

The power limits of the mortgagee creditor to track the mortgaged property within the scope of Iraqi law

By

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Abstract

The mortgage is the safest and practical guarantee for documenting secured debt for the many advantages of this type of collateral right by not giving up possession of the mortgaged property and retaining the right to dispose of the mortgaged property.

As a result of the current retention of his right to dispose of the mortgaged property, and in order to achieve balance and interview between the rights, the law granted the mortgaged creditor the right to trace the property in any hand in which it is provided that the owner of the property, which is usually the property to which the mortgaged property is transferred.

However, this right to trace the property is limited to several determinants. The same limitations arise from the nature of the right to trace itself, and it is not necessary to use this right until the conditions for the use of this right have been confirmed and the procedures set out by law are followed. If none of these conditions are met or legal procedures are violated, this right is not used, and therefore they are determinants that stand in the way of the creditor in the use of his right to trace the property.

Introduction

To ensure that the legislator balances the rights and to preserve the interest of the holder, the law allows the holder to use options that limit the creditor's authority to trace the mortgaged property, such as debt savings and the liberation of the property, when the holder uses one of these options and in its legal form. It has limited the creditor's authority to trace the mortgaged property and represents an obstacle between the creditor and its use of its right to trace the mortgaged property as a guarantee of its debt subject to insurance, which at the same time are determinants that are outside the right of tracking itself and related to the holder himself.

Due to the frequent use of mortgages by persons in documenting both the debts and the commitments they make in practice, the many problems raised by the issue of the transfer of the mortgaged property, and the researcher's desire to identify the determinants facing the creditor in tracking the mortgaged property in order to ensure its debt, this study came to examine (limits of the authority of the creditor dependent in tracking the mortgaged property) where Iraqi law is the scope of this study, by dividing the research on two subjects, the first to indicate the self-determinants and the second to examine the specifics of the foreign research conclusions are guaranteed by the most important results of the research.

Self-Determinants

The right to trace is one of the rights arising from a Mortgage Contract one of the important means of securing the debt of the mortgagee creditor is that it is the means through which the mortgagee can trace the mortgaged property into any hand to enforce it and obtain his right from it. However, the custodian must consider some limitations when using this right, which arise from the nature of the tracking right itself. Which are represented in the conditions of the right of tracking and the procedures for directing it. Before delving into the conditions and procedures of the tracing right, there is a specification of the authority of the mortgagee creditor. we must define the tracing right. Accordingly, we will divide this topic into two demands, the first to know what is meant by the right of tracking, and the second to define the conditions and method of using this right.

The Definition of The Right to Trace

Paragraph (1) of Article (1306) of the Iraqi Civil Code stipulates: for the pawnbroker. When the debt is due to expropriate the ownership of the bitter property subject Insurance in the hands of the holder. After being warned to pay the debt, the property, unless the possessor chooses to pay the debt or release the property from the mortgagee. It is through this the text makes it clear that the right of tracing is nothing but a right complementing the right of progress by authorizing the mortgagee creditor to exercise this right over the property after leaving the 'mortgagor's financial liability, and it is a right in exchange for the right of the debtor to retain the ownership, possession and disposal of the property¹.

The right of tracing has been defined as the ability of the mortgagee creditor to execute on the mortgaged property by virtue of the mortgage right even if its ownership is transferred to a third party or this third party acquires a right subject to the mortgage.² It was also defined as the right of the mortgagee creditor to pursue the mortgaged money in the event of the transfer of its ownership, or any other right in rem over it subject to mortgage to others in order to recover his debt from its price after execution on it.³.

The right of tracing is more clear in the subsidiary rights in kind than in the original real rights. Perhaps the reason for this is due to the fact that the owner of the subsidiary right in kind does not gain the authority to dispose of the thing subject to the right. Still, this power remains undiminished for the owner of the thing. The actions of this owner are the ones that achieve cases the process that enables the holder of the accessory in kind right to trace the thing in the hands of the person in possession of it. As for the original real rights, there is no such duality of power, as there is no one to avoid. The owner of the original real right has the right to dispose of the thing subject to the right in a manner that affects the content of the right; however, it is difficult to identify concrete instances in which the owner of the original real right pursues his authority [1].It is also noted that the right of tracing does not appear except in the relationship between the mortgagee creditor after him. The owner of a subordinate right in rem, and the holder of the mortgaged property after him, the owner of an original in-kind right after him, or any other right in sight upon

Edward Eid, Ancillary Rights in Kind, Al-Halabi Publications, Beirut, 1, 2003, p. 273.¹

Fikrar Ghanima and Dakoun Zuwaina, The Right to Trace as a Guarantee for the Mortgage Creditor, Master² Thesis, Mouloud Maari University, Faculty of Law and Political Science, 2017, p. 3.

