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Theoretical Problems of Right of Retention in Thai Law*
ปัญหาทางทฤษฎีของสิทธิยึดหน่วงในกฎหมายไทย

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Abstract

The right of retention under Thai law enables creditors to exercise their right themselves without having to ask the court to enforce it. Since some legal aspects of the concept of the right of retention are theoretically uncertain, the purpose of this article is to provide a proper interpretation of this right for two main issues.

Firstly, there are different interpretations of the clause "obligation in his favour relating to the property possessed", which is an element of the right of retention. On the one hand, some writers seem to suggest that it means that the holder of the right of retention must have done something to allow him to retain the property; on the

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other hand, the second interpretation, which is broader and covers the first theory of interpretation, suggests that it is unnecessary for the holder of the right of retention to have done something beneficial to the property retained. He is entitled to retain the property if it is related to the obligation and is beneficial to him.

As for the second issue, the right of retention is extinguished by the loss of possession of the property retained, with two exceptions. One is when the property retained is let with the consent of the debtor and the other is when the property retained is pledged with the consent of the debtor. In relation to this issue, most writers do not clearly explain the clause “loss of possession”. Rather, they merely provide an example where the right of retention lapses if, for example, the holder of the right of retention voluntarily returns the property retained to the debtor. Hence, if the holder of the right of retention involuntarily loses possession of the property retained, such as it is stolen or removed by the debtor, who is the owner of the property, it is unclear whether the right of retention is extinguished or not.

Keywords: Right of Retention, Obligation in His Favour Relating to the Property Possessed, Extinction of Right of Retention

บทคัดย่อ

สิทธิยึดหน่วงเป็นสิทธิประการหนึ่งในกฎหมายไทยซึ่งเจ้าหนี้สามารถบังคับให้เป็นไปตามสิทธิได้ด้วยตนเองโดยไม่จำต้องใช้สิทธิเรียกร้องผ่านศาล โดยที่มีปัญหาทางทฤษฎีเกี่ยวกับสิทธิยึดหน่วงในหลายประการ บทความฉบับนี้ประสงค์จะเสนอแนะแนวทางการตีความเกี่ยวกับสิทธิยึดหน่วงในสองประเด็น

ประเด็นแรก มีแนวทางที่แตกต่างกันในการตีความข้อความ “หนี้อันเป็นคุณประโยชน์แก่ตนเกี่ยวด้วยทรัพย์สินซึ่งครอง” อันเป็นลักษณะประการหนึ่งของสิทธิยึดหน่วง ในทางหนึ่ง มีคำอธิบายว่าผู้ทรงสิทธิยึดหน่วงต้องได้กระทำการบางอย่างแก่ทรัพย์สินเพื่อให้ตนเกิดสิทธิในการยึดหน่วงทรัพย์สินนั้น อีกทางหนึ่ง ซึ่งเป็นแนวทางการตีความที่กว้างกว่าและครอบคลุมแนวทางแรกด้วย อธิบายว่าผู้ทรงสิทธิยึดหน่วงไม่จำต้องกระทำการที่เป็นประโยชน์แก่ทรัพย์สินที่ครอบครอง เพียงได้ครอบครองทรัพย์สินและทรัพย์สินนั้นเป็นประโยชน์แก่ตนก็เพียงพอในการเกิดสิทธิยึดหน่วงแล้ว

ประเด็นที่สอง สิทธิยึดหน่วงระงับไปเมื่อผู้ทรงสิทธิยึดหน่วงสูญสิ้นการครอบครอง โดยมีข้อยกเว้นสองประการ คือ ทรัพย์สินอันยึดหน่วงไว้นั้นได้ให้เช่าไปหรือจำนำไว้ด้วยความยินยอมของลูกหนี้ ในประเด็นนี้ นักกฎหมายไทยมิได้อธิบายคำว่า “สูญสิ้นการครอบครอง” อย่างชัดเจน โดยมักจะยกตัวอย่างประกอบกรณีที่ทำให้สิทธิยึดหน่วงระงับ เช่น ผู้ทรงสิทธิยึดหน่วงยินยอม

สละการครอบครอง ดังนี้ จึงมีปัญหาว่า กรณีผู้ทรงสิทธิยึดหน่วงมิได้ยินยอมสละการครอบครอง เช่น ทรัพย์สินที่ครอบครองถูกขโมยไป หรือถูกแย่งคืนไปโดยลูกหนี้ซึ่งเป็นเจ้าของทรัพย์สินนั้น สิทธิยึดหน่วงจะระงับหรือไม่

คำสำคัญ: สิทธิยึดหน่วง หนี้อันเป็นคุณประโยชน์แก่ตนเกี่ยวด้วยทรัพย์สินซึ่งครอง ความระงับของสิทธิยึดหน่วง

1. Introduction

The right of retention under Thai law enables creditors to exercise their right themselves without having to ask the court to enforce it. In view of the fact that there are theoretical uncertainties regarding some legal aspects of the concept of the right of retention, the purpose of this article[1] is to provide a proper interpretation of this right.[2]

Firstly, in relation to the issue of the different interpretations of the clause "obligation in his favour relating to the property possessed", which is an element of the right of retention, Section 241 paragraph 1 of the Thai Civil and Commercial Code states: "If the possessor of a property belonging to another has an obligation in his favour relating to the property possessed, he may retain the property until the obligation is performed; but this does not apply, if the obligation is not yet due."[3] On the one hand, a number of writers[4] seem to suggest that this clause means that the holder of the right of retention must have done something to allow the property to be retained. A classic example is when the lessee of a car takes a rented car to an auto mechanic for repair. When the car has been repaired (i.e. the obligation in the contract of hire of work is due) and the lessee (who is the employer in the contract of hire of the work) fails to pay the mechanic (who is the contractor in the contract of hire of the work), the latter is entitled to retain the car, not only against the lessee, but also the lessor, who is the owner of the car, even though the lessor is not the

[1] Although one of the most controversial issues regarding the right of retention is its legal status in terms of whether it is an obligational right, a real right, or something in between, this issue is excluded from this article because it has often been addressed by Thai academics in the past, both in textbooks and papers. Instead, the intention of this article is to investigate some other debates that have rarely been raised in academia to date.

[2] An example of the discussion in relation to the legal status of the right of retention can be found in 'สิทธิยึดหน่วง: บุคคลสิทธิหรือทรัพยสิทธิ? งานวิชาการรำลึก TU Law Conference ปาฐกถานิติศาสตร์ ธรรมศาสตร์ชุด ศาสตราจารย์ ดร.ปรีดี เกษมทรัพย์ ครั้งที่ 5 ประจำปี พ.ศ. 2560' (สัมมนา, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 15 พฤศจิกายน 2560) ['Right of Retention: Personal Right or Real Right? TU Law Conference Series: Professor Dr Preedee Kasemsup Vol. 5 (B.E. 2560)' (Seminar, Faculty of Law, Thammasat University, 15 November 2017)].

[3] The current texts of the Thai Civil and Commercial Code referred to in this article are from กมล สนธิเกษตริน, *ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1-6 พร้อมคำแปลภาษาอังกฤษและอภิธาน* (พิมพ์ครั้งที่ 5, นิติบรรณาการ 2536) [Kamol Sandhikshetrin, *The Civil and Commercial Code Books I-VI and Glossary* (5th edn, Nitibannakarn 1993)].

[4] See heading 4, sub-heading 4.1 for further discussion.

contracting party in the contract of hire of the work. On the other hand, while the first theory suggests that the holder of the right of retention is entitled to withhold the property until the debtor fulfils his obligation (which is distinctive from the property retained), according to the court's decision, the property withheld and the fulfilment of the debtor's obligation are treated as the same thing, for example, the purchased land was retained from the prospective buyer in order to get its title.[5] More importantly, this also means that the court interprets the term, "obligation in his favour relating to the property possessed", differently from the first theory since the prospective buyer did not do anything to the property that benefitted the sale.

Secondly, as for the issue regarding the loss of possession of the property retained, the right of retention is terminated by the loss of possession of the property retained.[6] Nevertheless, there are two exceptions where the right of retention is still effective, even if the right holder loses possession of the property retained, which are (i) when the property retained is let with the consent of the debtor and (ii) the property retained is pledged with the debtor's consent. Therefore, it is unclear[7] whether the right of retention is terminated or not in cases where the holder involuntarily loses possession of the property retained, such as when it is deprived by the debtor, who is the owner, or is stolen by others.

2. Fundamental Characteristics of the Right of Retention in Thai Law

2.1 Definition, purpose and kinds of the right of retention

According to the Thai Civil and Commercial Code, the right of retention is the right of a creditor to retain others' property in his possession until the obligation is performed.[8] It is a type of securities like mortgages and pledges, which benefit the

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[5] See heading 4, sub-heading 4.1 for further discussion.

[6] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 250 [Thai Civil and Commercial Code, Section 250].

[7] See heading 4, sub-heading 4.2 for further discussion.

