

## The Effects of Mortgage, Frequent Mortgage and Terms of the Mortgage

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### ABSTRACT

Mortgage contract is one of the specified contracts. The mortgage contract is an actual collateral, meaning that the debtor determines a certain amount of money and the creditor will be entitled to an actual right over a specific amount of his possessions and assets which will make the creditor assured about the repayment of the debt by the debtor. In the present paper, we deal with general rules regarding the conclusion of a mortgage contract, some of its varieties such as frequent mortgage and mortgage on the properties belonging to another party, mortgage terms and the effects of mortgage. The relationship between the aforementioned contract and the rules and regulations of The Organization for Registration of Deeds and Real Estate, particularly the Article 34 q s which was modified on February 18, 2008 according to which the Article 34 of frequent mortgage was omitted renders the findings of the research innovative and thoughtful.

**KEYWORDS:** frequent mortgage, condition to deny the right to sell the object pledged by mortgagor, possessions of the mortgagor

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### INTRODUCTION

Literally, mortgage means constancy and stability (Sheikh Tusi, 1972, vol. 2: 196). The contract of mortgage is one of the authentic contracts. The contract of liability also takes an authentic form based on the theory of liability, because once the guarantor makes the commitment to pay the debt of the principal debtor without the principal debtor being cleared, this commitment actually denotes that the principal debtor will be still under obligation and with the realization of liability, he will not be considered as the third party. As a result, the creditor can first refer to him and in case of his refusal to pay and the impossibility of vindication, demand his debt from him. Despite this, liability is a personal guarantee while mortgage is a real security.

Like the contract of liability, bill of exchange and guardianship, the contract of mortgage is also an accessory contract. It means that there should be a debt, and the relationship between a creditor and a debtor should exist between the mortgagor and the mortgagee. However, this debt may be caused by the contract of loan or another contract such as the contract of purchase money which is the responsibility of the customer by virtue of the contract of sale and he puts his property in pledge as the security of the payment of purchase money. Moreover, it may not be resulting from the contracts such as obligation by virtue of destruction and causation which are the obligations not foreseen in the contract.

The contract of mortgage is a real security; however, it should be noted that the contract of mortgage is an accessory real right and not a principal right. It means that this right is not independent per se and is subject to the existence of debt, and contrary to the real principal right, possession does not belong to the creditor and he can merely use it as a leverage to demand his claim at an expedient time. Therefore, by virtue of the contract of mortgage, the object of mortgage will be put as a pledge by the creditor and the creditor will gain an accessory real right over it. So the debtor does not have the right to infringe on the security to the detriment of the mortgagee and the mortgagee has superiority over the other creditors in vindicating his claim from the object of mortgage.

Discussion about the contract of mortgage has been extensively done in the books and treatises written in our country, whether in jurisprudence or legal texts; however, there are different ambiguities regarding some of the subjects pertaining to the aforementioned contract. In the present article, the issue has been delicately discussed and investigated in regards to a number of subjects about which the law has been silent or is ambiguous and the lawmakers have contested about less. This is also because the current texts and compilations have not been much revised to modify the Article 34 q s. Hence, in the present paper, the following questions have been investigated and deeply analyzed:

- 1) What effects does seizure have on the contract of mortgage?

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- 2) Is the frequent mortgage permissible before redemption with regards to a property which is the object of the contract of mortgage?
- 3) What practical guarantee does the condition of divesting the right of sale from the mortgagee have?
- 4) How far do the extents of the right of the possession of the mortgagor in the object of the mortgage go?

### **First chapter: conclusion of the contract of mortgage**

#### **a) The necessity of offer and acceptance**

Mortgage has been expressively underlined by the lawmaker as one of the specific contracts in the Article 771 of the Civil Law. Since it's a contract, it needs the offer and acceptance of the parties and is a bilateral legal action which takes place with the mutual consent on the intention to initiate. In contrast, unilateral legal act does not need acceptance and is one-sided which will be realized with one purpose; actually, one party's intention to initiate and his consent are adequate for it. Generally, offer is made by the mortgagor and acceptance is made by the mortgagee, like when the mortgagor says I'm indebted 100 million tomans – as the purchase money of the shop – to you. I put as a pledge my car, and the mortgagee accepts the offer.

#### **b) The seizure of the property of the debtor**

There are different sayings in the Ja'fari jurisprudence with regards to seizure in the contract of mortgage.

