

The Provisions of Private Real Estate Concession Rights: A Comparative Study

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Abstract

The private real estate privileged rights require granting the creditor special securities in rem that protects him from insolvency as well as the disadvantages of crowding out the general securities. It is possible to invoke the general security because it is the subject of financial responsibility in specific circumstances. Securities in rem, including the private real estate privileges under study, are generally organized under property, which is a security for the payment of a debt. The law regulates the control of the mechanism for benefiting from this section pertaining to the securities in rem, as the legislation under comparative study enabled the creditor to pay his debt out of the privileged property that is expressed by the text of the law in order for the creditor to pay his right before ordinary creditors. In case the debt is not paid, the creditor will have the right of preference to satisfy the debt. Moreover, he would have the right to trace the property no matter into whose hands (possession) the property has passed. The legislator also provided legal means within those laws to maintain his rights and protect him from the actions of the debtor and the smuggling of the privileged property.

Keywords: *privileged rights, real estate, tracing, preference, creditor.*

Introduction

The rights of tracing and preference could be the most noticeable provisions of privileged rights of private real estate. The mortgagee's right to trace the property is linked to the pledger's right to dispose of the mortgaged property. These two rights are closely interrelated; otherwise, we will devalue the right of the mortgagor to ownership, as well as the mortgagor's right, unless he neglects the right of tracing. Here, the right to dispose can exist without the right of tracing, and this right shall not diminish the mortgagee's right. The mortgagor can take measures to expropriate the mortgaged property after its ownership has been expropriated from the debtor's trust. This construes both the mortgagor's right to dispose, and the mortgagee's right to trace, in addition to the connection between them. It can be said that the right of tracing means the right of the creditor mortgagee to levy an execution on the mortgaged property against the owner, and to pay his debt from the amount of the property by taking preference over the ordinary creditors and creditor mortgagees under his rank.

The importance of the study

The private real estate privileges are accessory rights in rem that are associated with the economic system within the state and are encouraged by the insurances represented in the private real estate privileges. It is not possible to create a new insurance system, because

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these ideas are associated with the public system. This warranty is a true representation of the requirements for the continuity of legal transactions between the creditor and the debtor on the one hand and strengthening the trust and credit as well as protecting his right from the risks of non-payment on the other hand.

The problem of the study

The Iraqi legislator's amendment concerning the provisions of privileged rights for private real estate was mentioned individually. Most of these texts were a reference to the provisions of mortgage insurance, despite their practical significance in our daily lives. We will investigate these provisions to find out their shortcomings.

The methodology of the study

The current study adopted the comparative analytical approach, as this becomes obvious when we get acquainted with some concepts related to this subject, study their characteristics and rules, and analyze and compare the legal texts in the Iraqi, Egyptian, and Jordanian laws with reference to the UAE law related to this subject. Moreover, these concepts are referred to the established general rules or foundations, in addition to revealing the similarities and differences between them and the Iraqi legal positions.

The structure of the study

The study will be divided into two sections. The first section addresses the provisions of real estate privileges. The second deals with investigating the provisions of privileged rights related to preference. The second topic deals with investigating the provisions of the privileged rights related to tracing.

The first topic: The provisions of privileged rights related to preference

As the private real estate privileges are accessory real rights, they are based on the creditor's right to guarantee paying the debt and give its owner the advantage of preference over other creditors when paid off the debt. These rights allow tracing this amount when execution is levied, no matter into whose hands (possession) the property has passed, as preference is the most noticeable warranty of the creditor. This will be the focus of our research on the provisions of privileged rights related to preference.

First branch: The concept of the right to precede

It is priority, which is the right granted to the creditor to get his money by taking preference over the rest of the other creditors. It is the crucial advantage that concerns the privileged right and all other insurances in rem. (Zweina, 2013). The right of preference is a privilege decided by law for the privileged creditor to pay him a right out of his debtor preceding other creditors. It is the representation of the privileged right, regarded as preference, that is expressed by law. The latter determines the rank of preference according to the provisions of Article (1362) of the Iraqi Civil Code, which stipulates (1) "The law shall fix the rank of a privilege in the absence of an express provision regarding the rank of a privilege, it will rank after every privilege the rank of which has been provided for. (2) In the absence of provision (in the law) to the contrary, privileged debts of the same rank shall be paid in proportion.

