Guzel Valeeva

Candidate of Historical Sciences, Associate Professor of the Department of Theory and Methods of Teaching Law of the Kazan Federal University

Mikhail Vekshin

Master's Degree Student of the Faculty of Law of the Department of Environmental, Labor Law and Civil Procedure of the Kazan Federal University

Ramil Khasanshin

Candidate of Legal Sciences of the Faculty of Law of the Department of Environmental, Labor Law and Civil Procedure of the Kazan Federal University

TO THE PROBLEM OF DEFINITION OF POSSESSION

DOI 10.30729/2541-8823-2022-7-2-63-72

Abstract. *The question of defining the concept of "possession" is due to the high importance of this phenomenon in civil turnover. Possession represents the foundation of the majority of civil-law relations connected with possession or domination over a thing. Such a position of ownership determines close attention of law researchers to the issues of ownership and, at the same time, a special caution of both domestic and foreign legislators in defining legal categories related to ownership.*

At present, the topic of ownership and its problems are very widely covered in special literature. Researchers have been asking questions of possession, qualification,

and consequences of its violation since the emergence of ancient concepts of belonging of a thing to a particular subject (including corporate) in general, but given the changing views on the world around, on the concept of "possession" and issues related to its protection, the specified problematic do not lose its relevance at present.

The need for theoretical development of the issues associated with the definition of the term "possession" is largely due to the fact that modern law and order often leave open the question of determining the essence of the concept and its essential features.

Keywords: *civic, civil law, possession.*

1. Introduction

Modern continental approaches to ownership originate in the legal doctrines formulated by F.C. von Savigny and R. von Iering. The first noted that researchers before him encountered great difficulties in developing the subject of ownership due to its complexity and complexity, and, therefore, before F.K. von Savigny there was simply no systematic work in which the concept of "ownership" would be disclosed.

In our opinion, it is impossible to consider ideas about the essence of possession without the reservation that major world legal orders rather late stop using Roman law as directly applicable law. The iconic researchers of ownership and its place in Roman law (and thus in all law in general, since Roman law is the recognized standard), F.C. von Savigny and R. von Iering, do not seek in their works to develop the most correct approach to ownership and ownership protection based on the available normative base: their task is to comment on the Roman sources in the most accurate way. However, their "commentary" on the Roman sources has been so successful that it has, in fact, shaped the theories of ownership that are still relevant today.

2. Methods

The research methodology is expressed by systemic, structural-functional, structural-logical, descriptive, institutional, as well as dialectical methods of scientific knowledge, collection, and analysis of scientific and practical material.

3. Results and discussion

1) Savigny, aware of the borderline state of the phenomenon "possession" between law and non-law, could not find its place in the system of Roman law,

noting that possession is not a right in rem, but it would be most logical to consider it in the section on the right in rem[1].

Savigny's major work on possession is entitled "The Right of Possession" (***Das Recht*** des Besitzes), in which the phenomenon is presented in corpus and animus. Possession is perceived by Savigny as a fact to which a certain mental process corresponds — such a state of will of the owner when he wishes either to dominate (to be the owner) over a thing or to possess it (to possess the thing as an intermediary owner). Possession in such a case is characterized not simply by a fact, but by a legal fact.

If the statics of "possession" according to Savigny raise only minor, rather fundamental questions — the owner is the one who wishes to be the lord of the thing and at the same time excludes all others from the possibility to lord over the thing, given the requirements for the character of custodia (in the broad sense it is "every position of the thing which according to a generally recognized empirical calculation of probabilities ensures our power over it"[2], but Savigny apparently means the literal sense of the word — "protection". Hereinafter custodia is understood in its literal meaning), the situation with the transfer of possession according to Savigny is somewhat more complicated, also because of the numerous exceptions described by the author.

The acquisition of possession under Savigny requires simultaneously:

1) loss of corpus by one person;
2) acquisition of corpus by another person;
3) loss of animus by one person;
4) acquisition of animus by another person.

Under such circumstances, possession can be retained by the animus alone. A thing accidentally left somewhere in this case will not pass to its new master, who excludes all others from physical dominion over it, into possession, because the previous master still possesses the will to dominate. Possession in such a case will cease only when the previous owner has come to terms with the loss of the thing once and for all.

As exceptions, Savigny's theory knows, among other things, cases where, as such, physical possession is not required — our thing is brought to our house, which, in turn, is in custodia, while we are away. Thus, possession could be

---

[1] *Savi'n'i F.K.* Sistema sovremennogo rimskogo prava: v 8 t. T. V [The System of Modern Roman Law: in 8 vols. T. V] / per. s nem. G. Zhigulina; pod red. O. Kutateladze, V. Zubarya. M.: Statut, 2017. P. 116.