1- Some people believe that seizure is the condition for the veracity of the contract of mortgage (Bojnourdi, 2003, v. 6: 13; Qomi, 1993, v. 3: 210). It means that mortgage has three principles, namely offer, acceptance and seizure. Therefore, in case of the lack of seizure, no contract takes place and offer and acceptance will have no effect.

2- Some people believe that seizure is a condition for necessity (Ameli, 1991, v. 5: 138). It means that the contract takes place with offer and acceptance; however, as long as the object of mortgage has not been seized by the mortgagee, it's permissible and the mortgagor will not be obliged to seizure and can annul the contract, but if it's seized by the mortgagee, mortgage will be necessary.

3- But there are a group of other thinkers who don't consider the seizure effective in mortgage and believe that mortgage will take place with offer and acceptance and implementing its terms is necessary for the mortgagor (ShahidThani, 1991, v. 4: 56; Najafi, 1991, v. 25: 99; AllameHelli, 1968, v. 2: 23; Sheikh Tusi, 1991, v. 2: 97).

In the Article 772, the Civil Law stresses that, "the object of the debtor [mortgaged] should be seized by the mortgagee or someone who will be determined between the parties, but the durability of the seizure is not a condition for the veracity of the transaction." This can be cosmetically inferred from the first part of the statement with an eye to the next statement which stipulates that "but the durability of the seizure is not a condition for the veracity of the transaction." Although this is not explicitly mentioned, the majority of the lawyers believe in it (Katouzian, 2006, v. 4: 323; Shahidi, 2006, 54; Madani, 2010, v. 5: 283; Bariklou, 2010: 86).

This conclusion is objectionable, because seizure can be material or credit-based. For example, consider someone who takes a loan of 50 million tomans from a bank. Logically, the bank takes as a mortgage the house or the land of the borrower. In the position of the mortgagee, the bank does not seize the house or the land materially; rather, the bank representative formally pronounces the seizure of the very object of mortgage in a public notary office and this is a result without any practical use. If a house is mortgaged and if our criterion is material seizure, it should be said that the mortgagor should evacuate the house in which he resides and bequeath it to the mortgagee. This is while with the registration of the mortgage contract, the mortgagee's concern in terms of the possibility of sale and vindication of the claim will be addressed and his demands will be met. So, what's the need for material seizure? We know that the real profits belong to the mortgagor. The objective is that the mortgagee be assured of the right to withhold the object of the mortgage and the possibility of accessing it. So, what's the reason that seizure should be considered as one of the elements of mortgage and create numerous difficulties for the people?

Therefore, since the concept of "putting the pledge" does not correspond to bequeathing and delivery, it's better that the judicial process considers the conventional and spiritual domination adequate for its realization and moderates the verdict of the Article 772 of the Civil Law and finally decreases the legal and practical difficulties in this regard.

#### **c) Frequent mortgage**

The question is that, can the owner offer the mortgage property to someone else for another time once a property is subjected to the contract of mortgage or not? The majority of the Ja'fari jurists consider the frequent mortgage permissible (Najafi, 1992, v. 25: 154; ShahidThani, 1996, v. 1: 129; Bojnourdi, 2004, v. 6: 25). The majority of lawyers consider this mortgage operative (Emami, 2009, v. 2: 425; Katouzian, 2006, v. 4: 334). The Article 34 of the law of registration ratified in August 1941 explicitly considers as permissible the frequent mortgage with regards to immovable properties and stipulates, "By mentioning the term of the right of the prior creditor, the

dealer can put as a pledge the object of transaction for the other loans. In case of the redemption of the prior transaction, the whole object of transaction will be considered as the security of the subsequent loan and if the prior transaction is not redeemed and the property is not sold, each prior creditor will have priority over the next creditors for vindicating his claim, the wages and the legal compensations.”

This article was modified during the reforms of 1972 and stipulated that, “in all the transactions mentioned in the Article 34 of this law, the debtor can deposit all of his debt including the main debt, the wages, legal compensations and administrative expenses before the public notary office that prepares the document and release the object of transaction or transact it with another party or deposit his whole debt at the registration fund or any other authority which the Organization for Registration of Deeds and Real Estate determines and lay the groundwork for the annulment and repudiation of the document by submitting the deposited documents to the public notary office.”

As a result, the revised Article 34bis ratified in 1972 has hereby put aside the contents of the previous Article 34 bis and prohibited the frequent mortgage and guided the debtor that in order to strike a deal with another party, he should pay his entire debt and legal wages and repudiate the mortgaged property.