It is understood from the text that the advantage of preference means that the mortgagee receives his dues before other creditors who do not have the same rank, whether they are ordinary creditors or overdue creditors. In order to take advantage of preference, it is required to register the mortgage, as without registration, the mortgage will be invalid. Thus, we find that the right of preference is the effect of the creditor taking the registration procedures, and therefore the privilege is expressed out of the date of registration. The holder of the privilege shall have priority in getting his privileged money or whatever substitutes for it. The matter of preference is the money subject to the privilege or what substitutes for it. According to the general privileged rights, they

include all of the debtor's present and future money. As for private privileged rights, they are a particular amount of money. If the privileged right becomes invalid, the preference shall be transferred to the compensation or insurance amount that substitutes for it. (Abdul-Jabbar, 2016)

Section two: The provisions of the right to precede

The creditor (the holder of the privileged right) may crowd out the ordinary creditors or other creditors who have their own privileged rights on the same property (Abed, 2019). The question that arises in the event of crowding out between privileged rights or other real rights is, "Who precedes the other? How is the creditor's rank determined in the event of crowding out?". The creditor who has the privileged right precedes in obtaining his right from the privileged money according to rank, because preference is the money subject to the privilege or what substitutes it. According to the general privileged rights, it includes all of the debtor's present and future money. As for the special privileged rights, it is the specific money that is the "the privileged rank." The creditor with the privileged right takes preference over all ordinary creditors and mortgage creditors (Abdul-Jabbar, 2016). This is what makes the privileged rights of the private real estate in question based on the following rules:

1- The capacity-based privilege

It may happen that a real estate privileged right crowds out another real estate privileged right, such as the real estate vendor's privileged right with another real estate seller's privileged right. That is, if the property is sold successively and a part of the price remains for each of the sellers, the first vendor takes preference over those who follow him, provided that he is registered for his privilege before them (Zahran, 1999).

By virtue of the right of preference or priority, the holder of privilege may, within the limits of the privileged money, take preference over all the debtor's ordinary creditors and the privileged creditors or other mortgagees who are overdue in rank. The rule is that the rank of every privilege is expressed by law. If a privileged debt has not explicitly expressed its privileged rank, then this debt is overdue in rank for each privilege is expressed in its rank. This is stated in Article (1362) of the Iraqi Civil Code, which stipulates that "The law shall fix the rank of a privilege in the absence of an express provision regarding the rank of a privilege, it will rank after every privilege the rank of which has been provided for. However, in the absence of a provision (in the law) to the contrary, privileged debts of the same rank shall be paid in proportion". This is what the article stipulates in the second paragraph. It is the law that determines the amounts guaranteed by the privileged right, even if the privilege is guaranteed at the same time (Abbas, 2017). In addition to the debt, the privilege is decided in relation to the accessories and consequences of this debt, such as interest and expenses, taking into account the understanding of the accessories in the narrowest limits. (Faraj, 1979).

Second: The crowding-based privilege

Despite the various types of privileged rights and different provisions of some of them, there is no single rule that determines the rank of each of these rights, but there are many rules regulating the rank of privilege. (Omran, 2010).

If the privilege of the vendor and the privilege of co-owner of the property crowd out each other, priority shall be given to the one who is first in origin in the event that the registration is carried out within the time specified in the law. However, if the registration is not completed within the period, which is two months from the date of disposal, the privileged right turns into a mortgage, and the rank will be determined from the date of registration. In the event of crowding out, preference shall be given to the one who is the first to register in accordance with the provisions of Article (1378) of the Iraqi Civil Code, which states "(1) the price and accessories due to the vendor or assignor of an immovable have a privileged right over the immovable sold or ceded. (Iraqi Civil Code/

40/1951). (2) The privileged right must be recorded in the Land Registration Department, and its rank is fixed by the date of recording”. Article (1380) of the same law states (1)“where a joint movable is portioned among the co-owners, the right of each one of them to claim from the other co-owners by reason of the partition and to receive the share that was determined for is secured by a privileged right over all the parceled shares that fell to the lot of the other co-owners. (2) This privileged right must be recorded in the Land Registration Department, and its rank runs from the time of recording “(Iraqi Civil Code/ 40/1951).