[8] โสภณ รัตนากร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (พิมพ์ครั้งที่ 11, นิติบรรณการ 2556) 329 [Sophon Rattanakorn, *Commentary on the Civil and Commercial Code: Obligations* (11th edn, Nitibannakarn 2013) 329]; ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (มุนินทร์ พงศาปาน ผู้แก้ไขปรับปรุง, พิมพ์ครั้งที่ 4, วิญญูชน 2562) 766 [Seni Pramoj, *Commentary on the Civil and Commercial Code: Juristic acts and Obligations Book 1 (Parts 1-2)* (Munin Pongsapan ed, 4th edn, Winyuchon 2019) 766].

creditor on claiming his obligation.[9] However, the holder of a right of retention is not entitled to directly enforce an obligation from the property retained, but rather to retain the property in order to force the debtor to perform the obligation. Moreover, it occurs only by virtue of law.[10] The right of retention may be divided into two groups, depending on kind of laws that create them, the first of which is the right of retention as a general law, which appears in Book II: Obligations. These provisions are generally applied in cases where the elements of the right of retention are met. Secondly, there are a number of specific provisions both in Book II: Obligations and others dealing with the idea of right of retention. Examples include carriage[11], deposit[12], innkeepers[13], warehousing[14], agent[15], and a possessor of an immovable property.[16] It should be noted that the term "สิทธิยึดหน่วง", which, literally means "right of retention" in English, is used in relation to sales and hire of work in some provisions. However, according to the English texts of the provisions, this term means "withhold" rather than "retain". For instance, the seller is entitled to withhold the property sold until the price has been paid when there is no time clause for payment of the price (Section 468)[17]. The nature of this right is not really right of retention because the seller does not possess the property belong to the debtor or another, and there is no obligation in the creditor's favour that relates to the property. In fact, it is the right not to perform his obligation in a reciprocal contract. As a result, these should be excluded from the concept of the "right of retention".

[9] โสภณ รัตนากร ibid.

[10] ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 767.

[11] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 630 [Thai Civil and Commercial Code, Section 630].

[12] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 670 [Thai Civil and Commercial Code, Section 670].

[13] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 679 [Thai Civil and Commercial Code, Section 679]. See heading 5, sub-heading 5.1, for further discussion.

[14] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 630 และมาตรา 671 [Thai Civil and Commercial Code, Sections 630 and 671].

[15] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 819 [Thai Civil and Commercial Code, Section 819].

[16] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 452 [Thai Civil and Commercial Code, Section 452]. See heading 5, sub-heading 5.1, for further discussion.

[17] When there is no time clause for payment of the price, the seller is entitled to retain the property sold until the price is paid.

2.2 Elements of the right of retention

In order for a creditor to be entitled to retain others' property on the grounds of the right of retention, the following four requirements must be met.[18] First, the creditor possesses a property belonging to another. Generally, the creditor has a possession of the property delivered to him by the debtor.[19] However, the property retained need not be the property of the debtor. Rather, it can be anyone's property. Second, the possession begins with a lawful act. This means that the debtor voluntarily delivers the property possessed to the creditor.[20] Thirdly, there is an obligation in the holder's favour relating to the property possessed. As the right of retention is an accessory right, there must have been a principal obligation between the creditor and the debtor already before the right of retention exists.[21] Finally, the obligation is due. If the obligation is not yet due, the creditor cannot claim the right of retention.[22] However, there is an exception in the case of insolvency of the debtor which has occurred and become known to the creditor after the delivery of the property, the creditor has the right of retention even if the obligation is not yet due.[23]

2.3 Extinction of the right of retention

2.3.1 Grounds for the extinction of the right of retention

The right of retention is extinguished on the following grounds. Firstly, the obligation is performed[24] or extinguished by other causes of the extinction of

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[18] It should be noted that Thai writers have different approaches to the elements of the right of retention. Some propose that there are three requirements, while others propose that there are five requirements. However, it is proposed in this article that the right of retention requires four elements.

[19] โสภณ รัตนากร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (n 8) 331; ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 767.

[20] โสภณ รัตนากร ibid. Some commentators perceive this requirement as a limitation of the right of retention, rather than its element e.g. ม.ร.ว.เสนีย์ ปราโมช ibid 775.

[21] โสภณ รัตนากร ibid 333; ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะหนี้ (ผลแห่งหนี้)* (พิมพ์ครั้งที่ 11, วิญญูชน 2563) 455 [Sanankorn Sotthibandhu, *Commentary on the Law of Obligation (Legal Effects of Obligation)* (11th edn, Winyuchon 2020) 455].

[22] โสภณ รัตนากร ibid 336.

[23] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 243 [Thai Civil and Commercial Code, Section 243].

[24] โสภณ รัตนากร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (n 8) 345; ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะหนี้ (ผลแห่งหนี้)* (n 21) 462.

obligation[25] such as release of obligation[26], set-off[27], novation[28], and merger.[29] If the obligation which is a principal right is extinguished, the right of retention is extinguished too. Secondly, the debtor claims the extinction of the right of retention in cases where the creditor does not comply with Section 246 paragraphs 1 and 2 which require the creditor to take such appropriate care of the property retained, and disallow the creditor to use or let the property retained or give it as security without the consent of the debtor.[30] Thirdly, The debtor claims the extinction of the right of retention upon giving proper security to the creditor.[31] Fourthly, the creditor, who is the holder of the right of retention, loses his possession of the property retained.[32] Finally, there are other grounds such as the property retained is wholly destroyed.[33]

2.3.2 Extinction of the right of retention on the grounds of the involuntary loss of possession of the property retained

The right of retention is extinguished by the loss of possession of the property retained.[34] Nevertheless, there are two exceptions where the right of retention is still effective, even if the right holder loses possession of the property retained, which are the property retained is let with the consent of the debtor and the property retained is pledged with the consent of the debtor.[35] It is apparent that the possession of the property is important to exercise the right of retention. The initiation and termination of the right of retention rely on the possession of the property. However, most recent writers do not seem to give a clear explanation of the term "possession" and the clause "loss of possession of the property retained".

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[25] โสภณ รัตนากร ibid.

[26] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 340 [Thai Civil and Commercial Code, Section 340].

[27] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 341 [Thai Civil and Commercial Code, Section 341].

[28] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 349 [Thai Civil and Commercial Code, Section 349].

[29] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 353 [Thai Civil and Commercial Code, Section 353].

[30] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 246 วรรคสาม [Thai Civil and Commercial Code, Section 246 paragraph 3].

[31] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 249 [Thai Civil and Commercial Code, Section 249].

[32] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 250 [Thai Civil and Commercial Code, Section 250]. See heading 2, sub-heading 2.3.2, for further discussion.

[33] โสภณ รัตนากร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (n 8) 345.

[34] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 250 [Thai Civil and Commercial Code, Section 250].

[35] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 250 [Thai Civil and Commercial Code, Section 250].

Hence, the actual meaning of the aforementioned term and clause in this context is unclear, as is the legal effect of involuntary loss.[36]

3. Sources of the Provisions on the Right of Retention in Thai Law

The first Civil and Commercial Code of Thailand was promulgated in 1923. However, only two years later, it was replaced by a new Code which is still in force today. Therefore, sources of the provisions on the right of retention under the 1925 Code are explored in this part by reflecting on the foreign laws that were the origin of the Thai provisions, and the minutes of the Drafting Committee of the Civil and Commercial Code in an effort to understand the drafters' purpose of applying these provisions. According to the evidence, the provisions of the right of retention under the 1925 Code were largely influenced by Japanese law, and partly by Swiss law.[37] Only two provisions, namely Sections 241 and 250, will be discussed for the purpose of this article.

3.1 Section 241 (dealing with the elements of the right of retention)

The evidence[38] shows that Section 241 is borrowed from Article 295 of the Japanese Civil Code and Article 895 of the Swiss Civil Code. First, Article 295 of the Japanese Civil Code reads:

> If the possessor of a thing belong to another has an obligation in his favour relating to the thing possessed, he may retain the thing, until the obligation is performed unless the obligation is not yet due.
>
> The foregoing provision does not apply, if the possession began by an unlawful act.[39]

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[36] See heading 4, sub-heading 4.2 for further discussion.

[37] ภาควิชานิติศึกษาทางสังคม ปรัชญา และประวัติศาสตร์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, *บันทึกคำสัมภาษณ์พระยามานวราชเสวี (ปลอด วิเชียร ณ สงขลา)* (พิมพ์ครั้งที่ 2, วิญญูชน 2557) 154-155 [Department of Legal Sociology, Philosophy and History, Faculty of Law, Thammasat University, *Transcript of Interview of Phraya Manavarajasevi (Plod Vichian Na Songkhla)* (2nd edn, Winyuchon 2014) 154-155].

[38] ibid 154.

[39] Ludwig Lönholm, *The Civil Code of Japan* (n.p. 1898) 75.

Second, Article 895 of the Swiss Civil Code reads:

> The creditor has the right to retain movable things and securities in his possession, with the consent of the debtor, until the satisfaction of his claim, if the claim is due, and according to its nature the claim stands in conjunction with the object of the retention. Among merchants this conjunction arises as soon as the possession as well as the claim originate from their regular business.
>
> The creditor has the right of retention, provided no rights exist in favor of third persons, from former possession, even if the thing, which he has received in good faith, does not belong to the debtor.[40]

According to the Minutes of the Drafting Committee of the Civil and Commercial Code dated 4th September 1925[41], the Committee concluded that Article 295 of the Japanese Civil Code conveyed a clear understanding of the concept. In addition, they discussed the likely meaning of the clause "if the obligation is not yet due" in the Japanese provision.[42]

The Committee agreed to draft the Thai provision along the same lines as the Japanese one. Originally, the Thai texts appear as:

> If the possessor of a property belonging to another has an obligation in his favour relating to the property possessed, he may retain the property until the obligation is performed; but this does not apply, if the obligation is not yet due.
>
> The provisions of the following paragraph does not apply, if the possession began by a Wrongful Act.[43]

The current Section 241 is almost the same as the original text. The only difference is that the term "an unlawful act" is used in Section 241 rather than "a Wrongful Act", and it appears that the former is broader than the latter. A wrongful act, which is a source of obligation (comparable to torts or delicts in other legal systems), appears in Book II: Obligations, along with contracts, management of affairs without

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[40] Robert P Shick, *The Swiss Civil Code of December 10, 1907 (effective January 1, 1912)* (The Boston Book Company 1915) 211.