Awad Ahmed Al-Zoubi, Introduction to the Study of Law, Wael Publishing House, Edition 8, 2013, pg 360.³

him before the mortgage⁴.

As the right of monitoring is only applicable to the mortgaged property and its annexes that are deemed real estate, whether by nature or by allocation, the right of tracking is limited to the mortgaged property itself. The real estate shall be allotted as one of the annexes to the real estate. If real estate by privatization loses this quality, it is not covered by the mortgage, and the right of tracing on it cannot be directly applied⁵.

The conditions and method of using the tracking right

We will divide this requirement into two branches. We dedicate the first to the conditions that must be met for the right of tracking by the mortgagee creditor, and the second for the method through which the right of tracking is used.

Conditions for using the right to track

Conditions related to the use of the tracking right can be divided into two types, conditions related to the mortgagee's right and conditions related to the property holder. This is what we will cover in the following two paragraphs

Conditions relating to the right of the mortgagee creditor

The right of tracing is available to every mortgagee creditor even if he is in a late rank or if he is not expected to get any amount from the price of the property, if the following conditions are met

The term of the secured debt: This condition is expressly stipulated in Article (1306/1) of the Iraqi Civil Code in its first part (may before the pawnbroker When the debt is due to expropriate the property the pledged subject As a security...) since the purpose of exercising the tracing right is to enforce the mortgaged property in the hands of the possessor and at that time this enforcement must be possible, and it is not like that unless the debt term has come, where the mortgagee has a right in rem over the mortgaged property. It entitles him to the privilege of tracking, so when the debt is due, he has the right to expropriate the mortgaged property in the hands of the owner of this property⁶. But if the term of the debt has not been resolved, even if the court granted this term, such as the term of the concession, the creditor may not exercise the right of tracing until this term expires. But if the debt term is forfeited for any reason, such as the 'debtor's insolvency or bankruptcy, the creditor may exercise the right of prosecution. The same is the case if the debtor waives the term of the debt⁷. But if the debt is conditional, the condition must be fulfilled so that the mortgagee creditor can exercise his right to pursue the property⁸.

The mortgage must be valid in the face of those who follow the real estate in his hands: since the real estate disposal is every act that would create one of the original or subordination rights in rem, transfer, change or eliminate it, and every act determined for one of the rights

Paragraph 2 of Article 1306 of the Iraqi Civil Code.⁴

Muhammad Taha al-Bashir and Dr. Ghani Hassoun Taha, previous source, pg. 446.⁵

Decision of the Iraqi Court of Cassation No. 1035/Civil Six /1994 on 3/10/1995 referred to by Duraid Daoud ⁶ Salman, Mukhtar in the Federal Court of Cassation, Civil Division, Part 3, 2009, pg. 907.

Dr. Suleiman Marqs, In-Kind Insurances in the New Civil Code, 2nd Edition, Egyptian Universities Publishing ⁷ House Press, Cairo, 1959, p. 283.

Shawki Banassi, Provisions of the Official Mortgage Contract in the Algerian Civil Code, Homa House for ⁸ Printing, Publishing and Distribution, Algeria, 2009, p. 380.

mentioned. Real estate disposal can only take place by registration in the Real Estate Registration Department⁹. Also since Article (1286/1) of the Iraqi Civil Code requires that the insurance mortgage be registered in the Real Estate Registration Department, the right to follow-up is not directly established to the mortgagee creditor until after the mortgage is registered in the Real Estate Registration Department, and with this registration, the mortgage is valid in the face of those who track the property between his hands¹⁰. If the mortgagee creditor registers his right over the mortgaged property before the disposer registers his right, then the mortgagee may track the mortgaged property and implementation. Otherwise, the mortgagee cannot directly follow the right of the creditor. The right of retaliation granted to the mortgagee creditor is considered the authority of the creditor over the mortgaged money in the face of third parties to whom the ownership of the mortgaged property or any right in rem has been transferred to it, and for the mortgagee creditor to enjoy this power, his right must be prior to the right of the holder.¹¹.

That the property is in possession of the possessor: the mortgagee cannot directly pursue the right of prosecution except by confronting the real estate holder, and the possessor does not mean the one who had accidental possession, such as the lessee, or if his possession was legal as the one who possessed the real estate, whether he was in good or bad faith¹². So that the possessor owned the mortgaged property after the mortgage was registered and not before it. Because the ownership of the property was transferred free of the mortgage before the mortgage was registered on it¹³.

