

# The Effect of Non-availability of the Title to Property on the Security Mortgage Contract a Comparative Analytical Study

Mohammed Khair M. Al-Adwan<sup>1</sup>, Nathem Al-Shbool<sup>2</sup>, Mahmoud Al Shawabkeh<sup>3</sup>

## Abstract

*Purpose: Determine the impact of the debtor's non-ownership of the mortgaged money on the validity and enforceability of the mortgage contract in accordance with applicable legislation. Theoretical reference: This research relies on the Jordanian Civil Law as the main reference, with comparison to other legislation such as Egyptian and French, which means determining the position of the Jordanian judiciary on the main problem in the research. Method: This study is considered a descriptive, analytical, comparative study, in which researchers will rely on describing the theoretical problem in legislation, analyzing texts, and comparing that with the laws referred to in the study. Results and Conclusion: The main conclusion is the security mortgage whose title to property is expected may be void if its subject was on a future property, and it may be also suspended if the ownership of the property is dependent on the obtaining of a certain condition. Implications of research: The security mortgage issued by the mortgagor's agent is considered valid as long as the agency is valid, and the security mortgage is considered issued on the property of others if the validity of the agency is invalid, so that the agent then does not have authority, or jurisdiction derived from the principal, to conclude the security mortgage. Originality/value: The value of the research is concentrated in its discussion of a practical issue that the legislator has not decided, and which has opened the door to jurisprudential and judicial diligence, despite its great importance, given that ownership of the mortgaged property is close to being considered a condition for the validity of the mortgage.*

**Keywords:** *Accessory real rights-expected title to property-guarantees of the fulfillment of the debt.*

## Introduction

The security mortgage is one of the most important means of creditor protection as long as its subject is a significant positive factor of the financial liability of the debtor. Because of the importance of the security mortgage, it has been consistently subjected to regulations and codifications by many civil law codes in many countries, drowning up its provisions and clarifying them for achieving its purposes and making a balance between the interests of its parties (Creditor and Debtor). In principle, the effects of the financial transactions between individuals, whether results in good or bad, are only limited to their parties. This leads to the assumption that only the debtor's financial liability is the source that can guarantee the fulfillment of his duty to pay his debts to the creditor. Therefore, the subject of the mortgage must be owed by the debtor since it is not possible that someone else bears the burden of his insolvency or intransigence in the fulfillment of the debts without a legal tie that involves him in the reason for such fulfillment.

The practice showed that there are many hypotheses in which a property owned by a non-debtor may be the subject of a security mortgage. The mortgage of someone's else property in the name and on the account of the mortgagor without having the authority of disposal of it is considered to be a security mortgage (4). By contrast, it is not considered to be a mortgage done by the non-owner of the property that may be made by the representative as long as he does not exceed the limits of his representation, otherwise, the case will be a mortgage of the property of others. Among the forms of mortgaging the property from a non-owner is the mortgage by a buyer of the property before its registration, it is also the case of the mortgagor mortgaging a property based on ownership pending a certain condition that has to be obtained, as he is not the owner of the mortgaged property as long as the conditional clause is not satisfied. Another example is the mortgage that is based on fictitious ownership of the real estate, and other cases that represent the fact that the property is mortgaged by someone other than the owner.

The mortgage of someone else's property is considered to be as such when it has been established, without any doubt, that the mortgagor does not have the authority to dispose of such property. In this case, the matter requires the search for the legal nature and the legal significance of such a mortgage. For this, it is

<sup>1</sup> Sultan Qabous University- OMAN/Al Yarmouk University - JORDAN. Email: m.aladwan@sq.edu.om

<sup>2</sup> A judge in Jordanian courts and a legal researcher. Email: N\_shboul@gmail.com

<sup>3</sup> AL-Esra'a University – JORDAN. Email: m\_shawabkeh@asu.edu.jo

<sup>4</sup> Tanago, Abdelsaied Samit, Accessory and Real Securities, Almaref Publication Company, 1996, P170.

necessary first to establish the legal ruling for mortgaging real estate owned by others in its exemplary form, as a general rule, and then clarify the different special forms of mortgaging real estate owned by others. The reason for this is that the law has set first a general rule providing that the mortgagor has to be the owner of the mortgaged property, then provided special provisions for specific cases when the ownership condition of the property is unobtained. Such provisions and regulations were for the achievement of justice and the proportionality of the legal ruling with what reality requires.

The most important questions that can be raised in regard to the security mortgage are; What is the status of mortgaging a property of someone else? In what cases is the mortgage can be considered as a mortgage of property owned by others? Are there any legislative solutions provided for each case? And does the existing law give the mortgage by the apparent owner the same ruling as the mortgage on the real estate of others?

## Theoretical Framework

This study has been carried out through two main sections, which can be outlined as follows:

Section One: Provisions of the Security Mortgage on the Property of Others.

The Fate of the Security Mortgage on the Property of Others

The Legal Nature of the Security Mortgage by the Mortgagor on the Property Owned by Others

Consequences Arising from the Mortgage on the Property Owned by Others

The Security Mortgage by the Mortgagor's Agent on the Property of Others

The Type of the Agency Required for Concluding the Security Mortgage Contract

Legal Solutions to the Problems of the Security Mortgage Under Agency

Section Two: Provisions of the Security Mortgage by the Apparent Owner of the Property of Others

The Security Mortgage by the Apparent Heir

Position of Jurisprudence

Position of Judiciary

The Security Mortgage Concluded by the Fictitious Owner

The Right to Uphold to Fictitious Contract

1.2.2 Options of the mortgagee creditor when the fictitiousness is proven.

## Methodology

Since this work is based on the analysis of the established legal rules that governing the security mortgage, descriptive and analytical approaches will be used as well as the inductive and deductive methods, in addition to the comparative approach between the Jordanian and the Egyptian civil laws.

## Results and Discussion

*Section One: Provisions of the Security Mortgage on the Property of Others*

The condition of the mortgagor's ownership of the mortgaged property is one of the conditions that affect the validity of the mortgage. The mortgage may be considered as a mortgage on a property of others if the mortgagor's ownership of the property is marred by a defect that affects its validity. When the security mortgage was on real estate that it is not owned by the mortgagor, but belongs to others, the law regulated this matter which can be considered the typical form of mortgage of property owned by others. In this case, the dispute does not arise over the validity of the mortgagor's ownership of the mortgaged property, but rather, whether the mortgagor is the owner of the mortgaged property or it belongs to another person.

There are two typical types of a mortgage on a property owned by others; first, when the contract of the mortgage was concluded between the mortgagee and the mortgagor who is not the owner of the property mortgaged; second, when the mortgage is concluded upon a defected agency that make the mortgagor

unauthorized to conclude the security mortgage on the property of others. Discussion of these issues will be under consideration in the following two sections.

### *The Fate of the Security Mortgage on the Property of Others*

When the mortgage was done by someone other than the real owner of the real estate, the mortgagor is considered to be disposed of the property of others without having the authorization to do so. As long as the contract of the security mortgage results in rights and obligations for its parties that might extend to the issuance of a judicial judgment to be enforced on the mortgaged property, the law has regulated this issue in specific provisions. Therefore, it is worthy to discuss the fate of the security mortgage contract on a property owned by others, also the status of such contract as well as its legal significance and its legal implications. Such discussion will be done under two sub-sections as follows;

#### *The Legal Nature of the Security Mortgage by the Mortgagor on the Property Owned by Others*

Article (1324/1) of the Jordanian Civil Code stipulates the mortgagor's ownership of the mortgaged property as a condition for the validity of the mortgage "The mortgagor must be the owner of the mortgaged property and must have the legal capacity to dispose of it". This means that the absence of the said condition renders the mortgage contract invalid. Despite this, the same provision did not provide what is the fate of the security mortgage done by someone other than the owner. For filling this gap Article (1325) states that: "The mortgage of someone's else property is not allowed unless the true owner ratifies it by an official deed". To explain, the concerned contract of mortgage, initially, is invalid unless approved by the real owner with an authenticated document <sup>(5)</sup>.