If a mortgage creditor crowds out a possessory mortgagor, or a creditor holding a privileged right of real estate, priority shall be given to the one who precedes the registration, unless the law stipulates otherwise. Article (1379) regarding the privilege of contractors and architects states that:

1- The amounts due to contractors and architects who have been entrusted with the construction, repair, or maintenance of buildings or other works have a privilege over such works to the extent of the increase resulting from such works to the value of the immovable at the time of the sale.

2- A formal note must be made showing the works that have been completed and the sums due in respect thereof; the privilege must be recorded in the Land Registration Department based on the strength of this note. The rank of this privilege is acquired at the date of the recording.

3- As regards these works, the holder of this privilege shall have precedence over the mortgagee of the land on which these works have been carried out (erected), if covered by the mortgage, regardless of whether this mortgage is authentic or possessory.

It is understood from the text that the extension of the authentic mortgage to the mortgaged appurtenances, such as improvements or constructions, shall not prejudice the privilege of the due sums for both the contractor and architect. We find that they deserve to take their rights before the mortgagee, even if it was a recorded right, before registering their privilege on these works. On the other hand, Article (1056) of the Egyptian Civil Code stipulates that “creditor mortgagees shall receive their rights before ordinary creditors out of the price of the mortgaged property or out of the money which substituted this property, where each one of them will receive his right according to his rank, even if registered in one day” (Egyptian Civil Code/ 40/1948).

It is understood from this text that the creditors are arranged in the following manner: If the creditors (or the holder of private real estate privilege, or of specialization or of possessory mortgage) find an official mortgage, it shall be submitted according to the rank of each one of them. The first in rank has priority to register. The ordinary creditors shall come after the formers, in which all of them are equal in rank, and they will crowd out what remains of the debtor’s money. It is noted that the rank of the mortgagee (the creditors attached to him with the privileged right) is determined by the rank of the entry, even if the creditors were registered in one day.

Article (31) of Notary Public Law No. 114 of 1946, amended on March 6, 2022, stipulates that: “A book for publication is prepared in the office in which documents and registration lists are recorded, as the case may be, with consecutive numbers according to the dates and hours of their submission.” Article (1134/2) of the Egyptian Civil Code also stipulates that “general privileged rights, even if they are subject to real estate, do not have to be proclaimed, where the right of tracing is not established in them, and there is no need for pronouncement either in privileged rights of real estate that guarantee amounts due to the public treasury. All these privileged rights are prior in rank to any other privileged right or any official mortgage right, regardless of the date of its registration.

In case of crowding between the privileged right and the mortgage debt, we distinguish between two cases: the first is “if the privilege is exempt from registration”, and the second is “if the privilege is subject to registration”. In the first case, the privilege takes preference over the mortgage in an absolute manner, regardless of the date of the privilege or the date of registering the mortgage. In the second case, priority will be given to the previous one in registration. If the privilege was registered in the real estate register before the mortgage, priority is given to the privilege, because the privileged rights on real estate apply to the provisions of the official (real estate) mortgage. These provisions stipulate that the mortgage is taken into consideration from the date of registration (Sawar, 1997).

In the event of crowding out among the privileges, the law determines their rank. If the law does not explicitly stipulate the rank of a privileged right, it shall rank behind every privilege mentioned by the law, whether it comes in the chapter dedicated to privileged rights or in another context of the Civil Code. It is noted that in the absence of a provision (in the law) to the contrary, privileged debts of the same rank shall be paid in proportion. (Omran, 2010).

