Hamy V Mugegodagey Charles De Silva

"It is clear that the dispossession referred to in section 4 of the Prescription Ordinance consists of a mover or deprivation of possession or in another word well known to the law 'an ouster'. Acts which merely amount to a trespass without 'ouster' do not amount to dispossession".

b). Neither force nor fraud is necessary, in the act of dispossession ***Perera V Wijesuriya***

In the South African case of **Nino Bonino V De Lange,** it was stated neither violence nor fraud is an essential element in the act of dispossession, provided that the act is done against the consent of the person despoiled & provided also that the performance of the act is illicit.

c). The crucial element is not the dispossession should be unlawful.

Where dispossession by the defendant takes place under cover of a legal right or legal authority the requirement of dispossession in a possessory action cannot be established.

d). Not only is it necessary to establish that the defendant was responsible for the dispossession of the plaintiff, but also that after the plaintiff's ouster, possession continued to be with the defendant.

e). The fact that the plaintiff has been able to recover possession of the property after ouster by the defendant does not invariably debar him from maintaining a possessory action.

* This is to prevent the act of spoliation from happening again.

Perera V Wijesuriya

In this case although the plaintiff got back her possession, she was entitled to institute an action against the person who dispossessed her & ask for a decree against that person for the restoration of her possession.

The Period of Possession

A conflict of views has arisen with regard to the question whether a possession by the plaintiff for a year & a day prior to the ouster is necessary before the plaintiff could be allowed to maintain a possessory action.

In cases such as, **Goonawardena** V **Pereira**
Silva V **Dingiri Menika**

it has been held that possession for a year & a day was not necessary to enable a dispossessed plaintiff to institute a possessory action; while in cases such as,

Abdul Aziz V Abdul Rahim (1909) 12 NLR 330
Silva V Appuhamy

It was upheld that possession for a year & a day is essential.

In **Silva V Appuhamy (1912)**
and in **Raymond V Wijewardena (1937)** the principle was laid down that possession for a period of a year & a day is essential but as a matter of a concession the plaintiff who was not in possession for the whole of this period could be permitted to 'tack on' his predecessor's possession to the period of his own possession.

Nevertheless, the view that in terms of our law possession for a year & a day is not necessarily required to render a person entitled to relief under a possessory action held & sway until the decision in **Edirisuriya V Jayawardena (1994)** .

Yet, Basnayake J in the obiter of**Perera V Wijesuriya (1957)**
strongly expressed that possession by the plaintiff for a year & a day cannot be treated as one of the ingredients required in a possessory action. For this was not a element common to all possessory actions maintained under section 4 of the Prescription Ordinance.

Only the remedy of "*mandament van complainte*" under the classical Roman-Dutch Law referred to the element of possession for a year & a day; this element was irrelevant to other possessory remedies of the Roman-Dutch Law and Roman Law,

The recent case of **Edirisuriya V Jayawardena (1994)** followed the 'tacking on' concept laid down in **Raymond V Wijewardena;** and established that the plaintiff is obliged to establish prior possession for a year & a day to maintain a possessory action.

6. THE VINDICATORY ACTION

(Rei Vindicatio Action)

This action lies to an owner who has been deprived of possession of his property. This is a right in rem.

The Requisites of a Vindicatory Action

The requisites of the vindicatory action consists of proof that :-
1). the plaintiff is the owner of the property. **Mansil V Devaya**
2). & that the property is in the possession of the defendant. **Morias V Victoria**

Several points regarding the essential elements of a vindicatory action

1). ***The burden of establishing the title devolves on the plaintiff.***
The significance of this requirement is that where the plaintiff fails to prove title in himself, judgment in the vindicatory action will be given in favour of the defendant, even though the latter has also not been able to establish title.

De Silva V Gunethilleke
A party claiming a declaration of title must show title to the land in dispute and if he cannot do so the action will not lie.

Abeykoon Hamine V Appuhamy
In a rei vindicatio action, the defendant being in possession, the initial burden of proof is on the plaintiff to prove that he had dominium to the land in dispute.

Muthusamy V Seneviratne
It is an elementary rule that in an action for declaration of title, it is for the plaintiff to establish title to the land he claims & not for the defendant to show that the plaintiff has no title to it.

2***). Once title is established by the plaintiff the burden of proof shifts to the defendant to prove that he has a right to possession or occupation of the property.***

Gunesekera V Lateef
Siyaneris V Udenis De Silva

In the latter case it was held that the burden of proof in regard to the right of possession was on the defendant.
He could prove that he had been given the possession either by the plaintiff or by some other person who was entitled to grant such right and that the right was still current.

3). Our law recognizes an exception to the general principle that the burden of establishing title in a vindicatory action falls on the plaintiff.

- The effect of this exception is that where the plaintiff enjoyed prior peaceful possession of the property & alleges that he was ousted by the defendant there is a rebuttable presumption of title in favour of the plaintiff.
- The burden of proving title in this situation must be undertaken by the defendant from the very commencement of the vindicatory action.

Mudalihamy V Appuhamy
MMedankara Therunnanse V Charles Dias
Rawater V Ross

In all these three cases the defendants failed to discharge the burden of proving title in himself. The defendants failed to rebut the presumption of title in favour of the plaintiff.

Kathiramathamby V Arumugam
Basnayake J held that:-

- In an action for declaration of title & for restoration to possession of land from which a plaintiff alleges he has been forcibly ousted, the burden of proving ouster is on the plaintiff.
- Where the plaintiff fails to prove ouster, the defendant's possession must be assumed to be lawful & the defendant is entitled to rely in this event on the presumption created by **section 110** of the Evidence Ordinance.

***4). The standard according to which the plaintiff is required to establish title in a vindicatory action*:-**
In **Pathirana V Jayasundara,**
H.N.G.Fernando J referred 'strict proof' of title holding that the plaintiff must prove title to the land which he claims a declaration of title. The defendant need not prove anything.

Wanigaratne V Juwanis Appuhamy
The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove & establish his title.
The high standard of proof of title by plaintiff required in a partition action does not apply to the proof a plaintiff's title in a vindicatory action.
Cooray V Wijesuriya

5). A person who has bare title is entitled to bring the rei vindicatio
Allis Appu B Endiris Hamy
A lessor has no right of possession during the subsistence of a lease, although he continues to have ownership of the property through this period.
A lessor who has leased the premises for a definite term can maintain this action against a third person who had taken possession of the premises, & claimed them as his own by an adverse title.

6). The rei vindicatio is available only to a person who has title at the time of the institution of the action.

Ponnammah V Weerasuriya
The Plaintiff sought to vindicate title to property conveyed to her by a person who had purchased it at a Fiscal's sale but who, at the date of the action had not obtained a Fiscal's transfer & obtained it nine after the institution of the action.
It was held that the plaintiff's title must fail, as her vendor had no title at the date of her own vindicatory action, in the absence of a Fiscal's transfer.

7). Not only must the plaintiff have title at the time of rei vindicatio in instituted, but he must retain title throughout the course of the action.

Eliashamy V Punchi Banda

This was a case where, during the pendency of an action for declaration of title, ejectment & damages consequent on trespass & the wrongful removal of plumbago from the land in dispute the plaintiff sold the land to a third party.
The court was of the opinion that the plaintiff could not obtain a decree for declaration of title & ejectment. However, the plaintiff was allowed to maintain his claim for damages which had accrued prior to the transfer of title.

8). Is it sufficient for the plaintiff to prove that he has title or is it a requisite of the vindicatory action that the plaintiff should establish prior possession on his part?

* It is submitted that if the plaintiff sues on the footing of a paper title the burden of establishing the validity of his title is on the plaintiff, in this event it is immaterial whether the plaintiff had prior possession of the land or not.

Appuhamy V Appuhamy
Punchi hamy V Arnolis

However, if the plaintiff sues by right of simple possession without relying on any paper title, the plaintiff must allege & prove both prior possession of the land by him & ouster by the defendant. Evidence of possession of the land by the plaintiff is relevant in the latter situation, but not in the former.

Defences to the Vindicatory Action

In **Allis Appu V Endiris Hamy** withers J laid down the following defences to a rei vindicatio:-
1). denial of the plaintiff's title.
2). setting up the defendant of his own title, in the sense of establishing a title superior to that of the plaintiff.
3). prescription of action.
4). The plea of res judicata.
5). right of tenure under the plaintiff- Eg:- usufruct, lease, loan.
6). The right to retain possession subject to an indemnity from the plaintiff under peculiar conditions.
7). The plea of exception rei venditae et traditae.
8). The ius tertii (whether the defendant is entitled to resist the plaintiff's vindicatory action by showing that title to the disputed property is neither in the plaintiff nor in the defendant but in a third party).

7. PAULIAN ACTION

The primary purpose of a Paulian action is to enable the courts to declare void an alienation of property which had been made in fraud of the rights of the creditors.
The action had its origins in Roman Law & was modified & developed in the Dutch Law.

In **Peter V Carolis** it was emphasized that the Paulian action in the law of Sri Lanka has assumed the character of an action in personam.
In Roman Law Paulian Action was considered as a collective action. However, differing from this view it is a settled principle in Sri Lanka today that the Paulian Action lies at the suit of an individual creditor & that what he recovers from the debtor goes not to the general body of creditors, but to the satisfaction of his own debt. This was observed by Betram CJ in,

Fernando V Fernando

In **Janis Appu V Baba Appu** this cause of action was described as declaring void and alienation alleged to be fraudulent.
The nature & relief available in a Paulian Action was discussed in **Meerasaibo V Philippsl**
It was observed that the plaintiff (creditor) cannot succeed in canceling a conveyance from his debtor to a stranger. At the most he could ask that the,
1). Conveyance should be declared void,
2). & that the land should be executable to his judgment not withstanding the conveyance.

**A Paulian Action should be identified in the following manner:-*
B owes a debt to **A** and avoids payment **A** files action to recover the debt. The court orders **B** to settle **A's** debt. (This action should not be mistaken for a Paulian Action) now **A** is regarded as a judgment creditor and **B** is regarded as a judgment debtor before the law.

