

Darko Stevanović¹

UDC 347.131.4(497.11)

Review article

Received: 25/04/2024

Accepted: 11/10/2024

DELIVERY AS A METHOD OF TRANSFERRING POSSESSION OF MOVABLE PROPERTY

ABSTRACT: In the introductory part of the paper, the author focuses on the general concept of the legal institution of possession, followed by an exposition of the concept of delivery. Special emphasis is placed on the characteristics of delivery and the element of intent. The core of the paper is dedicated to the types of delivery and the legal effects they have on property transactions. The Law on Basic Property Relations regulates the methods of delivery by which possession of movable property is transferred. By analysing positive legal regulations and existing judicial practice, the author seeks to address the need in modern society for the existence of forms of symbolic (fictitious) delivery, especially defending this type of delivery in cases of multiple sales of the same item. The author also proposes a thesis on the more recent understanding of certain forms of symbolic delivery. In the concluding section, it is argued that in the future, delivery should be understood as mutual agreement between both (contracting) parties, and that the requirement of good faith should not be insisted on in cases of multiple deliveries when acquiring ownership rights.

KEYWORDS: possession, delivery of goods, movable property, property rights, contract.

¹ LL.M., PhD candidate at the Faculty of Law, University of Belgrade, and a teaching associate at the Faculty of Law, University of Belgrade. ORCID id: 0009-0006-9533-9040, darko.stevanovic@ius.bg.ac.rs

1. The Concept of Possession

Possession is not a right. In legal theory, possession is commonly explained through the concept of actual control over an object (Stanković, Orlić, 2014, p. 33). The general concept of possession is not explicitly recognized by the legislator in the positive legal system of the Republic of Serbia, although the Law on Basic Property Relations does contain provisions referring to possession (Article 70, etc.). It seems that possession has long posed a challenging question in legal theory, and as a dynamic institute of property law, it leaves open the question-whether it is even possible to define possession in a unified and comprehensive way. Without delving into deeper doctrinal debates about the concept and legal nature of possession, this paper will present just one of many thoughts on this legal institute.

According to Vodinelić, possession could be defined as follows: “Possession is actual control or a factual state concerning an object that may correspond to ownership rights (*ownership possession*), another right (*possession of rights*), or an obligation (*possession of obligations*) and which is regulated by the appropriate legal rules on possession, rather than holding, are applicable” (Vodinelić, 2013, p. 394). However, the same author also acknowledges the idea that possession can be defined by resorting to typology (Vodinelić, 2013, p. 390) or enumeration (Vodinelić, 2013, p. 391). Attempts to define possession using general terms (*definitio fit per genus proximum et differentias specificas*) are insufficiently successful, considering that even such a definition of possession raises a number of potentially controversial questions (e.g., defining actual control, the manner in which actual control is manifested, distinguishing possession from related legal institutes, etc.). Therefore, for the purposes of this paper, the definition of possession will be reduced to its narrower meaning - actual control (e.g., a temporal-spatial relationship) or factual state (e.g., possession by heirs at the moment of delation).

2. The Concept of Delivery

Delivery is usually understood as a material act, a factual action characteristic of humans. The delivery of an object is an act of trans-

ferring possession or enabling actual control over the object. However, delivery in law is much more than a simple act; it is also an intentional action. In this regard, for delivery to produce legal effects and fulfill its purpose in law, it must be the result of a valid contract, an act of intent by the transferor, and an act directed toward the transfer of rights (Stanković, Orlić, 2014, p. 66).

Delivery is the consequence of a valid legal transaction, as an obligation on the part of the transferor. Such understanding of delivery is not unrecognized by legal systems that have accepted the causal principle in acquiring property rights (*iustus titulus* and *modus aquirendi*). Therefore, for a buyer to acquire ownership of movable property, the seller must deliver the item, i.e., transfer possession (enable the exercise of actual control), but since this is a mutual agreement, the acquirer must also take possession of the object. Furthermore, delivery is an intentional act. For delivery to produce its legal effect, it should represent a manifestation of the transferor's intent (Popov, 2012, p. 171). Even in cases where possession is acquired without the element of intentional delivery, it would still constitute possession, albeit *defective*. In legal theory, it is emphasized that depending on the manner of acquiring possession, one must distinguish between natural intent and "qualified intent". Natural intent (or will) corresponds to the simple understanding of the act of delivery as a way of transferring possession, whereby the performance of the act of actual control is granted solely by the existence of natural intent (Tešić, 2013, p. 60). On the other hand, when intent is expressed through a legal transaction as the basis for acquiring possession, then its quality in terms of leading to the validation of the legal transaction has to be confirmed (Vicković, 2016, pp. 117-118). This conception of intent also points to the third characteristic of delivery. Namely, it represents an act aimed at transferring rights (ownership).