The right to trace does not cease for any reason: to exercise the right to trace, this right must remain standing until it is started and the property is still existing in the possession of the possessor. An emergency may occur that prevents the use of the tracking right despite the availability of its other conditions, as in the case of the 'property's destruction and acquisition of it for the public benefit or selling it in a public auction as a result of execution on it by one of the creditors¹⁴. These cases lead to the liberation of the property and the forfeiture of the right of tracking. However, the right of the mortgagee creditor is transferred to the cash consideration for the mortgaged property, which is what Article (1298) of the Iraqi Civil Code came with, and the same is the position of the judiciary in this regard.¹⁵.

Conditions related to the property owner

Article (1306/2) of the Iraqi Civil Code specifies the conditions that a person must meet in order to be considered a property owner. The property can be traced in his hands, which are:

That the ownership of the mortgaged property or any other right in rem subject to a mortgage shall be transferred to the holder, meaning that it is permissible to deal in it and sell it by public auction, whether it is transferable right. He is property as the neck or the benefit, or if it includes all or part of the property only. The reason for the transfer of ownership or the right in rem does not matter. But if the

Article (3) of the Iraqi Real Estate Registration Law.⁹

Muhammad Taha Al- Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 447.¹⁰

Dr. Muhammad Waheed Al-Din Swar, Explanation of the Jordanian Civil Law, Ancillary Real Rights, ¹¹ Abstract Mortgage, Possessive Mortgage and Concession Rights, House of Culture for Publishing and Distribution, Amman, 1995, p. 110.

Muhammad Taha Al- Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 447.¹²

Dr. Al-Sanhoury, The Mediator in Explanation of Civil Law, Part 10, Personal and In-Kind Insurance, Dar Al-¹³ Nahda Al-Arabiya, 1970, p. 523.

Muhammad Taha Al-Bishr and d. Ghani Hassoun Taha, previous source, pg. 460.¹⁴

Court of Cassation Decision No. 189/measure/54 of 7/4/1959, published in the Judicial Journal .No. 4, Year ¹⁵ 14, 1959, p. 128.

transferred right is something that cannot be sold by public auction, such as the right of use or housing. . It is not considered a possession, and the right of tracking is not used against it.¹⁶. The lessee is not considered the owner of the property, he has no right other than personal rights before the lessee¹⁷.

Also, the transfer of ownership or the right in rem must be subsequent to the mortgage; that is, he has earned his right after the mortgage¹⁸. Whereas, failure to register the insurance mortgage in the Real Estate Registration Departmental irrigation makes the creditor an ordinary person and does not have the right to execute on the real estate disposed of.

That the possessor is not personally liable for the debt: If the possessor is personally responsible for the debt secured by the mortgage, the mortgagee creditor may execute on the mortgaged property in his possession under the right of public security, as if the possessor was a partner, joint or guarantor¹⁹. If the partner or the guarantor buys the mortgaged property, neither of them is considered the possessor because he is considered personally responsible for this debt.²⁰.

The heir is not considered in Islamic law responsible for the debt of the bequeather, according to the principle (to leave it only after paying the debts), which prevents the transfer of ownership of the mortgaged property to the heir except after paying the debt secured by the mortgage, which is unlike what is the case in French law, where the heir is personally responsible for the debt of the bequeather.²¹.

The person to whom the mortgaged property has transferred or any other right in rem shall not be considered possessor if the reason for the transfer of the right is the demise of the mortgage, such as selling in a forced public auction, expropriation for the public benefit, or the loss of the real property of the property.

He had registered his contract if it was one of the required documents: This prerequisite is not specified in Article (1306) of the Iraqi Civil Code, which defines the standards that the mortgaged property's possessor must meet.. However, it is implicitly benefited from its text that the possessor is the one to whom the ownership of the mortgaged property or any other right in rem is transferred to him, because this transfer can only take place by registration, and registration is sufficient to count him as a possessor even if he did not place his hand on the property and a mortgage lawsuit is filed against him²²,As the possessor is the one who acquired the ownership of a mortgaged property or a right in rem on it under a registered deed²³.

The second section: How to use the right of racking

Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pp. 447-448.¹⁶

Dr. Nabil Ibrahim Saad, In-Kind and Personal Insurance, Al-Halabi Human Rights Publications, 2010, p. 124.¹⁷

Dr. Al-Sanhouri, a previous source, p. 523.¹⁸

Dr. Al-Sanhouri, a previous source, p. 523; Muhammad Taha Al-Bishr and d. Ghani Hassoun Taha, previous source, pg. 448. ¹⁹

Dr. Jamil Al-Sharqawi, Lessons of Personal and In-Kind Insurance in the Egyptian Civil Law, Dar Al-Nahda ²⁰ Al-Arabiya, 3rd Edition, p. 237; Dr. Nabil Ibrahim Saad, previous source, p. 127; Decision of the Iraqi Court of Cassation No. 1546 / Rabaa Civil / 1998, published in the Judicial Bulletin, Ministry of Justice, No. 4, Year 14, 1999, p. 17.