[41] หอจดหมายเหตุแห่งชาติ, ม.สคก. เอกสารสำนักงานคณะกรรมการกฤษฎีกา รายงานประชุมกรรมการร่างกฎหมาย วันที่ 5 กันยายน พ.ศ. 2468 [Memorandum of the Committee of Codification, 5 September 1925 (B.E. 2468)].

[42] ibid 2.

[43] ibid 5.

mandate and undue enrichment. The term "unlawful act" suggests not only a wrongful act, but also other illegal means by which the creditor came to possess the property.

3.2 Section 250 (dealing with the extinction of the right of retention)

According to the *Index of Thai Civil Code,* Section 250 is inspired by Article 302 of the Japanese Civil Code, which reads:

> A lien is extinguished by loss of possession of the thing ; but this does not apply to the case where the thing retained is let or pledged according to the provisions of Art. 289, 2.[44]

As for the inspiration to draft this provision, the Committee simply mentioned that the Japanese provision, which is the model of the Thai provision, was an important provision; therefore, Thai law should follow Japanese law in this respect. The Thai provision appears as:

> A right of retention is extinguished by the loss of possession of the property; but this does not apply to the case where the property retained is let or pledged with the consent of the debtor.[45]

4. Interpretation of the Thai Literature and Thai Court's Decisions in relation to Studied Issues

4.1 Problems of interpretation of the clause "obligation in his favour relating to the property possessed"[46]

The literature explored is divided into two periods, namely before 1979 and from 1979. The justification for this division is that, before 1979, the concept of the right of retention was taught as a subject of Person and Real Securities. Therefore,

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[44] Ludwig Lonholm (n 39) 77.

[45] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 250 [Thai Civil and Commercial Code, Section 250].

[46] There seems to have been no attempt in the literature to describe the concept of the right of retention in the 1923 Code, which may be because the 1923 Code was quickly replaced by the 1925 version. A few commentaries on the Civil and Commercial Code were published in 1924, but they were only in relation to the provisions in Book I: General Principles. Therefore, the literature discussed in this section mainly involves the concept of the right of retention under the 1925 Code.

most of the commentary was found under Person and Real Securities (which usually include suretyship, pledge, mortgage and right of retention). Then, in 1979, the university curriculum was revised and the concept of the right of retention was removed from Person and Real Securities and placed as a subject of the law of Obligations.[47]

4.1.1 Literature before 1979

In 1929, Pridi Banomyong[48] briefly describes the right of retention as the right of a possessor of others' property, who has an obligation in his favour in relation to that property possessed, and is entitled to refuse to return it to its owner until that obligation has been fulfilled. Although he fails to provide an interpretation of the clause "obligation in his favour relating to the property possessed", he gives an example of the right of retention in a scenario where a contractor, in hire of work, has the right to retain the work he has accomplished until payment has been made.[49] Here, he cites the French Supreme Court Decision dated 13 May 1861.[50]

Luang Sarasaspraphun (Chuen Charuwat) makes the most serious attempt to interpret the clause "obligation in his favour relating to the property possessed". He provides a detailed account of the right of retention in his journal article entitled "Some Important Aspects in relation to the Right of Retention" published between 1931 and 1932. This article is divided into three parts, published in March 1931, April 1932 and May 1932, respectively. He begins the article by questioning the meaning of the word "relation" stated in Section 241, and the circumstances that can constitute an "obligation relating to property retained". In other words, what kind of "relation" that can create the right of retention? Does it always need to be the relation between the "thing" retained and the "obligation" claimed? And how?[51] His analysis is based

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[47] ถาวร โพธิ์ทอง, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยการประกันด้วยบุคคลและทรัพย์* (มหาวิทยาลัยธรรมศาสตร์ 2522) Introductory Chapter [Thavorn Phothong, *Commentary on Civil and Commercial Law: Personal and Real Rights* (Thammasat University 1979) Introductory Chapter].

[48] ปรีดี พนมยงค์, *บันทึกข้อความสำคัญประกอบด้วยอุทาหรณ์ และคำแนะนำแห่งประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2* (นิติสาส์น 2471-2473) 136 [Pridi Banomyong, *Notes of Substance including Illustration and Suggestion on the Civil and Commercial Code* (Nitisarn 1928-1930) 136].

[49] ibid.

[50] ibid.

[51] หลวงสาราสาส์นประพันธ์ (ชื้น จารุวัสตร์), 'ความสำคัญบางประการเกี่ยวกับสิทธิยึดหน่วง' (2474) 6 บทบัณฑิตย์ 841, 841 [Luang Sarasaspraphun (Chuen Charuwat), 'Some Important Aspects in relation to the Right of Retention' (1931) 6 Bot Bundit 841, 841].

on a comparative study of foreign laws such as French, German, English, Swiss and Japanese law.[52] He proposes that, based on legal reasoning, the term "relation" in Section 241 need not necessarily mean "seriously" (or "materially") related. Given that the provision simply uses the term "relate", the nature of relationship may be one of three categories, namely (i) legal relation, (ii) material relation and (iii) relation based on juristic acts and contracts.[53] First, a legal relation includes legal causes, juristic acts and other acts in law that lead to a relationship between the right of retention and the property retained.[54] This means that the holder of the right of retention and the right holder of the property retained formed a legal relation earlier, and the right of retention is the result of that relation, despite the fact that they have not agreed to a right of retention and there is no material relation between the property retained and the obligation.[55] Secondly, a material relation means that the holder of the right of retention has, for instance, invested or put effort into ideas to use the property retained, which has directly given him the genuine relation with it.[56] In this context, the right of retention is based on the property itself; therefore, this right can be generated even if the parties have never met each other.[57] Thirdly, a relation based on juristic acts and contracts is based on an agreement between the holder of the right of retention and the right holder of the property.[58] Although this is not specified in law like pledges or others, individuals can agree to such relationship provided that there is no law prohibiting it.[59] It seems that he did not finish the whole article, since a bracket [not yet finished] is inserted, at the end of each part, but the fourth part of the article has not been found. Therefore, this may not be his final idea on the interpretation of the clause "obligation in his favour relating to the property possessed".

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[52] ibid 841-842.

[53] หลวงสารสาสน์ประพันธ์ (ชื้น จารุวัสตร์), 'ความสำคัญบางประการเกี่ยวกับสิทธิยึดหน่วง' (2475) 7 บทบัณฑิตย์ 46, 46-47 [Luang Sarasaspraphun (Chuen Charuwat), 'Some Important Aspects in relation to the Right of Retention' (1932) 7 Bot Bundit 46, 46-47].

[54] ibid.

[55] ibid.

[56] ibid.

[57] ibid 48.

[58] ibid.

[59] ibid.

In 1934, Phra Sutthiatnarumon explains that the "obligation in his favour" must be related to the property retained, not to any other property. For example, A hired B to tailor a dress, but has not paid for the service. B is entitled to retain the dress until A pays for the service, which is an obligation that is related to the dress.[60]

In 1936, Seni Pramoj, one of the authorities on the law of Obligations, interprets this clause by clearly stating that there must be an obligation attached to the property retained.[61] In laymen's terms, the retention of the property causes an obligation that benefits the possessor.[62] For example, if A hires B to fix a car, B is entitled to retain the car in exchange for the payment. However, if A pays for the service (either in advance or later), B cannot retain the car, even if B is A's creditor in another obligation, such as loan that is not related to the car.[63] He cites the Supreme Court Decisions No. 565/1929 (B.E. 2472) and 1190/1930 (B.E. 2473).[64]

In 1939, K. A. Lawson explains that the obligation must be related to the property retained.[65] For instance, A hires B to fix a camera and promises to remunerate him for his work, meanwhile, B is A's creditor in another obligation worth 100 baht. When A remunerates B for his work, B is not entitled to retain the camera for the obligation worth 100 baht because it is not related to the camera.[66]

Khun Prasertsuphamatra, in 1953, merely proposes that the right holder must be a creditor in the obligation relating to the property retained and gives an example of A hiring B to repair his kitchen and the roof of his house by dividing the contract into two parts, namely 1,000 baht for the kitchen repair and 5,000 baht for repairing the roof. If B finishes repairing the kitchen and A has not paid for the service, B cannot retain either the kitchen or the roof because, by repairing the house, each

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[60] พระสุทธิอรรถนฤมนตร์, *กฎหมายแพ่งและพาณิชย์ว่าด้วยการประกันด้วยบุคคลและทรัพย์* (คำสอนชั้นปริญญาตรี, มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง มปป.) 263 [Phra Sutthiatnarumon, *Civil and Commercial Law on Person and Real Securities*, (Bachelor's Degree Lecture, The University of Moral and Political Sciences n.d.) 263].

[61] ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 773.

[62] ibid.

[63] ibid.

[64] ibid.

[65] เค เอ ลอว์สัน, *กฎหมายแพ่งและพาณิชย์ว่าด้วยการประกันด้วยบุคคลและทรัพย์* (คำสอนชั้นปริญญาตรี มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง, โรงพิมพ์มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง 2482) 263 [K A Lawson, *Civil and Commercial Law on Person and Real Securities* (Bachelor's Degree Lecture, University of Moral and Political Sciences, University of Moral and Political Sciences Publishing 1939) 263].

