

## **The Possession as argument of defense in the intruder eviction process.**

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It is a reality that the man in his emulation to satisfy primary needs for life executes acts, which accidentally generate juridical consequences and one of them is the possession, that is to say, the tenancy of a thing determined with ownership or proprietor intention or as accurately appears in article 415 of the Civil Code. *“the retention of a thing or the enjoyment of a right with ownership intention...”*.

Thence the legal concept it follows that a basic element of this figure, is the ownership intention, the holder's behavior of being considered the landlord and owner of the property that holds, which juridical consequences change in regard to the so called possession, in which only an external and material power is exercised over the property, without this intention. This element identified by the Romans also as *animus domini*, becomes more relevant than the *animus tenendi*, since, as Savigny said (who is widely credited with the Theory of the *“animus”* in the possession), the material actions over a thing mean nothing if they are not followed by the elect intention, which implies the desire and disregard of the holder, of a higher right.

We emphasize the previous concept because, our civil statute turns out to be impregnated with this theory, when it supports that the possession could be exercised in proper name or on behalf of another (*article 417*), and prove of this is that the article 606, establishes that the possession of the land will have to be proved by positive facts, of those which is only given by ownership right, such as the lease. A lessee can appear in the beginning, before everyone as holder, given that he enjoys the leasehold object of the lease contract, but in its title recognizes the foreign domain, and due to this recognition all the acts executed by this lessee, are in the benefit of this holder and this is due to the fact that the same one is executing acts of economical development of a property. Therefrom, master Valencia Zea accurately considers that *“holders are all the persons who according to the social uses exploit economically the things in proper profit to resemblance of the owners”* (*Civil rights, T. II, “Property Law”*)

This economical use provides an advantage for the holder, which is not different, than to turn him into owner of the property, in the course of time, but in journeying of the time he needs to guarantee the same, the protection of his right, in such way that if it is disturbed, bothered or deprived in his possession, by means of a possessory action he can put a remedy to the presence of acts opposite to his right.

The possessory actions, which appear regulated in the substantive law, *“are destined to acquire, preserve or recover the material possession of real estate or of rights in rem constituted in them”* (*art. 597*). This protection, which the law grants to the holder seeks to keep law and order, since the same can be affected if the holder is not protected. As Savigny accurately said, *“an attack to the possession is an attack to the human being”*. In the same sense, Colombian lawyer Velásquez Jaramillo, affirms that *“by means of the establishment of the possession there is protected the one who turns a property, socially deserted by the owner, in productive and valuable for the community. The work and the*

struggle of the man prevail over titles and deeds that solely produce nothing if his owner abandons the property” (*Goods*, p. 167).

It is precise to specify that this possessory protection can only be invoked by the holder who has held the property in calm and uninterrupted for a whole year (art. 599). This term is based on the fact that one year is enough time to differ, a possession from a simple or mere tenancy.

Nevertheless, although the possession is protected by the law, even against the owner, for example when the holder is awarded in good faith with the right to hold until the necessary expenses are paid (art. 439), there is an action that in its application has been openly denying this right and that perishes to be over the substantial rights that the law recognizes to the holders.

We refer to the article 1409 of the Judicial Code, which establishes: "*When the property is occupied without lease contract with the proprietor or with his proxy or his manager, any of these persons will be able to request of the chief of police to evict it and deliver it to the requestor. If the occupant or the occupants will not exhibit explanatory qualifications of the occupation, the eviction will be carried out immediately*".

This regulation dedicates the well-known “intruder eviction”, which intention is to make to empty a building from all those who does not demonstrate to have explanatory title for its occupation, and this title has been identified only with the lease contract, and why not interpret it that way, when disposition turns out to be inserted exactly in the paragraph regarding eviction. Therefore, to quote a case, the Civil Superior Court expressed in an appeal for legal protection lodged against a decision that granted an intruder eviction, that:

“Although article 1399 (article 1409) of the Judicial Code does not define what is understood as explanatory title of the occupation, from the integral interpretation of the above mentioned norm it must be inferred that it would have to be a contract of lease held with the owner of the property occupied or a contract of lease held with the manager of the property occupied. It will also be logical to think that an explanatory title would be a Certification of the Public Registry or a title that shows the ownership or a document where the owner of the building authorizes the occupation of the same (*Decision of September 2, 1994. The first Superior Court of Justice. Legal Protection Action of Constitutional Guarantee filed by ADISBEL MARTINEZ C. against CHIEF MAGISTRATE OF RIO ABAJO*)

The consequence of supporting an interpretation of such a nature, is the equivalent to tell a holder with fourteen years of possession, who has cultivated, sowed, built and supported the property, that what he carried out up to this moment, does not qualify to be protected, because if the owner gesticulates administratively, before the police authority, his condition will be of “intruder” and not of a holder protected by the Law.