- The matter is solved when **B** settles **A**'s debt.
- But if **B** disregards the direction of the court and avoids payment upon the request of **A** the court can seize a property of **B** and subject if to a Fiscal Sale and retain the money. **A** by way of a motion can claim the amount of debt owed by **B** from the Court. (this proceeding is also not a Paulian Action).

- But if **B** fraudulently alienates his property to another party in order to show that he has no assets to satisfy the judgment debt the element of fraud necessary to institute a Paulian Action is fulfilled. Therefore this alienation of land by the debtor in fraud of his creditor can be set aside at the instance of the creditor who has been prejudiced by this transaction, by instituting a Paulian Action.
- Hence, a Paulian Action is instituted by a creditor who finds that he is unable to get satisfaction on a judgment decree because his debtor has fraudulently alienated his property leaving no assets to satisfy the judgment debt.

Effect of the Paulian Action

In **Gunawardena V Bilindahamy ,**
it was held with regard to the effect of a Paulian Action that the fraudulent deed is not annulled by this action but only declared void so far as it is necessary to make the property available for execution.

Punchibanda V Perera

It was held in this case that the title to so much of the property that is not sold in execution does not revest in the transferor (debtor) but remains in the transferee.
The purpose for which a deed is declared void in such an action should be given due consideration and it was further observed that a declaration setting aside a deed should be limited to the purposes of execution; or in other words the declaration that the deed is void should only be to the extent to which the creditor has been prejudiced.
This principle was endorsed in,

Abdul Cader V Munasinghe
Mukthar V Ismail

The Plaintiff-creditor usually combines a Paulian action which aims at setting aside the deed of transfer with an action under **section 247** of the Civil Procedure Code asking the court to declare that the property which has been transfer in fraud of the creditors, is an asset of the debtor & liable to seizure for execution of the debt.

Who May Bring the Action

Any person who is a creditor of the person who alienates in fraud of the creditors (the alienor) at the time of the alienation of property can bring this action.
Planiol holds that a creditor who attacks an act of his debtor should prove that his credit arose prior to the act attacked. (However, those who become creditors after the fraudulent act have a right to bring this action, if the fraud was directed against them) Planiol further observed that the Paulian Action applies to all creditors without distinction-both,

1). those who have acquired a right by a voluntary act on their part,
Eg. 'A' loan some money to 'B' on the promise that 'B' would return it. Thus an agreement arises between the parties. Now 'A' is the creditor and 'B' is the debtor.

2). & those who have become creditors without having wishing it. (due to a fault of another)
E.g.- '**A**' is knocked down by '**B**'s car. '**A**' files action against '**B**' claiming damages since his medical expenses are very high. The court directs '**B**' to pay damages and thereby grants an order in favour of '**A**' until '**B**' pays the sum of damages '**B**' is regarded as a debtor and '**A**' is regarded as a creditor in the eyes of the law.

Mukthar V Ismail

- It was held that it is only a '*creditor in esse*' who can claim that an alienation was made to his prejudice, and that a creditor is a person to whom a debt is being owed by another.
- A '***creditor in esse***' is a person to whom another person owes a debt which actually exists either in an ascertained sum of money owing from the debtor to the creditor or in the form of a judgment debt or a contract debt.
  A claim for unliquidated damages would not fall within the ambit of the expression 'debt' so that only creditors upon whose claim judgment has already been entered would be entitled to allege that a particular alienation is in fraud of their rights.

Fernando V Fernando (1924) 26 NLR 292

Held :-

- A 'creditor' connotes the existence of a debt & a debtor.
- It cannot be said that the claim for damages is a debt, or that a person against whom the claim is made, is a debtor. It is only when the claim is found by the court to be due & is embodied in a decree that the relation of creditor & debtor would arise in such a case.

- According to **section 218** of the Civil Procedure code, 'when the decree commanding a person to pay money by court is unsatisfied, the judgment-creditor has the power to seize, & to sell or realize in money by the hands of the Fiscal.
- Therefore, a creditor can institute a Paulian Action to set aside a deed of sale of land if it leaves insufficient assets in the vendor's hands to satisfy the creditor or creditor's claim.
- Where, the claim is one for unliquidated damages, the person who asserts the claim cannot maintain a Paulian Action until his claim has been reduced to the form of a decree. Such a person was described by Bertram CJ. in this case as a '*creditor ex delicto*" (Future creditor).
- It is not only the affected creditor who may seek to set aside a deed executed in fraud of his rights a person claiming through a creditor may also do so.

In **Suppiah Naidu V Meera Saibu** it was observed that, '*If a creditor could claim on the ground of fraud to have the deeds declared void as against him, anyone claiming through the creditor has the same right".*

Mohamado V Manupillai

Haniffa V Mohamado
A, as principal debtor, & **B** as surety, granted a bond in favour of **C**. **A** did not mortgage any property, but **B** mortgaged some property of his own. On a decree obtained on the bond, a property was seized as the property of **A** & was purchased by the defendant at the sale in execution.
Before the sale **A** transferred all his property by three deeds executed on three successive days. The property purchased by the defendant at the execution sale was transferred on second day to the plaintiff. The plaintiff instituted an action for declaration of title to the property against the defendant.
The Supreme Court held that it was open to the defendant to show that the deed in favour of the plaintiff was executed in fraud of creditors.

Against Whom the Action Lies

- The action lies against all who knowingly share in the fraud.
- The Paulian Action lies against the transferee or alienee of property from a debtor who had purported to make the alienation in order to defeat fraudulently the legitimate claims of creditors.

In **Athukorale V Athukorale** it was held that a Paulian Action lies against a transferee because the subject of the action is to have his property declared liable to be sold for the purpose of satisfying a debt due to the creditor.
Planiol states that,
"A Paulian Action is always exercised against a third party that is against the person who has benefited from the fraudulent act"

- The transferor is a necessary party to the Paulian Action.

In **Gopalasamy V Ramasamy Pulle** it was held that the Paulian Action lies for the revocation of whatever has been alienated in fraud of the creditor, and it follows that when an alienation of this kind is attacked, both the grantor & grantee should have an opportunity to defend it.

It was acknowledged in, **Pitchohamy De Silva V Siyaneris** that when a fraudulent alienation is alleged the transferor must be made a party to the action, The rationale underlying this requirement is that the alienation could be set aside on the ground of fraud only in proceedings where the transferor was a party & before he can be held to have committed a fraud he is entitled to be heard in defence of himself.
Dissanayake V Baban

Debtor:-

- A Paulian Action is a relief available for a creditor when a debtor alienates his property in fraud of the rights of the creditors.
- This action does not lie against heirs of a debtor unless they are 'conscious of the fraud" and only if something has come into their hands through the guile of the deceased debtor.

Pitchohamy De Silva V Siyaneris

Future Creditor:-

A controversy surrounded the courts with the question whether a person who had only an unliquidated claim for damages at the time of the impugned alienation is a '*creditor*' for purposes of the Paulian Action.
Planiol, dealing with the law as to the category of persons entitled to bring the Paulian Action states:-
1). In normal state of affairs, the creditor who attached an act of his debtor should prove that his credit arose prior to the act attacked. Those who become creditors after the fraudulent act have therefore no right to attack it.

2). But they have such a right if the fraud was directed against them.
E.g.- Certain debtors commit frauds against their future creditors in arranging in advance the manner of withdrawing the pledge on which creditors will count in dealing with them.

Silva V Mack

- It was laid down that where there has been an actual intention to defraud future creditors anyone of them who is prejudiced may set aside the deed.
- It was further observed that:-
  where the claim of a creditor is for unliquidated damages (not pre-assessed) as in an action in delict some cases take the view that a decree must be obtained on this claim before a Paulian Action is brought.

Fernando V Fernando (1924) 26 NLR 292
The Supreme Court followed the opinion expressed in **Silva** V **Mack** but went on to hold that the term '*creditor*' could be used in reference to a person with a claim for unliquidated damages only when he can show prejudice because a decree has been entered in his favour.
The Court observed that:-

- A person who has a claim only for unliquidated damages against another cannot be regarded as a creditor.
- A '*creditor*' connotes the existence of a debt & a debtor.
- It cannot be said that the claim for damages is a debt, or that the person against whom the claim is made is a debtor.
- It is only when the claim is found by the court to be due & is embodied in a decree that the relation of creditor & debtor would arise in such a case.
- where the claim is one for unliquidated damages, the person who asserts the claim cannot maintain a Paulian Action until his claim has been reduced to the form of a decree.

Betram CJ expressed that,

> *"One feels reluctant to adopt a view which would seem to imply that, If a person committed a gross fraud or wrong against another & then disposed of his property with a view to avoiding the result of any consequent action, the person defrauded would not be a creditor for the purpose of a Paulian Action.*
>
> *There is however, a solution to this difficulty; namely, that such a person may be considered to have formed a design to defraud future creditors & prejudice caused by such a fraudulent design is declared to be within the scope of this remedy".*

Fernando V Fernando (1940) 42 NLR 12

The court decided that, where prior to the date of the alienation is sought to be attacked by the Paulian Action,

- a cause of action in delict (ex delicto) had accrued to a person who had notified his intention of bringing an action.
- & the alienor knew that if he alienated his property, there would be no assets or insufficient assets to levy execution on the claim, the deed could be set aside on the ground of fraudulent alienation.

Punchi Appuhamy V Hewapedige Sedera (1947)

This case supported the proposition that a Paulian Action can be instituted when a cause of action for unliquidated damages has accrued at the date of the alienation even though a decree in respect of that claim is obtained against the transferor only after the alienation takes place. Therefore, where **A** sues **B** on a claim for unliquidated damages & pending the action **B** fraudulently & collusively transfers his properties to a third party with the intention of defrauding creditors, a Paulian Action would be available to **A** if at the time he institutes the action, he has already obtained a decree in his favour in respect of the claim for unliquidated damages.

Mukthar V Ismail

- A Divisional Bench of the Supreme Court took the view that where a defendant transfers his property to another person pending a claim for unliquidated damages against him by the plaintiff, the plaintiff is not entitled institute a Paulian Action to have the property transferred declared as a fraudulent alienation if judgment is subsequently entered in his favour awarding a certain sum as damages.
- This view was clearly contrary to the earlier decisions on this point & resulted in some uncertainty as to when a person having a claim for unliquidated damages could institute a Paulian Action.