[66] ibid 230-231.

part of the house is not in his possession, which is different from the case of repairing a car delivered to the car mechanic.[67]

In 1960, Chitti Tingsabadh and Yol Theerakul explain that the obligation in favour must be related to the property retained.[68] For instance, a car mechanic is entitled to retain the car he has repaired until his fee has been paid. However, if the car owner has already paid the fee, the mechanic cannot retain the car for other obligations, such as a loan of which he is the creditor because it is not related to the car.[69] They also cite Japanese and Swiss law as the origins of the Thai concept.[70]

In 1976, Chit Sethabutr defines the meaning of the clause "obligation in his favour relating to the property" as the property retained creates an obligation of which the possessor is the creditor.[71] For instance, A hires B to fix his car, and B fixes the car; hence, in fixing A's car, there is an obligation in favour of B to retain the car until A pays him for his work.[72]

4.1.2 Literature from 1979

Sophon Rattanakorn, first published his commentary in 1995[73], observes that the right of retention involves an obligation that is related to property retained by a creditor[74], who, for example, undertakes to do something to the property in his

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[67] ขุนประเสริฐศุภมาตรา (จรูญ), *ลักษณะค้ำประกัน จำนอง จำนำ บุริมสิทธิและสิทธิยึดหน่วง* (คำสอนชั้นปริญญาตรี ปีที่ 4, คณะเศรษฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์ มปป.) 223-224 [Khun Prasertsuphamatra, *Suretyship, Mortgage, Pledge, Preferential Right, and Right of Retention* (Bachelor's Degree Lecture (4th Year), Faculty of Economics, Thammasat University n.d.) 223-224].

[68] จิตติ ติงศภัทิย์ และยล ธีรกุล, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2 มาตรา 241-452* (เนติบัณฑิตยสภา 2503) 3 [Chitti Tingsabadh and Yol Theerakul, *Commentary on Civil and Commercial Law, Book 2, Section 241 – Section 452* (The Thai Bar Under the Royal Patronage 1960) 3].

[69] Ibid.

[70] ibid 5.

[71] จิ๊ด เศรษฐบุตร, *คำบรรยายวิชากฎหมายแพ่งลักษณะทั่วไปแห่งหนี้* (พิมพ์ครั้งที่ 3, มหาวิทยาลัยธรรมศาสตร์ 2519) 115 [Chit Sethabutr, *Lecture on the Subject of Civil Law: General Principles of Obligations* (3rd edn, Thammasat University 1976) 115].

[72] ibid.

[73] The first edition of this commentary was published in 1995 and its title is "*คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป (*Commentary on the Civil and Commercial Code in relation to Obligations: General Provisions)". โสภณ รัตนากร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (กรุงสยาม พริ้นติ้ง กรุ๊พ 2532) [Sophon Rattanakorn, *Commentary on the Civil and Commercial Code in relation to Obligations: General Provisions* (Krung Siam Printing Group 1995)].

[74] โสภณ รัตนากร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (n 8) 333-334.

possession based on using his labour, skill or money to edit, repair, modify, improve, decorate, build or create the property, which raises an obligation to the debtor.[75] Also, it covers cases in which the prospective buyer, who had already made the payment, possessed the land purchased to secure the transfer of ownership and where a party in a compromise agreement had delivered the property to the other party before transferring the ownership.[76]

Daraporn Thirawat, first published her commentary in 2011[77], seems to have been the first writer who clearly supports the first theory of interpretation. She explains that the clause under discussion is an important principle of right of retention that connects between right of the holder of retention and the property retained.[78] This means that the creditor must have done something beneficial to the property retained, which raised a right. Therefore, this obligation that relates property are, for instance, repairing or taking care of the property or taking other action that improves its condition of the property.[79] She cites the Supreme Court Decision No. 2517/1987 (B.E. 2530) holding that an obligation for dying clothes was an obligation in favour for the contractor related to the clothes he retained.

Charan Pakdeethanakul, first published his commentary in 2012[80], explains that the property retained must be related to the obligation the creditor claims from the debtor.[81] The right of retention cannot exist unless the possessor of the property is a person who has the status of a creditor and the property is related

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[75] ibid 334.

[76] He cites the Supreme Court Decisions No. 253/1954 (B.E. 2497), 3187/1995 (B.E. 2532), 5623/1998 (B.E. 2541) and 7326/1998 (B.E.2541).

[77] ดาราพร ถิระวัฒน์, *กฎหมายหนี้: หลักทั่วไป* (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2554) [Daraporn Thirawat, *Law of Obligations: General Principles* (Faculty of Law, Thammasat University 2011)].

[78] ดาราพร ถิระวัฒน์, *กฎหมายหนี้: หลักทั่วไป* (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2563) 135 [Daraporn Thirawat, *Law of Obligations: General Principles* (Institute of Legal Education (Thai bar Association) 2020) 135].

[79] ibid 135-136.

[80] จรัญ ภักดีธนากุล, *กฎหมายแพ่งและพาณิชย์ว่าด้วยผลและความระงับแห่งหนี้ (พลสยาม พริ้นติ้ง 2555)* [Charan Pakdeethanakul, *Civil and Commercial Law on Effects and Extinction of Obligations* (Phol Siam Printing 2012)].

[81] จรัญ ภักดีธนากุล, *กฎหมายแพ่งและพาณิชย์ว่าด้วยผลและความระงับแห่งหนี้* (พิมพ์ครั้งที่ 4, กรุงสยาม พับลิชชิ่ง 2563) 209 [Charan Pakdeethanakul, *Civil and Commercial Law on Effects and Extinction of Obligations* (4th edn, Krung Siam Publishing 2020) 209].

to the principal obligation.[82] For instance, the principal obligation is not usually related to the property possessed by the creditor if it is a monetary obligation.[83]

According to Sanankorn Sotthibandhu, who also first published her commentary in 2012[84], the fact that an obligation is related to the property is sufficient to constitute the right of retention.[85] In her view, the right of retention consists of six elements. First, the obligation must connect the creditor to the debtor. Second, she simply uses the clause "obligation must be related to the property". Third, the aforementioned property must be in the possession of the creditor. Fourth, the possession must be legal. Fifth, the property belongs to others which may be either the debtor or others. Sixth, the obligation is due.[86]

Although other commentaries have explained the clause under discussion, their descriptions and illustrations are no different from the literature mentioned earlier; in fact, some writers have merely stated that the property retained must be related to the obligation without providing an analysis for the issue under discussion.[87]

4.1.3 Court's decisions

The Thai court seems to apply a holistic approach when interpreting this clause, not only in cases where the right holder has done something to the property[88], but also where the right holder has an obligation in favour of his own benefit. However, only the latter kind of cases will be examined here due to space constraints.

Supreme Court Decision No. 253/1954 (B.E. 2497) was related to a case concerning an agreement to sell or buy a piece of land. The prospective buyer had already made the payment and the prospective seller had delivered the land title deed and the land itself to the prospective buyer. However, the seller later refused to transfer the ownership by means of registration, which meant that the sales contract had not been concluded, since formal registration was required. In this case, the Thai

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[82] ibid.

[83] ibid.

[84] ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะหนี้ (ผลแห่งหนี้)* (วิญญูชน 2555) [Sanankorn Sotthibandhu, *Commentary on the Law of Obligation (Legal Effects of Obligation)* (Winyuchon 2012)].

[85] ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะหนี้ (ผลแห่งหนี้)* (n 21) 455.

[86] ibid.

[87] E.g. สุนทร มณีสวัสดิ์, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์: หนี้* (พิมพ์ครั้งที่ 4, วิญญูชน 2557) 263-264 [Sunthorn Manisawat, *Commentary on the Civil and Commercial Code: Obligations* (4th edn, Winyuchon 2014) 263-264].

[88] E.g. Supreme Court Decisions No. 178/1983 (B.E. 2526); 2157/1987 (B.E. 2530).

court held that the prospective buyer was entitled to withhold the property on the grounds of the right of retention and this approach was also taken in later cases.

In the Supreme Court Decision No. 1313/1979 (B.E. 2522), the plaintiff rented land from a temple and built a house on it, which he agreed to sell to the defendant and transfer the ownership in due course. The plaintiff delivered the possession of the house to the defendant. However, the plaintiff later sued the defendant on the grounds of eviction. The Court held that, since the agreement between the plaintiff and the defendant was an agreement to sell or to buy, according to Section 456 paragraph 2, it was binding on the plaintiff. The fact that the defendant occupied the disputed house on the grounds of the buyer, who had acquired it legally, and there was an obligation in his favour in relation to the house, caused the defendant the right of retention. Hence, the plaintiff's grounds for eviction were dismissed.

4.2 Problems with the extinction of the right of retention on the grounds of involuntary loss of possession of the property retained

4.2.1 The interpretation of the term "possession" and the clause "loss of possession"

Many scholars have interpreted this term and clause. For example, Seni Pramoj explains that the term "possession" in right of retention should be interpreted in the same way as the term "possession' in the property law (Book IV, Sections 1367-1386 dealing with "possession").[89] Among these provisions, the most important provision in relation to the issue of possession is Section 1367 - holding a property with the intention of holding it for himself.[90] According to him, "holding" does not necessarily mean that the holder must hold the property in his hand; it also includes him having the power to control the property so that he can access it at any time.[91] For instance, A is hired to repair a car, which he keeps in his garage. Although he goes home at night, he still holds the property.[92] As for "the intention of holding it for

[89] ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 771.

[90] "A person acquires possessory right by holding a property with the intention of holding it for himself".

[91] ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 771.