Dr. Al-Sanhouri, a previous source, pg. 524.²¹

Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 449.²²

Decision of the Iraqi Court of Cassation No. 1546 / Rabaa Civil / 1998 on September 18, 1998 mentioned ²³ previously.

The first thing to notice when using the right of tracking is that the execution procedures on the mortgaged property are inclusive of all the property to cover the entire debt of the creditor, whether the ownership of the property is transferred in whole or part of it, and whether the mortgaged properties remain in the same debt or their ownership is transferred as well. Except for the application of the rule of indivisibility of the mortgage referred to in Article (1294) of the Iraqi Civil Code (every part of the real estate or real estate pledged A guarantor for all the debt and every part of the debt is secured by real estate or real estate pledged all of which) and despite the jurisprudential differences in the legal rooting of the rule of indivisibility of the mortgage, which ranges from counting the basis of the rule to allocating a certain thing to ensure the fulfillment of the debt and linking it to the right of the creditor to obtain his debt²⁴ or on the basis of the intent or intent of the contracting parties²⁵ or, this rule is based on the authority of the mortgagee creditor to lock up the mortgaged²⁶.

Suppose the mortgagee uses his right to pursue the mortgaged property. In that case, the person to whom the property is transferred has no right to pay by dispossession of the debtor for the security of his free money or what is Be in his hand from the money mortgaged in the same debt. He could argue that he only owned some property [1]. According to the rule of non-fragmentation of the above mortgage, the Iraqi Civil Code has been able to keep from taking away a right to abstraction..

The issue of the competent authority to proceed with the procedures for selling the mortgaged property is disputed by two laws, namely the Execution Law No. (54) of 1980 and the Real Estate Registration Law No. (43) of 1971, as Article 107 of the Execution Law stipulates that it is permissible to sell the mortgaged funds that are mortgaged. The property and the real estate are security for a debt if it turns out that its value exceeds the insured debt and the owner of the ordinary debt asks to sell it, provided that first: that the auction shall not be opened for an amount less than the insured debt. Secondly - upon completion of the sale, he pays his rights to the owner of the preferred debt first, then pays the rest to the owner of the ordinary debt). Article 161 of the Real Estate Registration Law, it stipulates (The competent real estate registration department sells real estate documented by a mortgage or what is in its judgment or right a privilege based on a written request from the mortgagee creditor to collect his debt and its attachments if it is due for payment.) Also, article (162) and what follows from the same law clarified that the competent authority is the Real Estate Registration Department. The Iraqi judiciary had the final word in that the real estate registration department is the department competent to sell the mortgaged property and not the execution department while noting the unity of procedures in both laws²⁷.

As a result of the presence of the property in possession of the possessor, article (1306/1) of the Iraqi Civil Code stipulated that the possessor warn the mortgagor before

Dr. Mohamed Kamel Morsi, Explanation of the New Civil Law, Ancillary Real Rights or Real Insurances, ²⁴ Edition 2, 1951, p. 23.

Dr. Ahmed Abdel-Razzaq Al-Sanhoury, a previous source, pg. 373 and beyond, and pg. 745.²⁵

Dr. Solomon Mark, a previous source, pg 429.²⁶

State Shura Council Resolution No. 112/12/1981 on February 12, 1981, referred to by Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, p. 466. Decision No. 277/Tb/2007 dated 29/T2/2007 issued by the Nineveh Appeals Court in its discriminatory capacity, referred to by Dr. Saleh Ahmed Mohammed Abtan and Ikhlas Ahmed Rasoul, implementation of the mortgaged property, research published in Al-Rafidain Journal of Rights, Vol. 11, No. 41, 2009, p. 96.

starting the execution procedures on the property. The warning is required to be valid. If otherwise, the execution procedures on the mortgaged property shall be null and void and shall not be enforceable against the possessor.²⁸. The law did not clarify the data that the warning must contain, but the warning must contain information that meets its purpose.²⁹.

External Determinants

The options of the holder represented in paying the debt and releasing the mortgaged property are among the determinants outside the nature of the right of tracking, noting that the option of the holder to bear the procedures of expropriation is not one of the determinants of the 'creditor's authority to exercise his right. Tracking the mortgaged property, as it represents the practical practice of using the tracking right. on it we will show the fulfillment of the debt in the first requirement, and in the second we will show the release of the mortgaged property.