- This decision has been greatly criticized from the standpoint of principle & policy. Thus Prof. Weeramanthry states in his book on the Law of Contracts that,

> *"It is clear that the view of the Divisional Bench takes take the law too for, & opens the door to fraudulent alienation by a person who is aware of the existence of an unliquidated claim against him.*
> *Great practical difficulties would in this fashion be thrown in the way of a prospective plaintiff in a claim for unliquidated damages, & he would be compelled to look on helplessly at the spectacle of his debtor openly doing away with his assets upon notification of the plaintiff's claim"*

In **Jayasuriya V Jeeris** the Divisional Bench unanimously held that the case of **Mukthar V Ismail** had been wrongly decided & re-affirmed the legal position prior to **Mukthar**'s case.

- Wimalaratne J. referred to the decisions in,
  Fernando V Fernando (1924)
  Fernando V Fernando (1940)
  Punchi Appuhamy V Sedera (1947)

and pointed out that these three cases recognized the rights of a '*creditor ex delicto*' to attack a transfer on the ground of fraudulent alienation, provided that at the date of the institution of action his claim had been reduced to a decree.

Wimalaratne J. reviewed the earlier authorities & said:-
"The remedy of a Paulian action is available,…… to a plaintiff who has a claim for unliquidated damages, which claim is subsequently converted to a decree in his favour prior to the institution of the Paulian Action, even though the fraudulent alienation was prior to the date of such decree"

The Essential Ingredients of a Paulian Action

The following facts must be established in order that a transfer be set aside through the Paulian Action:-

1). Fraud must be alleged & proved.

Louis V Dingiri

The burden of proving fraud on the part of the debtor must be undertaken by the creditor. It must be shown affirmatively that the alienor intended to defeat the claims of the creditors.

Muttiah Chetty V Moahamood Hadjiar

- In such an action it must also be proved that the alienee with full knowledge that the alienation was being made to defraud creditors participated in the fraud. The mere fact that the alienee knew that the debtor also had other creditors is no ground for holding he is a participant in the fraud.
- Held that there is no presumption of fraud & that fraud must be proved by the plaintiff by the actual leading of evidence.

Sriwardena V Charles Singho

It was held that in an action to set aside a deed of transfer of property on the ground that it was executed in fraud of creditors,

- it is essential for the plaintiff to allege & prove fraud on the part of the purchaser.
- a solitary issue whether the deed was executed by the vendor to defraud the plaintiff does not suggest any fraud on the part of the purchaser.

Perera V Menik Etana
Tobias Fernando V Don Andirs Appuhamy

- Provides authority for the proposition that fraud must be proved not only on the part of the vendor but also on the part of the purchaser, of any rate where consideration has been paid.
- In that case the Supreme Court felt considerable suspicion that both purchaser & debtor knew that the property would be seized in connection with a pending case but held that the creation of suspicion is not a sufficient discharge of the onus of proving fraud.
- The underlying principle is that fraud must be reciprocally imputable.

Sarvanai Arumugam V Kanthar Ponnampalam

The Supreme Court expressed the view that a fraudulent intention can be inferred if,
i). there was no consideration
ii). the transfer was secret
iii). the transferor had continued in possession notwithstanding the transfer,
iv). the transfer left him (the transferor) without any property & without sufficient means to pay the debt which he owed at the time or was about to incur.
A creditor who is entitled to bring a Paulian Action must be someone who is actually prejudiced not only by the alienation but also by the fraudulent intention.

2). Inferences from payment or absence of consideration

Although in **Meerasibo V Philippsl** it was held that payment of consideration by the transferee negates fraud it has been established in the following cases that the payment of consideration does not a necessarily rule out fraud.

Government Agent, Southern Province V Kalupahana
It was held that passing of consideration to a transferor is not adequate to establish absence of fraud when there is no good faith. Where the transaction is fraudulent it is immaterial how valuable a consideration may have passed from the transferee for the conveyance is void.

In **Appuhamy V Belin Nona** It was summed up that,
the payment of the consideration for the purchase is by no means conclusive of the genuineness or honesty of the transaction…it is only one factor,
& while it will not enable the purchaser to retain the property where he has participated in the fraud yet, where is not sufficient evidence to involve the purchaser in any fraud or where it is merely a case of suspicion of his participation in a fraud, then the payment of the full stipulated consideration strengthens considerably the purchaser's claim to retain the land he has bought.

In **Bala Etana V Dassi Terunnanse**
It was held that if it is proved that the consideration has not been paid this may tend to establish one element in demonstrating that the transaction is a contrivance (device) to defraud creditors.
Siriwardena V Charles Singho
It was observed that, in an action to set aside a deed of transfer of property on the ground that it was executed in fraud of creditors, it is essential for the plaintiff to allege & prove either absence of consideration on the transfer or fraud on the part of the purchaser.

In **Meerasaibo V Ayan Sinnavan**
The court held that consideration will not avail the purchaser if he had participated in the fraud.

3). Insufficiency of assets in the debtor's hands

It is only when the property retained by the debtor proves insufficient to meet the claims to creditors that the latter can follow the property which had been alienated by the debtor. The Paulian Action would be denied to a creditor on the ground that this fundamental requirement has not been satisfied.
Supramaniam Chetty V Gunawardena
Kannappen V Mylipody

Louis V Dingiri
The Paulian Action can succeed only if the assets remaining with the debtor after the transfer are insufficient to satisfy creditors. It is therefore necessary to prove that the alienation left the debtor with practically no property out of which the claims of the creditor could be met.

In **Fernando V Fernando** it was held that this action may only be brought by a creditor, who can show that by reason of the alienation complained of the debtor has no assets on which execution could be levied, or that assets on which it has already been levied are insufficient to satisfy the debt.

4). Actual prejudice sustained by the creditor

In **Punchi Menika V Dingiri Menika** it was emphasized that a creditor who is entitled to bring a Paulian Action must be one who is actually prejudiced by the alienation. This is the basis on which a person who had a claim for un liquidated damages at the time of the transfer is permitted to bring a Paulian Action when he obtained a decree.

Fernando V Fernando
A creditor must satisfy the Court that the property fraudulently alienated was available to him for execution against the debtor.

The above propositions are in line with the decision of,**Baba Etana V Daru Terunnanse**

Prescription

A Paulian Action is prescribed & cannot be instituted after the lapse of *three years* from the date on which the cause of action accrued to the creditor in terms of **section 10** of the Prescription Ordinance.

Fernando V Peiris
It was held that the cause of action accrues from the date of the alienation in fraud of creditors, If the fraud is concealed, the cause of action accrues (arises) when the creditor becomes aware of the fraud.

In **Atukorale V Atukorale**
The Supreme Court took the view that, where a Paulian action is based on a fraudulent alienation directed against "future creditors" the right of action of a person who claims to belong to the class of persons against whom that fraudulent alienation is directed, arises only when he becomes a creditor.
Accordingly in the case of such a person a cause f action arises & time begins to run under the Prescription Ordinance, only on the date when the Plaintiff becomes a creditor.

- ***Thus, it must be established in a Paulian Action,***
  a). That the alienor intended to defeat the claims of his creditors.

  b). That the alienation left him with no assets on which execution could be levied or that the assets on which it has already been levied are insufficient to satisfy the debt.

  c). That particular creditors including the creditor impeaching the alienation had in fact been prevented by it from recovering what was their due.

8. ATTRIBUTES OF OWNERSHIP

Dominion or ownership according to Prof. Lee is the relation protected by law in which a man stands to a thing which he may,
a). Possess
b). use & enjoy
C). alienate

The rights of an owner according to Maasdorp,
1). The right of possession & the right to recover possession.
2). The right of use & enjoyment
3). The right of dispossession
He further stated that these three factors are all essential to the idea of ownership but all of them need not be present in an equal degree at one & the same time.

In **Attorney General V Herath** it was held that possession of the rights mentioned a love are generally sufficient to constitute a person as an owner under the law of Ceylon (Sri Lanka)

In **Jinawathie V Perera** a unanimous decision of five judges of the supreme court re-iterated that the Roman-Dutch law concept of an owner's rights provided the foundation for the meaning of ownership in our law.
Ranasinghe J. referred to ownership as encompassing '*the ius abutendi*' though the aspect of alienation rather than destruction emphasized in the Roman Dutch Law concept of owner's rights. Ownership can thus encompass complete rights in regard to possession use & enjoyment and alienation or encompass a residue of these rights when some of them are deducted & conferred on others.

However the right accompanying ownership of property has been significantly restricted by statutes in Sri Lanka. The modern view is that rights of private ownership available to individuals must be controlled in the interest of the community as a whole. The idea of social responsibility has influenced materially the resolving of conflicts between the individual interest & the social interest in his area.

(1). The Right to Possession

The right to possession is probably the most fundamental right subsumed in ownership. Grotius states that,
"Ownership is the property in a thing whereby a person who has not the possession may acquire the same by legal process"
Modern legislation provides for situations in which private ownership of property can be brought to an end by the intervention of the state & in which possession of the property can be acquired by or on behalf of the state.

(1) **The Land Acquisition Act.**

This Act empowers the Minister to make a declaration that a land or a servitude is required for a public purpose & direct the acquiring officer to take possession of that land for and on behalf of the state.

(2). The Requisitioning of Lands Act.

This Act enables a competent authority to take possession of any land with the prior approval of the Prime Minister where it appears to him that the land is required.
a). for the purpose of maintenance of supplies or services essential for the life of the community.
b). for the purposes of use and occupation by Sri Lanka's armed forces or any visiting force.

3).Certain Acts which provides for the establishment of institutions/corporations contain provisions empowering a competent authority to acquire land for the purposes of such institutions or corporations under the Land Acquisition Act.

Eg. The State Film Corporation Act
Ceylon Petroleum Corporation Act
The Irrigation Ordinance
The Ceylon Shipping Corporation Act
The Agricultural Insurance Law

4). The Mines & Mineral Law

Enables the compulsory transfer of certain property to any corporation established to develop the mineral industry,

5). The Requisitioning of Motor Vehicles & Agricultural Equipment Act.