Article (1425) of the Jordanian Civil Code stipulates:

- 1- If the law has not expressed the rank of the privileged right, then it would follow the stipulated rights.
- 2- In the absence of a provision (in the law) to the contrary, privileged debts of the same rank shall be paid in proportion.

It is understood from this text that the rank of each privileged right is expressed by the law, whether it is advanced or overdue. If the law does not express the rank of the privileged right, then it follows the rights provided for, which are the special privileged rights that precede the general privileged rights and include the privileges of judicial expenses, sums due to the state, and the expenses of preserving and repairing movables. As for the general privileged rights, they include the privilege of amounts due to employees, amounts due to suppliers of food, clothing, and medicine, and the alimony privilege. (Al-Obeidi, 2011). In the absence of provisions (in the law) to the contrary, privileged debts of the same rank shall be paid in proportion (Al-Sanhure, 2000).

The second topic: The provisions of privileged rights related to tracing

If the aforementioned preference gives the creditor priority in paying the debt out of the amount charged with the privilege, then the exit of that money from the hands of the debtor gives the creditor the right to trace, no matter into whose hands (possession) the property has passed, and to implement it to satisfy its right. This is what we will try to explain in two separate requirements.

First branch: The meaning of right to trace

The right to trace is “an authority granted to the holder of the privileged right to track down the amount subject to the privilege, no matter into whose hands (possession) the property has passed, and to execute it in order to claim his right out of its price” (Obeidat, 2011). According to the specific rank in the law, Article (1345) of the Iraqi Civil Code stipulates that “A mortgagee may receive (collect) his right out of the thing that is the subject of a possessory mortgage even if the ownership thereof has been transferred (passed) to a third party. However, the third party may pay the creditor his right, except where the mortgage was offered (given) by someone other than the debtor as security for the same right. (Iraqi Civil Code/ 40/1951).

As we mentioned earlier, the provisions of the official mortgage apply to privileged rights in private real estate. The advantage of tracing means having preference over the mortgaged property (the privilege), no matter into whose hands (possession) the property has passed, and requesting execution on it to pay the debt from its price. This means that

the right of tracking is a prelude to the exercise of the right of precedence. The debtor's money is a priority with regard to the general privileged rights on the one hand, and on the other hand, he responds to those amounts that he has at the time of implementation (Abdul-Jabbar, 2016).

Article (1060) of the Egyptian Civil Code states:

1- The mortgagor may, upon the maturity of the debt, expropriate the ownership of the property in the hands of the stakeholder, unless the stakeholder has chosen to pay the debt, expropriate the property from the mortgage, or abandon it.

2- Anyone who transfers to him for any reason the ownership of this property, or any other real right over it that is subject to a mortgage shall be deemed to possess the mortgaged property without being personally liable for the debt secured by the mortgage.

The mortgagee (or the holder of privileged rights) may trace the mortgaged property, no matter into whose hands (possession) the property has passed. The purpose of the right to trace is to enforce the property in the hands of the person to whom it was transferred. The law does not grant the mortgagee vis-à-vis the person to whom the property is transferred the same rights it grants vis-a-vis the mortgagor. It takes into consideration the new element, which is the owner of the property, and grants him rights that were not available for the mortgagor. The purpose behind that is to encourage individuals to deal with mortgaged real estate because of its benefit to the national economy (Abdul-AlBaqi, 1950).

In order to find out the extent to which the privileged right and the holder of the right enjoy the right to trace the privileged right, we must distinguish between the privileged rights in view of their usefulness, which are general privileged rights and private privileged rights. With regard to private privileged rights, the Jordanian legislator mentioned the owners of these rights, the advantage of tracking if they registered their privilege in the real estate registry, because the real estate privilege is in fact a mere mortgage. Article (1352) of the Jordanian Civil Code and Arab Civil Codes corresponding to it state that "The mortgage creditor has the right to track the mortgaged property for any possessor thereof in order to pay his debt when the deadline comes according to rank" (Jordanian Civil Law No. (43) of 1976. Corresponding to Article (1429) of the Civil Transactions Law of the United Arab Emirates).