The first requirement: the fulfillment of the secured debt

The main objective that the mortgagee creditor seeks from resorting to using the right of tracing is to obtain his debt secured by the mortgage. If that happened, and if the secured debt was paid, the goal that the creditor intended from the mortgage would be achieved, and thus the need to use the right of tracking would be avoided if the secured debt was fully fulfilled, which is often done by the holder of the mortgaged property. Accordingly, we will discuss the definition of debt fulfillment and cases of fulfillment, each in a separate branch.

Section One: Defining the Debt Fulfillment

Fulfillment in general, is the natural way for the obligation to expire and its demise, and it is the principle where the debtor implements what he has committed in kind, and it is a legal act from two sides, the payer and the one who pays it. The origin between the creditor and the debtor is known as simple fulfillment. However, a person other than the debtor may settle the debt to return to the debtor what he has paid for, so here it is known as fulfillment with subrogation³⁰.

As for what is meant by the payment of the debt after it determines the authority of the mortgagee creditor to pursue the mortgaged property. It is an agreement between both the possessor and the mortgagee creditor to fulfill the secured debt, and this is represented in the implementation of the same obligation between each of the creditor mortgagee and the debtor mortgagor, whether its place is to pay a sum of money or deliver something or perform an act or refrain from an act.³¹ The holder usually resorts to repaying the debt if the property has multiple mortgages and the value of the first mortgage is equal to the value of the property or more than the price due, then the holder pays the debt with the placement of the mortgagee creditor. But if the property is transferred to the possessor without consideration or the consideration has been paid in advance, or if the deferred price does not pay the full debt secured by the mortgage, then the holder then pays what is not due from him.³². It should be

Saeed Mubarak, Explanation of the Iraqi Civil Law, Rights in Kind, Freedom House, Baghdad, 1, 1973, p. 28
148.

Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 451.²⁹

Dr. Abdul Majeed Al-Hakim, the Brief Explanation of Civil Law, Part 2, Rulings of Commitment, 6th³⁰
Edition, Al-Atek for Book Industry, 2006, p. 357.

Belhah Al-Arabi, Provisions of Commitment, House of Culture for Publishing and Distribution, Amman, 2nd³¹
Edition, 2014, p. 35.

Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pp. 452-453.³²

noted that the fulfillment of the debt secured by the security mortgage leads to the real estate being freed from the mortgagee creditors despite the fact that their rights remain³³.

Article (1307/2) of the Iraqi Civil Code specified the time at which the 'mortgagor's debt can be paid to avoid execution on the property by stipulating (and the 'holder's right to pay the debt remains valid until the day the auction is awarded...) In this case, the holder must: He pays everything guaranteed by the mortgage that is executed on the property according to it, and he pays the principal of the debt and all the interests that it guarantees³⁴. He must also pay for all that has been spent in the procedures from the time of his warning³⁵. If all of this is not paid, it is not prevented without the mortgagee continuing the execution procedures on the real estate, no matter how small the remaining amount of the debt is. It is noted in this regard that the Iraqi civil law did not require a warning to the possessor that includes a notification of the due date of payment, since the possessor is not an original debtor or a guarantor in rem until he is warned of the time of payment.³⁶

Cases of fulfillment

The fulfillment of the debt secured by the mortgage can be done by the possessor of his own accord and of his own free will.³⁷ Thus, it is considered an application of the general rules of fulfillment with solutions that we noted at the beginning of the first section. If the holder pays the debt, he replaces the mortgagee by virtue of the law in all his rights except for those related to guarantees provided by a person other than the debtor, as in the case of the personal guarantor and the guarantor in kind.³⁸ The return of the possessor to the debtor, in this case, is a personal claim based on gain without cause and which assumes that enrichment has been obtained from on the one hand, and poverty on the other, if the payer has an interest in paying the debt or has no intention of donating³⁹, which corresponds to the status of the holder. The holder can also recourse against the mortgagor claiming the guarantee if he had received the ownership of the property for a reason that required the guarantee if the reasons for establishing this guarantee are available.

However, there may be cases where the creditor is forced to pay the debt, which is if the holder owes an amount due to his possession of the property and is due to be paid with sufficient to pay all the debts of the creditors whose rights are registered on the mortgaged property, then every mortgagee creditor has the right to compel the holder to fulfill his right provided that the holder has register the title deed⁴⁰.

The second case is when the amount owed by the holder is less than the debts of the mortgagee creditors, so that it is not sufficient to pay all the debts due, or it is not due for payment with the agreement of all the creditors. Mortgagor demands the possessor to pay the

³³Dr. Muhammad Waheed Al-Din Siwar, previous source, p. 118.