Accordingly, for defining the legal nature of such action (security mortgage) resorting to the provisions relating to the actions of the curious in regard to the property of others is necessary. In this context, Article (171) of the Jordanian Civil Code stated that: "A disposition shall be dependent for the effectiveness thereof upon ratification if it is made by volunteer..." according to this article, along with what has been stated in Article (1325), it can be said that the validity of the mortgage contract by the non-owner of the property is subject to the approval of the real owner evidenced by an official deed. Therefore, the mortgage contract that has been concluded by a non-owner is considered to be a contract by a curious person on the property of another <sup>(6)</sup> pursuant to the provisions of Article (171) of the Jordanian Civil Code and would be suspended upon the authorization of the true owner in accordance with the provisions of Article (1325) of the Jordanian Civil Code. All these are in order to fulfill the condition of the mortgagor's ownership of the mortgaged property stated in Article (1324) of the Jordanian Civil Code. The Jordanian Court of Cassation confirmed this trend by stating that: "the criterion for adjudication, in this case, is that the mortgage and seizure of the plaintiffs' shares were made in favor of the loan of both Ali .. and Salama .. and that the plaintiffs were not a party to that contract, and they did not issue any permission for this mortgage in exchange for that loan, which contradicts the provisions of Article 1325 of the Jordanian Civil Code, which does not validate mortgaging the property of others unless the approval has been made by the true owner evidenced by an official deed. Such an act of mortgage also violated the general rules governing contracts contained in Article 171 of the Jordanian Civil Code, as well as Article (208) of the same Code, which stipulates that "the contract bears nothing for others, but they may gain rights" <sup>(7)</sup>.

The Egyptian Civil Law provided provisions relating to the mortgage of the property of others in Article (1033/1) stating that: "If the mortgagor is not the owner of the mortgaged property, the mortgage contract becomes valid if ratified by the true owner of the property by an official deed. In the absence of ratification, the mortgage is only effective from the time that the immovable becomes the property of the mortgagor". According to this provision, the contract of a mortgage by a person other than the owner of the property is incomplete, but not absolutely invalid. Its validity as the phrase (*it becomes valid*) indicates that it is dependent on the ratification of the true owner of the property. Thus, Egyptian law has adopted the theory of voidable contract and the theory of relative invalidity of the contract, and this means that the mortgage on the property of others cannot be considered

<sup>5</sup>) Suwar, Mohammed Wahid-Aldin, Accessory Real Rights, Dar **Al-Thaqafa** , Jourdon, 1995, P59.

<sup>6</sup>) *Ibid*.

<sup>7</sup>) JC of Cassation, Civil Division, No.2190, 1995, Qustas Publications.

a null and void contract as long as might be validated ( 8). Therefore, the legal nature of the mortgage concerned according to Egyptian law is only relatively invalid that can be corrected ( 9).

#### *Consequences Arising from the Mortgage on the Property Owned by Others*

Considering the validity of the contract mortgage on the property of others is dependent on the ratification of the true owner entails effects on the contracting parties as well as on the true owner of the mortgaged property.

#### *Effects of Mortgaging the Property of Others on the Contract Parties (the mortgagor and the mortgagee).*

The suspended contract can be defined as a contract that takes place without having any effects unless ratified in order to be valid and implemented, and if such ratification lags behind it becomes void and null<sup>(10)</sup>, and therefore the effects of the contract can be effective by transferring the ownership of the property to the mortgagor, as the reason for considering a mortgage contract on the property of others is suspended is the fact that the act has been done by someone other than the owner. Therefore, if the property becomes owned by the mortgagor, then the defect does not exist anymore, and thus the rule mentioned in Article (24) of the Code of Judicial Rulings can be applied which stated that: “*If the impediment is removed, the forbidden is restored*”, which can be applied when the property of the other becomes the property of the mortgagor, subsequently the ex-mortgage contract on the property of others becomes valid and applicable. such applicability of the contract is not based on the time of its conclusion but on the time of transferring ownership of the property to the debtor-mortgagor. There are many jurisprudential explanations for this. For instance, Nabil Saad commented that: “...it is logic saying it is not possible to make the mortgagor’s possession of the mortgaged property having a retroactive effect, this means that the persons to whom rights are entrusted by the true owner should not be harmed (11 ). Hammam Zahran also noted that “The mortgage as a *right in rem* can only be established from the date of the mortgagor’s ownership of the property ...” (12).

It seems to be logical that at the time of transferring the ownership to the debtor mortgagor is the time of the entry into force of the mortgage contract, this is so because the mortgage is an accessory real right that is required to be based on real, pure, and undisputed ownership, in addition to the need to protect those who have a right to the concerned property during the time period from the date of conclusion of the mortgage contract by the mortgagor, who is not the true owner of the property at the time, until the time of transferring of the ownership of the property to him.

The Egyptian law added to the text of Article (1033/1) an explicit statement stating that the mortgage contract turns valid in the event that ownership of the property is transferred from the true owner to the mortgagor who concluded the contract of the mortgage, while he was not the owner of the property at the time. Although Jordanian law does not contain the same clear statement as Egyptian law, it comes to the same conclusion when provided that the mortgage contract is considered to be valid from the time that the immovable becomes the property of the mortgagor.

#### *The Effect of Mortgaging the Property of Others on the Mortgagor and the True Owner of the Mortgaged Property*

Article (1325) of the Jordanian Civil Code provided that: “The *mortgage of someone’s else property is not allowed unless the true owner ratifies it by an official deed*” Thus, the mortgage that concluded on the property of the true owner depending on the approval of the latter, Otherwise, the security mortgage contract is null and void (13).

By contrast, Egyptian law made a distinction between the effect of the security mortgage contract on the mortgagee creditor mortgagee as a party to the contract on one hand, and the effect of such contract on

8) Tanago, *Op Cit*, p175.

9) Sharif, Mohammed, *General Principles in Real Rights and the Right of Jurisdiction*, Dar Al -Nahda Alarabia, Cairo, 2010, P131.

10) Alattar, Abdelnaser, *Voluntary Sources of Obligations in the EUA Law of Civil Transactions*, The UAE University Publications, 2000, P 266.

11) Saad, Nabil, *Personal and Real Securities*, Alhalabi Alhokokia Publications, Bairout, 2010, P57.

12) Zahran, Hammam, *Personal and Real Securities*, Almaref Co, Alexandria, 2010, P351.

13) Suwar, *op cit*, P60.

the true owner on the other. To explain, even though the contract can be constituted between the mortgagor and the mortgagee which is avoidable in favor of the latter, it is not valid against the true owner who remains a side to the contractual relationship between the mortgagor and the mortgagee, unless he ratifies it by an official deed. If the mortgagee creditor requests, before the true owner's ratification, the annulment of the contract, and this was done, the contract ceases to exist and there is no legal effect or significance of the ratification of the true owner, as it applies to a non-existent contract. Contrary to this, if the true owner ratifies the act, such ratification turns the mortgage concerned valid and applicable from the time of its conclusion. and valid based on the time of issuance of the mortgage. At this point, both the Jordanian and Egyptian laws are the same in conclusion, and the difference between them only lies in the view that the Jordanian law considered the mortgage contract concerned as *suspended* whereas the Egyptian law consider it as a *voidable* contract ( <sup>14</sup>).

#### *The Security Mortgage by the Mortgagor's Agent on the Property of Others*

Agency (mandate) is a form of contractual representation ( <sup>15</sup>), and as defined by the Journal of Judicial Rulings in Article (1449): as “authorization of a person in the place of another to do the job on behalf, and representing him in that job. It is said for the person whoever appoints him as an agent, and for the person who did the appointment as the principal, and for the job to be done on behalf of the principal as an authorized upon”. The agency (mandate) is a contract by which the agent authorized to engage in legal on behalf of the principal ( <sup>16</sup>). It has been defined by Article (833) of Jordanian civil law as “*a contract whereby the principal puts another person in the place of himself in an ascertained, permitted dealing*”

It is possible for the owner of the property to authorize another person to conclude a security mortgage with the mortgagee on his property, and therefore the provisions of the representation in contracting become applicable. There are some issues to be addressed here such as the type of the act of representation that has to be done between the owner of the property and the agent, the type of the agency or mandate whether it is general or specific, the limits and conditions of such agency, the issues that can be raised in the case of the mortgage was under an agency contract, and the legal solutions provided to these questions.

#### *The Type of the Agency Required for Concluding the Security Mortgage Contract*

There are many forms of agency or mandate ( <sup>17</sup>). It could be general (absolute) or particular (restricted). While the general agency includes every matter that accepts representation, the specific or particular agency is when restricted in its scope, and the representative acts according to specific instructions issued by his principal. Article (836) stipulates that: “An agency shall be particular (special) if it is restricted to one or more specified matters, and shall be general if it includes everything that may accept representation”. The question of determining the type of agency that is required for concluding a contract of security mortgage will be addressed as follows;

#### *The Type of Agency Required for the Security Mortgage*

The law stipulated that the mandate contract either be general or specific based on the disposition to be delegated, as Article (838) stated that: “*Any act which is not an act of administration or preservation requires a particular agency specifying the kind of act and the dealings to be performed under the agency*”. Therefore, it is important to define whether the security mortgage is an act of management and preservation, or an act of disposal, in order to determine whether it requires a specific or general agency for the concluding mortgage contract of the property of others. The security mortgage is

<sup>14</sup>) While a voidable contract is a description of a contract due to the lack of eligibility of the contracting party or due to the existence of one of the defects of consent, the suspended contract is a contract whose validity depends on the authorization of the person who has jurisdiction, therefore, one of the conditions for its enforcement is left behind.