[2] *Yushkevich V.A.* O priobretenii vladeniya po rimskomu pravu [On the Acquisition of Possession under Roman Law]. M., 1908. P. 75.

acquired even when the acquirer and the thing are on different continents-the domestic notion of possession is certainly in rebellion here.

2) Iering's theory of possession is presented in its main part in his major work, On the Basis of the Defense of Possession. This work aims primarily at criticizing Savigny's theory and only secondarily at opposing his own theory:

"Savigny's chief error, in my opinion, is that he identifies the concept of 'possession' with that of 'actual dominion over a thing,' without noticing that 'actual over a thing' is a relative and limited concept. Through this, he puts himself in the necessity of artificially expanding this later to such an extent that it loses all meaning and is completely distorted"[1].

Throughout most of his work, Iering does not so much criticize the provisions of Savigny's theory as he notes the logical "inconsistencies" of these provisions: "Possession continues according to Savigny as long as it is possible to reproduce the original state arbitrarily …

The bridge that leads to our land is destroyed; until it is repaired, our access to it is absolutely barred: I ask, does possession continue? Yes, answers Savigny, "it is self-evident that such a temporary obstacle does not deprive us of possession. I cannot understand how it is "self-evident" … does this temporary obstacle not exclude the possibility of an arbitrary reproduction of the original state, at least for the time being?

This passage makes it clear that Iering does not agree with the very idea of "possession persists as long as there is a possibility to arbitrarily reproduce the original state," but rather with how to determine the point at which this possibility is considered terminated for one person and initiated for another.

Iering categorically disagrees that possession is only a physical dominion over a thing, but notes that, according to Savigny, the termination and establishment of possession is not characteristic of the mere fact of physical dominion.

Whereas Savigny singles out animus domini as a necessary element in the transition of possession, because its place is taken by the certainty of the restoration of one's physical dominion again, Iering rejects the necessity of the will to dominate a thing — it is simply superfluous in the system of objective possession.

Iering objectifies animus domini: first, through what the concept of custodia incorporates — directly creating such conditions under which the physical domination of another person is impossible (locking things up, setting up a fence, posting guards, etc.). Secondly, through the moral restrictions of

---

[1] *Iering R.* Ob osnovanii zashchity vladeniya [On the basis of protection of possession]. M.: Tipografiya A. Mamontova i K°, 1883. P. 129.

a particular society to the possession of an obviously alien thing (including the fear of punishment for an offense) — there is a custom in society according to which a particular type of thing (for example, bicycles) people leave unattended, or the thing is in such a position that it is impossible not to conclude that it belongs to someone (for example, it is impossible to conclude that a laptop left on the table in a cafe does not belong to anyone).

This is how Iering criticizes the theory of possession, which is based on custodia: it is not necessary for all things to physically remove all third parties from being able to possess it. Possession can be exercised as long as the thing is kept in the form in which circulation is accustomed to finding it. In other words, the nature of possession may differ depending on the characteristics of the thing itself: "For some things it (the external state of a thing — my V.M. note) coincides with holding or physical possession, for others it does not. Some things it is customary to keep under personal or real supervision, others it is customary to leave unguarded and unattended.

Thus, R. von Iering concludes that animus domini is completely absorbed by the fact of physical domination: where there is a desire to possess, there the subject of possession either carries out direct protection of the thing from another's domination (for example, locking his house), or leaves the thing in a position in which other people perceive the thing as a stranger. At the same time, when the thing finds itself in a situation from which there is no desire to possess (for example, the owner fails to take measures within a reasonable time to return the violated possession or leaves the thing in an environment in which one would not normally leave such a thing), possession ceases.

In the end, Iering's main point is that the basis of the defense of possession (he does not assess the appropriateness of such a category of Roman law as "defense of possession") is the right of ownership. In this sense, it is the owner's interest that is the basis of the defense of possession, and it is the owner's interest that is the basis of the defense. The owner in the above sense must be presumed to be the owner of the thing until proven otherwise: "the possession of things is the reality of ownership. It alone is able to reproduce that full coincidence between ownership and possession which the interests of civil turnover demand.

It is for this reason that possession must be protected, that the owner is usually the owner of the thing. This statutory regulation meets the requirements of turnover because it simplifies the means of protecting the owner by reducing the standard of proof. To prove that a person is the owner of a house (in circumstances where ownership is not tied to registration), there is no need to prove the entire succession of title to the house all the way back to the

person who created the house — it is sufficient to prove that possession has been acquired.

In such circumstances, the defense of the thief is a necessary evil in the name of the common good in the form of stability of circulation and protection of property rights (in Savigny, on the contrary, the defense of the thief is the crown of proprietary protection).