The article prioritized those who have the general privilege of tracing. The vendor, or the co-owner, each one of them shall have the right to trace the real estate to which he has the privileged right. This does not matter into whose hands (possession) the property has passed in order to pay his debt, whether the privileged right is the price of the property or the remainder of price, or what resulted due to the release of his right in it, or any other right of the vendor, or the shareholder in it (Rajeeb, 2009).

The holders of privileged rights enjoy the advantage of tracing, although the definition of Article (1424) of the Jordanian Civil Code did not refer to this feature. The reason is that this feature, along with the advantage of preference, is one of the basic characteristics of real rights in general and accessory real rights in particular. Notwithstanding, the Egyptian and Iraqi civil laws did not explicitly indicate that the general privilege rights gave the creditor the advantage of tracking (Al-Obeidi, 1933).

Section two: The tracing right provisions

The creditor's exercise of the right of tracing means his right to take measures to expropriate the mortgaged property against the stakeholder upon the maturity of the debt. If the creditor mortgagee initiates the proceedings on the mortgaged immovable, then he shall have levied execution on all his debt on the real estate that has been transferred to the stakeholder, whether the ownership of the real estate is transferred to the stakeholder in whole or in part, regardless of whether the mortgaged immovable remains in the hands

of the debtor or is transferred to other stakeholders. This is just an application of the rule of mortgage indivisibility. Article (1294) of the Iraqi Civil Code stipulates this rule by stating “Every part of the mortgaged immovable is a security of the entire debt, and every part of the debt is secured by the whole of the mortgaged immovable.” In the event that the mortgage creditor exercises his right to trace the possessor, the latter shall not have the right to demand the deprivation of the debtor, neither of his free funds nor of the funds mortgaged in the same debt. It means that the stakeholder does not have the right to ask the mortgage creditor to execute first on the debtor's money, whether it is mortgaged or not, as the Iraqi legislator has not allowed the stakeholder to do so. The Iraqi legislator did well because this right contradicts the text of Article (1294) Iraqi Civil Code, which referred to the indivisibility of the mortgage right and to the right of the mortgagor in execution levied on the stakeholder, even if part of the real estate had been transferred to him or if one of the mortgaged real estate was the one that had been transferred to the stakeholder.

It must be noted that the proceedings for expropriation of the mortgaged property under Iraqi law are carried out in accordance with the provisions of Real Estate Registration Law No. 43 of 1971 and Implementation Law No. 45 of 1980. The Real Estate Registration Department is the department concerned with selling mortgaged property, as Article (161) of the Real Estate Registration Law stipulates: “The competent Real Estate Registration Department shall sell real estate that is documented with a mortgage or what is equal to or a privileged right based on a written request from the mortgagee to collect his debt and accessories if it is payable.”

First: Reversion

The creditor cannot track the property by executing on it, selling it at public auction and paying his rights, except when the debt is due. The privileged creditor depends on his right to execute the real estate when the debt is due, whether the term is contractual or judicial. The privileged rights of private real estate give its owner the advantage of tracing because the real estate privilege is in fact an official (real estate) mortgage. If the vendor or assignor of the property registers his privilege in the real estate register, he would have the right to trace the sold property in order to pay the remainder of the price. The co-participant can each of them, if he registers his right in the Land Registry, trace the privileged property in his favor, no matter into whose hands (possession) the property has passed, in order to fulfill his right (Sawar, 1950).

In order to exercise the right of tracing, the creditor must first serve notice on the debtor to pay in the first place. It is a preliminary formal proceeding carried out by the holder of the privilege to command the debtor and warn him in the event of his failure to pay the debt through the judicial record (Amina & Jamila, 2014). Thus, the laws under the comparative study ruled that Article (1306) of the Iraqi Civil Code stipulated in its first paragraph that: “A mortgagee may, upon maturity of the debt and after having served notice on the third party holder (stakeholder) to pay the debt, take proceedings for the expropriation of the mortgaged property unless this stakeholder has chosen to pay the debt or redeem the mortgage of the property.” (Iraqi Civil Code/ 40/1951).