<sup>15</sup>) Article (108) of the Jordanian civil law “It is permissible to contract in person or through representation unless the law requires otherwise.”, and Article (109/1) “The representation in contracting is contractual or legal”

<sup>16</sup>) Sharif, *Op. Cit*, p 116.

<sup>17</sup>) Articles (835-838) of the Jordanian Civil Law.

considered to be an act of disposal<sup>(18)</sup>, not an act of administration and preservation<sup>(19)</sup>, since the latter acts are only for the management that does not involve any financial risks contrary to the acts of disposal which carry a degree of risk danger to the financial liability of the disposer, and thus, such acts of disposal including the mortgage require special protection<sup>(20)</sup>. The Jordanian Court of Cassation confirmed that “It is understood from Articles (125) and (126) of the Jordanian Civil Code that the acts issued by the guardian with regard to the funds of the minor: a. Those that are included in the acts of administration such as fulfilling rights and paying debts... b. Those that do not fall within the administrative activities, such as acts of sale, mortgage, loan, conciliations, division of common funds, and the investment of money, are not valid unless permission from the competent court is obtained, and in the manner that it determines”<sup>(21)</sup>.

As long as the security mortgage is an act of disposal, not an act of management and preservation, a specific agency is needed in accordance with Article (838) of the Jordanian Civil Code, and with what has been confirmed by the Jordanian Court of Cassation which stated that: “ It is understood from the provisions of Articles (836, 838 and 840) of the Civil Code that the agent cannot conclude a mortgage if the agency contract did not contain an authorization to do so because the act of concluding a mortgage is an act of disposal, not an act of management and preservation, requires a particular agency”<sup>(22)</sup>.

#### *The Particular Agency Required for the Security Mortgage*

It has been established that the agency must be specific in purpose in order for the representative to conclude the security mortgage on the real estate belonging to the principal. The particular agency is an agency by which the agent can do only the specified acts that have been authorized to do by the agency contract. In this context, it is required in any act that is not administrative and acts of disposal in particular<sup>(23)</sup>. In regard to the security mortgage, the particular agency is required and should be clear in its terms for authorizing the representative to conclude the mortgage.

The practice of the Court of Cassation was not consistent in respect of this issue. In some decisions, the court stipulated that the agency contract must specifically contain a particular provision saying that the agent has the power to conclude a mortgage contract. The Court said in this regard that:

“It is not possible to say that the agency that included the phrase (to dispose of as he wishes) in the piece of land is an absolute statement, which permits the agent to conclude the mortgage on the land that he is entrusted with. has the right to mortgage the piece of land he is entrusted with. This is because the mortgage needs a special provision in the power of attorney as it is not an act of management and preservation pursuant to Article (838) of the Civil Code. It is not right to consider that whoever has the right to sell has the right to conclude the mortgage since the law provided for each case legal provisions governing it and has indicated through those texts the persons who own the right to conclude the mortgage.”. this decision

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<sup>18)</sup> Article 126 of the JC Law Article (126) of the Jordanian Civil Code provided certain acts that are not considered among the acts of management issued by the guardian in the monies of the minor and gave examples of them, including mortgage, where it says: “The actions issued by the guardian in the monies of the minor that are not included in the management actions, such as selling, Mortgage, loan, ...”.

<sup>19)</sup> Article 125 of the JC Law provides the acts of management issued by the guardian in the monies of the minor, and gave examples of them, where it says: “Management contracts issued by the guardian in the monies of the minor are valid and enforceable, even if they are of slight injustice, and it is considered among the management contracts in particular Rent if its period does not exceed three years, preservation and maintenance work, fulfillment of rights, payment of debts, sale of agricultural crops, sale of movables that quickly perish, and alimony on the young”.

<sup>20)</sup> Al-Obeidi, Ali Hadi, Al-Wajeez in Explanation of Civil Law, The Real Rights, Dar Al-Thaqafa for Publishing and Distribution, Amman, 2012, P255. Pasha, Muhammad Kamel Morsi, Explanation of Civil Law, Personal and Real Securities, Dar Al-Maarif, Alexandria, 2005, P132.

<sup>21)</sup> JC of Cassation, Decision No.207, 2006, Qustas Publications.

<sup>22)</sup> JC of Cassation, Decision No. 694, 2003, Qustas Publications. For more details on the mortgage upon general agency see Obeidat, Yusuf Muhammad, Principal and Accessory Real Rights, Dar Al-Masirah for Publishing and Distribution, Amman, 2011, P255.

<sup>23)</sup> Sharif, *op cit*, p116.

of the court has dissented by one of the panels <sup>(24)</sup> <sup>(25)</sup>. In another ruling, the same Court approved the contract of the security mortgage concluded by the agent by inferring that the intention of the principal was directed to authorize the agent to conclude the security mortgage without mentioning that explicitly, basing its conclusion on the rule that says “who owns the most owns the less”\_declaring that: “The expressions stated in this agency are considered to indicate that the principals have they organized this agency in favor of the agent after they received the price for the entire piece of land and that it is an agency that cannot be dismissed because the agent’s right is attached to it is an expression that should be interpreted as stated. It clearly indicates that the agency was issued in favor of the agent within the meaning of Article (863) of the civil law. Thus, the principal has no right to restrict or terminate this agency as long as it was issued in favor of the agent who has the absolute right to dispose of, in all aspects that are required by the nature of the acts entrusted to him, including the mortgage since whoever owns the most owns the less” <sup>(26)</sup>.

Taking into account the different views of the Court of Cassation regarding the concerned issue, one may come to the conclusion that the agency contract must specifically include a particular provision authorizing the agent to conclude a contract of security mortgage, and it is not enough to be established upon mere inference. In other words, as long as the mortgage is an act of disposal, it is not sufficient to deduce that from the content of the expressions included in the agency contract. This can be evidenced by Article (838) which provided that: “*Any act which is not an act of administration or preservation requires the grant of a special agency specifying the kind of act and the dealings to be performed under agency*”. In addition, according to the law, the general or absolute agency can only authorize the agent of administrative and preservation acts, but not that of disposal according to Article (837) of the Jordanian Civil Code which clearly stated that: “*If the agency is in general words with no indication as to its purpose, then the agent will only be authorized to carry out administrative and preservation acts.*”. Therefore, the Court, when considering the agency, does not have to infer the will of the principal from the general expressions provided in the agency contract, but rather has to stick to the requirement that the agency must be particular and specific in its terms regarding the authority of the agent to conclude the security mortgage.

This was confirmed by the Jordanian Court of Cassation by stating that “If the agency contains general terms that do not specify the type of legal act entrusted to the representative, then it would be only an authorization of management and preservation acts. The agency if limited to be for certain legal acts such as the sale of a certain item should be strictly observed, but if the mandate was general without specification, then it may include any acts except acts of donations and discharge as they must be declared. <sup>(27)</sup>”

#### *Legal Solutions to the Problems of the Security Mortgage Under Agency*

When the mortgagor’s intention is to give a person an agency to conclude a contract of security mortgage on a specific property, the agency may be marred by problems that affect the mortgage concluded. Therefore, it is necessary to find out appropriate solutions to such problems, especially in the existence of a right of the mortgagee who concluded a mortgage on the property to guarantee the indebtedness between him and the mortgagor who may have originated the indebtedness due to the existence of this guarantee.

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<sup>24)</sup> <sup>24)</sup> JC of Cassation, Decision No. 694, 2003, G Panel, Kestas Publications. It is important to refer to the mentioned dissenting opinion similar to that in case No.2092 of 2001 in which the court inferred the will of the principal in concluding the mortgage without mentioning the expressly in the text.

<sup>25)</sup> JC of Cassation, Decision No. 980, 5<sup>th</sup> P, 1991, G Panel, Kestas Publications

<sup>26)</sup> JC of Cassation, No.2092, 2001, 5<sup>th</sup> Panel, Qustas Publications. From Article (833) of the civil law, it is understood that the agency is a contract... The attorney-plaintiff has established himself in the aforementioned general agency and has given him the freedom to dispose of his property, including mortgaging these properties, and with an explicit text in the text of agency including what he wished to exclude... And according to his agency ... and since the agent’s act as a principal relies on a general agency in which he stipulates the mortgage, the claim of the discerning person requesting the annulment of the mortgage deed has no basis in the law.