[92] ibid.

himself.", this must be interpreted from the intention of the holder, according to the rule in Book IV: Property Law. In terms of the extinction of the possession, this is explained as being when the possessor abandons his possession (according to Section 1377[93]) or transfers it to another (according to Sections 1378[94], 1379[95] and 1380[96]).[97]

Similar to Seni Pramoj, Chit Sethabutr defines the term "possession" as meaning that someone is holding a property with the intention of keeping it for himself, according to Section 1367.[98] The loss of possession occurs when the creditor no longer possesses the property retained so that the right of retention lapses.[99] However, he gives an example of a seller retaining the property until the buyer pays for it. If the seller delivers it to the buyer, the right of retention lapses.[100]

Khun Prasertsuphamatra does not explicitly define the word "possession", but he provides an example of Section 241 that A hired B to repair a boat, and when the repair was finished, A asked B to postpone the payment, but B still returned the boat to A. Even if A does not pay for the repair later, B cannot take the boat back from A into his possession because his possessory right already ended.[101] Moreover, he explains possession in the right of retention by referring to provisions (Sections 1367, 1368[102] and 1369[103]) in the property law. While the terms "retain", "hold" and

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[93] "Possession comes to an end if the possessor abandons the intention to possess or no longer holds the property.

Possession does not come to an end if the possessor is prevented from holding the property by some cause which is temporary in its nature…".

[94] "Transfer of possession is affected by delivery of the property possessed".

[95] "Where property is already held by the transferee or his representative, the transfer of possession may be effected by a declaration of intention".

[96] "Transfer of possession is effected when the transferor, while continuing to hold the property, declares an intention to hold it thenceforward on behalf of the transferee.

If the property is held by his representative, the transfer of possession may be effected by the transferor directing such representative thenceforward to hold the property on behalf of the transferee".

[97] ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 784.

[98] จิ๊ด เศรษฐบุตร (n 71) 163.

[99] ibid 172.

[100] ibid. He cites the Supreme Court Decision No. 1194/1937 (B.E. 2480). As already noted, this specific kind of retention is not the right of retention studied in this article.

[101] ขุนประเสริฐศุภมาตรา (จรูญ) (n 67) 223.

[102] "A person may acquire possessory right through another person holding for him".

[103] "A person who holds a property is presumed to hold it for himself".

"possess", are somewhat related, they have different meanings.[104] He gives an illustration of the possessory right as a man who finds a mineral and picks it up to become his property. However, if he picks it up and finds it has no value, and throws it away, it means he has no intention to keep it for himself; hence, he does not have possession. He merely holds it temporarily.[105] Khun Prasertsuphamatra further explains that, while retention is a kind of holding but its extent is not as strong as if a person holds the property with the intention of making it his own. In the case of retention, the creditor merely holds the property in the context of performing an obligation.[106]

K. A. Lawson defines the holder of the right of retention as the person who possesses the property when the obligation is created.[107] For example, A takes a car to B to be repaired and agrees to pay for the service when the repair is finished. After finishing the repair, B is entitled to retain the car that has been in his possession, but he no longer has the right of retention if he returns the car to A because he does not possess it. K. A. Lawson further explains that the fact that the creditor keeps the property somewhere under his power is sufficient to constitute a possession.[108] The right of retention lapses if the right holder loses possession because he no longer has a chance to retain the property. However, if he is able to re-possess the property after losing possession, he acquires the right of retention again with the new possession. This is because the law does not specify that the right of retention only occurs when the creditor possesses the property when the obligation is due. Even if the obligation is due, and the creditor receives the property later, he can still retain it.[109]

Sanankorn Sotthibandhu also explains that possession is an important element of the right of retention. The property must be in the holding and possession of the creditor. Thus, if the creditor is deprived of the possession of the property, the right of retention ends naturally, with an exception where the property is let or pledged by consent of the debtor.[110] She further explains that the right of retention is

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[104] ขุนประเสริฐศุภมาตรา (จรูญ) (n 67) 240-242.

[105] ibid.

[106] ibid.

[107] เค เอ ลอว์สัน (n 65) 229.

[108] ibid.

[109] ibid 243.

[110] ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะหนี้ (ผลแห่งหนี้)* (n 21) 463.

a right of the creditor who possesses the property in the sense of "holding" it. Since this is a personal right, which is always based on contractual grounds, it is distinctive from the meaning of "possessory right" in Section 1367 of the property law (Book IV), which is a kind of real right.[111]

Daraporn Thirawat observes that, if a creditor possesses property that belongs to another, it means that the debtor has delivered it into his possession.[112] Additionally, the debtor must have had the legal possessory right before he delivered it to the creditor and he must have voluntarily delivered it.[113] For instance, if the property has been stolen and the debtor obtained it with good faith, i.e. he did not know that it was stolen, he does not possess it legally.[114] In this case[115], the right of retention cannot occur if the debtor delivers it to the creditor.[116]

4.2.2 Legal effects of involuntary loss of possession

Very few scholars have discussed the legal effects of involuntary loss. Nonetheless, Phra Suttiatnarumon explains that the right of retention is the right of the right holder to retain the property, and it is necessary for the holder to continue to possess the property for the right of retention to exist. Hence, the right of retention lapses if the possession ends; for instance, if the property is stolen or the creditor returns it to the debtor, or lets it out or pledges it.[117]

However, Seni Pramoj suggests that it cannot be deemed as loss of possession if the property retained is stolen, because the possessor does not voluntarily abandon or transfer it (according to the property law); instead, it is a case

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[111] ibid 453-454.

[112] ดาราพร ถิระวัฒน์, *กฎหมายหนี้: หลักทั่วไป* (n 78) 134.

[113] ibid 135.

[114] ibid.

[115] Other commentators do not really explain the meaning of possession in Section 241 and Section 250. They simply provide brief examples. E.g. หลวงธรรมนูญวุฒิกร, *คำสอนกฎหมายว่าด้วยการประกันด้วยบุคคลและทรัพย์* (มปพ. 2476) คำบรรยายวันที่ 3/10/2476 ว่าด้วยสิทธิยึดหน่วง [Luang Thammanoon Wutthikorn, *Lecture on the Law of Personal and Real Securities* (n.p. 1933) Lecture Date 03/10/1933 (dealing with the right of retention]; อุกฤษ มงคลนาวิน, *คำอธิบายกฎหมายแพ่งและพาณิชย์ว่าด้วย ค้ำประกัน จำนอง จำนำ บุริมสิทธิ์ และสิทธิยึดหน่วง* (มปพ. มปป.) 172-187 [Ukrit Mongkolnavin, *Commentary on the Civil and Commercial Law: Suretyship, Mortgage, Pledge, Preferential Right and Right of Retention* (n.p. n.d.) 172-187]; จรัญ ภักดีธนากุล, *กฎหมายแพ่งและพาณิชย์ว่าด้วยผลและความระงับแห่งหนี้* (n 80) 218-219.

[116] ดาราพร ถิระวัฒน์, *กฎหมายหนี้: หลักทั่วไป* (n 78) 135.

[117] พระสุทธิอรรถนฤมนตร์ (n 60) 283.

of unlawful deprivation (according to Section 1375[118]).[119] In cases where property retained is let or pledged with the consent of the debtor, the creditor is a holding agent because he still has possession of it (Sections 1368 and 1381[120]). However, it is specifically provided in Section 246 that, if the holder of the right of retention lets the property retained or gives it as security, without the consent of the debtor, the right of retention may lapse, provided that the debtor claims the extinction of the right of retention. Nonetheless, the important point is that the right of retention lapses if the creditor abandons or transfers possession. He cannot bring an action for recovery of possession except in case of deprivation.[121] As long as there is an obligation in relation to the deprived property, the right of retention can re-exist if the property is back in the possession of the creditor. This is because it is not specified that the possession must occur at the same time as the creation of the obligation in Section 241. Therefore, even if the creditor has possession of the property after the obligation has been created, he can still acquire right of retention.[122]

According to Charan Pakdeethanakul, the right of retention should not be deemed to be extinct if the property is removed or stolen by no fault of the creditor.[123] Although there is no specific provision in relation to this issue, the Supreme Court has held[124] that, if the property retained is stolen or the creditor is illegally deprived of it, even if it is done by the owner of the property, which does not constitute a criminal offence, the person who stole it or removed it does not have the right of retention, and the creditor's right to retain the property will not be affected. Hence, the creditor is entitled to claim the property back.[125]

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[118] "Where a possessor is unlawfully deprived of possession, he is entitled to have it returned, unless the other party has over the property a better right which would entitle him to claim it back from the possessor.

An action for recovery of possession must be entered within one year from the time of dispossession".

[119] ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 784.

[120] "Where a person holds property as representative of the possessor, he may change the nature of his holding only by a notice to the possessor that he no longer intends to hold the property for such possessor or by becoming in good faith, through the act of a third person, possessor under a new title".

[121] ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ เล่ม 1 (ภาค 1-2)* (n 8) 784.

[122] ibid.

[123] จรัญ ภักดีธนากุล, *กฎหมายแพ่งและพาณิชย์ว่าด้วยผลและความระงับแห่งหนี้* (n 80) 218.

[124] He cites the Supreme Court Decision No. 546/1977 (B.E. 2520).

[125] จรัญ ภักดีธนากุล, *กฎหมายแพ่งและพาณิชย์ว่าด้วยผลและความระงับแห่งหนี้* (n 80) 218-219.

Sunthorn Manisawat specifically explains that the loss of possession according to Section 250 means that the possessor loses the possessory right.[126] He further explains that the end of the possessory right may be due to either abandoning or transferring the property. However, possession does not end in the case of deprivation such as the property being stolen or taken back by the debtor without the creditor's consent because the creditor can take the possession back according to Section 1375. Hence, the possession does not end and the right of retention does not lapse.[127]

5. Analysis of Studied Issues

5.1 Proper interpretation of the clause "obligation in his favour relating to the property possessed"

This article supports the theory of interpretation that the clause "obligation in his favour relating to the property possessed", which is an element of the constitution of the right of retention, should be broadly interpreted as "the holder of the right of retention benefits from the obligation and this obligation is related to the property retained".