One of the lawyers believes that such a mortgage is not accurate because of the incompatibility of frequent mortgage with legal regulations. He says, “The prohibition of frequent mortgage is more compatible with the legal rules. Since the mortgage right of the mortgagee belongs to the whole property, no authentication will emerge for the second mortgagee. In other words, the mortgaged property cannot be assigned another right of mortgage. For this reason and due to the emergence of problems resulting from the frequent mortgage, the lawmaker was forced to modify the Article 34 q s bis which has necessitated the payment of the whole debt and the repudiation of the mortgaged property for the entitlement of the mortgagor to the right of transaction.” (Bariklou, 2010: 87).

To criticize this viewpoint, it should be noted that although it's true that the entire property is considered as a security vis-à-vis each part of the debt and the mortgage right belongs to the entire property, we know that the mortgagor will still be the owner and possessor, and will be only obliged to protect the rights of the mortgagee; however, he can take possession of the property and enjoy its advantages in spite of putting it for mortgage. The objective of the mortgage is that the mortgagee be assured of the entailment of the object of mortgage and the possibility to access it so that he may vindicate his claim through selling it. Therefore, if the mortgagor preserves the rights of the first mortgagee and uses it as a security for another debt which he should pay, the rights of the first mortgagee will not be infringed upon and at the time of collecting the debt, the first mortgagee will have priority over the other parties. It means that what will be obtained through selling the property will belong to him [the first mortgagee], and if something is left, it will be shared between the other creditors. Unfortunately, although the author has published his book after the time when the revised Article 34 bis ratified on February 18, 2008 which is currently operational, he still uses the revised Article 34 bis of 1972 as a reference. The Article 34 of the registration law was revised on February 18, 2008 and the Article 34 bis was also removed on that date. Perhaps the attention of the aforementioned author to the bylaw of the implementation of the contents of the enforceable registered documents and the Article 108 has dissuaded him from the conclusion he had reached regarding the frequent mortgage and made him agree with the lawyers who don't have any uncertainty or doubt about the possibility of frequent mortgage. The Article 108 of this bylaw stipulates that, “in mortgage transactions, the dealer, through the right of extradition and securities of the good enforcement of the services, can mention the right of the prior creditor and the expiration date of the prior document, and thereby procure the object of transaction for other loans as a security. In case that the prior transaction is repudiated, the whole property of transaction will be put as a pledge for the next creditor in a sequence of priority.

As a result, the frequent mortgage should be considered as correct and it should be noted that the mortgagor doesn't need permission by the first mortgagee when he wants to mortgage his property for a second time. Because as it was noted, the second mortgage does not violate the rights of the first mortgagee and the first mortgagee has priority over the other creditors. Moreover, whenever the first mortgage is repudiated, the property subject to transaction will automatically be put in the pledge of the next creditor and there's no need for his request.

#### **d) Mortgaging the property of another party**

It's not necessary that the debtor be the owner of the property which he mortgages. A third party can also mortgage his asset in lieu of his debt with or without the permission of the debtor. If a father puts his home as a pledge for the debt of his son, then if the debt is not paid by the debtor, the creditor can submit to the relevant authorities a request for it to be sold and vindicate his claim. Consequently, whenever the third party takes action without the permission of the debtor, his action will be considered gratuitous and he will not have the right to refer to the debtor. However, whenever the third party mortgages his asset or property with the permission of the debtor, the debtor will not be released from responsibility before the owner. In this case, once the mortgaged property is

sold and its sale amount equals the amount of the debt, the third party can refer to the debtor, and if the sale amount is more than the value of the debt, the additional part will be given to the owner and with regards to the part which has been paid to the creditor, the owner can refer to the debtor. For example, if a house is sold for 60 million tomans and the debt of the debtor is 40 million tomans, the remaining 20 million tomans will be returned to the owner and he can refer to the debtor for the 40 million tomans and as a result, the price of the mortgaged property will belong to the owner in place for that property. However, this rule is applicable when the property is non-fungible. Once the property is fungible and is sold for more than the value of the debt, the additional amount will be given to the debtor and thus he should return the property to the owner.

From the other hand, it's possible that the third party may entrust his property to the debtor so that the debtor can mortgage it in place for his debt. There are some conflicts between the authors regarding the legal nature of this relationship. The majority of Ja'fari jurists consider the legal relationship between the owner of the mortgaged property and the debtor as *commodatum* (lending contract) and consequently have called it a "hypothecation of commodious" (ShahidThani, 1996, v. 1: 234; Ameli, 1991, v. 5: 97; AllameHelli, 1968, v. 2: 14). However, some experts of civil law have called it "real suretyship" (Katouzian, 2006, v. 4: 359).