3. Types of Delivery

3.1. Physical (Real) Delivery

Physical (real) delivery (lat. *traditio vera*) represents a method of delivering an object that is realized through direct (simple apprehension) action, often referred to as “hand-to-hand delivery” (lat. *traditio de manu ad manum*) or placing the object at the disposal of the transferee in some other way. Movable objects, due to their nature, are suitable for classical physical delivery, unlike immovable objects (e.g., land, buildings), where possession is transferred based on the agreement of the contracting parties. Physical delivery is the oldest tradition and a regular method of transferring possession (*corpore et facto*). However, it also raises controversial questions, such as: determining the moment when the object is physically delivered to the transferee (this is important because of the risk of potential damage to the object) or in the situation when the so-called *nuda traditio* is performed. If the act of physical delivery lacks the transferor’s intent to transfer the right, ownership is not transferred to the transferee, but this does not mean that possession has not been transferred - on the contrary, the transferee has acquired possession (but not ownership) of the object. Based on the aforementioned, it can be concluded that physical delivery is sufficient if it enables the transferee to exercise actual control, without requiring that actual control be fully established.

3.2. Symbolic Delivery

Symbolic delivery (lat. *traditio symbolica*), as the name suggests, is carried out through certain symbols or symbolic actions that clearly and unambiguously indicate that delivery has occurred, i.e., that possession of the object has been acquired. Symbolic delivery is performed by transferring possession through a document of title, gestures, symbols, allocation and marking of the object, partial delivery of the object, etc. Whenever physical delivery is impossible (which is rare in practice), more precisely, when physical delivery would be difficult or would in-

cur additional costs, the parties can agree to perform symbolic delivery. The moment when symbolic delivery is considered to have occurred depends on the specific circumstances of the case. Since this form of delivery often lacks a temporal-spatial relationship between the possessor and the object, it is believed that delivery has occurred depending on how symbolic delivery is manifested. It is sometimes difficult to consciously recognize that symbolic delivery is being performed, but traditionally it includes actions such as the delivery of documents that allow the transferee to establish actual control over the object (e.g., delivery of a bill of lading symbolically constitutes the delivery of goods), partial delivery of the object or tools (e.g., delivery of a key that allows possession of objects located in the room). Symbolic delivery can also appear as the allocation and marking of objects, marked with a specific sign or symbol (e.g., the delivery of forest trees, certain heads of livestock, etc.).

3.3. Fictitious Delivery

Fictitious delivery represents the most specific method of delivery, introducing the fiction that physical delivery has actually occurred, while the right itself is transferred based on a legal transaction (contract). It concerns the transfer of rights, not a change in the possession field. Fictitious delivery is always contactless, as the item must generally be held by the party prior to its transfer. With some caution and optimism for having enough capacity to conduct research in the future and more detailed analysis, in the following sections we will explore only some of the issues directly related to the specified topic. Essentially, fictitious delivery is voluntary, whereby ownership (or another right) is transferred by a declaration of intent, often manifested through a contractual clause. Hence, the following question arises: Is fictitious delivery nothing more than a clause in the contract that creates the fiction that delivery has occurred and that the right has been transferred by the contract itself? Delivery is much more than a simple contractual clause - it is an independent and abstract act. The legislator's use of the term "at the moment of concluding the legal transaction" implies that possession is transferred at that moment, *ex lege*, meaning that the contracting