Firstly, according to the clause "If the possessor...has an obligation in his favour relating to the property possessed" contained in the provision can be literally understood as the possessor having an obligation that benefits him and that obligation is related to the property retained.

Secondly, it appears to be explained in the literature that a creditor must have an obligation that benefits him in relation to the property retained in order to acquire the right of retention, which is a broad interpretation of this issue. The problem is that most scholars have tended to use the same classical example as an illustration, with the debtor hiring the creditor to repair something and failing to pay for the service; hence, the creditor is entitled to retain the property. Initially, this seems to suggest that these scholars believe that the creditor must have done something to the property in order to acquire the right of retention; however, it can also infer that they simply wish to explain that the creditor must have an obligation

[126] สุนทร มณีสวัสดิ์ (n 87) 268.

[127] ibid.

related to the property retained and that this obligation is related to it because he repaired it. They do not intend to imply that the creditor needs to have done something to the property, but rather to give this example as an obvious illustration. It may be inferred that the only writer, namely Daraporn Thirawat[128], who clearly explains that the creditor must have done something to benefit the property, accidentally concluded her interpretation from the aforementioned classical illustration (where the creditor is hired to repair something) based on a slight misunderstanding. Additionally, in his article, Luang Sarasaspraphun[129] asserts that there are three different kinds of "relation", namely legal, material and contractual. Although he does not provide a definitive answer to this point since the final article was not finished, it may be inferred that a relation, as an element of the right of retention, covers both a legal relation (a broader one that refers to cases where the creditor has an obligation that is beneficial to him) and a material relation (a narrower one that refers to cases where creditors have done something to benefit the property). It can be implied that, although Luang Sarasaspraphun mentions a contractual relation, the right of retention excludes this type on the grounds that this kind of right is created by virtue of the law.

Thirdly, the Court also supports the second theory based on a case in which it held that a future buyer, who already possessed the property he bought, was entitled to retain it until the seller had performed his obligation (in this case by transferring the ownership (by registration) to the buyer).[130] This would also result in a fairer outcome for the buyer, since he would be entitled to retain the land, regardless of whether the period of prescription had passed. The seller would be able to avoid performing his obligation on the grounds of prescription if the buyer did not have the right of retention or the buyer would only be entitled to damages if the prescription had not passed. It may be argued that the court could apply an incorrect legal principle to provide the buyer with a fairer outcome, given that, in this case, the buyer retained the land, which was the object of the sale. This is different from the nature of the right of retention when the creditor retains the property to secure the principal obligation. However, the response to this argument is that the property retained by the buyer was distinctive from the principal obligation between the parties. Since the

[128] ดาราพร ถิระวัฒน์, *กฎหมายหนี้: หลักทั่วไป* (n 77) 135.

[129] หลวงสารสาสน์ประพันธ์ (ชื้น จารุวัสตร์), 'ความสำคัญบางประการเกี่ยวกับสิทธิยึดหน่วง' (n 53) 46-47.

[130] Supreme Court Decision No. 253/1954 (B.E. 2497).

parties had entered into an agreement to sell or to buy the property, the obligation arising from this agreement was that the buyer was bound to make the payment and the seller was bound to transfer the ownership of the property sold. The fact that the seller delivered the land to the buyer but failed to transfer the ownership by registration reflects the failure of the debtor to perform that obligation. Hence, the buyer was entitled to retain the land until the principal obligation, namely the transfer of ownership was complete. In addition, the court has held that the right of retention does not apply in cases where the property retained is not related to the obligation. For instance, it has been held that, in cases where the borrower of money gave the title deed of the property to the lender to secure the payment, the lender was not entitled to retain it since it was not the property related to the loan.[131] This reinforces the Thai Court's application of the correct legal principle of the right of retention in related cases.

Fourthly, since the right of retention is deemed to be a general concept, this doctrine should be broadly interpreted so that it can cover all kinds of obligation.[132] A contract is not the only source of an obligation, but also a unilateral promise (subject to debate), tort, *negotiorum gestio*, undue enrichment, and obligations imposed by the law. The first theory may be incompatible with other kinds of obligation (than contracts), but the creditors of those obligations are entitled to acquire the right of retention. For example, A loses his rabbit and publicly announces to pay a reward to anyone who can provide information about it. B finds the rabbit, takes care of it and informs A. In this scenario, B is entitled to the reward. This is a promissory obligation[133]. However, A fails to give B the reward and demands the return of the rabbit on the grounds of ownership. When applying the first theory, it is questionable if B is entitled to retain the rabbit because he has done nothing to

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[131] E.g. Supreme Court Decision No. 545/1961 (B.E. 2504).

[132] Pridi Banomyong argues that, there is deemed to be an obligation related to the property possessed, even if the possession of the property retained does not stem from the contract, but the possessor received the property in good faith and paid for the value, according to Sections 416-417 of the Civil and Commercial Code. ปรีดี พนมยงค์ (n 48) 137.

[133] It should be noted that whether the advertisement of reward is promissory or contractual obligation is debatable. However, even if it is treated as being contractual in nature, it does not change the fact that the person who completes the specified act as given in this case does not do anything that benefits the property retained.

benefit it, but when applying the second theory, A is definitely entitled to retain the rabbit due to its relationship with the promissory obligation.

Fifthly, the nature of the right of retention as a general law should be compatible with that of specific law. The relationship between the right of retention as a general law and specific law is that, if the case falls within the scope of any specific provision, such a provision would be applied to the case instead of the general provisions. However, both the general law and the specific law deal with the same matter, despite the narrower scope of the latter. Of course, it is provided in the specific law that the creditor who has the right of retention has done something to benefit the property retained. For instance, the depositary is entitled to retain the property deposited until he has been paid all that is due to him on account of the deposit.[134] Nonetheless, there are other provisions in relation to the right of retention in specific circumstances when the creditor has not benefited the property, but he is legally permitted to retain it because it is related to the obligation. For instance, it is provided in the law of wrongful acts[135] that a possessor of immovable property is entitled to seize animals that belong to another person if they cause injury on such property and "retain" them as security for any compensation that may be due to them; moreover, he is even entitled to kill them if it is necessary under the circumstances. Obviously, as a result of a wrongful act, the creditor does not do anything that benefits the animal in this case, but the law still permits him to retain it to secure the performance of the obligation from its owner, who is the debtor in this obligation. In another case, the proprietor of an inn, hotel or other such place is entitled to "retain" the luggage or other property of a traveller until he has been paid all that is due to him for lodging and other services afforded to the traveller to satisfy his needs, including disbursements.[136] Again, the creditor does nothing to benefit the property in this case, but he is entitled to retain it because it is related to the obligation and the law further permits the proprietor to sell the property retained at public auction and pay himself the amount due to him from the proceeds of the sale, together with the costs and expenses of the sale.[137] This is different from the general

[134] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 670 [Thai Civil and Commercial Code, Section 670].

[135] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 452 [Thai Civil and Commercial Code, Section 452].

[136] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 679 [Thai Civil and Commercial Code, Section 679].

[137] It should be noted that there is a contradictory view that the right of an innkeeper to retain the property of a defaulting traveller is distinctive from the right of retention because the obligation is related to traveller rather than the property. พระสุทธิอรรถนฤมนตร์ (n 60) 264.

nature of the right of retention where the creditor is only allowed to retain the property until the obligation has been performed. However, this difference may stem from the nature of the innkeeper's contract, which is different from other contracts or obligations because debtors who are guests of inns, hotels or other such places may only stay where once and live in different places far away. It would be impractical for the creditor to retain the property to secure the payment since the debtor may never come back to the inn again. This is why the law gives this kind of holder of the right of retention the right to sell the property retained, which is broader than the right given to that of the holder of the right of retention in the general law.

5.2 Proper interpretation of the extinction of the right of retention on the grounds of involuntary loss of possession of the property retained

The "right of retention" and "possession" have an important relationship, as can be seen from the provision related to its elements (Section 241), someone must possess property that belongs to another in order to acquire the right of retention, and the provision related to its extinction (Section 250), the right of retention is extinguished by the loss of possession of the property retained. As a result, it is apparent that the possession of the property is a very important factor of the acquisition of the right of retention. Hence, it is necessary to understand the meaning of "possession" before determining if the right of retention is extinguished because of involuntary loss of possession.

Since clear definitions of these two points are only found in a few commentaries, it is doubtful what the actual meaning of "possession" and "loss of possession of the property retained" are and how possession begins and ends.

5.2.1 Proper interpretation of "possession"[138] and "loss of possession of the property retained"

Only two writers, namely Seni Pramoj and Chit Sethabutr, provide a clear explanation of these points. They clearly express that the term "possession" means holding a property with the intention of holding it for oneself by referring to Section

[138] It should be noted that the requirement of the possession of property belonging to another to establish right of retention stems from the interpretation that a possessor is a person who has possession.

1367 of the property law. In terms of the clause "loss of possession of the property retained", Seni Pramoj explains that the possession ends when the possessor abandons his possession, according to Section 1377, or transfers it to another, according to Sections 1378-1380.

Although other writers do not clearly explain the meaning of the issues under discussion, none of them seems to contradict Seni Pramoj and Chit Sethabutr, apart from Khun Prasertsuphamatra and Sanankorn Sotthibandhu[139], who impose different meanings on retention and possession. Khun Prasertsuphamatra, for example, perceives possession as someone holding property with the intention of owning it, which differs from retention, because the property is only held pending the performance of an obligation.[140] Also, when considering the whole context based on these writers' illustrations, the classical example is when the debtor delivers property to the creditor for repair in exchange for a remuneration. When the repair has been done and the debtor does not pay the remuneration, the creditor is entitled to retain the property. The fact that the debtor delivered the property to the creditor is a case of delivery of possession by which the creditor becomes the possessor of that property. Similarly, when considering the language used by these scholars, Daraporn Thirawat explains that the debtor must have the lawful possessory right before he voluntarily delivers the property to the creditor, while K. A. Lawson suggests that the fact the creditor keeps the property in his power is sufficient to constitute possession. This implies that these writers share the same view that "possession" in Section 241 has the same meaning as "possessory right" in Section 1367, although most of them do not explicitly say so.