In refuting the first viewpoint, it should be categorically noted that the relationship between the owner and the debtor is not a *commodatum* (lending contract) because as we all know, in a lending contract it's only the permission for utilization that will be given to one party and the remaining original property should be eventually returned to the owner. While as to the subject at hand, the borrower may refuse to pay the debt and the original property might be sold and this is contrary to the purpose and objective of lending contract. With the action of the borrower, the property will be put as a pledge for his debt and may somehow be subject to diminution. The other owner also doesn't have the right to annul the mortgage contract because such a relationship cannot be considered as a lending contract at all. In refuting the second viewpoint, it should be also stressed that such a relationship cannot be a representation of the contract of guarantee, because based on this assumption neither the transferring of obligation to obligation nor the annexation of obligation to obligation has been realized. The guarantee of the transferring of the debt from the obligation of the main debtor is the duty of the guarantor while in the aforementioned assumption, such an action will not lead to the clearance from obligation of the debtor and he is still obliged to pay the debt. The debt will not be also charged with the guarantor (owner) because the creditor cannot refer to the rest of the debtor's properties if a property is sold for a price less than the debt. Therefore, considering this legal action as guarantee is not valid.

However, whenever a third party offers his assets to the debtor so that he may mortgage it, there should be no doubt and uncertainty regarding the accuracy and influence of such an action. It's better that we investigate the legal relationships of this legal action separately. It should be underlined that the relationship between the owner and the debtor is a contract of mandate by which the client (owner), through the letter of attorney, gives the lawyer (debtor) deputyship to mortgage his assets for the creditor. The Article 24 of the bylaw of the implementation of the contents of the enforceable registered documents also considers the relationship between the parties to be based on a contract of mandate in case that the third party gives permission to the creditor so that the debtor may introduce his asset as a document for confiscation. The aforesaid article stipulates that, "the third party can introduce [acknowledge] his asset for the implementation of the writ of execution. In this case, after confiscation through implementation, the introducer won't be entitled to the right to withdraw. Introducing the assets of the third party by the debtor in a representative way on behalf of the owner will not be significant if the letter of attorney explicitly implicates it. In this case, after the confiscation of the property, the client will not have the right to ask for the restitution of the confiscated property."

However, the agreement between the debtor and the creditor is a contract of mortgage. This way, before the conclusion of the contract of mortgage between the debtor and the creditor, the third party can dismiss the lawyer; but as soon as the contract of mortgage has been realized between the debtor and the creditor, the mandate will be realized and then will be rescinded and the owner can no longer violate the contract of mortgage which has been concluded between the debtor and the creditor.

## **Second chapter: conditions as an integral part of contract**

### **a) The condition of the mandate of the mortgagee**

One of the conditions which have been explicitly emphasized in the Civil Law is the condition of the mandate of the mortgagee for selling the mortgaged property. The Article 777 of the Civil Law has stipulated that, "upon the conclusion of the contract of mortgage or by virtue of the *alahedde* contract, it's possible that the mortgagor entrusts representation to the mortgagee by which the mortgagee can vindicate his claim from the mortgaged property or its price if the mortgagor does not pay back his debt."

Therefore, based on this article, the two parties can reach a compromise and insert the condition of mandate [representation] in sale in the contract so that the mortgagee can vindicate his claim by selling the mortgaged property and receive his claim in case that it's not paid by the mortgagor on due time.

From the other hand, the Article 34 of the registration law has created some limitations. This article instructs that, "with regards to all the mortgaged, conditional and other contracts mentioned in the Article 33 of the registration law regarding the movable and immovable assets, if the debtor does not pay his debt on the due time specified in the document, the creditor can get a legal writ of execution and ask for the payment of his claim through the notary office which has prepared the documents."

Some experts believe that the Article 777 has been subject to implied abrogation, because in the Article 34 q s, the necessity of referring to public notary offices has been mentioned and therefore the mortgagee cannot independently attempt to sell the mortgaged property and vindicate his claim (Ja'fariLangroudi, 2000: 123). Some others believe that the authority of the lawyer and the permanence of the credibility of the Article 777 of the Civil Law are stronger (Katouzian, 2006, v.4: 341).

It seems that what is compatible with the legal rules is that the Article 34 q s has not abrogated the Article 777 of the Civil Law. Firstly, the Article 34 q s is dedicated to the movable and immovable properties which have a legal document, while the Article 777 is absolute from this perspective.