³⁴Article (1305) of the Iraqi Civil Code.

³⁵Article (1307/2) of the Iraqi Civil Code.

³⁶Muhammad Abu Al-Haijaa and Alaa Shawkat Al-Dulaimi, Legal Means of Confronting the Mortgage Creditor, A Comparative Study in Jordanian and Iraqi Laws, Research published in the Journal of Sharia and Law Studies Studies, Volume 43, Supplement 4, 2016, pg. 1461

³⁷Article (1307/1) of the Iraqi Civil Code.

³⁸Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 454.

³⁹Dr. Abdul Majeed Al-Hakim, a previous source, p. 367.

Dr. Al-Sanhouri, a previous source, pp. 417-418.⁴⁰

debt⁴¹.

The Iraqi Civil Code did not provide for the above two cases in terms of obligatory fulfillment of the debt secured by the insured mortgage. However, according to the general rules, if the holder does not voluntarily fulfill his obligation, the mortgagee creditors may resort to the methods established by law for compulsory execution by the public authority⁴².

As for the latter case, it is achieved when the previous owner of the mortgaged property requires the possessor to pay the purchase price to the mortgagee creditors, and thus the mortgagee creditors have the right to compel the possessor to pay the debt⁴³. Also then the stipulation can be applied for the benefit of others. If the previous owner of the mortgaged property stipulates that the possessor pay the price of the property, the creditors may compel the possessor to pay.⁴⁴

The release of the mortgaged property

The 'possessor's resort to liberating the mortgaged property from the debts attached to it is the second determinant of the 'creditor's authority to track the mortgaged property, so we will discuss the purpose of liberating the mortgaged property and its procedures in the first requirement, as for its effects we will address in the second topic.

The first Branch: the concept of liberation and its procedures

Liberation is defined as a procedure whereby the holder displays the registered 'creditors' rights before registering his title deed, the value of the property. If all or some of the creditors do not accept, the procedures for selling the property must be followed immediately⁴⁵. Liberalization, then, is a legal means by which the holder can present to the creditors whose debts are restricted before registering the title deed of the value of the property, and it entails the disposal of the property from all mortgages.⁴⁶ The holder resorts to the use of the right of the liberation of his own volition, whenever the debts registered on the property are greater than the value of the property, the holder presents the value of the property to the registered creditors and releases the property at this value, or it is sold by public auction⁴⁷.

Liberalization achieves the interest of the possessor, as it entails keeping the mortgaged property free from the mortgage without paying an amount greater than the real property value. It also serves the interest of the mortgagor. It is sufficient for him to find a buyer for the mortgaged property without following the long and complicated implementation procedures, on the other hand, liberalization serves the interest of the mortgagee creditors when they obtain the value of the property without the need to take sale procedures⁴⁸. Liberation at the same time allows the holder to get rid of the secured debts before their due date without the need for your o'clock I see solutions for the term of the secured debt⁴⁹. Thus, liberating the real estate is distinguished from repaying the debt in that the possessor is only obligated to pay the real value of the real estate, regardless of the

Dr. Muhammad Kamel Morsi, Explanation of Civil Law, Personal and In-Kind Insurance, revised by ⁴¹ Counsellor Muhammad Ali Skeiker, Mansha'at al-Maaref, 2005, p. 216.

Abdul Qader Al-Far, Provisions of Commitment, House of Culture for Publishing and Distribution, Amman, I ⁴² 16, p. 69.

Jalal Muhammad Ibrahim, Dependent Rights in Kind, Al-Isra Press, Cairo, 1, 2009, p. 283.⁴³

Dr. Abdul-Majid Al-Hakim, Abdul-Baqi Al-Bakri and Muhammad Taha Al-Bashir, Civil Law, Sources of ⁴⁴ Obligation, Press of the Ministry of Higher Education and Scientific Research, p. 145.

Kazem Hassan Al-Rubaie, Al-Wajeez in Original and Subordinated Rights in Kind, Al-Askari Press, Baghdad, ⁴⁵ 1, 2012, p. 196; Muhammad Taha Al-Bishr and d. Ghani Hassoun Taha, previous source, pg. 456.

Dr. Nabil Ibrahim Saad, a previous source, p. 144.⁴⁶

Dr. Al-Sanhouri, a previous source, 540.⁴⁷

Dr. Samir Abdel-Sayed Tanago, Personal and In-Kind Insurance, 1st Edition, Manshaat Al-Maaref, ⁴⁸ Alexandria, 1980, p. 106; Dr. Solomon Mark, a previous source, p. 246.