Another supportive reason is that the provision on "possession" only appears in Book IV: Title 3 (Possession) of the Thai Civil and Commercial Code, while, according to the English texts, the terms under the provisions of right of retention and possession show great similarities. While the term "possessor" is used in Section 241, it is also used in Sections 1370[141], 1374[142],

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[139] As stated in heading 4, sub-heading 4.2.1.

[140] ขุนประเสริฐศุภมาตรา (จรูญ) (n 67) 240-242.

[141] "A possessor is presumed to possess in good faith, peacefully and openly".

[142] "Where a possessor is disturbed in his possession by unlawful interference, he is entitled to have the disturbance removed. If further disturbance is to be apprehended, the possessor may apply for an injunction.

An action for removal of disturbance must be entered within one year from the time of the disturbance".

1375[143], 1377[144], 1381[145] and 1384[146] in the property law to denote that the person who has possession acquires the possessory right.

In summary, "possession" is equivalent to "possessory right", which contains two elements. The first is "holding", which means that a person can physically exercise his power to control the property and there is nothing to prevent him from doing so. Also, it must be objectively expressed so that others know of it and respect it. The second element is that he must intend to hold it for his own benefit, but he need not necessarily be the owner.

As for the "loss of possession of the property retained", which causes the right of retention to be extinguished (according to Section 250), it should be interpreted that "possession" is equivalent to the possessory right (in Section 1367[147]); hence, when the "possession comes to an end", it should be interpreted as the extinction of the possessory right, which can occur in two scenarios, the first of which is when there is a lack of the elements of the possessory rights. The possessor no longer holds the property or abandons his intention to hold it for himself. The second is when the possession is transferred by the property being delivered from one person to another (Section 1378), or by expressing the intention because another person already holds the property (Section 1379), and by transferring the possession to a representative of the transferee and directing him to hold the property on the transferee's behalf (Section 1380).

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[143] "Where a possessor is unlawfully deprived of possession, he is entitled to have it returned, unless the other party has over the property a better right which would entitle him to claim it back from the possessor.

An action for recovery of possession must be entered within one year from the time of dispossession".

[144] "Possession comes to an end if the possessor abandons the intention to possess or no longer holds the property.

Possession does not come to an end if the possessor is prevented from holding the property by some cause which is temporary in its nature".

[145] "Where a person holds property as representative of the possessor, he may change the nature of his holding only by a notice to the possessor that he no longer intends to hold the property for such possessor or by becoming in good faith, through the act of a third person, possessor under a new title".

[146] "Possession shall not be deemed interrupted if the possessor involuntarily loses the holding of the property, and recovers it within one year from the date of the loss or by means of an action instituted with that time".

[147] "A person acquires possessory right by holding a property with the intention of holding it for himself".

5.2.2 Legal effects of a case in which the holder of the right of retention is involuntarily deprived

The possession of the property comes to an end when the possessor abandons his intention to possess it, no longer holds it (Section 1377) or transfers the possession (Sections 1378-1380). However, the possessor may no longer hold the property intentionally or non-intentionally (i.e., voluntarily and involuntarily) and obviously, the possession lapses if the possessor voluntarily loses the property. However, it is unclear if possession lapses in the case of involuntary loss. Involuntary loss may occur either because the possessor does it (such as loss of property) or is deprived of the property by another. It is unclear whether this is considered as "no longer holding the property" (Section 1377).

There are two separate points to be analysed in this respect, the first of which is whether the right of retention ceases to exist when the right holder loses the possession of the property. There is no commentary in the law of obligations that specifically explains this point, but it can be considered based on the meaning of "holding" (Section 1367), which means that a person is able to physically exercise his power to control the property and there is nothing to prevent it. Also, it must be objectively expressed so that others know of it and respect it. Hence, whether the fact the possessor loses the property causes the possession to lapse needs to be considered by the power to control the property. For instance, if the lost property is still on the possessor's premises, he still has the power to control it and, since the holder still holds the property, he still has the possessory right; hence, the right of retention is not extinct. However, if the fact changes and the property is lost elsewhere and the holder does not know where it is, it should be deemed that he no longer holds it. In this case, the holder of the right of retention loses the possessory right, resulting in the extinction of the right of retention.

The second point is when the holder of the right of retention is illegally deprived of the property and little explanation of this point has been found in the literature. A few writers have attempted to explain it, but indirectly, and they appear to have different views. On the one hand, Phra Suttiatnarumon deems that, to maintain the right of retention, it is necessary for the holder of the right to possess the property at all times. The right of retention lapses if the possession is terminated, such as the property being stolen. Therefore, it can be concluded that, according to Phra Suttiatnarumon, the right of retention lapses if the creditor is involuntarily

deprived of the property since he no longer holds it, but it is unclear if the creditor will acquire the right of retention again if re-possesses the stolen property.

On the other hand, Seni Pramoj argues that possession does not end when the property is stolen on the grounds that the possessor does not abandon or transfer it; instead, it is a case of involuntary deprivation in which the possessor may be entitled to have it returned. It can be inferred that "no longer holding the property" will only cause the lapse of possession if the possessor is no longer holding it voluntarily. The possession does not terminate if the possessor no longer holds the property involuntarily, which is not the case if the property is lost in Section 250. Also, Charan Pakdeethanakul and Sunthorn Manisawat share the view that the right of retention should not be extinct if the property is involuntarily deprived or stolen without the fault of the creditors.

Although Charan Pakdeethanakul claims that there is a Court decision, namely Supreme Court Decision No. 546/1977 (B.E. 2520),[148] to support this interpretation, he seems to have mistaken the case because, on reading the Court's decision in detail, it is found that it did not hold that the right of retention lapses if the holder is deprived of the property. The fact in this case is that the defendant, a company, owned a copy machine, which it loaned out and the lessee pawned it. When the lessee did not redeem the copy machine, the pledgee sold it at public auction and the buyer then sold it to the plaintiff. When the defendant found the copy machine later and took it back into its possession to be repaired, the plaintiff sued the defendant for its return. Although the defendant claimed that it had the right to recover the property as its owner, the Court held that the plaintiff had a better right, since he had purchased the property in good faith from a bona fide trader (Section 1322). The defendant also claimed that it had the right to retain the property because the plaintiff had not paid for the service. However, it was accepted by the parties that the plaintiff did not hire the defendant to repair the copy machine; instead, the defendant had involuntarily taken it from the plaintiff. Hence, it was held that the defendant did not have the right of retention. As can be seen, for the right of retention to occur, there must be an obligation related to the property retained but there was no obligation between the parties in this case.

Other writers do not seem to explain this issue, although K. A. Lawson briefly touches on it. He observes that the right of retention lapses if the right holder

[148] จรัญ ภักดีธนากุล, *กฎหมายแพ่งและพาณิชย์ว่าด้วยผลและความระงับแห่งหนี้* (n 80) 218-219.

loses possession because there is no chance to possess the property when the possession is lost, but the right of retention exists again if the creditor is able to re-possess the property.[149] This may imply that K. A. Lawson is of the view that the right of retention can only exist if the creditor has the property retained in his possession. If he does not hold the property, it cannot be retained. There cannot be a right of retention as long as the property is lost. It is worth noting that Seni Pramoj similarly asserts that the creditor may acquire the right of retention if he has the property back in his possession, but it should be understood that Seni Pramoj does not include involuntary deprivation because he does not believe that the right of retention lapses due to involuntary deprivation.[150]

There are three possible interpretations of the legal effect when the holder of the right of retention is involuntarily/illegally deprived of the property retained. The first is that the right of retention is extinguished and cannot be restored, even if the right holder re-possesses the property later. The second is that the right of retention is extinguished, but the right holder can re-acquire it if he re-possesses the property, while the third is that the right of retention is not extinguished.

This article agrees with the third interpretation, that the right of retention is not extinguished, given that the creditor, who is the holder, re-possesses the property within the time specified by the law.

Initially, it seems reasonable that the right of retention should lapse because the right holder, who is illegally deprived of the property retained, no longer holds it and, hence, has no power to control it. Moreover, it is not provided in Section 1377 that "no longer holds the property" is necessarily voluntary or involuntary. Hence, it seems that the creditor or the holder of the right of retention, who is deprived of the property retained, no longer has the possessory right.

However, on closer inspection, there is a specific provision that permits a possessor who is deprived of the property to take action to recover possession within one year, according to Section 1375. This shows that it is possible for a creditor to be entitled to have the possessory right returned. This differs from "no longer holding property" when there is no chance that the possessory right will be returned, which

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[149] เค เอ ลอว์สัน (n 65) 243.

[150] บัญญัติ สุชีวะ, *คำอธิบายกฎหมายลักษณะทรัพย์* (ไพโรจน์ วายุภาพ ผู้ปรับปรุง, พิมพ์ครั้งที่ 17, เนติบัณฑิตยสภา 2559) 268 [Banyat Sucheewa, *Commentary on the Law of Property* (Pairoj Wayuparb ed, 17th edn, The Thai Bar Under the Royal Patronage 2016) 268].

means that the right of retention will be permanently extinguished. Therefore, the creditor should have right of retention if he recovers the possessory right. Moreover, since the absence of holding the property retained does not stem from the intention or fault of the creditor in this case, it is not fair to consider that his right of retention has lapsed. Also, the first theory of interpretation may support the illegal deprivation of the property retained by the debtor, especially since it is not deemed to be theft in criminal law (Section 334 of the Thai Penal Code) if the debtor is the owner of the property retained. If this was permitted, it would not be compatible with the notion of the right of retention.