Secondly, the Article 777 is devoted to the possibility of giving mandate to the mortgagee by the mortgagor and the Article 34 q s does not deny mandate and representation at all and simply prevents the creditor from taking a private and personal action and refers him to the public notary office which has prepared the documents so that he may vindicate his claim this way.

Therefore, from what was said, it can be concluded that the Article 34 q s makes the creditor obliged to refer to legal authorities for selling the mortgaged property and vindicating his claim, whether the debtor has a mandate or not, and this authority with regards to mortgaged documents which are arranged and prepared officially is the Organization for Registration of Deeds and Real Estate. Correspondingly, the Article 34 q s will be implemented and as regards the normal mortgage documents, the mortgagee should refer to an official court and file a lawsuit in accordance with the Article 779 of the Civil Law and ask the court that the mortgagor gives commitment for paying his debt through selling the mortgaged property.

#### **b) The condition of the non-sale of the mortgaged property**

With regards to the condition of the divestment of the right of sale from the mortgagee, the Article 778 of the Civil Law says, "If it has been set as a condition that the mortgagee does not have the right to sell the mortgaged property, this condition is null and void."

Having in mind this article, there's no doubt among the jurists and lawyers regarding the nullity of the condition. However, what is vague and general is the practical guarantee of the enforcement of the article in the contract of mortgage. The question is that, will the inclusion of such a condition in the contract of mortgage lead to the nullity of the contract or is simply a null condition.

If we say that such a condition is contrary to the expediency of the essence of the contract of mortgage, we should unquestionably rule that the condition and the contract are both null and baseless; but if such a condition is opposed to the expediency of the essence of the contract of mortgage, should we consider the condition unlawful and the contract accurate based on the clause 3 of the Article 232 of the Civil Law?

The majority of jurists (AllamehHelli, 1968, v. 2: 11; Ameli, 1991, v. 5: 75; MuhaqqiqThani, 1852, v.1: 274) and the authors of civil law (Emami, 2009, v. 2: 443; Ja'fariLangroudi, 1999: 130; BoroujerdiAbdeh, 2003: 316; ParvizNovin, 2000: 165) believe this condition to be opposed to the expediency of the mortgage. They say that the essential impact of the mortgage is that the mortgagee be able to receive his claim through selling the property which he has possessed as a security in case of the non-payment of the debt. So any condition that divests this right from the mortgagor is contrary to the expediency of the contract and is null. Some, however, have only considered the condition to be null (Katouzian, 2006, v. 4: 343).

In the viewpoint of the authors of the present paper, the latter opinion should be accepted because the essence and expediency of the contract of mortgage is that a property or asset should be put as a pledge for the claim and the creditor will be entitled to a real right over certain properties of the debtor so that he may make sure of the confiscation of the mortgaged property and the possibility to access it. However, the modality of the vindication of the claim is not the essential impact of the contract of mortgage and has an auxiliary nature.

If the expediency of the essence of the contract of mortgage is the right of selling the mortgaged property by the mortgagee, then the inclusion of the Article 779 of the Civil Law by the lawmaker immediately after the article discussed before regarding the condition of the representation of the mortgagee for the mortgagor in selling the mortgaged property will seem something useless and futile. Because if the essential effect of the contract of

mortgage was the right to sell the mortgaged property, he could independently sell it and vindicate his claim from its price. This is while the Article 779 of the Civil Law has discussed about the condition of the representation of the mortgagee for the mortgagor and stipulated that if the mortgagee does not have mandate and representation in sale, he should refer to a court to oblige the mortgagor to sell the mortgaged property in case that the transaction document is general. Moreover, the Article 778 cosmetically endorses the veracity of this standpoint.

### **Chapter three: the effects of mortgage**

#### a) The rights and responsibilities of the mortgagor

##### **1- Limitations on the right of possession**

As it was mentioned earlier, the complete ownership over the security property belongs to the debtor, whereas the lawmaker decreases his authority over the mortgaged property. The mortgagor is the owner of mortgaged property and its original benefits also belong to him. The Article 876 of the Civil Law underlines this fact, as well. However, since mortgage is a real security and implicates the real right of the creditor over a certain part of the possessions of the debtor, protecting the real rights of the mortgagee demands that the mortgagor should not be able to utilize and make use of his own property at will; however, there's a controversy between the jurists and the lawyers regarding the limits of this freedom.

1- The majority of the Ja'fari jurists believe that the mortgagor does not have the right to utilize and make use of the mortgaged property at all (AllameHelli, 1968, v. 2: 26; ShahidThani, 1996, v. 1: 234; Najafi, 1992, v. 2: 195; Ameli, 1991, v. 5: 115-116).