Article (1072) of the Egyptian Civil Code, which corresponds to Article (1306) of the Iraqi Civil Code, states “If the stakeholder has not chosen to pay the debts, empty the property or release it. The mortgagor may take expropriation proceedings against him in accordance with the provisions of the pleadings law, except after having served notice on the third party to pay the due debt or redeem the mortgage of the property. The warning shall be given after alerting the debtor to expropriate the property or together with this warning at the same time. It is noted from the texts that tracing is the ability of the owner of a private real estate right to execute on a property owned by others. The right of tracing is not limited to enabling the owner of the right to direct the implementation procedures referred to in the above articles, but rather to his right to reject the offer of the stakeholder

to release the property in the event that the offer is underestimated. Perhaps, this is what leads us to discuss the warning as one of the proceedings for exercising the right of tracking and preceding as a proceeding owned by the property owner. Returning to the reading of the text in the Iraqi legislation above, we found that the legislator stipulated that the exercise of the right of dependency was given to the possessor only without a need to warn the debtor. The Egyptian legislator, on the other hand, requires that the warning be for the possessor and the debtor, which is a successful position compared to the position of the Iraqi legislator. The reason is that warning the debtor first may lead to the debtor taking the initiative to pay. (Al-Bashir, 1976)

Thus, there is no need to complete the proceedings against the stakeholder, as the aforementioned article stipulates that “if the stakeholder has not chosen to pay off the recorded debts, empty the property, or release it, the mortgagor may not take the proceedings of expropriation against him in accordance with the provisions of the Procedures Law except after serving notice on him to pay the due debt or redeem the mortgage of the property. The command shall be given after warning the debtor to expropriate the property, or with this warning at the same time. It is noted that the Egyptian legislator distinguished between warning the possessor and the debtor when tracing, and required warning the debtor first, and then warning the possessor. The Jordanian legislator did not differentiate between warning the creditor and warning the possessor, as did the Egyptian legislator, as Article (1353) of the Jordanian Civil Code stipulates that “the creditor in a real mortgage may take measures to expropriate the property and sell it if the debt is not paid on time.” This is done after warning the debtor and the owner of the property in accordance with the procedures stipulated in the Procedure Law and special laws. As for the data included in the warning paper, the Iraqi legislator did not address them, while the Egyptian legislator indicated the data should be indicated in the expropriation warning paper. This paper is one of the pleading papers in Article (401) of the Egyptian Law of Procedures, which states that “execution begins with the notification of the expropriation of the property to the debtor to his person or his domicile, including the following data:

- 1- Stating the type and date of the executive bond, the amount of debt to be paid, and the date of announcing the bond.
- 2- Warning the debtor that if the debt is not paid, the warning will be noted down and the property will be forcibly sold.
- 3- Describing and indicating the real estate and its location, area, borders, numbers, names, and numbers of the acres in which it is located, and other things that are useful in identifying it, by applying to the Real Estate Notary Public. The creditor may obtain a petition authorizing the bailiff to enter the real estate to obtain the necessary data to describe the real estate and its contents. He may also accompany someone to help him, where it is not permissible to complain about this matter.
- 4- Designating a domicile for the direct creditor for the procedures in the town where the Execution Court headquarters is located.

If the notice paper does not include any of the items (1, 3) of this article, it shall be invalid. If the execution is on mortgaged real estate by someone other than the debtor, the warning shall be announced to the mortgagor after assigning the debtor to pay it in accordance with Article 281. The Egyptian legislator also required that the warning be registered; otherwise, it would be invalid, based on the text of Article (412) of the Civil Procedure Code, which states that “the warning must be registered and its registration indicated on the margin of the notice registration within 15 days from the date of the notice registration, and the notice registration shall be omitted”. As for the Jordanian legislator, he referred to data similar to what was stated by the Egyptian legislator in Article (70) in Paragraph (C) of the Jordanian Implementation Law No. (25) of 2007.