<sup>27)</sup> JC of Cassation, No.338, 2004, 5<sup>th</sup> Panel, Qustas Publications

Issues concerning the problems that may affect the agency in concluding the mortgage as well as the legislative, jurisprudential, and judicial solutions provided will be under consideration as the following:

#### *Formality of the Agency Concerning the Security Mortgage*

The contract of agency is considered to be one of the consensual contracts which required the matching of the offer with the acceptance between its parties, without any specific form required. This was demonstrated by Article (90) of the Jordanian Civil Law terms which stated: *“A contract shall be made by virtue solely of the confluence of offer and acceptance, subject to the specific provisions laid down for the making of the contract by law”* (28). By contrast, The Egyptian Civil Code in its Article (700) required formality in the mandate contract as a general rule: *“In the absence of any provision of the law to the contrary, a mandate must be executed in the same form as that required for the execution of the judicial act in respect of which mandate is given”*. This means that the agency provided for concluding the security mortgage contract must be in accordance with the formality required for the security mortgage contract itself (29).

Despite the foregoing, the law may require certain formality for a certain contract in certain circumstances, although it does not necessitate such formality within the general rules such as the formal requirement for the lawyer’s mandate to present before courts on behalf of his client (30). Along with this line of argument, Jordanian civil law stipulated a specific formality for the agency for the purpose of concluding the security mortgage contract, by the special regulation (A law amending the provisions related to immovable funds and its amendments) (31), which regulated the provisions concerning the agency in legal acts that transfer the ownership of immovable funds, and their mortgage in Article (11/a/b).

While paragraph (a) of Article (11) provided provisions regulating the agencies concerning the legal acts that transfer the ownership of immovable funds, and their mortgage before courts and the directorates of registration based on the authority that organized them, paragraph (b) dealt with the agencies that cannot be isolated because of the rights of others are attached to them. These two paragraphs of Article (11) are applicable to the agency that is given by the principal to the mortgagor for concluding the security mortgage on a property. Article (11) stated that: *“Agencies related to the disposals of transferring the ownership of immovable property and mortgaging it that are organized by notaries within the Kingdom or organized by the consuls of the Hashemite Kingdom of Jordan, and notaries outside the Hashemite Kingdom of Jordan to enable the agent to carry out the above-mentioned acts to another person in which the land registration directorates operate within one year, from the date of its organization, it is considered canceled if its provisions are not implemented by those directorates within the aforementioned period”*.

*B. The agencies organized by the employees mentioned in Paragraph (a) of this Article in accordance with the provisions of the Notary Public Law, and those who have similar powers according to a special arrangement under special laws, and which include the disposals that transfer the ownership of immovable funds, and their mortgage and related to them the right of third parties are enforceable in all cases at the directorates Registration and courts within one year from the date of its organization, whether the principal dismissed the agent, or the principal or agent died, and in the event of the death of the agent, the land registration directorates implement the purpose of the agency at the request of one of the heirs.*

Then, in paragraph (f/1) of the same article, the law stipulated that such agencies have to be registered at the Directorate of Registration *“The agency referred to in this article must be registered with the competent Registration Directorate for a fee of (16), One thousand sixteen thousands of the estimated value of the immovable property entrusted by,*

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<sup>28)</sup> Sarhan, Adnan and Khatar, Nouri, *Explanation of Civil Law, Sources of Personal Rights*, Dar Al-Thaqafa, Amman, 2009 , P 102.

<sup>29)</sup> Alamrosi, Anwar, *Real Accessory Rights, Real securities in civil law*, Almarif Com, Alexandra, 2003, P34.

<sup>30)</sup> Article (63/2) Article (63/2) of the Code of Civil Procedure and its amendments No. 24 of 1988 published on page (735) of the issue (3545) of the Official Gazette dated (2/4/1988), in which it provides that: *“Taking into account the provisions of the Law of the Bar Association and the Conciliation Courts Law that the agent must prove his agency on behalf of his client with an official deed if his agency is public, and if it is private and informal, the signature of the principal must be certified.*

<sup>31)</sup> Law No. 51 of 1958 amending the provisions relating to immovable funds and its amendments, published on page (50) of issue (1410) of the Official Gazette on (1/1/1959).



*and a mark in this regard shall be placed on the real estate registry sheet pertaining to that asset ”.* In this regard, the Court of Cassation declared that: “the agency that cannot be isolated should be registered at the competent authorities in the case of the right of the representative has been attached to it according to Article (11) of the law amending the provisions related to immovable funds ..”(32).

The Jordanian law requirement of the registration of the mandate for concluding the contract security mortgage is necessary. Therefore, the representative’s act of concluding the mortgage contract under an unregistered agency or mandate is void and null, regardless of the inconceivability of this presumption in practice since the non-existence of the real estate (property) registry system in Jordan. The contract of mortgage in this case is considered to be a mortgage on the property of others because it would be based on a void contract.

#### *Exceeding of the Agent of the Limits of the Agency in the Security Mortgage*

The agent derives its authority of disposal from what the contract of the agency contained which defines the limits of acts that are authorized to be done (33), and according to Article (840) states: “*By virtue of agency contract, the power of the agent to act in which the agency authorizes is established, with without exceeding its limits except in what is more beneficial to the principal*”. This means that the agent has no authority to act if acceded to the agency’s limitation. Therefore, acts in this case cannot be attributed to the principal. Under this sub-section, two important aspects have to be discussed as the following:

#### *Cases of the Agent Exceeding the Agency’s Limits*

The agent is considered to have transgressed the limits of his power if he/she concludes a security mortgage upon an agency that does not contain the authorization to do so in specific according to Article (836/1) of the Jordanian Civil Code. In some cases, and contrary to reality, the agent might conclude a mortgage contract by error or mistake thinking that such an act is necessary for a certain action. In this case, the agent exceeds the limits of his mandate with respect to the mortgage (34). Another example is when the agent acts beyond his/her authorization and concludes a security mortgage that is based, in fact, on an unauthorized act beyond the limits of the mandate. Of course, according to Jordanian civil law, such an act is invalid, null, and void. Probably one of the most prominent examples of this is when the representative borrows on behalf of his principal without being authorized to do so, and then concludes a mortgage to secure his debt. The Court of Cassation in this case considered such a mortgage which is based on an invalid act as void, the Court stated that: “since the agent is not authorized in the agency contract deed to acknowledge ... his acknowledgment in the debit deed is void, as well as the mortgage on which it is based, and this necessitates the ruling annulment of the mortgage deed” (35 )

In addition, it has been considered that concluding a mortgage under an expired mandate is one of the forms of exceeding the agency’s limits by the agent. Article (862) of the Jordanian Civil Code stated the cases of which the agency terminates: “The power of attorney ends: 1- Upon completion of the work entrusted to him 2- Upon expiry of the term specified for it, 3- Upon the death of the principal or his capacity being impaired, unless the agency relates to the right of a third party, 4- Death of the agent...”,

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<sup>32</sup>) JC of Cassation, Decision No. 246, 2015, Fth Panel, Qustas Publications.

<sup>33</sup>) As the legislator did in Article (837) of the Jordanian Civil Code, which stated: “If the agency is a general term that is not associated with what clarifies its meaning, then the agent is not authorized to do anything other than management and preservation.”

<sup>34</sup>) JC of Cassation, No. 1153, 2016, 5<sup>th</sup> Panel, Qustas Publications; Decision No. 1153 of 2016, Qustas Publications.” It became clear from the foregoing that the one against whom the owner of the plot of land is being appealed authorizes the agent according to the agency to perform specific actions that are mentioned in the contract of the agency, not including borrowing ... that is, it is not permissible to be burdened with a mortgage since it is still in the name of the owner - defendant - and this is not considered to be among the necessary accessories”.

<sup>35</sup>) JC of Cassation, No. 2151, 2006, 5<sup>th</sup> Panel and No. 1096,1991, General Panel, Qustas Publications.

the law also regulated the time periods during which the acts upon agencies are permitted in relation to the transferring acts of the ownership of immovable things and its mortgage under the law amending the provisions relating to immovable funds and its amendments. The validity time given to the concerned agencies is one year starting from the date of their conclusion, otherwise, it would be invalid<sup>(36)</sup>, and therefore, the conclusion of the security mortgage by the agent after that time is considered to be an accession of the agency's limits<sup>(37)</sup>. An exception has been made in this regard by Article (114) which declared that: "If the agent and the person contracting with him are both ignorant at the time of concluding the contract the termination of the representation, the effect of the contract made by the agent will attach to the principal or his successors". And if the agent and the person contracting with him are both with good faith ignorant at the time the contract is made of the agency having been terminated, his act is not considered as beyond the limits of the agency, the effect of the agency remains valid, and the effect of the contract made by the agent will attach to the principal or his successors<sup>(38)</sup>.