Contains provisions for the requisitioning of equipment for temporary use by Government. The period of temporary use of equipment however, should not exceed thirty days in a year.

The right to possession as an incident of ownership envisages not merely the right to retain possession but also,

a). The right to recover possession in circumstances where the owner has been unlawfully deprived of possession of the property.
However several statutory provisions significantly restrict the common law right of the owner to regain possession of his property.
Eg:- **The Paddy Lands Act.**

- restricts the eviction of tenants from paddy lands.

Rent Restriction Ordinance

- restricts the ejectment of tenants

b). The right to exclude others from the possession of the property.
This right is also statutorily restricted.
Eg The Electricity Acts.
Prevention of Terrorism Act
The Atomic Energy Authority Act
The Radioactive Minerals Act
The Land Acquisition Act

(2). The Right of use & Enjoyment

Here, again modern legislation has imposed fundamental limitations on the attributes of ownership.
a). The Right of exploitation of property in general

- **The Town & Country Planning Statues**

This introduced restrictions in respect of interim development of property.

❖ **The Rent Restriction Act**

These impose restrictions on the increase of rent & prohibit an excessive advance, premium or other additional payment.

❖ **The Nuisances Ordinances**

It constitutes certain offences such as, having foul & offensive drains; keeping an accumulation of dung; keeping a house building or land in a filthy state; casting dirt in streets, suffering waste or stagnant water to remain etc.

*b). **Mining & Exploitation of Minerals***

❖ **Mines & Mineral Law**

It vests absolute ownership of certain minerals in the Republic, enables the compulsory acquisition or requisition of immovable or movable property to develop the mineral industry.

❖ **The Radioactive Minerals Act**

This provides for the compulsory acquisition by the Minister of prescribed substance & minerals & plant, & for the control of Mining, production, treatment & transport of radioactive minerals & substances.

*c). **Use of Water Resources***

❖ **The Irrigation Statutes (Ordinance of 1946 & 1951)**

These provide for the construction and maintenance of irrigation work; the division of the responsibility for the construction or maintenance of the whole or any part of the irrigation work between the Government & the proprietors, the variation of the conditions relating to the construction or maintenance of the irrigation work or the supply of water there under or the variation of any scheme for any of the said purposes etc.

❖ **The Water Resources Board Act**

Imposes on the Board the duty to advise the Minister on matters of:-

- The control, regulation & development, including the conservation & utilization of the water resources of the country.
- the promotion, construction, operation & maintenance of scheme of irrigation, drainage, flood control & hydraulic power.
- the promotion of afforestation
- the control of sea erosion

❖ **The Irrigation Act**

This ensures the protection of irrigation works & conservation of water.

d). Building

An owner of land has the right to build on his land;

Where in the course of building on his land, a land a person encroaches on the land of his neighbor, the person on whose land the encroachment has been made can require in lieu of removal of the encroachment that the party responsible for the encroachment should take a transfer of the piece of land encroached upon and so much else of the land as is rendered useless, & pay him the value of land transferred together with the cost of transfer & a reasonable sum as damages for the trespass & as a solarium for the compulsory expropriation of his property.

This position was followed in,

Bisohamy V Joseph
Silva V Silva

In **Gunathileke V Municipal Council Colombo**

- It was held that a person who builds portly on his own land & partly on his neighbor's land has no right to claim compensation for the value of the building or a portion of it from the owner of the land encroached upon.
- It was further held that his right is restricted to a removal of the encroaching portion of the building or right to buy the land on which it stands.

e). Planting or Cultivation

The right to plant or cultivate on one's land is one of the attributes of ownership.
With regard to problems arising with the over hanging branches of trees it was held in **Muttiah V Dias** that a neighbor is entitled to clip off the branches but does not have the right to cut down the trunk.

It was also observed that the owner of a land which a tree overhangs has the right to have the tree cut down without paying compensation for it to its owner.

In **Jayasundara V Godage** it was observed that an order of the court is advisable before exercising the right to cut down over hanging branches. Shaw J was of the opinion that an action for an order of the court would not be necessary if the person whose land is overhung with branches should dip the branches without trespassing as his neighbor's land.
However, under the Thesawalamai Law the position is now established that a land owner is not entitled to have the overhanging branches of a cultivated fruit tree growing on an adjoining land, cut off. This conclusion was reached in,

Suntharam V Sinnathamby
Kandasamy V Mailvaganam

3). The Right of Disposition

- **The Tea & Rubber Estate (control of fragmentation) Act**
  - Provides that the transfer of ownership of a tea or rubber estate is null & void in certain circumstances.
  - The partition by deed of a tea or rubber estate is stringently controlled by this statute.
  - The mortgage of part of a tea or rubber estate as a divided lot is treated as null & void.
  - The control of institution & entertainment of partition actions in respect of tea & rubber plantations.

- **Paddy Lands Act.**

It makes provision in regard to leases and changes in ownership of controlled paddy lands.

Ownership of property involves duties owed to others

Major obligations are imposed on persons by virtue of his ownership of property.

1). ***The duty not to cause injury by an abuse of the rights of ownership***

The doctrine of abuse of rights raises the question as to whether an intentional lawful act can become wrongful when the sole motivation for doing it is the desire to cause injury to another. In the early case of **Bradford V Pickles** the House of Lords refused to concede that the English Common Law recognized such a concept of abuse of rights.

In this case a person who excavated his own land, & interrupted underground water which would otherwise have flowed in to his neighbour's land, with the sole purpose of raising the value of his own land to the neighbour, was considered to have acted within the law.

Nevertheless the later trend in the English Common Law was to recognize that an owner should not abuse his proprietary rights.

There is authority from the Roman Dutch text writers is support of a doctrine of abuse of rights & it has been observed in several South African cases.

In the early Sri Lanka case of ,**Jayawardena V William,**
the court refused to recognize the doctrine of abuse of rights in our Law. It was held that a lawful act does not become unlawful because of a malicious motive.

However the more recent case of **David V Abdul Cader** decided that a person who is motivated by malice & refuses a statutory licence to an applicant can be liable to him in damages.
This ruling is consistent with the doctrine of abuse of rights recognized under out law.

(2). The duty to avoid causing a nuisance to one's neighbour

- An owner of property is under a duty to use his property in a manner that would not cause a nuisance to his neighbours.
- An owner of a property therefore, must not do anything on his land that will make it a source of interference with the reasonable use & enjoyment of a neighbouring land.
- The Roman Dutch Law recognizes that a land owner has the right to prevent an unlawful infringement of his rights of enjoyment of his land independent of any *dolus* or *culpa* on the part of the person who infringes such rights. This position is also accepted in the English Law.
- The balance to be maintained in this context is between the right of an owner of property to do what he wishes with his own & the right of his neighbour not to be interfered with,
  It the inconvenience can be avoided by taking precautions the plaintiff has no right to demand that the defendant's use of his property be restricted.

(3). The duty not to commit a trespass by over hanging branches

- Under the Roman Dutch Law an owner of land must permit his neighbour to cut over hanging branches of trees that grows on his land. Thus, the only rights which a neighbour has under the Roman Dutch Law as regards the branches & leaves of trees planted near his boundary, are to cut down the branches which overhang his property.
- However, the duty to permit a neighbour to cut overhanging branches is dependant on whether the overhanging branches constitutes a nuisance,

(4). The duty not to cause a subsidence of the neighbour's land

- The owner of land is under a duty not to cause a subsidence of his nieghbour's land. The basis of this duty is the principle that the neighbour is entitled to vertical & lateral support of is soil.
- Prof.G.L.Peiris holds that there is clear judicial authority in Ceylon that the right to vertical & lateral support is available only in respect of the soil, & that the right of support for wall or building can be acquired only by grant or by prescription.

In **Bandappuhamy V Swamypillai** the plaintiff-owner was awarded damages against a neighbouring owner of land who cut earth from his own land & deprived the plaintiff owner of lateral support for his land.

Weerasiri V Sanchihamy is a clear authority for the principle that lateral support for a wall or building can only be acquired by prescription as under the English Law.
In this case the plaintiff alleged that his right to lateral support for his land which had a building constructed on it, had been interfered with by the defendant's intestate wrongfully cutting away the earth immediately adjoining the plaintiff's land without leaving proper & sufficient support for the plaintiff's premises & claimed damages.

The court in dismissing the plaintiff's action stated that the plaintiff has not proved what he had alleged that he had acquired a prescriptive right to the lateral support of the wall which fell in consequence of the intestate's dealing with the adjacent soil of his own property.

9. CO-OWNERS

When two or more persons own undivided shares of any property (equal or unequal) they are termed as joint owners or co-owners of the property in question.
There is no division of the co-owned property & each co-owner is entitled to the entirety of the property in proportion to the extent to his undivided interest.
Joint ownership may result from contract as between partners or joint purchasers, or under the terms of a will or upon intestacy.

It may relate to any kind of property but the cases which come into court usually concern joint ownership of land. It must be noted however, that a person who has no interest in the soil, but has an interest only in a building on the land, cannot be treated as a co0owner. This principle was applied in,

De Silva V Siyadoris
Hamidu V Gunasekera

Co-owners' rights to use and exploit the co-owned property

A co-owner is entitled to the use & enjoyment of the common property in such a manner as is natural & necessary under the circumstances. A Co-owner even though he may not have the consent of his co-owners is entitled to use the common land but he is not entitled to appropriate more than his lawful share.

- If a co-owner is to put the common property to a use that is not natural or necessary, he must obtain the consent of the other co-owners. If consent is withheld it is always possible to institute a partition action to divide that land.
- Joint property cannot be converted to purposes, other that for which it is intended, nor can it be applied to new uses. If the character of the property is changed without the consent of all co-owners, or it anything like that is attempted, the other co-owners can compel him to restore the property to its original condition.

Thus it was stated in, **Silva V Silva,**
"I would not say that in no case can a co-owner build without express consent. Building might be natural & necessary act. If the land were fit for paddy, I conceive that one co-owner could not forbid another to cultivate without reasons given, nor could consent be required for an act which is a natural & necessary element of their co-ownership."