Dr. Nabil Ibrahim Saad, previous publication, p. 147.⁴⁹

amount of the secured debt.⁵⁰ Also, the right of the possessor to release the property and pay the debt is proven from the time of his warning to pay the debt however, the right to repay the debt extends to the day the auction is settled. As for his right to release the property, it remains until the day of signing the seizure on it from the mortgagee.⁵¹ In addition, the payment of the debt is just a means that prevents the creditor from being repaid from continuing to pursue the property. As for liberation, it is a means for the expiration of the auxiliary in-kind rights registered on the property.⁵² In addition, the option to release is valid only for those who acquired the ownership of the mortgaged property⁵³.

As for the liberation procedures, the first thing to notice, and through the text of Article (1308/1) of the Iraqi Civil Code, is that the right of liberation is proven to the property owner only.⁵⁴ The right of the holder to release the property remains until before the completion of the process of registering the mortgaged property in the name of the auctioneer, regardless of whether the secured debts have been resolved or not. Register his title deed in their chosen place of residence specified in the contract, and it must contain advertising on the summary of the holder's title deed and a statement of the rights that have been registered on the property with the amount estimated by the holder as the value of the property⁵⁵, as the purpose of this information is to introduce the creditors to the property that will be released, the rights it entails, and the price at which the property was sold so that each creditor can know whether it is in his interest to accept or reject the offer.⁵⁶ Noting that the estimation of the value of the property by the possessor should not be less than what is required according to the price that is taken as the basis for estimating the price in the event of expropriation, which is the property tax, and that it should not be less in any case than what is owed by the holder from the price of the property.⁵⁷ The holder must also be serious in his presentation of the value and observe moderation in his presentation, otherwise what he offers may be rejected by the mortgagee creditors⁵⁸ But if the parts of the property were encumbered with different mortgages, in this case, the value of each part must be determined separately and presented to the mortgagee creditors for this part.⁵⁹ Bearing in mind that the holder is not obligated to present the value of the mortgaged property in real terms, it is sufficient to show his willingness to pay the offered amount as indicated in Article (1308/3) of the Iraqi Civil Code.

The Effects of Liberation

The legal basis for the holder's obligation to remain on the show throughout the legal period of (30) days is his unilateral will⁶⁰, then it is imagined that we are faced with two assumptions, the first is the acceptance of the offer and the second is the rejection of the offer.

If the offer is accepted, then there is a personal obligation on the holder of the amount that he offered and the non-acceptance of the offer It is permissible to refer to it during the legal period specified for 30 days according to Article (1309) of the Iraqi Civil Code. This situation is either by the creditors accepting the offer explicitly and often if the offer pays all of their

Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 461.⁵⁰
Article (1307/2) of the Iraqi Civil Code.⁵¹

Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 456.⁵²

Dr. Bmo Pervez Khan, Editing of Mortgaged Property and Its Provisions in Civil Law - An Analytical ⁵³
Comparative Study between Iraqi and Egyptian Laws, Research published in the Journal of Tikrit University of
Legal Sciences, Year 6, Issue 22, June 2014, p. 240.

See the first section of the second requirement of the first topic.⁵⁴

Article (1308/2) of the Iraqi Civil Code.⁵⁵

Dr. Jalal Muhammad Ibrahim, a previous source, p. 331.⁵⁶

Article (1308/2/h) of the Iraqi Civil Code.⁵⁷

Dr. Shams Al-Din Al-Wakeel, Insurance Theory in Civil Law, 2nd Edition, Mansha'at Al-Maaref, ⁵⁸
Alexandria, 1959, p. 350.

Dr. Samir Abdel-Sayed Tanago, a previous source, p. 277.⁵⁹

Dr. Abdel-Fattah Abd Al-Baqi, Personal and In-Kind Insurance, House of Culture Press, 1950, p. 430.⁶⁰

debts or it does not exceed the actual property price, and the acceptance can also be tacit when the creditor leaves the 30-day period to pass without using his right to request the sale of the property⁶¹. The acceptance of the offer, whether express or implied, has consequences. The first is the obligation of the personal holder to pay the displayed value, and the second is to free the property from the security mortgage⁶². Despite the 'holder's commitment to pay the offered amount, this amount is guaranteed by the mortgaged property in addition to the 'holder's guarantee according to the guarantee. The year, i.e. with all its other movable and real property⁶³.