In our consideration, the management of this figure, which application competes to the authorities of police (Chief magistrates and Mayors), has ignored the principle of protection, which the substantial law awards in favor of the holder. A person who remains more than one year in possession of a property, is not intrusive, but a holder, to whom the

law grants even the so called writ of possession to defend his right. If an owner wants to detach or vacate the property the holder has to exercise an action for recovery ownership, which is the legal way that corresponds to those who carelessly has allowed another to productively use the property and in fact to use it as if he was the owner, or at least believing that he is. Because, the inactivity of that owner, has made the holder think that this unoccupied property is not useful for him, which has led it to occupying, cleaning, administering and even building in good faith, on the property, under the belief that the article 606 of the Civil Code, states that *“the possession of the land shall be proved with positive facts, of those which only come from the domain, like renting, timber cut, building construction, bonder, plantations or sowings, and others of equal significance, executed without the assent of the one that disputes the possession”*.

Under this premise, this holder has built and sowed on the property, because the civil legislation has told him, through this norm that his possession is proved by positive facts only derived from domain, and not precisely so that these positive facts are evidence for a possessory action, but because with the time he intends to become the owner of the property, because at least that is what he has been told, that if it has pacific and uninterrupted public possession, during the lapse established by law, he shall become holder of the property by means of a well-known figure which is the positive prescription of lands. But none of this will happen, if the owner appears in person to a Magistrate Office to request the intruder eviction, of a holder who has more than 12 years being there, unfailingly his expectation will turn out to be truncated, because for the police authority, he will remain an intruder, without caring for the law which grants rights in favor of the holder. It will only be necessary to wonder, what would happen with the improvements, sowings, and plantations carried out in good faith on the property? Who recognizes the holder's maintenance of the property or the expenses incurred to defend the property of third parties who wanted to take possession of the property? The answer is not simple and even less can be established that the holder if evicted will not loose his rights, since this person was never qualified within this administrative process as a holder but as an intruder, that is to say, a person who has no permission nor any right to occupy the property, since his interfering on the property, is qualified as in bad faith, because he does not have an explanatory title.

We wonder, what will do the police authority with a holder, who demonstrates to have legitimately acquired according to an intestate succession, the possession rights that the testator had over a property, when this holder presents to the Chief magistrate the executed resolution awarding the inherited goods and among them the possessory rights, which according to article 1548 of the Judicial Code will be inventoried like personal right purely possessory that the testator had over the lands or servient estates? Will he be evicted because this resolution does not constitute an explanatory title, because in his interpretation, he understands that explanatory title is a lease contract, because that is what article 1409 of the Judicial Code states? Definitely he could not and shall not do it, and not because it is a question of the explanatory title, but because the possession itself is a title, and not understanding the term as juridical document by means of which a right is granted, but like the cause, reason, motive or pretext so that this person could occupy the property.

This situation de facto, which produces juridical effects, requires a more detailed analysis at the moment of applying the law to a specific case, because a holder is often taken as an intruder, far from the legal tenor for which there was conceived this law, which is no other than to evict a person to vacate a property destined to renting, when this last has entered the property without a contract with the owner, his proxy or a manager. Something different is the person who has occupied it, with the landlord interest and starts a behavior as if he had domain over the property, then this person cannot be catalogued as an intruder but as a holder.

Going a little further, the doctrine has raised that a holder can turn into proprietor, provided that he publicly, openly and frankly rebels against the owner right and initiates a new stage of landlordship not only in his proper name but with clear acts of rejection and disregard of the right that previously acknowledged the owner. The simple act of the lessee of not paying the rent does not turn him into a holder, it requires to be joined by material acts from which is generated the intention of being a holder with ownership interest. Let's suppose that this holder has more than five years of not paying the rent, does not even appear around the building, much less he claims it, leaving the holder to carry out acts, of those only given by the domain and later on, the owner instead of going to the ordinary justice to exercise his action for recovery of ownership, chooses the easiest route and goes before a police authority to interpose an intruder eviction, knowingly that the treatment of one figure opposite to other one is completely dissimilar and are destined to regulate or to recognize opposite juridical relations.

We believe that this topic deserves a clearer juridical regulation, leaving no margin to erroneous interpretations, for the sake of recognizing the right that attends to every holder to be protected, who cannot be confused with the figure of the intruder, as it has been done, since it is a reality that if it is still considered that an explanatory title, it is the equivalent of a contract, the possession will have to give in before the appeal of the owner, not as the holder he really is but as an intruder.