2- Another group of experts consider as inappropriate the possessions which transfer the ownership such as sale, donation and peace; however, as regards the other possessions, they believe that if the possessions of the mortgagor do not harm the mortgagee, they are permissible (Sabzevari: 109). As a result, the possessions which benefit the mortgagor and do not violate the rights of the mortgagee are permissible.

In two of its articles, the Civil Law has specified the permissible possessions which are apparently contradictory to each other. The Article 793 of the Civil Law states that, "the mortgagor cannot take possessions in the mortgage which violate the rights of the mortgagee, unless by the permission of the mortgagee." The Article 794 also says that, "the mortgagor can make modifications in the mortgaged property or take other possessions which are beneficial for the mortgage and are not contradictory to the rights of the mortgagee without being prohibited by the mortgagee. In case that prohibition takes place, the permission should be issued by the ruler."

As a result, in the Article 739 of the Civil Law, the limits of the possessions of the mortgagor is confined to the possessions which violate the rights of the mortgagee; however, in the Article 794, the possessions of the mortgagor should be beneficial and operative, as well. In other words, except for the Article 793, the mortgagor can take possessions which are not contrary to the rights of the mortgagee and inoperative such as residence in the mortgaged property, but in keeping with the Article 794, the mortgagor does only have the right to take possessions which are not contrary to the rights of the mortgagee, beneficial and operative.

Some lawyers have underlined the contradiction between the two articles and stated that the implication of the Article 794 is non-harmfulness to the rights of the mortgagee. Unquestionably, this statement cannot be accepted because the meaning and significance of being operative is utterly different from the concept of non-contrariness. This can be also clearly inferred from the diction of the Article 794 which has used the words "and" and "both". As a result, the contradiction between the two articles is completely evident; however, to amalgamate the two articles, we should note that the Article 793 does not have the meaning of "opposite", nor should we consider the contents of the Article 794 pertinent to the material possessions. Neither of these two solutions which are accepted, based on the aforementioned articles, including the vindication-related possessions which are the possessions that take place with the objective of vindicating the benefits by the possessor himself like the residence of the mortgagor in a mortgaged property or doing agricultural activities in a mortgaged land are operative. Such possessions are not permissible because they are not operative for the mortgage (Ja'fariLangroudi, 2000: 143). As a result, we believe that the clause of influence in the Article 794 of the Civil Law is redundant and should be revised and the only redline for the possessions of the mortgagor will be damage and detriment to the mortgagee.

Undoubtedly, the possessions which transfer ownership such as sale, donation and peace are not operative, because there is no doubt about the harmfulness of such possessions. The Supreme Court decision no. 620 dated November 11, 1997 also testifies to this standpoint. It's mentioned in this verdict, "according to the Civil Law, although mortgage does not withdraw the mortgaged property from the ownership of the mortgagor, it creates a real right and priority for the mortgagee over the mortgaged property and he can vindicate his claim through selling the mortgaged property. The transactions of the owner as regards the mortgaged property will not be operative if they violate the rights of the mortgagee whether the transactions of the mortgagor violate the rights of the mortgagee actually or potentially. Given these circumstances, when the mortgagee has handed over the mortgaged property to

the mortgagor to take possession after the realization of the contract of mortgage, attempting to sell the property or transferring the shop's key-money to a third party without the permission of the mortgagee is one of the possessions which are contrary to the rights of the mortgagee and not operative. By ruling that such a possession is not operative, we mean the lack of operation not futility. The prevalent viewpoint of the majority of Ja'fari jurists and the contents of the Article 229 of the law of probate matters substantiates this viewpoint. Therefore, if the mortgagor transfers the mortgaged property to another party without the permission of the mortgagee, the transaction will be considered an unauthorized transaction and the permission of the mortgagee is indication and confirms it since the day of the conclusion of the contract. However, the point which is important here is that the permission of the mortgagee does not mean the abandonment of mortgagee and the dismantlement of the right of mortgage. Therefore, there's no contradiction between the operativeness of the transaction and the permanence of the mortgaged property. As a result, the possession which transfers ownership and the intention to harm the mortgagee is evident in it is not operative; however, when the property of the mortgagor is put as a pledge for the claim and the only purpose is to make the mortgagee assured of the seizure of the object of mortgage and the mortgagor is still the owner of the original property and its benefits and when the permanence of the seizure is not one of the conditions of the accuracy of the mortgage, why should the owner be deprived of the opportunity of utilization? When someone takes loan from the bank and puts his home as a pledge in the mortgage of the bank, resides in the home or if he is a resident there, continues his possessions. This is a product of our society's current convention and because of the mortgagor's ownership, his vindicated possessions are not blamed. Therefore, the clause "operative" in the article 794 is a discarded matter and the solution which was stated is immensely compatible with the legal structure of mortgage and the social expediencies and our time's convention.