#### *The effect of Acceding of the Agency's Limit by the Agent*

If it is proved that the agent has concluded a mortgage contract by exceeding the limits of his/her agency, he/she would be done an act without having the authority to do so on the mortgaged property<sup>(39)</sup>, and thus his/her action is considered to be done by a voluntary agent. This was confirmed by the Jordanian Court of Cassation which said: "the agent if acceded the limits of his agency he becomes the same as the voluntary agent in which he has acceded"<sup>(40)</sup>. This means that the mortgage by him/her is a mortgage on the property of others and its validity is depending on the approval of the true owner of the property who has the choice of either approving the act of the agent or rejecting it<sup>(41)</sup>. This view was confirmed by the Court of Cassation when stated: "If the two plaintiffs (the defendant) granted upon a specific agency that cannot be dismissed because the agent's right is attached to it, and they authorized him to conclude a mortgage in their he plot of land...The two plaintiffs dismissed the aforementioned agent on 19/5/1997 by virtue of a warning, then the aforementioned agent signed a declaration and undertaking dated 21/9/1997 that includes a declaration informing him of the dismissal, and his undertaking not to use the agency and consider it null. It is from this acknowledgment that the two parties to the special agency contract, which was issued in favor of the agent, have terminated this agency of their own will, and with the approval of the aforementioned agent, so this agency is considered terminated from the date of 21/9/1997 according to the provisions of Article (863) of the Jordanian Civil Code. Accordingly, the act of borrowing by the agent on 20/2/2001 and mortgaging the shares of the plaintiff in favor of the defendant is a voluntary act has no effect on the plaintiffs unless they permit this act in accordance with the provisions of Article (839) of the Civil Code, and since the plaintiffs did not authorize the mortgage deed made by the

<sup>36)</sup> Article (11-a, b) of the law amending the provisions related to immovable funds.

<sup>37)</sup> By analogy with the disposal of property ownership transfer: Court of Cassation Law No. 1782 of 2016, five-member panel, Qustas Publications "it is proven from the case papers that the plaintiff has appointed the first defendant under the special power of attorney... on 10/2/2009 and that the defendant, on the basis of this agency, assigned the apartment, the subject of the case, to the second defendant on 8/9/2010, that is, after more than a year has passed since the date of organizing the agency, and since Article 11/A of the law amending the provisions related to funds is not The movable agency requires the implementation of the agency within one year from the date of its organization, and otherwise it is considered canceled, that is, if the first defendant disbursed based on the special agency referred to above to the second defendant after more than a year has passed, the assignment is not considered effective against the plaintiff who owns the apartment, which necessitates with him the rescission of the sale that took place and based on this agency".

<sup>38)</sup> Sarhan, op cit, p162.

<sup>39)</sup> Ibid, p161.

<sup>40)</sup> JC of Cassation, Decision NO. 1101, 2010, 5<sup>th</sup> Panel, Qustas Publications.

<sup>41)</sup> Article (175) stated in its two paragraphs: "1- If the suspended disposition is approved, it shall be executed based on the time of its issuance, and the subsequent authorization shall be considered as the previous agency. 2- If the authorization is refused, the disposition shall be invalid." Likewise, Article (839) stated that: "The subsequent authorization for disposal is considered the same as the previous agency."

defendant according to the special power of attorney issued by them and canceled by the agreement of its two parties, then the mortgage deed No. .. is void against the plaintiffs” (42).

### *Section Two: Provisions of the Security Mortgage by the apparent owner of the Real Estate of Others*

While section one of this study dealt with the question of the fate of the security mortgage by the mortgagor or his representative on the property of others, as well as the issues that may arise in the case if the mortgage has been done under agency contract and legal solutions proposed, this section is devoted to discussing the question of the security mortgage by the apparent owner (mortgagor), claims the ownership of the property subject to the mortgage either by presenting himself (appearing) as the successor, or that he fictitiously owns the property.

The apparent owner is the person who appears or manifests to the public -contrary to the truth- as the true owner of the property, so others considered him as such, and they began to deal with him on this basis (43). In principle, concluding a mortgage by the apparent owner is to be considered a mortgage on the property of others since he/she is not the true owner. But because the others dealing with him/her with good faith thinking that they concluded the mortgage contract with the true owner, the law regulated this issue in particular provisions for the purpose of protecting them by adopting the principle that protecting the apparent situations and good faith. However, under this section, two important issues will be under consideration as follows;

#### *The Security Mortgage by the Apparent Heir*

An apparent heir is a person that is not the true one but appears to people as such (44), thinking that the property has been transferred to him as the true legal heir, and this remains until the true heir of the property appears, who returns to recover his property from the apparent heir (45). The apparent heir is not the owner unless he presented official documents approving that he is the successor of the property concerned. This view has been confirmed by the Jordanian Court of Cassation which stated that: “...because the apparent heir does not have the right to sell, but based on the official documents that he has from an official body (*Document of Defining Inheritance*), and according to considerations necessitated by justice and the stability of transactions in the society... the sale conducted by the apparent heir is considered to be valid and enforceable against the true heir, and then the purchaser has the right to take possession of the sold ”(46). However, the questions relating to the extent to which the mortgage by the apparent heir is considered as a mortgage to the property of others, and the outcome of such mortgage are important issues that will be under consideration as follows;

#### *Position of Jurisprudence*

When the apparent heir mortgages the property in his capacity as owner, and then it turns out that was not the case (he is not the true owner), the problem here raises two principles: first is the principle that protecting the apparent situations, and the second principle is that protecting the stability of transactions that based on apparent statuses. While the adoption of the first principle leads to the conclusion that the mortgage made by the apparent heir does not apply against the true owner as long as it is dependent on his approval, the adoption of the second principle leads to the conclusion that the mortgage concerned is valid even against the true owner when the mortgagee creditor acted with good faith believing that he was contracting with the true owner rather than *de facto* with the apparent heir (47).

Neither the position of the civil law of Jordan nor that of Egypt was clear with regard to this matter. To explain, whether the apparent heir's mortgage is a mortgage on the property of others or not, or whether

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42) JC of Cassation, Decision NO. 146, 2004, Panel, Qustas Publications.

43) Saad, op cit, p 74-75.

44) Tanago, op cit, p 191.

45) Zahran, op cit, p 371.

46) JC of Cassation, Decision NO. 2043, 2005, G Panel, Qustas Publications.

47) Hosni, Abddaem, Real Estate Credit between Islamic Law and Civil Law, Dar Alfikr Aljamee, Alexandria, 2007, P 132.

such mortgage is valid against the true owner or not. Therefore, the matter should be looked at the jurisprudence which took different views on the question concerned.

#### *Considering the Apparent Heir's Mortgage as a Mortgage on the Property of Others*

Some jurisprudence has argued that the *bona fide* mortgagee creditor cannot uphold to the mortgage concluded with the apparent heir against the true heir. They provide many reasons in justifying their position, most of that although the law adopted the principle of the protection of apparent situations in regard to apparent representation, it does not adopt the same principle in regard to the fulfillment of paying the debt with respect to the apparent debtor. So, the rule may not be applied to all cases that contain apparent situations<sup>(48)</sup>. They added that the acts of the apparent heir must not harm the true heir of the property<sup>(49)</sup>. Therefore, not taking into account the idea of protecting the apparent statutes means that the mortgage by the apparent heir is a mortgage for the property of others, and the validity of the contract is suspended upon the permission of the true heirs.

#### *Considering the Apparent Heir's Mortgage Valid and Enforceable*

Contrary to the previous position, the majority of jurisprudence<sup>(50)</sup> adopted the view that the mortgage by the apparent heir is valid and enforceable against the true heir. They based their position on the principles of protecting the apparent situations and protecting the interest of the creditor who acted with good faith, believing at the time of the conclusion of the mortgage that he dealt with the true heir. They also justify their view on the rule that says “the common mistake generates the right”, as it generates a collective mistake in the belief that the act of the apparent heir is legitimate. They said that this is simply an application of the theory of the apparent statute which has been established by jurisprudence and judiciary, in addition to the importance of the stability of transactions in the society<sup>(51)</sup>. This view, however, is a departure from the principle, since the effect of actions is limited to its parties, and that a person does not give more than he possesses<sup>(52)</sup>.

It seems to be right the rule that says the collective mistake generates right, which is in fact a judicial and jurisprudential principle based on the collective belief of all those dealing with the person. Relying on such principle is a matter of activating the legislative purpose of the laws, which find its basis in society. Hammam Zahran noted in this regard that: “Because the collective belief is the true source of law, and it is a sufficient source for establishing and transferring rights.”<sup>(53)</sup>. However, at the same time, it is not sufficient that the principle of collective mistake generates the right to prove the good faith of the mortgagee creditor. The collective mistake does not exclude the individual mistake which in this case does not replace the collective mistake. It is possible, and with the existence of collective mistake, the mortgagee creditor acts with bad faith and knows at the time of concluding the contract that he was dealing with the apparent heir, and therefore he cannot uphold the mortgage against the true heir.

real mortgage.