As for the third case an intention, which is the case of refusing the offer every creditor has a right registered on the property, no matter how late his rank is, and every guarantor has this right, and the reason for giving the right of refusal to the guarantor is when the amount is The offered value is less than the value of the property, so the guarantor is liable to pay the rest of the debts⁶⁴. When the offer is rejected, the refusal must request the sale of the property within (30) days from the notification of the last announcement, and he must also deposit in the 'court's fund an amount sufficient to cover the selling expenses in order to confirm the seriousness of the refusal.⁶⁵ This amount may not be recovered unless the auction is successful⁶⁶.

If the offer is rejected and it goes to public auction, the sale is made according to the real estate registration law, and then we are faced with two possibilities. Half a tenth⁶⁷, and the bid is awarded to the winner. As for the second possibility, it is represented in awarding the bid to others, when bidding for an item to G is greater than the value offered by the holder plus half of the tenth Who is the bidder on? Pay the expenses incurred by the holder in his title deed, advertisements, auction price and editorial expenses⁶⁸. In this case, the third party receives the property from the holder and according to the provision of Article (1313/2) of the Iraqi Civil Code, and in the event that the amount of the 'creditors' debt is increased, this increase is the right of the holder⁶⁹.

Article (1312) and Article (1316/2) of the Iraqi Civil Code say that when real estate is sold at auction, all rights in kind, whether they are primary or secondary, are lost. This is true even for creditors who haven't been named, but a recent trend in the law is to not tell one of the creditors who must be told. However, the law treats this case.

The liberation procedures are not invalidated, but rather the liberation effect does not take effect in the face of those who neglected to announce it.[1] Note that once the offer is accepted, the property's registered rights don't go away. Instead, the holder has to put the amount in the court's fund.

Dr. Al-Sanhoury, a previous source, pg. 557.⁶¹

Dr.. Solomon Marqes, a previous source, p. 368.⁶²

Muhammad Taha Al-Bishr and Dr. Ghani Hassoun Taha, previous source, pg. 468.⁶³

Dr.. Ramadan Abu Al-Saud and d. Hammam Mohamed Mahmoud, Personal and In-Kind Insurance, ⁶⁴ University Press, Alexandria, 1998, pg. 420.

Dr. Shams Al-Din Al-Wakeel, previous source, p. 353.⁶⁵

Article (1309) of the Iraqi Civil Code.⁶⁶

Article (1311) of the Iraqi Civil Code.⁶⁷

Article (13010/2) of the Iraqi Civil Code.⁶⁸

Article (1314) of the Iraqi Civil Code.⁶⁹

Conclusion

To sum up "the limits of the power of the mortgagee creditor to track the mortgaged property within the scope of Iraqi law", we find that the mortgagee creditor cannot exercise his right to pursue the mortgaged property however he wants, but through conditions that must be met and procedures, he must follow. When these conditions are met, the most important of which is the availability of the property of the possessor of property for the person who exercises right to advance towards him. So the creditor is in front of the 'holder's options, represented by the 'holder's fulfillment of the secured debt and the release of the mortgaged property.

The right of retaliation is defined as a right established to the creditor based on the right of insurance mortgage, which authorises him to pursue the property burdened with mortgage and enforce it against the possessor to obtain his debt from the price of the property, so long as the possessor is not personally liable for the secured debt.. The right of tracking is used against the owner of the property whenever its conditions are met. The right of retaliation is not used against the mortgagee of the real estate, because it is possible to conduct the sale procedures directly upon the maturity of the debt or its forfeiture by relying on the right of the mortgage itself because the mortgagee does not leave the mortgagor.

The fulfillment of the debt after it determines the authority of the mortgagee creditor to track the mortgaged property as an agreement between the mortgagee creditor and the property holder to pay the latter the debt secured by the mortgage while replacing the mortgagee in the rank with the rights of other unpaid creditors not forfeiting. Payment of the principal is optional unless the consideration for the property remains in possession of the possessor with its sufficiency to pay the debts, or insufficiency with the agreement of all creditors to claim the possessor, or if the mortgagor requires the possessor to pay the price of the property to the creditors. In all these cases, the fulfillment of the holder is obligatory.

As for the real estate liberation is defined as the possessor offering the amount of the real estate to the creditors so that the possessor can get rid of all the debts that burden the mortgaged property. The holder limits the creditor's authority to pursue the mortgaged property during the 30-day period for which this offer remains.

The ownership of the property is proven to the holder in the event that the offer is accepted or the bid is awarded to the holder, but in the case of selling the property by auction, the one who wins the bid receives the right from the holder and not from the mortgagor.

The option of the holder to bear the procedures of expropriation is not a limitation of the 'creditor's authority to pursue the mortgaged property. Still, rather it is the acquiescence of the holder to the exercise of the 'creditor's right to pursue the mortgaged property.

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