This paragraph states, “After completing the proceedings stipulated in paragraphs (a) and (b) of this article, the debtor shall be notified, including the following:

- 1- Stating the type and date of executive bond and the required amount of debt.
- 2- Describing the property, indicating its location, area, borders, number, and real estate area.
- 3- Choosing a domicile for the direct creditor for the proceedings in the town where the department headquarters is located.
- 4- The property will be forcibly sold if he refuses to pay the debt within seven days following the date of notification.

Second: The exceptions to the right of tracing

There are two exceptions to the right of tracing: the first of which is a legal exception and is related to general privileged rights, in which the right of tracing is not established. The second is a practical exception related to the special privilege attached to a movable. Although this privilege gives its owner the right to legally trace, it is often disrupted as a result of the inability to invoke the privilege of those who possess the movable for a valid reason and in good faith. All comparative legislation has adopted this position. Article (12) of Jordanian Law No. (46) of 1953 (Law of Immovable Property as a Security for the Debt) stipulates that “if the conviction period expires and the debt is not paid, or due to the fulfillment of a condition in the conviction contract that requires the term to come before the expiration of that period. If the debtor fails to fulfill his pledge, the Registration Department shall undertake the sale of the shop that has placed security for the debt in the manner indicated in the article, based on the request of the creditor or his heirs (if he is deceased), or based on the request of one of the creditors who are below him in grades (if there are creditors in second or third degree.....etc). This is regardless of whether the debtor has died, been declared bankrupt, or has not left behind any of the transfer holders, without the creditor being obligated to obtain a ruling or any decision from the courts or being obligated to return to the estate of the deceased debtor or to the bankruptcy court officer. ”.

Finally, it should be noted that the right to trace is not separate from the right of preference in particular, as there is a close relationship between them. The right of tracing is a means or mechanism to protect the right of precedence, as it paves the way for the right of precedence to levy execution on the mortgaged property in the event that it is released from the debtor’s pledge so that the mortgagee can fulfill his right before others according to this privilege. Likewise, the right of precedence is inseparable from the right of tracing whenever the mortgaged property is released from the mortgagor's custody. Precedence always accompanies the mortgage. As for the right of tracing, it may or may not be associated with the mortgage, depending on the circumstances. If the mortgaged property remains in the possession of the mortgagor, then the need for traceability will no longer exist in this case. The creditor only needs the right of preference, but in the event that the ownership of the mortgaged property is transferred to others, the creditor mortgagee then needs the right of tracing and preference.

As for the extent of the rights of tracing and preference in real rights, the opinion of the majority is that the real rights, whether original or accessory, give their owner the rights of tracing and preference, with a difference in the degree of emergence of each of the rights of tracing and of preference. The original and accessory real rights give their owner the right of tracing and the right of preference, without these rights being limited to the accessory real rights. The Court of Cassation in Iraq affirmed that the original real rights give their owner the right to trace, as it ruled that: “the buyer has the right to trace the thing sold when a third party (stakeholder) opposes him. The buyer has the right to sue the seller or the one who seized the thing sold” (Abass, 2017)

In spite of the fact that the real rights, whether original or accessory, grant their owner the right of tracing. The right of tracing is the most obvious right of the accessory real rights. The reason behind that is due to the fact that the owner of the thing to which the accessory real right is attached still has the right to dispose. The holder of an accessory real right cannot dispose of the thing subject of the right. If the owner disposes of the thing on which the accessory real right is based on and transfers its ownership to another person, then these disposals achieve the practical cases in which the owner of the accessory real right resorts to tracking the thing in the hands of the disposer. As for the original real rights, the owner of the original real rights is the one who has the authority to dispose of the thing subject to the right, as there is no other person who can dispose of the thing. Thus, it is difficult to find practical examples in which the owner of the original real right exercises his authority in tracing (Al-Shamari, 1944).

Conclusion

- 1- Private real estate privileges are indivisible accessory real rights that grant their owner the priority over the property subject to the privilege no matter into whose hands (possession) the property has passed, so that it is an accessory when established and redeemed.
- 2- Under Iraqi law, the privileged rights of private real estate are referred to the provisions of the expiry of possessory and real mortgages. However, there is no explicit text to that effect, that is, there is no explicit text in Iraqi law indicating the expiration of privileged rights of private real estate.