Another opinion of jurisprudence<sup>(54)</sup> added another condition to enable the creditor to uphold the mortgage done by the apparent heir, that the latter should have completed the official registration procedures at the Registration Authority Department, and that his right to inheritance has been declared according to Article (1148) of the civil code, which stated that: “*Ownership, nor other real rights, are transferred between the contracting parties, and in the right of others, except by registration in accordance with the provisions of the laws pertaining to it*”. However, this view can be challenged since Article (1086/1) of the same law provided that: “*The heir acquires through inheritance movables and immovables, and the rights that the inheritance contains*”, which was

<sup>48)</sup> Siwar, op cit, P 60.

<sup>49)</sup> Tanago, op cit, P 192.

<sup>50)</sup> Hamdan H Abdelatif, *Real Securities*, 2<sup>nd</sup> ed, Aldar Aljameia, Beirut, 1985, p. 165; Al-Sanhouri, *Personal, and Real Securities*, Part Ten, Al-Halabi Publications, Beirut - Lebanon, 2005, p. 310; Hosni, op cit, p. 133.

<sup>51)</sup> Zahran, op cit, P 373.

<sup>52)</sup> Hosni, op cit, P 132.

<sup>53)</sup> Zahran, op cit, P 373.

<sup>54)</sup> Ibid.

confirmed by the Jordanian Court of Cassation when stated that: “It is not a condition for proving the ownership of the heirs (defendants) to carry out the transfer process, and to obtain a deed of registration for their ownership, but only proving the ownership of the inherited or his share in the sold item and that the plaintiffs are the heirs because the heir acquires the title to the movable and immovable as well as the rights by inheritance, pursuant to Article 1086/1 of the Civil Code (Cassation No. 883/78 and 1531/2000)...”<sup>(55)</sup>.

#### *Position of Judiciary*

The Jordanian Court of Cassation tended to adopt the principle that protecting the apparent situations and the stability of transactions in the society. The court considered in its rulings that the mortgage by the apparent heir is a valid mortgage. More recently, the high authority of the same Court (<sup>56</sup>) ruled the same in a case concerning an act of sale concluded by the apparent heir, which can be analogous to the security mortgage since both legal acts concern an act of exchange with respect to the property. The court declared that: “The rights of the heirs are established as soon as the inheritor dies, and the evidence of defining the inheritance issued to the heirs is revealing, but not establishing of those rights, so the plaintiff is not an heir, and she has no rights in the heritage, and the actions that she carried out, which is the sale of (250) share of the Arab Bank shares, which was owned by the deceased...”. The Court also considered the apparent heir’s legal act as an act of disposal of the property of others. “They are acts occurred in respect to the property of others, but these actions took place while the evidence of limitation of inheritance was No. 53/107/26 valid, and before issuance of the judgment annulling it, and correcting the names of the real heirs, ... which necessitates that its sale be considered the sale of the apparent heir if it is, in reality, a sale of the property of others, because the apparent heir does not own the thing sold...”

When it is discovered that the apparent heir has disposed of a property that he does not have the right to dispose of, it is considered to be a disposal of the property of others. Therefore, in principle, the validity of such disposal depends on the approval of the true owner. Contrary to this view the court adopted another opinion based on the principles of justice, stability of transactions, good faith, and the protection of apparent situations. In its ruling, the court stated that: “... However, there are considerations necessitated by justice, and the stability of transactions in society that make the sale of the apparent heir valid and enforceable against the real heir, and then the purchaser owns the sold property in application of the general rules referred to in Article (114) and Article (1189/1) of the Jordanian Civil Code (<sup>57</sup>), as the contract of transfer and sale of shares is the subject of the case from the first plaintiff to the sixth defendant during the establishment of the inheritance evidence, which was subsequently invalidated, and since the sixth contracting party was in good faith because she believed in receiving the ownership of the shares from their true owner, who was carrying evidence of limitation of inheritance issued by a competent Sharia court, and since the two contracting parties were ignorant at the time of concluding the contract that the evidence of limitation of inheritance by which the plaintiff sale the shares subject of the lawsuit to the sixth defendant was incorrect, and the plaintiff party did not provide any evidence to prove otherwise, and since the contract concluded between the first defendant and the sixth defendant was done in exchange for compensation, and not as a donation...”, and therefore the disposition issued by the heir was considered valid and enforceable against the true heir, as it was stated in the decision: “... What is based on that is that the aforementioned sale contract is a valid and enforceable contract against the true heirs, and then the purchaser – the defendant owns the sold, and the plaintiffs may not- the true heirs - to recover the sold shares, but rather to ask the seller for the value of the shares that she sold.” Therefore, the court decided, in conclusion, to consider the behavior of the apparent heir correct and enforceable. This was repeated in many decisions of the Jordanian Court of Cassation and became an established principle in Jordanian jurisprudence since it is a well-established principle in Jordanian judiciary and practice. In another decision

<sup>55</sup>) JC of Cassation, Decision No. 2446, 2008, 5<sup>th</sup> Panel, Kestas Publications.

<sup>56</sup>) JC of Cassation, Decision No. 2043, 2004, P Panel, Kestas Publications.

<sup>57</sup>) Article 114 of the Jordanian Civil Code stated that: If the representative and the person who contracted with him were both ignorant at the time of concluding the contract of the termination of the representation, then the effect of the contract concluded by him is added to the principal or his successors. Article (1189) stipulates 1- A claim of ownership shall not be heard against a person who possesses a movable property or a right in rem over a movable property or a deed to its bearer and his possession is based on a valid reason and in good faith., 2- Possession by itself is a presumption of ownership unless otherwise proven”.

of the high authority, it has been maintained that: “The rights of the heirs are established as soon as the inherited dies, and that evidence of limiting the inheritance reveals the right and does not establish it, and that the right of the true heirs against the apparent heir is not limited only to the claim of invalidity on the assumption of proof... And that the apparent heir disposes of his rights to a true heir, and based on the official documents that he possesses, and for considerations necessitated by justice and the stability of transactions in society, he is considered a representative of the true heir in according to Article (114) of the civil law, and his actions are correct and enforceable against the true heir, and thus the passage of time that prevents hearing the claim for invalidity stipulated in Article ( 168/3) of the civil law is valid in respect to the case”<sup>(58)</sup>. In another ruling, the court stated: “The principle in contracts is that they are not enforced except for the contracting parties, and the right holder is not bound by the actions of others regarding this right, the law recognized the apparent status in Article (114) of the civil law taking into account considerations arising from justice and the stability of transactions. This means that if the owner of the right has contributed by his mistake, negatively or positively, to the appearance of the apparent owner as the true one, which prompts the others with good faith to contract with him upon surrounding circumstances which would generate the common belief that this appearance corresponds to the truth, and it is based on that the enforcement of the concluded act between the apparent owner and the others with good faith in confronting the true owner on the grounds of the theory of apparent agency that was formulated by the judiciary, and supported by jurisprudence”<sup>(59)</sup>.

The second opinion of jurisprudence, along with what was maintained by the Jordanian Court of Cassation, is the approach that deserves support because it was based on aspects of justice that require the protection of others with good faith.

The mortgagee creditor whose interest is only to guarantee the indebtedness formed between him and the debtor should not be deprived of this guarantee for a reason beyond his control. In this case, the harm that may be inflicted on him is more than the harm that may be suffered by the true owner of the property. In addition, the appearance of ownership should be looked at as a problem only between the apparent owner, and its impacts should not affect others. Therefore, the mortgage issued by the apparent heir must be considered valid and enforceable against the true owner, and it does not depend on his approval as the same as a mortgage on the property of others in its normal way as previously explained. This view may be justified on the basis that the apparent situation is not a problem confined to the creditor alone, but rather a problem pertaining to the public interest. It is possible that the apparent status of someone as an owner of a property is visible to a wide segment of the *bona fide* society. In this case, priority should be given to the public interest over the private interest of the true owner.

#### *The Security Mortgage Concluded by the Fictitious Owner*

Fictitiousness in contracting means the existence of two contracts between two parties; while the hidden contract which is real does not appear to others and remains confined to its parties, the fictitious contract is revealed by its parties to others, and they rely on it in their legal acts and dealings<sup>(60)</sup> - this is fictitiousness in its relative form, but not absolute, as we will explain later - It is not necessary for fictitiousness that the two contracting parties intend to hide the real contract to harm the creditors. It is enough for the fictitiousness in contracting to exist the existence of two contracts, one is real and the other is hidden, which differ either in terms, elements, and conditions, or nature, like the price, for example, in the sale, in addition to the existence of a temporal or mental correlation between the two contracts. Moreover, for the fictitiousness to exist the real contract must be hidden, and the fictitious one shown to others<sup>(61)</sup>.

<sup>58</sup>) JC of Cassation, Decision No. 1783, 2016, P Panel, Kestas Publications.

<sup>59</sup>) JC of Cassation, Decision No. 1177, 1996, 5<sup>th</sup> Panel, Kestas Publications.