As a result, the interpretation of the permanent lapse of the right of retention is unsatisfactory. It may be argued that, even if the right of retention is absolutely extinguished, the creditor can still enforce the obligation by demanding a specific performance. However, it should be noted that a holder of the right of retention has a better right than an ordinary creditor because he is deemed to be a third person who is protected from the judgement enforcement, according to Sections 322 and 324 of the Thai Civil Procedure Code. For instance, he may submit a request to the Court for the payment of the debt owed to him in preference of ordinary creditors.[151] Moreover, the right of retention is not prescribed. Therefore, a creditor who has the right of retention is entitled to retain the property until the obligation has been performed regardless of whether the prescription of the principal obligation has lapsed or not.

The second possible interpretation that the right of retention lapses if the creditor loses possession, but reoccurs if he re-possesses the property is supported by K. A. Lawson. He explains that, to acquire the right of retention, it is possible that the creditor possessed the property after the obligation was created because the law does not specifically provide that the possession must have occurred before the creation of the obligation.[152] However, the creditor re-acquires the right of retention if he re-possesses the property provided that all the elements of the constitution of the right of retention are met.

The third possible interpretation is that the right of retention does not end as a result of the loss of possession, provided that the right holder re-acquires

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[151] ประมวลกฎหมายวิธีพิจารณาความแพ่ง มาตรา 324 [Thai Civil Procedure Code, Section 324]; See also Supreme Court Decision No. 546/1977 (B.E. 2520).

[152] เค เอ ลอว์สัน (ก 65) 243.

the possession within one year from the date he lost the property, or brings an action for the recovery of possession within the aforementioned period. Seni Pramoj seems to support this interpretation, since he explains that the fact the holder of the right of retention is deprived of the property retained does not cause the right of retention to be extinguished. Although he does not explicitly state that the creditor must have re-possessed the property or brought an action for recovery within one year of the deprivation, this meaning can be implied because, if the possession of the property deprived is not returned to the right holder, it should be deemed that it ended after the period the right holder of the possessory right is permitted to claim recovery of the possession, namely within one year, according to Section 1375.

This article agrees with K. A. Lawson and Seni Pramoj's account that the holder of the right of retention whose right is extinguished due to loss of possession can re-acquire the right of retention if the possession is returned to him, provided that the obligation still exists and other elements of the right of retention are met. However, it disagrees with the second interpretation on the grounds that it (the right of retention lapses if the creditor loses possession) should only be applied in cases where the holder of the right of retention who loses possession of the property retained either (i) does not re-possess the property within one year after the date of deprivation, or (ii) does not bring an action for recovery of possession within one year after the date of deprivation. However, if the right holder does not receive the property back within the specified period in Section 1375, it can be deemed that the possession is definitely extinguished and, hence, the right of retention has lapsed.

It is worth noting that the interpretation proposed in this article that "if possession is back to the right holder within the specified period, the possession has never been interrupted", appears to be compatible with Seni Pramoj's account, although not explicitly stated. He merely asserts that the possession does not end if the possessor is involuntarily deprived of the property because it may be returned to him, according to Section 1375. This article proposes that this treatment of Seni Pramoj's perspective is supported by the legal principle in Section 1384, which provides that possession does not end if the possessor recovers the possession within one year from the date of the loss or by means of an action initiated within that time. This reflects that this provision is aligned with Section 1375, and supports Seni Pramoj's assertion that, in cases where the right holder is illegally deprived of possession, it does not end if, it is returned to him, or he brings an action for recovery

within one year after the loss. For example, creditor A, who has the right of retention, is deprived of the property retained by debtor B, who is also its owner. A's right of retention is not lapsed if he takes action for recovery within one year. However, if he does not do so, it should be deemed that the right of retention was extinguished from the date of the deprivation. Nonetheless, if he legally retrieves the property later by whatever means, such as B voluntarily returns it to him, the right of retention can be regenerated, if the other elements of the constitution of the right of retention are fulfilled.

It should be noted that commentators on the property law usually regard Section 1384 as the exception of adverse possession (Section 1382[153]). According to the literature[154], Section 1384 is the exception of Section 1382. It means that Section 1384 is applied as an exception when someone claims adverse possession and is deprived of the property, but recovers possession within one year. In this case, his possession is not deemed to have been interrupted by the deprivation. However, this article is of the view that the law does not clearly provide that Section 1384 can only specifically apply to cases of adverse possession, despite this provision being subsequent to Sections 1382 and 1383, which are specifically related to adverse possession. Nonetheless, the part of Book IV: Property to which these provisions belong is entitled "Possession"; therefore, this article proposes that the rule under Section 1384 should also be applied to other cases when the possessor is involuntarily deprived of the property possessed, such as the holder of the right of retention.

Moreover, when considering the legal effects of the right of retention, the second and third approaches do not seem to result in a different outcome in that the right holder, who was deprived of the property retained and then re-possesses it, is entitled to retain the property. However, on closer inspection, the legal effects during the period when the property is not in the possession of the right holder, or more accurately, his holding, and the period when the property is returned are different. According to the second approach, there was no right of retention during the aforementioned period because it had already lapsed (Section 250). It can only

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[153] "Where a person has, for an uninterrupted period of ten years in case of an immovable, or five years in case of a movable, peacefully and openly possessed a property belonging to another, with the intention to be its owner, he acquires the ownership of it".

[154] บัญญัติ สุชีวะ (n 149) 328; ม.ร.ว.เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยทรัพย์สิน* (อักษรนิติ 2479) 712-715 [Seni Pramoj, *Civil and Commercial Code on Property* (Aksornniti 1936) 712-715].

re-exist if the possession of the deprived property is returned to him (i.e., the elements of the right of retention are met again). However, by applying the third interpretation that the possession has never been interrupted, according to Section 1384, the right of retention has continuously existed, even during the period that the right holder did not have possession of the property retained. This is an important point in relation to the fruits of the property retained because the law provides that[155] a creditor with the right of retention is entitled to take the fruits of the property retained and appropriate them to the performance of the obligation in preference to other creditors; while, according to the second approach, the right holder cannot enjoy the fruits of the property during the period of no possession, but he can, according to the third approach.

In conclusion, this article supports the third interpretation on the grounds that it is the most compatible with the purpose of the law on the right of retention, since it provides creditors with better protection, prevents the owner of the property retained from being deprived of it and finally, it is aligned with the interpretation of possession in the property law.

6. Conclusion

In relation to the interpretation of the clause "obligation in his favour relating to the property retained", most writers who address the right of retention in the literature do not adequately explain that the creditor must have done something to benefit the property retained in order to acquire the right of retention. Instead, they tend to give illustrations where a creditor is hired to repair a property and the debtor fails to pay the service so he is entitled to retain the property repaired. It can be inferred that those writers do not suggest that the holder of the right of retention must have put skills or invested in the property retained; rather, this is only an example of a case where the property is related to the obligation that benefits the creditor. They do not intend to mean that the fact that the creditor has done something to benefit the property retained is the only absolute example of the clause "obligation in his favour relating to the property retained". Thus, the interpretation of this clause preferred in this article is that the creditor's possession of the property is related to an obligation and the property is beneficial to him. Another

[155] ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 245 [Thai Civil and Commercial Code, Section 245].

principle that supports this interpretation is that the concept of the right of retention is a general concept of obligation; hence, it should be able to apply to all kinds of obligations. The interpretation supported in this article would allow creditors with other kinds of obligations to retain property that they possess that is beneficial to them and is related to the obligation, even if they have not put any skills into improving the condition of the retained property. Also, as this concept is a general law, this interpretation would make it compatible with that of specific law. In some specific cases, the holder of the right of retention does not benefit the property retained at all, but the law provides such a right merely because the property is related to the obligation and is beneficial to him. Other supporting reasons are that the interpretation proposed in this article is reinforced by Courts' decisions and provides better protections to the creditor.

As for the interpretation of issue of where the holder of the right of retention is involuntarily deprived of the property retained whether the right of retention lapses or not since the law simply provides that it lapses if the right holder loses the possession of the property retained, it is proposed in this article that the interpretation on the issue under discussion must take the principle of possession in the property law (Book IV: Property, Title III: Possession) into consideration. The important elements of possession (or possessory right) are holding the property with an intention of holding for himself. The possession comes into an end when the possessor voluntarily abandons or transfers it. Thus, the end of the possession that would cause the right of retention lapse definitely includes voluntary abandonment and transfers of the possessor. However, in cases where the holder of the right of retention is deprived of the property retained, it cannot be deemed that the possession ends immediately. This is because the possessor may retrieve the property back or bring an action for recovery within one year after the date of deprivation, which in this case, the law deems that the possession has never been interrupted; thus, the right of retention is deemed as never been lapsed. As a result, to answer the issue under discussion, the moment/point to determine if the right of retention is definitely extinguished in case of involuntary deprivation is the time of after one year from the date of deprivation. If after this time, the right holder does not have the possession back or does not bring an action for recovery, the right of retention lapses, which it is retrospective to the date of deprivation. However, if the holder recovers the possession or takes an action for its recovery within the specified time, the right of

retention has never been lapsed. It should also be finally noted that, in cases where the right of retention is absolutely lapsed because the holder does not re-possess the property within one year, if after that he has the possession of the property back, the right of retention can still be generated, provided that other elements are fulfilled.