parties do not determine this method of transferring possession by their own will. Therefore, in all cases where fictitious delivery forms are observed, it is the legislator who determines when delivery is considered to have occurred, while the will of the contracting parties is assessed regarding the validity of the contract. Delivery occurs not at the moment when the parties agree on delivery but at the moment of their mutual agreement to conclude the legal transaction. At the same time, it is possible to view fictitious delivery as a subsidiary method of delivery, as the autonomy of will allows the contracting parties to postpone the moment of delivery as the establishment of direct actual control, but only to the extent that it is feasible for the recipient to establish actual control at the moment of concluding the contract. Analogously, can the contracting parties subsequently agree that ownership rights be transferred by one of the methods of fictitious delivery, and would this constitute a new agreement under which the fulfillment of the conditions for acquiring the right should be assessed? Fictitious delivery is necessarily imposed by the circumstances of the parties' lives. Hence, there is the impression that these questions are worth discussing after becoming familiar with the types of fictitious delivery.

We learn about the various symbolic delivery from Article 34 of the Law on Basic Property Relations. The three forms include *constitutum possessorium*, *traditio brevi manu*, and *cessio vindicationis*.

Traditio brevi manu ("short hand delivery") represents a type of symbolic delivery where the immediate possessor, who holds an item under a legal basis (e.g., a borrower), acquires ownership through a subsequent contract with the previous owner. The ownership is transferred with the conclusion of the contract (it is presumed that the will is expressed through the legal transaction), in a symbolic manner. In this case, it is evident that the assumption that the immediate possessor is also the titleholder of the ownership does not apply. Although the borrower is the immediate possessor and may act as the owner towards third parties, they become the actual owner by means of "short hand delivery". It should be emphasized that no actual transfer of possession occurs here; rather, ownership is acquired, making this type of symbolic delivery unsuitable for transferring possession between the direct and

indirect possessor (the immediate possessor retains his/her position). However, it is also incorrect to state that short hand delivery is always associated with the acquisition of ownership. In cases where a holder possesses an item without a legal basis (e.g., his/her possession is unlawful), but later acquires a lawful basis (e.g., through a lending contract), short hand delivery results in the acquisition of possession, allowing the possessor to benefit from the contractual relationship.

Still dealing with the previous issue, the following question can be posed: Can short hand delivery transform mere control (detention) into ownership? In the situation in which a driver subsequently acquires ownership of a company car, they were previously a detentor based on his/her employment, but then became both the owner and immediate possessor upon purchasing the vehicle, with no need for actual delivery. In this situation, short-hand delivery is enough.

Constitutum possessorium is another form of symbolic delivery, which can be described conditionally as *a maiori ad minus*. In this case, the former owner transfers his/her ownership to the new owner, retaining possession of the item under a narrower legal basis (e.g., as a usufructuary). Here, two types of possession are present: dependent, immediate possession (usufructuary) and independent, indirect possession (owner) (Gavella et al., 1998, p. 142). This type of delivery logically implies that only the owner can manage his/her property and that only the owner can establish a narrower right over his/her own property. Again, this type of symbolic delivery is not possible between the immediate and indirect possessor. For example, the owner of a movable item, who is also the immediate possessor, may sell and symbolically transfer the item, but remain as the usufructuary, thereby retaining immediate possession. It is commonly stated that the nature of his/her possession changes, transforming independent into dependent possession (Klarić, Vedriš, 2009, p. 214). In contrast, in cases of physical transfer between the immediate and indirect possessor, possession is fully transferred, and the indirect possessor becomes the immediate possessor, while the former immediate possessor loses his/her status.

Cessio vindicationis, the third form of symbolic delivery, involves three parties in a legal relation: the indirect possessor (the owner), the