## **2- Giving the mortgaged property to a trustee in case of the death of the mortgagee**

The contract of mortgage is necessary for the mortgagor and permissible for the mortgagee. The permissibility of the contract of mortgage for the mortgagee does not subject it to the rules of permissible contracts and mortgage will not be abrogated with the death, insanity and mental incapacity of one of the parties. That is why the Article 788 of the Civil Law stipulates that "the mortgage will not be abrogated with the death of the mortgagor or mortgagee."

From the other hand, after the explicit statement of the lawmaker regarding the non-abrogation of the contract because of the death of the parties, the situation of the mortgaged property has also been relatively clarified. If the mortgaged property is possessed by the mortgagee and he dies, the mortgagor will have no responsibility because according to the clear terms of the Civil Law, the permanence of seizure is not a condition for the accuracy of the mortgage. If he doesn't reach an agreement with the heirs of the mortgagee over selecting a trustee, he can ask the court to entrust the mortgaged property to another trustee. The latter part of the Article 788 stresses that, "in case that the mortgagee is dead, the mortgagor can demand that the mortgage be transferred to a third party with whose compromise, the heirs will be determined and in case that a compromise is not made, the aforesaid person will be indicated by the ruler."

## **3- Paying the maintenance expenses**

The mortgagor is the owner of the original property and the benefits, so logically the maintenance expenses of the mortgaged property should be undertaken by him. The Civil Law hasn't made any statement in this regard. Perhaps the silence of the Civil Law is because of the obviousness of the matter. Moreover, it can be clearly inferred from the legal principles of the contract of mortgage and the Article 789 of the Civil Law which considers the mortgagee a trustee and repository.

### **b) The rights and responsibilities of the mortgagee**

#### **1- Preserving and protecting the mortgaged property and returning it**

In the contract of mortgage, seizure is not a condition for the accuracy of the transaction and the mortgagor does not have any responsibility to keep the mortgaged property in the possession of the mortgagee; however, whenever the mortgaged property remains in the possession of the mortgagee as a result of the agreement or compromise of the parties, he should be considered as the trustworthy owner and their relationship will be subject to the rules and regulations of the contract of bailment. That is why the Article 789 of the Civil Law pronounces that "mortgage is considered as a deposit at the hands of the mortgagee and as a result, the mortgagee is not responsible for the destruction or deficiency of the property unless in times of fault." Therefore if the mortgagor puts as a pledge his car in mortgage and the car is possessed by the mortgagee and is destroyed because of earthquake, the mortgagee will not be responsible; however, if he goes on a trip with the same car and experiences a car crash on the road and the car is damaged, the mortgagee will be responsible for its defect or destruction.

Furthermore, if the debtor is exonerated in one way and for a certain reason, the contract of mortgage will be dissolved because the mortgaged property is possessed by the mortgagee and their relationship is subject to the rules of bailment. In case that the property is claimed, the term deposit will not be used anymore and if the mortgagee doesn't deny it, he will be responsible for any deficiency and destruction even if it's not documented by his statement. In affirming this issue, the Article 790 states: "after the clearance of the obligation of the debtor, the mortgage will be considered as a deposit at the hands of the mortgagee; nevertheless, if he doesn't deny it despite the existence of claims, he will be its guarantor even if he hasn't committed any wrongdoing."

## **2- Preventing the mortgagee from possessing the mortgaged property**

By virtue of the contract of mortgage, the mortgaged property will be belonging to the mortgagee, but the mortgagor is still the owner and his right of ownership will not be eliminated and only will his possessions be limited. The mortgagee will not have the right to utilize and possess the mortgaged property. The mortgagor will be the owner of both the mortgaged property and its benefits, so if the mortgagor hasn't given the mortgagee the permission to take possession, the possessions of the mortgagee will not have legal credibility. The possessions without permission will also be impermissible and will be put through the latter part of the Article 789 of the Civil Law. It means that with encroachment, the fault of the mortgagee will become clear and he will be responsible for the destruction of the mortgaged property and its benefits.