3) Subsequent scholars have in one way or another been forced to lean towards one of the above concepts: either "possession is a fact, and is protected by itself" or "possession is a right, and the protection of possession is conditioned by it". Iering and Savigny, through their legal research, instilled in the continental legal model the understanding that the concept of "possession" is something more than mere physical possession, which arises and ends only through the transfer of physical dominion over a thing (traditio).

Thus, A. V. Germanov, beginning his discussion of the legal nature of possession, points out that it is necessary to distinguish between possession as a mental and physical state. In fact, here are the author points to the need to draw the reader's attention to the very corpus and animus of possession according to Savigny. Further, A. V. Germanov elaborates on the possessive will (animus) in the end, concluding that the psychophysical state of a person in relation is so firmly connected with factual circumstances that to separate it from corpus makes sense only to determine the reasons for termination of one possession and establishment of another: "the question of possession consists not in the autonomy of the will as such, but in the circumstances under which one will take priority over another (volitional emancipation)"[1].

A. O. Rybalov, on the contrary, gives the mental relation of a person to a thing the dominant position, classifying possession into types exactly through animus to "possession as one's own" — the strongest possession, in which the owner does not recognize anyone's power over the thing, except his own. At the same time, possession (echoing Savigny) can also be indirect — for example, the owner, by leasing a thing, continues to be the owner of that thing through the preservation of his will to dominate[2].

M. A. Aleksandrova also in her work "The right of ownership and methods of its protection" points to all the same dualism of ownership: corpus and animus, but clearly sympathizes with the position reflected in the partially realized later

---

[1] *Germanov A. V.* Ot pol'zovaniya k vladeniyu i veshchnomu pravu [From use to possession and right in rem]. M.: Statut, 2009. P. 149.

[2] *Rybalov A. O.* Kratko o vladenii [Briefly about possession] // URL: https://zakon.ru/blog/2020/08/26/kratko_o_vladenii/.

Concept of development of civil legislation of the Russian Federation[1], according to which the Russian legislation should not contain indirect ownership (i.e., possession of "bare" animus) for the purpose of maintaining the stability of circulation and simplifying procedures of ownership protection never appeared in the Russian civil law[2].

The most interesting in this context is the approach of G. F. Pukhta, who is also in the paradigm formed by the concepts of Iering and Savigny. The author supported the concept, according to which possession is an independent right, simultaneously being a right: "possession of a thing without the right of ownership to it and independent in relation to this right is a legal condition, the very fact is a right — the right of possession…

Others, in a kind of despair, have denied the "fact is a right" position altogether, arguing that possession is not a right, although at the same time they admit that the violation of possession is an offense." G. F. Pukhta adds: "possession in itself does not have the properties of a right, but must borrow them from some other right, under the protection of which it is placed"[3].

In our opinion, it is impossible to disagree with these thoughts, because the fact as such, without the introduction of additional constructions in its contents (whether animus domini/ possissendi according to Savigny or Eigentum according to Iering), cannot be protected — the violation of the fact of possession is its termination (even if temporary). In such a case, the legal order has nothing to protect at all — only memory remains of possession.

Pukhta also correctly points out a flaw in Iering's theory: the right of ownership cannot be the starting point for the right of possession, since the right of ownership must be independent of possession, but, on the contrary, ownership in relation to possession is not true.

Having drawn conclusions crucial to our study, Pukhta concludes that in possession the subjective possibility of the right is protected; the right of

---

[1] *Yakovlev V. F.* Kontseptsiya razvitiya grazhdanskogo zakonodatel'stva RF (odobrena resheniem Soveta pri Prezidente RF po kodifikatsii i sovershenstvovaniyu grazhdanskogo zakonodatel'stva ot 7 oktyabrya 2009 goda) [The concept of development of civil legislation of the Russian Federation (approved by a decision of the Presidential Council for codification and improvement of civil legislation on October 7, 2009)] // Vestnik VAS RF [Herald of the Supreme Arbitration Court of the Russian Federation]. 2009. No. 11. 78 p.

[2] *Aleksandrova M. A.* Pravo sobstvennosti i sposoby ego zashchity v grazhdanskom prave [The right of property and the means of its protection in civil law]. Sankt-Peterburgskii gosudarstvennyi universitet, 2017. Pp. 28–29.

[3] *Pukhta G. F.* Kurs Rimskogo prava T.I [A Course in Roman Law, Volume I.] / per. s nem. prof. Rudorffa. M.: Tipografiya "Sovrem. Izv.", 1874. P. 320.

possession is the right to one's own person. By violating possession, a person simultaneously violates the natural right of the individual to submit to things.

4. Summary

As a result of our study, we conclude that possession can be perceived either as an already formed subjective right, or as an actual state that is subject to protection, because when possession is violated, there is a simultaneous violation of some subjective right of the owner of the thing.