Government Agent Kalutara V Gunaratna
A land owned in common had been used by all the co-owners for several years as a distillery & warehouse for the manufacture of arrack.
It was held that a co-owner was not entitled to object to the issue or renewal of a licence in favour of another co-owner to manufacture arrack at the distillery.

It was further observed that in this situation a co-owner cannot be heard to object to a user which is,

> *"a natural & necessary element of co-owner ship"* an user which he had acquiesced in (agreed) over the years, nor is his consent a necessary prerequisite for the use of the common land for the purpose for which it was intended.

In **Siyadoris V Hendrick**

- a land had been purchased by the co-owners for the purpose of exploiting the plumbago contained in it.
- It was not suggested that the usual and customary method of obtaining the plumbago was departed from, or that the lessee was improvident, or the royalty inadequate.
- The court firmly held that the land had been used by the co-owners for a normal & a natural purpose.

* If a co-owner excludes the other co-owners from possession and puts the common property to its normal use. He must account to the other co-owners for their proportionate share of the profits made.

Thus in **Appuhamy V Adria**, where only some of the co-owners had dug & removed plumbago from the common land the court held the other co-owners were entitled to a share of the profits so obtained and that they could claim only an account of the plumbago which had been exploited

Grotius States that,

"A Co-owner must account to the other co-owners for their proportionate share of the fruits of the property. All profits & losses must be divided in equal proportions except such losses as are accessioned by ban faith or extraordinary neglect".

The rationale behind this is that the rights of one co-owner cannot be exercised in such a manner as to cause unfair prejudice to the reciprocal rights of the other co-owners.

* Co-owner can also use a right of way over the common property to a house occupied by him. This would not be a servitude but a right a co-owner has over the common land, provided he does not cause injury or damage to the other co-owners.

Singho Appu V Hendrick Appu

The Right to Cultivate the Co - Owned Land

1*). A co-owner has the right to cultivate the entire land & until the land is divided to exclusively possess the improvements. At one stage of the development of the law there was a conflict of judicial opinion on the point but the matter may now be considered as settled.*

In **Thinohamy V Paulis**

- The plaintiff claimed a defined 1/3 share of a land called Delgahawatte. The second defendant claimed the entirety of the plantation.
- The Second defendant was at one time entitled to 2/3rd of Delgahawatte & had made the whole plantation.
- A portion of the land representing a 2/3rd share of the soil & plantation was separated off & sold subsequently by the second defendant to one M.A.
- The defendant still claimed the plantation on the remaining 1/3rd portion which admittedly belonged to the plaintiffs.
- The commissioner held that the defendant was entitled to 1/3rd of the plantation & dismissed the plaintiff's action, except as to the soil.

- In appeal the court stated that,

"The Partition Ordinance provides for a co-owner being allowed credit for any improvement made by him on the common land unless of course, he has acquired it by prescription"

It was further observed that the plantation or improvement accrues to joint or co-owners in proportion to their respective shares, & the improving co-owner can acquire a right to be compensated for the improvement.

But Prof. G.L.Peiris states in his books on the law of property that the above view must now be characterized as manifestly unsound.

Silva V Silva

It was held that:-

- The Partition Ordinance introduced no change with regard to the rights of co-owners under the Roman Dutch law to be compensated for improvements.
- Treated co-owners who had improved the land as bona-fide possessors even if they planted more land than their shares amounted to, if the other co-owners acquiesced in their doing so.
- A co-owner working in a plumbago mine must hand over a proportionate share of the profits to the other co-owners whose claim to a portion of the profits arising from their undivided ownership of the soil
- Differing from this principle in a case of appropriation of the fruits of a plantation made by one co-owner or by some co-owners the entirety of the fruits can be taken beneficially by the co-owner or co-owners responsible for the making of the plantation.
- The rationale is that the co-owned property as it existed previously did not contain the plantation & that the advantage of the fruits of an improvement of this kind must endure exclusively to the co-owner who makes the improvement to the co-owned land.

II). When a co-owner plants more that his proportionate share of the common property he is entitled to possess the entire plantation as against the other co-owner, until such time as the common ownership is terminated in an action for partition.

Arnolis Singho V Mary Nona

The plaintiff & the defendant were co-owners of a property along with some others. The plaintiff instituted the action against the defendant for a declaration that he was entitled to the possession of certain rubber trees planted by him on a portion of the common land, & for damages for wrongful possession of the plantation by the defendants.

In the Supreme Court Nagalingam J held that where a co-owner plants more than his proportionate share of the common property he is entitled to possess the entire plantation as against the other co-owners until such time as the common ownership is put an end to in an action for partition.

Peiris V Appuhamy

But as stated in this case the previous decision should be modified to the extent that it will not apply where the improvement has been made against the wishes or without the acquiescence of the other co-owner.

***III). Is the co-owner making the plantation entitled to an order of ejectment against the other co-owners*?**

Gunesekera V Silva

- The Supreme Court decided that a planting co-owner cannot have the other co-owner ejected from the land, because every co-owner has a right to possess the co-owned land.

- Although a co-owner who has made a plantation is entitled to an order of ejectment against a person who obtained a lease of the plantation from a co-owner who had no right to enjoy the improvements, an order of ejectment will not be made against the lessor himself since he is a co-owner of the land.
- Thus where one co-owner makes a plantation, with another's consent he is entitled to possess it exclusively. However he cannot obtain an order of ejectment against another co-owner from the entire land.
- The supreme court refused to give an order of ejectment against a co-owner from the entire land Sansoni J. observed that:

"We have to enforce the right of an improving co-owner without unduly interfering with the right of other co-owners"

IV). where a co-owner makes a plantation on the common property with the consent of his co-owners:-

a). He is entitled to possess the entirety of that plantation as against the other co-owners until the common ownership is terminated by a partition action.

b). The exact share of the person suing in such a case is irrelevant so long as he establishes that the person sued has no right to enjoy the plantation.

c). It makes no difference if two or more co-owners make the plantation & only some of them sue to enforce their rights of possession against a co-owner or any outsider who has no right to enjoy such improvement.

The Right to Construct Buildings on the Common Property

(1).

- Where the natural use to which a common property can be put is to build on it a co-owner has a right to build on it. His right does not depend on a custom.
- A co-owner may restrain another by injunction only when has proprietary rights are being violated; but so long as the land is being put to the uses for which it was specially adopted no restraint by injunction is permissible.

In **Silva V Silva (1903)**

- the plaintiff & the defendant were co-owners of a piece of land. The defendant objected from the outset to the plaintiff's building a house. Notwithstanding the objection the plaintiff continued to build the house and the defendant then obtained an injunction against the plaintiff. The building was stopped & the plaintiff alleging he had suffered damages sued the defendant. It was held that he had no cause of action.
- The court was of the view that if the land was a building site, then natural use to which the land can be put was to build on it. However, if a co-owner attempts to build in the face of strong objection by the other co-owners he can be restrained from doing so.

Silva V Silva (1906)

- In this case the plaintiffs objected to the building of the house at an early stage. There was no evidence to show that the building of a house in the locality was a use of the joint property which would naturally have been in the contemplation of the parties.

- The Supreme court held that one of several co-owners of a land had no right to build on the common property without the consent of the other co-owners and that where a co-owner, had done so, he had no right to compensation from the other co-owners

unless it could be shown that the building of a house on the land was a use of the joint property which was natural & orthodox having regard to the nature, situation and the extent of the land.

Goonewardene V. Goonewardene (1913)

- Woodrenton J referred to the general rule that one co-owner cannot build a house on a land held in common without the consent of the other co-owners.
- He stated that this was subject to a category of exceptions based on the principle that, *"The law does not prohibit one co-owner from the use and enjoyment of the property in such a manner as is natural & necessary under the circumstances"*

Kathonis V Silva (1919)

It was observed that:-

- *"A co-owner has the right to build and live on the common land"*
- "Presumably this right is limited to the accommodation which his share would provide when convenience of possession is considered.
- Therefore it has now come to be recognized that a co-owner as a matter fact has a of right to prevent another co-owner from building. Note that the consent of the other co-owners is required only in circumstances where building would be tantamount to an unexpected and novel use (not natural and ordinary use) of the co-owned property.

Charles V Themanis (1914)

- where the construction of a building amounts to an unexpected & novel use a co-owner who objects to the building is entitled in law to prevent the build and ask for an injunction against the co-owner who proposes to build" rather than resorting to a partition action.

Perera V Podisingho

- Where the proposed building would obstruct a passage available to all co-owners the court will prohibit such building, &
- where the proposed building deprived the other co-owners of the right to put up a building on the road frontage an order for demolition of the building can be obtained.

- The case of **Elpi Nona V Punchi Singho** (1950) is an important one because it summed up the principles of law under which a co-owner can build on common property as of right without the consent of the other co-owners and when such consent would be necessary. It also indicated the circumstances under which a co-owner can obtain an injunction for the demolition of a building put up by another co-owner.

- In this case Gratiaen J. held that a co-owner has a right to build on the common property without the consent of his co-owners, provided he acts reasonably and to an extent which is proportionate to his share and does not infringe the proprietorship rights of other co-owners. His lordship emphasized that the Roman-Dutch Law does not go so far as to vest a co-owner with an absolute right to prevent other co-owners from building on the common land.

In summing up the rights of a co-owner in the common property Gratiaen J.said in this case:

- It seems to me that every co-owner has the right to enjoy his share in the common land reasonably and to an extent which is proportional to his share, provided that he does not infringe the corresponding rights of his co-owners. Moreover, neither he nor they can except by mutual consent, apply the common land to new purposes in such

manner as to alter the intrinsic character of the property. Should the erection of a building for instance, (or for that matter, any assertion of a co-proprietorship right) be proved to constitute an interference with the legitimate use of the property by an objecting co-owner a cause of action accrues to compel the wrongdoer to restore the status quo. The question whether in any particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors and cannot be solved as an abstract question of law.

Justice Gratiaen further said,

- The cause of action in proceedings of this kind is based on the infringement of the rights of the objecting co-owner and not on a right simpliciter to withhold consent to something which is, either an alteration or conversion of the intrinsic character of the common property or an attempted user of the property which is disproportionate to the improving co-owner's interest thereon.

This judgment attempts to interpret a co-owner's right to build so that there will not be unreasonable restrictions on the development of common property.