Suggestions

- 1- We urge the Iraqi legislator to re-adapt the legal provisions mentioned in the texts regulating these rights in a manner that is compatible with the current economic and social developments, such as regulating other privileges which are as important as those regulated. One example is the lender's preference for the sum of the property, which is one of the most typical examples in society to promote granting loans to dealers. It is located under the section pertaining to the sorts of special rights available on the property.
- 2- We recommend the Iraqi legislator amend the text of Article (1306 / 1st Paragraph), which only included serving notice on the stakeholder, to be as follows: (A mortgagee may, upon the maturity of debt, expropriate the mortgaged property as a security in the hands of the possessor of this property after having served notice on the third party holder to pay the debt. This notice shall follow warning the debtor to expropriate the property, or simultaneously, unless the stakeholder has chosen to pay the debt or redeem the property.

References

- Abbas, S, S. (2017) privileged rights and their ranks in the Iraqi civil code, a comparative study. Volume 1, Issue 3, Part 1.
- Abd Dre'I, H. (2019) Accessory real rights, Dar Al-Sanhouri.
- Abdel Baqi, A. (1950) Provisions of the Egyptian Civil Code, Personal and Real Estate Insurance, Publishing House.
- Abdel-Jabbar, F. (2016) The Role of In-kind Insurance in the Stability of Financial Transactions. Master's Degree, Zayan Ashour University in Djelfa.
- Abdul-Qader Al-Far, (1998) Sources of Commitment, Dar Al-Thaqafa Library, Amman.

- Al-Bashir, M, T.. (1976) The brief explanation of Accessory real rights (Security Mortgage, Possessive Mortgage, privileged Rights), Comparative Study, 1st edition, Dar Al-Hurriya, Baghdad.
- Al-Obaidi, A, H. (2011) The brief Explanation of Civil Code, Real Rights, Amman House of Culture.
- Al-Sanhouri, A, A. (2000) The Mediator in Explanation of the New Civil Law, Part 10, 3rd Edition.
- Al-Shammari, A, H. (N.D.) The in-kind liability of the holder of the insurance mortgage.
- Amina, B., Djamila, T. (2014) Enforcement of the Official Mortgage for Third Parties in the Algerian Civil Code. A master's degree in law, specializing in law, Boudow.
- Assia, S., Hanan, (2020) The right of special privilege over real estate in Algerian law. M, A. submitted to complete the requirements for obtaining a master's degree in Algerian law
- Egyptian Civil Code No. 131 of 1948.
- El-Sayed Omran, M. (2010) Personal and in-kind insurances.
- Farag, T, H. (1979) Sale and Barter Contract, University Culture Foundation.
- Iraqi Civil Code No. 40 of 1951.
- Iraqi Implementation Law No. 43 of 1971.
- Jordanian Civil Law No. (43) of 1976.
- Obaidat, Y. M. (2011) Original and Accessory Real Property Rights, Dar Al-Masirah, first edition, Amman.
- Rajeeb, B, Y. (2009) Explanation of Civil Law (privileged Rights), Amman, House of Culture.
- Saad, N, I. (2007) Original real rights, their provisions and sources, Real and personal insurances (official mortgage / right of jurisdiction / possessory mortgage / privileged rights / guarantee), New University House (ed.), Alexandria.
- Siwar, M, W. (1997) The Right to Property in and of itself in Civil Code, House of Culture Library, Amman.
- Taha, G, H., Al-Bashir, M. T. (N.D) Accessory real rights, Part 2, Al-Atak Company, without a year of publication.
- The Civil Transactions Law of the United Arab Emirates according to the latest amendments, a series of legislations and laws of the United Arab Emirates (6) for the year 2020.
- Zahran, H, M, M. (1999) Real and Personal Insurance, University Knowledge House, Cairo,.
- Zweina, Z, N. (2013) The Right to Privilege in Algerian Legislation, M, A. for obtaining a master's degree in law, Faculty of Law and Administrative Sciences, University of Algiers.