<sup>60</sup>) Al-Sanhori, Abd al-Razzaq, Al -Wasit in Explanation of Civil Law, General Theory of Obligation, Evidence, Effects of Obligation, Al-Halabi Publications, Part Two, Beirut - Lebanon, 2005, p. 1077

<sup>61</sup>) Mental coherence: that the will of the two parties when concluding the real contract tends to a fictitious one, see in detail at Sultan Anwar, Rulings of Commitment, (The Brief in the General Theory of Commitment), Beirut - Lebanon, 1980, p. 152.

A person may own property under a fictitious contract and conclude a security mortgage on the property of someone else who does not know at the time of concluding the mortgage of the contract was fictitious upon which the ownership of the property has been transferred to the mortgagor. Since there are provisions regulating this issue, it is important to search certain questions relating to the legislative protection as well as the balance of interests between the parties of the real contract, and between the parties of the fictitious contract with regard to Others, in addition, determining which of the two said contracts (real or hidden), that the mortgagee creditor can hold on to it.

There are many forms of fictitious contracts that have been recognized by both jurisprudence (62) and judiciary (63). These forms are:

1. Absolute fictitiousness which concerns the whole contract in terms of its actual existence. In this case, the two contracting parties fabricate an unreal appearance of the existence of the fictitious contract, like someone who wants to keep his monies away from creditors by transferring its ownership to his wife (64).
2. Relative fictitiousness which is unlike the absolute one, and which concerns only certain aspects of the contract rather than dealing with the entire aspects of the contract in terms of its existence in reality. (65). This type of fictitiousness is of a multi-format and has been divided by jurisprudence and the judiciary into many forms including by way of concealment, by way of counteraction (), and by way of harness (66).

Whatever the type of fictitiousness, it is important to define the legal status of each of the mortgagor and the mortgagee creditor, and define as well who has the right to cling to the fictitiousness, also it is not of less importance to investigate what are the options that the mortgagor possesses, and more than that to what extent does the law take the principle of protecting the apparent conditions into account in the case of the mortgage by the owner with a fictitious document. All these issues will be under consideration as follows;

#### *The Right to Uphold to Fictitious Contract*

The existence of the mortgage by the owner upon a fictitious document suggests that there are three parties involved; the mortgagor, the person contracted with him, and the mortgagee creditor (the Other) (67). Upon this picture, it is necessary to determine who has the right to cling to the fictitious contract, and what are the conditions for claiming such right.

With regard to the question of who has the right to uphold to fictitious contract? Article (368/1) of the Jordanian Civil Code declared that the Others are entitled to such right: *"If a fictitious contract has been concluded, creditors of the contracting parties and particular successors in title, may, if they are with good faith, avail themselves of the hidden contract and establish, by any means, the simulation of the contract by which they were prejudiced"*. The creditors of the two contracting parties and the special successor for each of them are considered among the Others. The mortgagee creditor is considered to be a special successor as the term (special successor) means everyone who succeeds the predecessor in a *right in rim* over a specific thing or in the ownership of something (68). Therefore, in the case of a mortgage done by the owner with a fictitious deed, the mortgagee creditor is entitled to benefit from the right to uphold the fictitious contract upon which the ownership of

62) For more details See. Al-Shawarbi Abdel-Hamid; Al-Danasouri Izz al-Din, simulation in the Light of Jurisprudence and the Judiciary, fifth edition, No published, p. 22.

63) JC of Cassation, Decision No. 3593 of 2006, 5<sup>th</sup> Panel, Kestas Publications said: "...considering a fictitious contract necessitates the existence of another real, concealed contract that the two contracting parties conceal because the fictitious has multiple forms, including jurisprudence, and the fictitious one. Absolute and formal in the way of concealment, and formal in the way of counteraction, and formal in the way of harnessing" See Al-Sanhouri, op cit, PP. 1074 and 1075.

64) JC of Cassation Decision No. 3593 of 2006: "...the absolute fictitiousness, which deals with the existence of the contract itself, so the apparent contract does not exist in reality, and the like – a person wants to prevent his creditors from executing on something he owns, so he sells This thing is a fictitious sale to a person who agrees"

65) Al-Halalsha Abd al-Rahman, Al-Wajeez in Explanation of the Jordanian Civil Law, The Effects of the Personal Right - Provisions of Commitment, Dar Wael for Publishing and Distribution, Amman, 2006, p. 159.

66) *Ibid*,

67) The creditor is the special successor of the owner over the mortgaged assets, and the use of the term Others is only for clarifying the idea.

68) For more details on the concept of the special successor, and its influence on the actions of the predecessors see Al-Saadi Muhammad Sabri, Al-Wadeh in Explanation of Civil Law, General Theory of Obligations, Contract and Individual Will, Algeria, 2012, p. 325

the property has been transferred to the mortgagor. It is possible for the mortgagee creditor to invoke the fictitiousness of the contract between the mortgagor and the person from whom the ownership of the property is transferred to the mortgagor, upon the following conditions:

First: The existence of two contracts (true and fictitious). the true contract represents the true will of its parties, and the other contract which is fictitious represents the untrue will of the parties that appears to all contracting parties.

Second: Registration of the mortgage contract by the mortgagee creditor, and the registration of the fictitious contract. It is very well-established that the legal acts on properties require certain formalities. The legal act must be publicized (published) on the property sheet at the competent registration department, otherwise, such concluded acts would be invalid. These required formal conditions have to be obtained in order for the mortgagee creditor to invoke fictitiousness. Such formal conditions are:

1. If the mortgagee creditor wants to uphold the fictitiousness of the contract, the mortgage must be registered at the registration department. Failure to do so means that the right to a mortgage does not exist in the first place, and therefore the mortgagee creditor has no legal status.
2. A fictitiousness of the contract assumes the existence of two contracts, and the fictitious contract must have been registered and become effective. Otherwise, the fictitious contract will be treated as non-existent, without any legal significance, and have no effect, since what is built on falsehood is void.

Third: Registration of the mortgage should be subsequent to the registration of the fictitious contract, and prior to the registration of the true contract. As long as the registration of the true contract necessarily means the absence of the good faith of the mortgagee creditor. By comparison, the registration of the true contract means a creation of a new situation that is visible to the public. The wisdom behind enabling the mortgagor to stick to the fictitiousness is his reassurance based on the state of the property.

Fourth: Good faith of the mortgagee: that is, he believes- contrary to the fact- and in good faith, that he has received a mortgage from a true owner, or that he believes-contrary to the fact- that the ownership of the property has transferred as stated in the fictitious contract. It is sufficient for the existence of good faith that he did not know that there is a true contract existed, contrary to the one on which the mortgage was built with the mortgagor. The law was aware of such situations to protect the legitimate confidence from the apparent conditions that the mortgagee creditor reassured to conclude the mortgage with the mortgagor debtor. In this context Article (368/1) clearly provided that:

*"If a fictitious contract has been concluded, creditors of the contracting parties and particular successors in title, may, if they are with good faith, avail themselves of the hidden contract and establish, by any means, the simulation of the contract by which they were prejudiced."* By contrast, when the mortgagee creditor is with bad faith, he has no right to avail himself of the fictitious contract, but only the true one <sup>(69)</sup>. Dr. Al-Sanhouri <sup>(70)</sup> presented an example of such a situation assuming that the property has been mortgaged after the sale contract has been registered., and then it was sold to another person by virtue of a fictitious contract. The mortgagee creditor, in this case, has the right to uphold (invoke) the true contract on which his mortgage was based. The subsequent contract has no effect against him if he proves its fictitiousness.

The good faith of the mortgagee creditor should be considered at the time of concluding the mortgage, not after the publicity and registration of the real contract. In the latter case, the mortgagee creditor should have known the status of the property at the time of concluding the mortgage, and the validity of the true contract with respect to time <sup>(71)</sup>. Al-Sanhouri <sup>(72)</sup> maintained a contrary position to this opinion noting that: "All of these have the right to uphold to the apparent contract, so the real right (*right in the rim*) is considered to have been transferred to them from the seller..", and he added in the footnote No. (2) of his book that: "Even though the contract concealed one was publicized a month before they are publicizing

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<sup>69)</sup> See above on the mortgage of the apparent heir in terms of protecting the apparent conditions

<sup>70)</sup> Al Sanhori, Real and Personal Securities, op cit, P 1098.

<sup>71)</sup> Zahran, op cit, P 368.

<sup>72)</sup> Al-Sanhori, Real and Personal Securities, op cit, P 1101.



their real right, as long as they proved that they were knowing nothing of the existence of the hidden contract at the time of their dealings with the apparent buyer, despite of its being publicized ...”.