immediate possessor (someone holding the item according to a narrower legal basis), and a third party (the future possessor). Namely, in this form too, ownership is transferred by concluding a contract, but this situation is more complex. In simplified terms, the transferor and the acquirer conclude a sales contract, but as the item is held by a third party under a legal basis (e.g., a depository), ownership is transferred upon the conclusion of the contract, with the third party being notified of the change. This is a contract of cession, a common way of transferring claims, and there are views that it can also be assignment (Klarić, Vedriš, 2009, p. 141). Essentially, this involves transferring the right to demand delivery of the item (the right to file a *rei vindicatio* lawsuit). It is important to distinguish between a contractual and a real-property claim. By transferring the claim, the cessionary gains the right to demand fulfillment from the debtor, which is a contractual claim. However, can the cessionary demand delivery of the item from a third party who holds the item at that time? It seems that this is no longer the same claim arising from the cession contract (which is of a contractual nature), but rather a real-property claim, which applies against all third parties (*erga omnes*). If the item is with a person to whom the debtor has transferred it, the cessionary has the right to demand delivery from the current possessor because they have acquired ownership through symbolic delivery. The moment of acquiring ownership is usually considered to be the conclusion of the cession contract, but we believe that this moment should be delayed until the debtor is notified of the validly concluded contract (notification is typically the cedent's obligation, although one might argue that the debtor should be notified regardless of who informs them). Analogously, when establishing a pledge over a movable item already pledged to a third party in his/her possession, it suffices for the pledgor to notify the possessor of the new pledge contract and instruct them to deliver the item to the new pledgee once the first claim is satisfied.

A particularly important question regarding *cessio vindicationis* is whether this delivery is necessarily tied only to indirect possession, that is, when the indirect possessor transfers ownership of an item in the immediate possession of a third party holding it under a legal basis. From the legal formulation, it does not appear that this type of delivery is limited to indirect possession. Instead, it can be extended to examine

whether it is possible to transfer possession of a movable item held by a third party without a legal basis. For example, is it possible to sell and deliver a stolen item not in the seller's possession? Despite the risk to the buyer, the answer can be positive. Since this involves transferring the right to demand delivery, the transferor can conclude a sale contract for the stolen item, resulting in symbolic delivery and the acquisition of ownership, and possibly possession, if accompanied by the ability to exercise control (e.g., the acquirer knows where the item is). In such a case, the acquirer becomes the rightful owner with legal protection, but now not from the moment when the third party is informed (or learns about the contract), but rather at the moment when the legal transaction is concluded. It is worth questioning whether this is truly a case of *cessio vindicationis* or a new form of symbolic delivery.

In all the previously described cases of fictitious delivery we have seen its crucial characteristics. Legal theory has developed fictitious delivery as a way of acquiring rights without establishing immediate possession, as duplicating delivery acts would be highly illogical (Stanković, Orlić, 2014, p. 68). Also, fictitious delivery enables protection of both possession and acquired rights. From the moment the right is acquired, the person is legally entitled to protect his/her right (e.g., ownership in petitory actions) and also his/her possession (through possessory proceedings and self-help). We conclude that, despite its significance in legal transactions, fictitious delivery has some drawbacks. It often does not lead to legal certainty, as for fictitious delivery to serve both acquisition and publicity functions (Živković, 2021, p. 16), third parties must know or have the opportunity to know that the delivery has occurred.

4. Delivery in Case of Multiple Sales of the Same Item

In the event of multiple sales of the same item, possession is what leads to the acquisition of ownership rights. Specifically, it is important to distinguish between the sale and the delivery of an item. If the seller enters into a contract with one party and sells the item to them, but at the same time concludes another contract for the same individual-

ized item with a different party, and subsequently delivers the item to that party, preference is given to the party in possession, who thereby becomes the sole owner of the item. However, legal theory adds another condition, even though it is not stipulated in the legal text. This condition refers to the good faith of the third party, seen more as an ethical premise (Stanković, Orlić, 2014, p. 66). Thus, if the third party (the acquirer) knew or should have known, based on the circumstances, that the seller had previously sold the item, his/her potential possession would be in bad faith and insufficient for acquiring ownership rights. However, this solution is not acceptable. The requirement of good faith (obviously influenced by French law) is unjustifiably demanded here, as good faith does not lead to the acquisition of ownership rights, but rather the act of delivery does. Accordingly, what is the position of the first acquirer? Based on the aforementioned, it could be concluded that they do not have the right to ownership protection for obvious reasons, nor the right to possession protection, precisely because they never established factual control over the item. They have the right to claim damages if the conditions are met, and this would be directed at the seller in bad faith in a process of unilateral contract termination. Additionally, if the third party acted in bad faith and contributed to the failure of fulfilling the obligation arising from the prior contractual relationship between the seller and the original buyer, the third party's responsibility could also be established. Namely, by interfering in the obligation of two parties, a fair solution would be to hold the third party liable for the damages caused (similar to a sanction for malicious conduct), even though the basis for such liability would be extra-contractual. To avoid such cases in practice, we believe that this is precisely where fictitious delivery could reach its full potential, especially when, for some reason, the acquirer is unable to take possession of the item immediately. This method ensures legal certainty by presuming that the transfer of ownership has occurred, allowing the owner to protect his/her right through ownership lawsuits. If the same item were sold by a dishonest seller and physically delivered to a third party, in the event of a conflict between two claims, priority would be given to the first and only rightful owner.

