

# Legal Provisions Governing Security Mortgages by Apparent Owners of Third-Party Real Estate

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**Abstract:** This article explores the legal and practical implications of a security mortgage created by an apparent owner (mortgagor) over property that they do not legally own. It focuses on cases where the mortgagor claims ownership of the mortgaged property, either by presenting themselves as the rightful owner or through a false assertion of ownership. The discussion aims to examine the legal framework surrounding such situations, the challenges they present, and potential solutions for resolving disputes arising from these cases.

An apparent owner is someone who, contrary to the truth, presents themselves to the public as the true owner of the property, leading others to believe this and engage with them as if they were the rightful owner. In principle, a mortgage established by an apparent owner should be considered a mortgage on someone else's property since they are not the true owner. However, because others interact with them in good faith, believing they are dealing with the true owner, the law addresses this issue with specific provisions aimed at protecting these individuals, based on the principle of safeguarding apparent situations and good faith. two important issues will be under consideration as follows.

## THE SECURITY MORTGAGE BY THE APPARENT OWNER

An apparent owner is a person that is not the true one but appears to people as such (Tanago,1996:191), thinking that the property has been transferred to him as the true legal owner, and this remains until the true owner of the property appears, who returns to recover his property from the apparent owner (Zahran,2001:371). The apparent owner 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 owner 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 owner is considered to be valid and enforceable against the true owner, and then the purchaser has the right to take possession of the sold "(<sup>1</sup>). However, the questions relating to the extent to which the mortgage by the apparent owner 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 Owner 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 owner 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 owner (Hosni,2007:132).

Neither the position of the civil law of Jordan nor that of Egypt was clear regarding this matter. To explain, whether the apparent owner's mortgage is a mortgage on the property of others or not, or whether 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 Owner'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 owner against the true owner. They provide many reasons in justifying towner 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 (Suwar,1995:60). They added that the acts of the apparent owner must not harm the true owner of the property (Tanago,1996:192).Therefore, not taking into account the idea of protecting the apparent statutes means that the mortgage by the apparent owner is a mortgage for the property of others, and the validity of the contract is suspended upon the permission of the true owners.

#### Considering the Apparent Owner's Mortgage Valid and Enforceable

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<sup>1</sup> JC of Cassation, Decision NO. 2043, 2005, G Panel, Qustas Publications.

Contrary to the previous position, most of the jurisprudence (Hamdan,1985: 165 & Al-Sanhouri,2005:310) adopted the view that the mortgage by the apparent owner is valid and enforceable against the true owner. They based towner 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 owner. They also justify towner 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 owner 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 society (Zahran,2001:373). 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 (Hosni,2007:132).

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.” (Zahran,2001:373). 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 owner, and therefore he cannot uphold the mortgage against the true owner.

real mortgage.

Another opinion of jurisprudence added another condition to enable the creditor to uphold the mortgage done by the apparent owner, that the latter should have completed the official registration procedures at the Registration Authority Department(Zahran,2001:373), 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 owner acquires through inheritance movables and immovables, and the rights that the inheritance contains”, which was confirmed by the Jordanian Court of Cassation when stated that: “It is not a condition for proving the ownership of the owners (defendants) to carry out the transfer process, and to obtain a deed of registration for towner ownership, but only proving the ownership of the inherited or his share in the sold item and that the plaintiffs are the owners

because the owner 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)...”(2).

#### 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 owner is a valid mortgage. More recently, the high authority of the same Court (3) ruled the same in a case concerning an act of sale concluded by the apparent owner, 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 owners are established as soon as the inheritor dies, and the evidence of defining the inheritance issued to the owners is revealing, but not establishing of those rights, so the plaintiff is not an owner, 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 owner’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 owners, ... which necessitates that its sale be considered the sale of the apparent owner if it is, in reality, a sale of the property of others, because the apparent owner does not own the thing sold...”

When it is discovered that the apparent owner 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 owner valid and enforceable against the real owner, 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 (4), 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

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<sup>2</sup> JC of Cassation, Decision No. 2446, 2008, 5th Panel, Kestas Publications.

<sup>3</sup> JC of Cassation, Decision No. 2043, 2004, P Panel, Kestas Publications.

<sup>4</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”.

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 towners 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 sold 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 owner was considered valid and enforceable against the true owner, 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 owners, and then the purchaser - the defendant owns the sold, and the plaintiffs may not- the true owners - 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 owner 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 of the high authority, it has been maintained that: "The rights of the owners 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 owners against the apparent owner is not limited only to the claim of invalidity on the assumption of proof... And that the apparent owner disposes of his rights to a true owner, 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 owner in according to Article (114) of the civil law, and his actions are correct and enforceable against the true owner, 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>(5)</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

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<sup>5</sup> JC of Cassation, Decision No. 1783, 2016, P Panel, Kestas Publications.

apparent agency that was formulated by the judiciary, and supported by jurisprudence”<sup>(6)</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 owner 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 towner legal acts and dealings (Al-Sanhori,2005:1031) - 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 (Sultan,1980: 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

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<sup>6</sup> JC of Cassation, Decision No. 1177, 1996, 5th Panel, Kestas Publications.

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 (Al-Shawarbi & Al-Danasouri, 2002:22) and judiciary (<sup>7</sup>). 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 (<sup>8</sup>).

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 (Al-Halalsha, 2006:159). 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 (Halalsha, 2006: 159-161).

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) (<sup>9</sup>). 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,

<sup>7</sup> JC of Cassation, Decision No. 3593 of 2006, 5th 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".

<sup>8</sup> 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"

<sup>9</sup> 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.

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 rem over a specific thing or in the ownership of something (Al-Saadi, 2012:325). 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 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. Dr. Al-Sanhori 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 on him if he proves its fictitiousness. (Al-Sanhori,2005: 1089).

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 (Zahran,2001:368). Al-Sanhori 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 .."( Al-Sanhori,2005:1101), 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 townner real right, as long as they proved that they were knowing nothing of the existence of the hidden contract at the time of townner 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>(10)</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 (Al-Sanhori,2005: 1114). 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>(11)</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

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<sup>10</sup> Law concerning the disposal of immovable funds (Jordanian) No. 49 of 1953, Official Gazette No. 1135, page 577

<sup>11</sup> J C of Cassation, Decision No. 4062, 2013, 5th Panel, Kestas Publications.

enforceable mortgage against both, the apparent owner and the true owner of the property (Sharif,2012: 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” (Hosni,2007:134). Egyptian law has the same position as Jordanian law in this issue (<sup>12</sup>). 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.

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<sup>12</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.

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 owner 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 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.

## REFERENCES

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