The other side of the "ownership" issue is represented by the position according to which possession as such, outside the context of any greater right to a thing, is not subject to protection.

In the context of the Russian legal order, we believe that possession is exclusively a factual condition expressed in the fact that the owner exercises custodia — protection in relation to the thing, or leaves the thing in such a setting without protection, in which the legal order is used to find the thing with the possessor. Such an approach to the definition of possession allows flexibility in determining the moment when a thing is removed from a person's possession, depending on the cultural specifics of a particular locality.

However, the positioning of possession as a fact does not allow for its full-fledged protection within the framework of the civilizational process, since in order to protect possession it is necessary to have some subjective right that corresponds to the inadmissibility of taking a thing out of a person's possession.

5. Conclusion

In continental Europe, notions of possession were developed under the influence of two major theorists in the subject, F.C. von Savigny and R. von Iering, who became the symbol of the irreconcilable concepts of "possession-fact" and "possession-law". All subsequent continental scholars in the field adopted one or another concept with certain reservations and offered their own vision of the problem points of each of the concepts.

To date, the legislators of continental countries also reflect in their jurisdictions the concepts of these jurists, taking into account the political and legal situation in a particular country, seeking to meet the challenges posed by the civil turnover.

The Russian legislator today has cautiously defined possession as the fact of a person's dominion over an object, thereby allowing for a "painless" transition

both to an approach that takes into account the owner's will and to an approach that equates possession and subjective right, in connection with which we can conclude that in this area of knowledge legal scholars have been given very fertile ground for research.

6. Acknowledgements

This paper has been supported by the Kazan Federal University Strategic Academic Leadership Program.

References

Savi'n'i F. K. Sistema sovremennogo rimskogo prava: v 8 t. T. V [The System of Modern Roman Law: in 8 vols. T. V] / per. s nem. G. Zhigulina; pod red. O. Kutateladze, V. Zubarya. M.: Statut, 2017. 299 p. (In Russian)

Yushkevich V. A. O priobretenii vladeniya po rimskomu pravu [On the Acquisition of Possession under Roman Law]. M., 1908. 222 p. (In Russian)

Iering R. Ob osnovanii zashchity vladeniya [On the basis of protection of possession]. M.: Tipografiya A. Mamontova i K°, 1883. 179 p. (In Russian)

Germanov A. V. Ot pol'zovaniya k vladeniyu i veshchnomu pravu [From use to possession and right in rem]. M.: Statut, 2009. 700 p. (In Russian)

Yakovlev V. F. Kontseptsiya razvitiya grazhdanskogo zakonodatel'stva RF (odobrena resheniem Soveta pri Prezidente RF po kodifikatsii i sovershenstvovaniyu grazhdanskogo zakonodatel'stva ot 7 oktyabrya 2009 goda) [The concept of development of civil legislation of the Russian Federation (approved by a decision of the Presidential Council for codification and improvement of civil legislation on October 7, 2009)] // Vestnik VAS RF [Herald of the Supreme Arbitration Court of the Russian Federation]. 2009. No. 11. 78 p. (In Russian)

Aleksandrova M. A. Pravo sobstvennosti i sposoby ego zashchity v grazhdanskom prave [The right of property and the means of its protection in civil law]. Sankt-Peterburgskii gosudarstvennyi universitet, 2017. 208 p. (In Russian)

Pukhta G. F. Kurs Rimskogo prava T. I [A Course in Roman Law, Volume I.] / per. s nem. prof. Rudorffa. M.: Tipografiya "Sovrem. Izv.", 1874. 560 p. (In Russian)

Information about the authors

Guzel Valeeva (Kazan, Russia) — Candidate of Historical Sciences, Associate Professor of the Department of Theory and Methods of Teaching

Law of the Kazan Federal University (18 Kremlin St., Kazan, 420008, Russia; e-mail: valeeva@icloud.com).

Mikhail Vekshin (Kazan, Russia) — Master's Degree Student of the Faculty of Law of the Department of Environmental, Labor Law and Civil Procedure of the Kazan Federal University (18 Kremlin St., Kazan, 420008, Russia; e-mail: vekshinma@gmail.com).

Ramil Khasanshin (Kazan, Russia) — Candidate of Legal Sciences of the Faculty of Law of the Department of Environmental, Labor Law and Civil Procedure of the Kazan Federal University (18 Kremlin St., Kazan, 420008, Russia; e-mail: khasanshin.ramil@mail.ru).

Recommended citation

Valeeva G. A., Vekshin M. A., Khasanshin R. I. To the problem of definition of possession. Kazan University Law Review. 2022; 2 (7): 63–72. DOI: 10.30729/2541-8823-2022-7-2-63-72.