5. Conclusion

The delivery of an item as a means of transferring possession often results from a prior legal relationship between the parties, which necessarily enables the creation of a new right. Delivery appears to be the dividing line between two different effects of the same legal relationship, separating the contractual from the property law aspect and thus leading to different legal consequences. Delivery, by which possession is transferred, produces certain effects, often independent of the awareness (and will) of the legal subjects. The importance of delivery is discussed from the perspective of the contracting parties as well as third parties, in light of the protection of legal certainty. In the future, delivery should be viewed as mutual consent of both (contracting) parties.

The need for different types of delivery adds to its importance, considering that in the complexity of legal transactions and the speed of legal commerce in modern society, the significance and practicality of existing forms of delivery are not exhausted. Besides certain theoretical concepts, judicial practice contributes to a better understanding of various forms of delivery. Additionally, we have the impression that the criteria for the practical and theoretical distinction of delivery forms are often blurred, raising the question: Can we expect that certain types of delivery persist in the future, and what is the relationship between different forms of delivery?

The focus of this paper particularly highlights certain issues regarding fictitious delivery, which occurs at the moment of contract conclusion, and the possibility that in the case of *cessio vindicationis*, we should not limit our thinking solely to the demand for indirect (legal) possession. Thus, it is evident that the transfer of possession of movable items through fictitious delivery also occurs when the item is in the hands of a third party who holds it without legal basis.

Finally, in the case of multiple sales, priority in acquiring rights should be given to the party to whom the item has been delivered, without the requirement of his/her good faith. In the event of his/her bad faith, a more just solution would be to establish extra-contractual liability for compensation for the damages caused, in accordance with the general rules of obligation law.

References:

- Gavella, N, Josipović, T., Gliha, I., Belaj, V., Stipković, Z. (1998). Stvarno pravo. Zagreb: Informator.
- Klarić, P, Vedriš, M. (2009). Opći dio, stvarno pravo, obavezno i nasljedno pravo. Zagreb: Narodne novine.
- Orlić, M. (3-4/1979). Zaštita državine (poseda). Anali Pravnog fakulteta u Beogradu 27: 301-311.
- Popov, D. (2012). Predaja stvari kao način sticanja (*modus acquirendi*) stvarnih prava. Zbornik radova Pravnog fakulteta u Novom Sadu 46: 169-185.
- Stanković, O., Orlić, M. (2014). Stvarno pravo. Beograd: Nomos.
- Tešić, N. (2/2013). Nekoliko aktuelnih pitanja iz oblasti zaštite državine. Harmonius – Journal of Legal and Social Studies in South East Europe 2: 57-86.
- Vicković, T. (2016). Pravna dejstva državine u savremenom pravu. Doktorska disertacija odbranjena na Pravnom fakultetu u Novom Sadu.
- Vodinić, V. (2013). Šta se štiti u posesornom postupku? O pojmu i prirodi državine (poseda). Djelotvorna pravna zaštita u pravičnom postupku - Liber Amicorum Mihajlo Dika. Zagreb: Pravni fakultet Sveučilišta u Zagrebu: 373-409.
- Vodinić, V. (2015). Državina - Pojam, priroda, zaštita i razlog zaštite. Beograd: Pravni fakultet Univerziteta Union u Beogradu.
- Živković, M. (2021). Pravo registara nepokretnosti. Beograd: Univerzitet u Beogradu-Pravni fakultet.