(2). Co-owner's remedy in regard to buildings made by another co-owner without consent

- What is the remedy available to a objecting co-owner under the Roman Dutch law when another co-owner attempts to build on the common land against his wishes?
  -The objecting co-owner may seek an injunction restraining another co-owner from building on the common land.

Muthaliph V Mansoor (1937)

- The Supreme Court held that an injunction issue even if irremediable harm has not been suffered by the plaintiffs.

(3). **Co-owners remedies in regard to improvements made to common property, & other rights of co-owners**..

Where a building has been erected on the common property by a co-owner, acting within his rights what is the nature of the interest available to the improving co-owner in respect of the structure erected?

- A co-owner cannot ask for a declaration of title to the building or improvement as long as the land remains undivided.

Therefore, in **Charles V Juse Appu** the supreme Court held:-

"A building accedes to the soil. A co-owner is entitled in law to his undivided share of every inch of the soil. On that principle it would not be open to a co-owner to ask for a declaration of title to Specific portion of the common property. When a co-owner is declared entitled to a building in effect it means that be is also declared entitled to the soil covered by it"

- A co-owner is nevertheless entitled to maintain a possessory action in respect of a house or other building properly constructed by him for his own benefit on the common property.

Enhis A.C.J. declared that:-

- If a co-owner exercises his right & builds a house for his private use on the land he is able to eject any other co-owner who attempted to occupy that house without his permission.
- The right to build a house on the common land carries with it a right to keep the house private; & to that extent an order for ejectment could be made.
- A co-owner may have the right to enter the house for certain purposes, but not to claim one of the rooms for his personal residence

(4). When the co-owner constructing the building (without transgressing the rights of the other co-owners) loses the use & enjoyment of the building, he is entitled to compensation from the other co-owners.

De Silva V Siyadoris
Silva V Babunhamy

The Right of a co owner to use a Trespasser for Ejectment

- The owner of an undivided share of land is entitled to use a trespasser to have his title to the undivided share declared, and for the ejectment of the trespasser from the whole land.

Hevawitharane V Dangan Rubber Co.Ltd.

- It is not necessary that he makes the other co-owners, parties the action.
- The offence of criminal trespass maybe committed by the owner of an undivided share of land who enters unlawfully upon a separate part of the some land held in divided shares. **Magiris V Piyanoris**

A co owner's Right to Compensation for Improvements

- The law of Sri Lanka concedes the right of compensation for improvements to co-owners who effect improvements bona fide on the common property.

In **Silva V Silva (1911)**
It was held that a co-owner is entitled to compensation for improvements effected by him on the common land but is excluded from the benefit of the "ius retentionis" (the right to retain).

Silva V Babunhamy (1912)
The Court laid down the principle that the improving co-owner can claim either the cost of the improvement or the difference between the original & the enhanced value of the property whichever is less. (quantam of compensation).

Perera V Pelmadulla Rubber & Tea Co. (1913)
The court reiterated that a co-owner building on common property has no larger rights to compensation than a bona fide improver of property which was not his own.

Sanchi Appu V Marthelis (1914)
It was held in this case that the improving co-owner becomes entitled to compensation at the time when he is deprived of possession & enjoyment of the structure. The right to compensation would generally accrue to the improving co-owner at partition, if the portion of the land on which the building stands, is allotted to another co-owner.

De Silva V Siyadoris

- A Co-owner who puts up a building on the common property acquires no title in severalty as against the other co-owners. The building once erected accedes to the soil & becomes part of the common property. Therefore the right of the builder is limited to a claim for compensation which is capable of being enforced in a partition action.

- No distinction should be drawn between buildings & plantations with regard to a co-owner's right to compensation for improvements effected on the common property.

Therefore it can be concluded that:-

(a). a co-owner's right to compensation for improvements effected on the common property depends on the question whether the co-owner in making the improvement acted within or in excess of his rights &

(b) If the improvement had been property & lawfully effected the co-owner responsible for the improvement is entitled to be compensated on the same footing as a bona fide possessor, provided that in the partition proceedings is not assigned the portion of the land on which the improvement stands.

The competence of a co owner to alienate Rights in the common Property

(I) The general rule is that a co-owner has no right to alienate more than his undivided share of the common property.

- This principle was applied in **Vaz V Haniffa.**
- Voet states that:- *"Where things are the property of several co-owners, each of them can only sell or transfer by delivery to the purchaser, to the extent of his own share".*
- In**Thamboo V Anammah** it was laid down that a co-owner cannot give a right of way or other servitude over the common property without the consent of the other co-owners. This is because this would impose a constraint on the proprietary rights of the others.

(II) It is the accepted view in Sri Lanka that the rights of a Mortgagee to whom a co-owner has hypothecated his undivided share of the common property, continue to attach exclusively to that share notwithstanding a subsequent 'amicable partition' of the property in to divided allotments.

- The effect of this view is that the mortgage does not automatically attach to any share of the divided allotment conveyed to the mortgagor which had not been previously covered by the bond.

In **Jayathilleke V Sriwardena**

- **A, B** and **C** who were co-owners effected an amicable partition of the common property, implemented by cross conveyances, on the basis that each should become the sole owner of an unencumbered divided allotment in exchange for his original undivided share in the land.
- However **A** had previously mortgaged his undivided half share in the common property to **D** but had fraudulently suppressed this from **B** & **C.**
- In an action by **D** to enforce his mortgage bond it was held that **D** was entitled to a hypothecary decree in respect of the whole land to the extent of **A**'s original interest there in which had been mortgaged (The result was that **B** & **C** received less than they had bargained to receive from **A** in the amicable partition).

(III)Does section 17 of the Partition Ordinance prohibit the alienation, hypothecation pending partition proceedings of an interest to which a co-owner may ultimately become entitled by virtue of the decree in the pending action?
Two grounds of policy prevailing in this regard under our law:-

(a) In **Khan Bhai V Perera** the judges decided unanimously on this general question that persons desiring to charge or dispose of their interests in a property subject to a

partition action could do so *"by expressly charging or disposing of the interest to be ultimately allotted to them in the action"*
This ruling had undoubtedly influenced the actions of countless vendors and purchaser for many decades so that the decision could not be lightly disturbed.

Manchanayake V Perera
Srisoma V Saranelis Appuhamy

(b). **Section 17** of the Partition Ordinance prohibited the alienation or hypothecation of undivided interests presently vested in the owner of a land which was the subject of pending partition proceedings.

- There was no statutory prohibition against a person's common law right to alienate or hypothecate by anticipation interests which he could only acquire on the conclusion of the proceedings.
- As the Supreme Court aptly observed in **Subseris V Prolis** ,

"Section 17 imposed a fetter on the free alienation of property and the court ought to see that fetter is not made more comprehensive that the language & the intention of the section require".

(IV) A co-owner can give a conditional transfer that is a sale with a condition to obtain a retransfer.

In **Garlis Singho V Geeger Singho** it was held that where property owned by co-owners is conveyed by the them on a conditional transfer and is subsequently retransferred to them without specifying any particular proportions the deed of retransfer will be construed to mean that the property was returned to them in the same proportions as those in which they held it at the time when they executed the conditional transfer.

(V). The legal position of a co-owner who after erecting a building on the common property, sells his undivided share in the land without making any reservation as to the building, according to the decision of the supreme court in **Ranasinghe V Ariyaratne Epa** is that the improving co-owner's right in the building pass to the transferee and thereafter to the successors in title of the transferee.

10. EMPHYTEUSIS

- Emphyteusis is a contract involving the grant of immovable property- generally land to a person either in perpetuity or for a long period on condition that the grantee improves the land and pays the grantor a small rent in money gain or in some other way in recognition of the paramount title vested in the grantor.

- The contract of emphyteusis is clearly recognized by the Roman Dutch common law.

- Voet supports the view that emphyteusis cannot be classified under either of the heads of sale or lease, but that it is a contract sui generis.

- Emphyteusis denotes either,
  - the actual property granted on tenure,or
  - the contract itself for such tenure, or
  - the actual right in re which is established.

According to Voet emphyteusis may be created by the following three modes:-

a) Contract Accompanied By Delivery.

In answering the question whether writing is an essential requirement in this instance Voet holds that under the Roman Dutch common law writing is not an essential requirement.

He further states that even though writing is not essential to this contract it is regarded as being the most reliable guard & helper of memory. It is also the clearer proof of actions which are to hold good for an unending an immemorial or at least a lengthy period. It helps to prevent transactions from otherwise being lost through the passage of time
.
However contrary to the above view Van Leeuwen was of the opinion that for this kind of contract there must be writing,

The controversy which was a feature of the Roman Dutch common law is treated as settled for the law of Sri Lanka by the provisions of the Prevention of Frauds Ordinance.

The Prevention of Frauds Ordinance NO.7 of 1840 provides that interests in land or other immovable property must not only be in writing but also require notarial attestation. In the absence of compliance with these formalities such contracts are declared to be "*of no force or avail in law*".

Since emphyteusis partake of the character of a contract creating interests in immovable property the application of this statutory formality incorporated in the Prevention of Frauds Ordinance to such a contract is indisputable.

Don Abraham V Samarakkody

The approach reflected in this judgment is criticized on the basis that if failed to take into account the provisions of the Preventions of Frauds Ordinance.

(b) Bequest by Last Will

This mode of acquiring the right of emphyteusis has not created any difficulty.

C) <u>Prescription</u>

In Sri Lanka this matter is governed by the Prescription Ordinance under the present condition of the law a servitude of emphyteusis can undoubtedly be acquired by prescription under the terms of this Ordinance.

This position was upheld by the Supreme Court in **<u>Jayawardene V Silva .</u>**

- In this case **'H'** by a deed dated 1836 delivered over the land in question to '**S'** & '**A'** to be cultivated by them and their descendants in perpetuity in condition that 1/3rd of the produce should be rendered to the proprietor.
- The plaintiffs claiming to be successors in title to **'H**' brought an action for declaration of title against the defendants who were the heirs of **'A'**.
  The deed of 1836 not having been registered under the provisions of Ordinance No. 6 of 1866 was not admitted in evidence.
- It was held that it was open to the defendants to establish their title to the servitude of emphyteusis by prescription.