## **3- The right of vindicating the claims from the mortgaged property**

The contract of mortgage causes that the creditor obtain a real security over a certain amount of the debtor's property so that he may vindicate his claim from the mortgaged property if the debtor refuses to pay his debt or is not capable of paying it. As it was mentioned in the discussions related to the condition of representation for the mortgagee, it should be noted that the condition of representation for the mortgagee will not make him needless of referring to the relevant authorities. According to the Article 34 of the former law of registration ratified in 1973 with regards to the immovable properties, the debtor had a period of 8 months since the notification of the writ of execution to pay his debt. As to the movables, the period for the payment of the debt by the mortgagor was 4 months. Otherwise, action would be taken for auctioning the property. However, according to the Article 34 of the new registration law ratified on February 18, 2008 with regards to the immovable and movable properties, as the debtor fails to pay his debt in due time, the mortgagee can refer to the public notary office to ask for the issuance of the writ of execution. If the debtor doesn't pay his debt in 10 days since the notification of the writ of execution, the Organization for Registration of Deeds and Real Estate, upon the request of the creditor, can assess the whole mortgaged property and its certainty and then can hold a high tender after 2 months since the date of the certainty of assessment. Moreover, according to the former law, whenever there's no buyer for the property, it will be entrusted to the creditor after getting the whole rights and duties and legal expenses by virtue of the official transfer deed. However, according to the latter part of the Article 34 of the new registration law, the claims of the mortgagor, that is his legal claims, will be vindicated and the surplus will be returned to the mortgagor and if the object of security can't find any buyer in the high tender session, based on the explicit reference of the Article 126 of the bylaw of the implementation of the contents of the enforceable registered documents, the modality of investigating the complaints about the administrative process and its clauses will be found out and the property will be handed over to the creditor at the price with which the tender starts, after receiving the execution fees and the tender fees, and if he has something additional to the claim, it will be collected. If the mortgagee is not able to recover the surplus to his claim, in case of request, the property which is being put for tender will be given to him in proportion to the claim. However, if the transaction document is not official and is ordinary, the mortgagee should inevitably refer to the court, file a lawsuit and ask for the commitment of the mortgagor to pay this debt through selling the mortgaged property.

## **4- Withdrawing from mortgage**

As it was noted, the contract of mortgage is necessary for the mortgagor and permissible for the mortgagee. Therefore, the mortgagee can abandon and renounce the contract of mortgage whenever he wishes. The clause 2 of the Article 34 q s and Article 112 of the bylaw of the implementation of the contents of the enforceable registered documents explicitly endorses this standpoint. In this case, the mortgagee who had priority over every other creditor for vindicating his claim before abandonment can simply refer to the mortgaged property and the rest of properties of the debtor after withdrawal from and abandonment of the mortgage simply as an ordinary creditor.



## CONCLUSION

In dividing the security into two categories of “personal” and “real,” mortgage falls under the second category. In real security, the obligation of an unknown party will not be annexed to the obligation of the principal debtor; rather, the creditor will gain a real right over a certain amount of the properties of the debtor and this makes him prior to the other creditors in time of the vindication of the claim. Seizure is also a principle of the contract and the contract will not take place without it. This is while the convention is such that it does not accept material dominance. In the common property also the seizure should take place with the permission of other shareholders; otherwise, it will not be effective. In mortgage, as opposed to sale, ownership will not be transferred and the mortgagor is still the owner. The objective of mortgage is the confiscation of the mortgaged property and having access to it so that the mortgagee can sell it in time of need and vindicate his claim. Therefore, frequent mortgage with the condition of the preservation of the rights of the first mortgagee is absolutely permissible and since mortgage is undividable and the whole property is considered as a pledge vis-à-vis each part of the debt, the rights of the first mortgagee will not be infringed upon at all and he will have priority over the other creditors. Mortgaging the property of another party, like the frequent mortgage and mortgaging a common property is also accompanied with the guarantee of accurate implementation and influence. If upon the conclusion of the contract, the condition of the divestment of the right of selling the mortgaged property from the mortgagee is compromised, the nullity of the condition according to the surface of the Article 778 and the circumstantial evidence of other articles, particularly the Article 779 of the Civil Law will not be extended into the contract and only the condition will be null and void. As to the limits of the freedoms and authorities of the mortgagor, it can be said without doubt that the possessions which transfer the ownership such as sale, donation and peace are not effective and transferring it this way will render the contract an unauthorized transaction. However, with regards to other possessions, it seems that we should only consider the infliction of damage upon the mortgagee as a redline for the possessions of the mortgagor and don't blame his utilized possessions, having considered the current course and conventions of the society.

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