Taking into account the different views about this matter, the registration of the mortgage contract in the property’s journal necessarily assumed the bad faith of the mortgagee creditor who concluded the contract. Initially, the mortgagee creditor must exercise a certain degree of caution and care as that exercised by the normal one. He is supposed to search for what was recorded in the property’s journal. In view of the content of the indebtedness and the conclusion of the mortgage, it is necessary for him to ascertain and inquire about the security degree that the property has and the strength of its guarantee for the indebtedness. Therefore, the registration of the true contract before the registration of the mortgage necessarily indicates the bad faith of the mortgagee creditor.

Fifth: The completion of settlement in regard to the property that has documented registration deeds.

The fourth condition relates to properties that have not been settled. As for the immovable assets that have been settled and documented with registration deeds Article Five of the law concerning the disposal of immutabilities<sup>(73)</sup> stated that: “...*lawsuits of pseudonymity in property, and all other immovable funds with authenticated registration deeds shall not be heard.*”. The law prohibited fictitious lawsuits and pseudonyms formed on registered properties. The law viewed that registered properties are not disputable on the basis of fictitiousness and pseudonyms. The claim of fictitiousness in this regard is useless, and it must be rejected. This supports what was mentioned in the third condition that required the registration date of the mortgage should be prior to the date of ownership registration upon the true contract, and subsequent to the registration of the fictitious contract.

#### *Options of the Mortgagee Creditor When the Fictitiousness is Proven*

When the conditions of fictitiousness are obtained in respect to the mortgage on which was based, and when the right of the mortgagee creditor to uphold fictitiousness is established, his options stated by law in Article (368), which stated that:

“1- *If a fictitious contract has been concluded, creditors of the contracting parties and particular successors in title, may, if they are with good faith, avail themselves of the hidden contract and establish, by any means, the simulation of the contract by which they were prejudiced.* 2- *In the case of a conflict of interest between interested parties, some of whom rely upon the fictitious contract and others on the hidden contract, the former shall have preference* “. That is, the mortgagee creditor has two options, either to avail himself of the fictitious contract and then the contract that will be valid against him is the apparent contract on which his mortgage was built, with its all elements and conditions. The other option for the mortgagee creditor is that he can uphold the true contract that the two contracting parties covered up (the mortgagor and the one whom the property was transferred), as it is the contract that represents the true will of the contracting parties. Proving the fictitiousness of the contract may be by all means such as testimony for example even if the fictitious contract was written, since the fictitiousness in relation to others is a material fact rather than a legal act<sup>(74)</sup>. This was confirmed by the Jordanian Court of Cassation stating that: “The legislator has made the choice for the *bona fide* discerning person between upholding the apparent contract or upholding the hidden contract when the fictitiousness is proved in accordance with Article 368/1 of the Civil Code”.<sup>(75)</sup>

As a result, if a *bona fide* person mortgaged a property from the apparent owner with a fictitious deed or document, the mortgage is valid, and the mortgagee creditor may hold on to this mortgage. It is not possible to apply the general rule in mortgaging the property of others, despite the possibility that the mortgaged debtor does not own the mortgaged property. The rules of good faith and the protection of the apparent situations make it a valid and enforceable mortgage against both, the apparent owner and the true owner of the property<sup>(76)</sup>.

<sup>73)</sup> Law concerning the disposal of immovable funds (Jordanian) No. 49 of 1953, Official Gazette No. 1135, page 577

<sup>74)</sup> Al-Sanhori, Real and Personal Securities, op cit, P 1114

<sup>75)</sup> J C of Cassation, Decision No. 4062, 2013, 5<sup>th</sup> Panel, Kestas Publications.

<sup>76)</sup> Sharif, op cit, P 136.

In addition, in the event that the mortgagee creditor concluded a mortgage with the apparent owner upon a fictitious document or deed, and at the same time the true owner concluded a mortgage with another person on the same property, the preference here would be given to the mortgagee creditor if he upholds to the fictitiousness of the contract and left behind the true one, this is in accordance with Article ( 368/2) which clearly declared that: “ *In the case of a conflict of interest between interested parties, some of whom rely upon the ostensible contract and others on the hidden contract, the former shall have a preference*” (77). Egyptian law has the same position as Jordanian law in this issue ( 78). It is worth noting in this regard that the text of Article (368) of the Jordanian civil law is typically the same as that of Article (244) of the Egyptian Civil Code, which states: “*1- If a simulated contract has been drowned up, creditors of the contracting parties and particular successors in title, may, if they are with good faith, avail themselves of the hidden contract and establish, by any means, the simulation of the contract by which they were prejudiced. 2- In the case of a conflict of interest between interested parties, some of whom rely upon the ostensible contract and others on the hidden contract, the former shall have preference.* “. Therefore, there is no need for comparison between the laws as long as they are of the same position in regard to the issue concerned.

## Conclusion

This study was carried out and based on those hypotheses in which the property that is not owned by the debtor can be the subject of a security mortgage, despite the absence of the indebtedness relationship between the owner of the property and the creditor. However, in exploring the depths of such exceptional hypotheses, certain results of this study have been reached followed by some recommendations that might be useful to be noted in revising the legislations regulating the security mortgage.

### *First: Results*

1. When concluding a security mortgage, the law requires that the mortgagor should be the owner of the mortgaged property. In the case of the absence of such a condition, the mortgage would be considered to be concluded on the property of others as a general rule, and therefore its effectiveness shall be dependent thereof upon the ratification of the true owner of the mortgaged property.
2. The security mortgage whose title to property is expected may be void if its subject was on a future property, and it may be also suspended if the ownership of the property is dependent on the obtaining of a certain condition.
3. The Jordanian law did not address the retroactive cessation of the mortgagor's ownership of the mortgaged property, unlike the Egyptian law which kept the mortgage in place despite the retroactive cessation of the ownership of the property, and considered it a mortgage on the property of others.
4. The fate of the security mortgage on constructions or buildings that were built on the land of others, is affected by the fate of the ownership of these buildings, and this is depending on the good or bad faith of the builder, and also on the options available to the landowner either to own or remove the buildings or for the builder to own them.
5. The security mortgage by the mortgagor's agent is considered valid as long as the agency is valid, and the security mortgage is considered to be on the property of others if it was based on an invalid agency so the agent then would have no authority or jurisdiction derived from the principal to conclude the security mortgage.
6. it seems to be right the view adopted by jurisprudence and judiciary that considering the security mortgage by the apparent owner, whether it is an apparent heir or an owner with a fictitious deed, as a valid and effective mortgage against the true owner, and it is not dependent on his approval. This is for the protection of the apparent situations as well as the *bona fide* of the mortgage creditor.

### *Second: Recommendations*

1. First: Hoping that the Jordanian legislator adopts a provision that keeps the mortgage valid in the event of the mortgagor's title to the property being retroactively ceased, the same as the

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<sup>77)</sup> Hosni, op cit, p 134.

<sup>78)</sup> With the acknowledgment that the position of the legislators does not agree on the value of the form in the structure of the mortgage if the official writing of the mortgage is a condition for contracting for its establishment under Jordanian law so that it becomes null if this writing is left behind, then the official writing of the Egyptian law performs the function of publicity and not the contracting, so that the mortgage is based It is valid even if it is not officially registered, but rather it requires writing to be invoked before others.

position of Egyptian civil law stated in its article (1034). The proposed provision would be: “*A mortgage constituted by an owner whose title to the property is subsequently ceased to exist for any reason, remains a valid mortgage in favor of the mortgagee creditor if has acted in good faith at the time of the conclusion of the mortgage*”.

2. Hoping that the Jordanian legislator adopts a special text that deals with the case of mortgaging buildings built on the land of others with the bad faith of the builder, in the case that the owner of the land requests its removal. A paragraph proposed to be added to the text of Article (1140) of the Civil Code might become as follows: “*2. If the landowner asked that the new constructions have to be removed, the mortgagee creditor has the right to demand that his debt must be immediately paid, or a sufficient guarantee must be provided for his debt*”.
3. Hoping that the Jordanian legislator clarifies its position on the transfer of the security mortgage to the divided part that falls into the share of the mortgagor partner outside the mortgaged property. It is proposed that the text of Article (1331/1) states” *“the partner in co-owners of the immovable held in common can conclude a mortgage on his portion, and the mortgage, after partition, turns into the defined portion that falls into his share, taking into account its registration at the registration department.”* has to be amended by adding the following paragraph to become as follows:
  - a) the partner in co-owners of the immovable held in common can conclude a mortgage on his portion, and the mortgage, after partition, turns into the defined portion that falls into his share, subject to its registration at the registration department.
  - b) If a part other than the immovable held in common, as a result of the partition falls into his share, the mortgage, with its degree of priority, shall be transferred to him following the partition with equivalent value to the value of the mortgage.
  - c) Allocating the amounts due to him from the equivalent of the shares, or the price of the property, to pay off the mortgage debt.

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