11. SERVITUDES

What is a servitude?

Prof. Lee defines servitudes as a,

"real right enjoyed by one person over or in respect of the property of another".

Voet says that servitude does not mean that the person should do something but that he should allow something to be done or refrain from doing something (for the other person's advantage)

Servitudes are classified as:-

a). real (or praedial) and
b). personal

a). Real / Praedial Servitudes:-

A right enjoyed as incidental to and inseparable from ownership of immovable (land or buildings) property is termed as praedial servitudes.
A person who enjoys a real servitude is entitled to prohibit something or to do something for his own benefit upon another's land; so it's a right detached from the ownership of one's praedium (land) and attached to the ownership of another.
These are perpetual in its character. Once acquired it survives irrespective of the death of the person who enjoyed the right.

b) Personal Servitudes:-

A personal servitude is not enjoyed by virtue of land. It is a right vested in a person. It lasts only as long as the life time of the person.
Eg. a usufruct.

- Servitudes relate to an interest in land & as such come under **section 2** of the Prevention of Frauds Ordinance.
  A document dealing with a servitude (interest in land) must be registered in order to obtain priority.

- Land to which a servitude is attached is the dominant tenement and land subject to the servitude is the servient tenement.

- Servitudes are sometimes classified as negative servitudes and positive servitudes. A negative servitude is one where the owner of land subject to the servitude (the servient tenement) is required to refrain from some conduct such as building on it.
  A positive servitude is one where the owner of the land to which a servitude is attached (the dominant tenement) has a right to do something on the land subject to the servitude (the servient tenement).
- All servitudes must be used in such a way as not to burden the servient tenement more that is necessary for the proper exercise of this right.

  Eg. If the dominant tenement's servitude gave a right to use a footpath the user cannot claim a footpath.

- Once a servitude is granted, all things necessary for its exercise are considered to have been granted at the same time.

Eg. *The right of drawing water from a well entitles the servient owner to a right of way to the well and the right of leading water by means of a water course entitles him to keep the water course in repair and to a right of way along it for that purpose.*

- There cannot be a servitude over a servitude as the grant of a servitude creates an obligation upon the servient tenement, which the dominant tenement's owner cannot extend.
- No one can have a servitude over his own land (Nulli Res Sua Servit),
- A co-owner cannot create a servitude affecting the co-owned land without the consent of the other co-owners.

Acquisition of Servitudes

(1). <u>By Grants</u>

Here the owner of the servient tenement agrees to grant a servitude and the some principles as to transfer of land applies,

- Mr. Wijeyadasa Rajapakse states in his book on "the Law of property (Vol-1)-ownership" that 'servitudes may be created by an agreement accompanied by delivery which consists in the mere exercise of the right with the owner's consent or by the pointing out by the servient owner of the place where the right is to be exercised. However, the court requires the clearest proof to support an oral contract for the granting of a real servitude when the servient tenement is being transferred to a new owner, the insertion of a clause setting out the terms of the servitude in the deed of transfer is sufficient, no registration of any separate contract is required.

- A deed or an instrument creating a servitude must grant it in express terms. An instrument creating a servitude is an instrument creating an interest in land and therefore it must be notarially executed. In order to gain priority the instrument should be registered.

- Generally a servitude cannot be granted impliedly however there are exceptional circumstances in which an implied grant is recognized by the courts as creating a servitude.

<u>Jayatilleke V Amerasinghe (1957)</u>

This was a case where two adjoining houses were separated by a common wall which did not go up to the roof. A row of dwelling houses **A, B, C, D, E, F** & **G** adjoining one another belonged to the same owner and were built in such a way that the lavatory labourer used a two-foot passage next to the drain on the East side of the houses to go from house to house through the common door-ways which were between the houses for the purpose of washing the common drain and removing the dust bins. Premises **F** & **G** were sold by the owner to the plaintiff & the defendant respectively. There was a common door which gave access from the rear of one house to the rear of the other.
The court observed that, the right to use the passage & the door way for the purpose for which they had been originally intended and used all along was implied in the grant to the plaintiff of the premises **F** with the common door-way. The defendant was therefore not entitled to remove the common door at the rear and obstruct the passage between **F** & **G**.

Thus a servitude would be implied only in exceptional situations where the land would be of no use without the right of the servitude.

If no particular portion of the servient tenement is specified in the grant as the area over which the servitude can be exercised, the dominant owner has the right to determine the area over which he will exercise the right.

Real servitudes acquired by prescription pass with land, whether specifically mentioned or not in the grant as the owner of the land alienates it subject to the servitude.

Suppiah V Ponnambalam
Maheswary V Ponnadurai

(2). By Last Will

Rights of servitude can be created and bequeathed by a testator in his last Will. If a testator provides for it and the probate is registered, a servitude may be created.

(3). By Prescription

Title to a servitude may be acquired by prescription. The Prescription Ordinance holds that acquisitive prescription is possible only in relation to *'land and immovable property'*

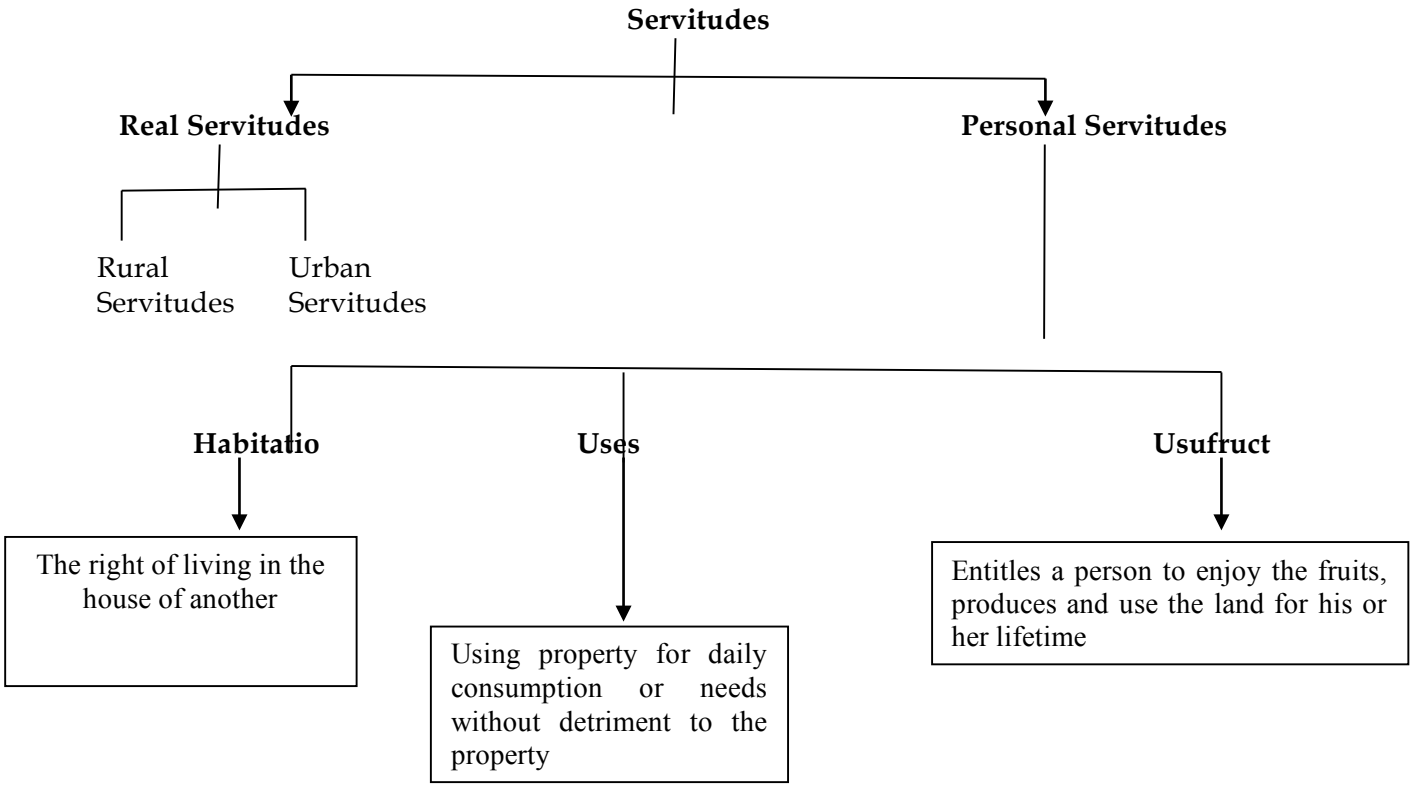
In **Marasinghe V Samarasinghe**
the majority of the judges of the Supreme Court was of the view that a servitude acquired by prescription should be equated to one acquired by grants simpliciter and held that the owner of the servient tenement could offer and alternative that was equally convenient to the dominant tenement. This view was followed in **Wijesena V Fernando**
and represent the current legal position. This view was based on the ground that a servitude should cause as little burden to the servient tenement as is reasonable and necessary for the exercise of the dominant tenement owner's rights.
A servitude acquired by prescription can be deviated from by mutual agreement. This would not amount to the abandonment of the servitude. The servitude is deemed to attach to the new route on the basis of prescription.
Luciya V Somarathe

(4). By Decree of Court

The owner of a land which has no access to a public road is entitled to claim a right of way of necessity and can compel the owner of the land which lies between his property & the road to grant him such a right. If the latter refuses he can enforce his right by an action.
Therefore a servitude maybe created by a judicial decree of court.
Cooray V Samarasinghe
A decree of Court granting a servitude may have to be registered in order not to lose priority.

(5) By Immemorial User (Vetustas)

The doctrine of vetustas is defined as a state of things which has endured for a long time that its origin dates back to a period to which the memory of a man does not extend, giving rise to a legal prescription that such origin was legitimate and excluding the parties from furnishing proof that it was so.
A servitude can be acquired on the basis of immemorial user or vestustas only when there is clear. Proof that the public has used a right of way for so long that its origin is obscure.



b) Real Servitudes

(1). **Rural Servitudes (Rustic Servitudes)**

The general rule is that servitudes attached to land are regarded as rural servitudes even if the land is located in a town. It is the use to which the property is put that is the distinguishing feature between rural and urban servitudes.

All rural servitudes consist in allowing the dominant tenement holder to do something and the servient tenement to permit something to be done. Thus it allows the dominant owner to use the servient tenement in a certain way.

Real servitudes are from their very nature exercised intermittently.

Servitude rights which falls within the category of rural servitudes are:-

a) Right of way

The relation of dominant tenement and servient tenement must exist in order to give rise to a right of way by reason of prescriptive user.

Eg. Right to go over another's land on foot or on horseback, Right to drive cattle.

Maasodorp holds that rural servitudes requires that the intervening properties shall be subject to some servitude thought not necessarily the some as the servient property in order to bring the latter in to touch or communication with the dominant tenement.

Suppiah V Ponnampalam

- This was a case where an owner of land who had acquired a right of way by prescription conveyed the land by a notarial instrument to another. There was no specific mention of the right of way.
- Wood Renton J. Held that the transferee was entitled to assert his right to the servitude acquired by the transferor though it had not been expressly conveyed.

A similar position was followed in **Maheswary V Ponnadurai**

Fernando V Fernando (31 NLR 126)

- It was held that where a right of way is acquired by prescription the owner of the servient tenement is not entitled to divert the particular track acquired by user.
- When a servitude of way is constituted without precise definition, the owner of the dominant tenement has in the first instance the right to decide the route but he must exercise this right reasonably.

Senathiraja V Marimuttu

- It was observed in this case that when a servitude of right of way has been granted & no particular portion of the servient tenement has been indicated over which the servitude maybe exercised, the owner of the dominant tenement has the right of election as to the portion on which he will exercise his right of servitude.
- The owner of the servient tenement also has the right to vary the route without prejudice to the owner of the dominant tenement. It was discussed in **Marasinghe V Samarasinghe** that he may vary the route provided the new route is a convenient as the old one.

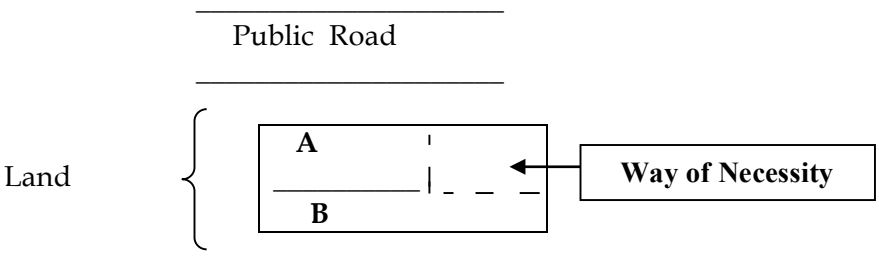
Dias V Fernando was a case where a person who has acquired a right of way over another's land deviated the route and it was effected by mutual agreement which was not notarially attested. The court held that the servitude was attached to the new route.
Therefore, it is viewed that where a the route (or the right of way) is precisely defined, any alteration is possible only on mutual consent.

b) Way of necessity

- A way of necessity is a right of way granted in favour of some property over an adjoining one when the right of way constitutes the only means of entry to and exit from this property to some place with which it must due to necessity have a communicating link.
- Owners of old lands which do not abut (touch) upon a high road or neighbour's road are entitled to a way of necessity. The court is empowered to grant them a necessary road whereby to reach the high road by shortest way and with the least damage.
- A way of necessity maybe a permanent way giving access to a public road, for all lands which do not adjoin a highway or a public path way.

In **Nagalingam V Kathiresapillai**

- It was decided that where a land one of the boundaries of which was a public road is divided into two or more portions the back portion which would otherwise have no access to the public road retains an outlet to the public road over the front portion even in the absence of an express reservation of a servitude.



- A way of necessity is limited to the extent absolutely essential for the purpose of giving access; and cannot be extended according to the mere wishes of the owner of the dominant tenement.

Therefore in, **Fernando V De Silva** the Supreme Court held that he owner of the land which had access to the high road by a path could but claim a cart way unless the actual necessity of the case demanded this extension.

- Our courts have denied claims for way of necessity merely to have a more convenient road.
  It was held in **Mohotti Appu V Wijewardena** that a way of necessity will not be granted if there is an alternative route to the one claimed although such route may be less convenient and involve a longer and more ardous journey. **Chandrasiri V Wickremasinghe**

- However in **Fernando V Alwis** it was held that if the alternative route is too difficult and impassable (such as a sea-shore during monsoons) the actual necessity of the case is the determining factor. In such a case it is not necessary to establish that the way claimed is the only means of access from this land to the public road.

c) Right to draw water from another well
- Right to lead water out of a stream,
- Right of drain

d) Right to use threshing floors
In **Weeraisnghe V Perera** it was held that the right to thresh paddy on another's land is a servitude, which can be acquired by prescriptive user.

e) Grazing Rights
Deals with the right to turn cattle on to another's land for grazing.

(2). Urban Servitudes
- Generally servitudes attaché at to buildings and dwelling houses are considered urban even if located in a rural area. Urban servitudes do not merely consist in permitting something to be done but also impose a duty not to do something on one's own property which otherwise would be permissible.

Eg. the duty not to obstruct another person's light or view by building too high.

- Maasdorp is of the view that an urban servitude may subsist even though the two tenements are separated by intervening properties which are free from servitude.

(1) **Servitude of light and air**
- The servitude of right of light and air was known as a right which could be acquired by prescription under the Roman Dutch law.
- Every owner of property has the right to build as high as he likes on his own property subject to his neghbour's right to light and air. This is a servitude which prevents a person from exercising his/her right to building as he/she wishes on his/her land.
- In the importance case of **NeateV De Abrew** the Supreme Court held that the right to the servitude of light and air can be acquired under **section 5** of the Prescription ordinance. This decision was followed in the later cases such as,
  Goonawardena V Mohideen Koya & Co. Pillay V Fernando
  Pillay V Fernando

  In **Goonawardena V Mohideen Koya** Hutchinson CJ held that a right to the servitude of light and air can be acquired by prescription. But the right which can be so acquired

is not a right to all the light and air which may have come to the buildings not a right to have it come absolutely undiminished but only to so much of it as is required for the use and enjoyment of the building.

- In **Pillay V Fernando** if was observed that a right of servitude of light and air may be acquired by prescription by mere enjoyment just as much as any other servitude.

- The authority laid down in the above cases was not followed in **Perera V Ranatunga** where it was held that a mere enjoyment of an unobstructed flow of light because a neighbour did not build on his land for over ten years does not amount to adverse possession and therefore the right of a servitude of light and air cannot be acquired by prescription by mere enjoyment.

- Finally in the case of **Moosajee V Carolis Silva** the Supreme court overruled **Neate V De Abrew** and decided that mere long enjoyment of a flow of light does not amount to adverse possession within the meaning of **section 5** of the Prescription Ordinance.

- The servitude right to prohibit a neighbour from obstructing the window light by erecting a higher building on his adjoining land cannot be acquired by the mere fact that the neighbour has not built on his land for a long period so as to cause such obstruction of light and air.

- The court in **Moosajee V Carolis Silva** was guided by the constraints that would be placed on urban development if the right to light and air was interpreted as it had been in **Neate V De Abrew.**

(2) **Right of overhanging trees**

Grotius states that no one should allow his trees to overhang to the ground of his neighbour. The latter may cause the branches over hanging on his ground to be cut down or if not shall be entitled to the fruits which hangover.

- An action lies against a neighbour for damages arising from fruits falling off overhanging trees under the Roman Dutch law and English law no right of servitude can be claimed in respect of an overhanging tree by the owner. An owner of a tree cannot by prescription acquire a servitude right to compel his neighbour to let it hand over his land **Muttiah V Dias.**
- The owner of a land which a tree overhangs has a right to have the tree cut down without paying compensation for it to its owner,

  Muttiah V Dias
  Corea V Boteju

- A land owner has no right to enter into his neighbour's land and cut down trees without the permission of the neighbour. But in**Dias V Strong** the court held that if there is an imminent danger of the tree falling he will be justified in summarily felling (cutting) it.

(3) **Right to erect a scaffolding**

A right to enter and erect a scaffolding in the neighbour's land if it is otherwise impossible to erect a building is similar to a right of way of necessity.

Cooray V Samarasinghe

(4) **Right of lateral support**

Roman Dutch Law recognizes the principle that an adjoining neighbour has no right to excavate his land in such a manner as to deprive his adjoining land owner of the natural use

of his land. Such right is known as "*lateral support*" and extends to the support of neighbour's land burdened with a building.
Therefore an owner of a building is entitled to lateral support from the adjoining land for his building.

If the servient landowner makes excavations which cause the dominant owner's building any damage the servient landowner is liable in damages.
Pedris V Batcha

Termination of Servitudes

(1) **Abandonment**

A servitude is lost when the dominant tenement owner clearly and intentionally abandons it. But a mutual agreement to deviate the route acquired by prescription does not amount to intentional abandonment.
Tacit or implied abandonment takes place when the servient owner is permitted to do something which necessarily obstructs the exercise of the servitude and makes the servitude inoperative.
Eg. builds a house across a roadway.

It was held **Paramount Investment V Cader** that abandonment must be proved, for under our law a servitude of right of way created by a deed cannot be lost by mere non-user.

(2) **Merger**

If the ownership of both dominant and servient tenements vests in one person, the servitude is extinguished since one cannot have a servitude over his own property.
Merger will not be permanent if there is an intention that the servitude should revive at some later point of title.

(3) **Non User**

When the proprietor of the dominant tenement though having the opportunity has abstained from using the servitude it comes to an end. The periods required for such non user are governed by the Prescription Ordinance.

(4) **Destruction of Property**

A servitude is destroyed when the dominant or servient tenement is destroyed, but if the property is restored to its former condition the servitude automatically revives.

(5) **Partition Decrees**

Such decrees create new title and thus extinguish servitudes, unless they are specifically recorded in the decree.

(6) **Forfeiture**

If a servitude is created subject to a condition which provides that if the rights granted are employed in any manner which is contrary to the deed of grant, the servitude shall be forfeited. A provision of this kind must be strictly construed.