

The promise of mortgage in the Jordanian civil law

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Abstract:

The researcher dealt with the subject of the promise of mortgage, and the most important conditions that must be met in order for us to be in front of a promise of mortgage that fulfill all the legal conditions in the first requirement of the research were discussed, then to talk about the most important implications of the promise of mortgage in the second requirement of this research. The problem of the research lies in clarifying the adequacy of the legal texts regulating the provisions of the mortgage, so that the legislator did not deal with the issue of the promise of the mortgage within these rules, and on the other hand, the statement of the extent to which the general rules related to the promise to contract on the promise of mortgage can be dropped. The researcher followed the descriptive analytical approach to answer the problem posed in the research by describing the problem under study and analyzing the legal texts regulating the subject using jurisprudence opinions and jurisprudence of the courts.

Keywords: General conditions of contracting, registration of a promise by mortgage, reversal of the promise, possession mortgage, insurance mortgage, real estate property law.

Introduction:

In the Jordanian civil law, the Jordanian legislator organized several means to enable the mortgagor to guarantee his right to the debtor, as these means were many and varied. Mortgage is one of the most important of these means that the legislator dealt with in the provisions of the Civil Code and the Real Estate Ownership Law, but in practice, a person may be a person and a person may need to mortgage his money to another person, but not at that time but at another time. In order to reinforce this matter, one of the parties may resort to the so-called promise of the mortgage, which was not addressed by the Jordanian legislator in particular related to the mortgage within the legal provisions regulating the mortgage.

Since the legal texts read a single unit, and with reference to the rule of the special, the general is restricted. Referring to the general rules in civil law in particular to the topic "Promise to contract", we will examine in this paper the possibility of overriding the general rules related to the promise of contracting to the promise of a

pledge, given that the pledge is essentially a contract. Accordingly, the researcher in this research will address the conditions of the promise of the mortgage by dropping the general rules related to the promise of contracting the promise of the mortgage, and then stating the most important effects of the promise of the mortgage, each in a separate request

The importance of the research lies in that the mortgage is one of the most important means by which the creditor preserves his right with the debtor, but the debtor may resort to the promise of the mortgage in some cases. Since the Jordanian legislator did not deal with the issue of the promise of the mortgage within the special rules regulating the mortgage, it was necessary to research this subject.

This research aims at several things:

1. Indicate the extent to which the general rules relating to the promise by contracting the promise of the mortgage can be waived.
2. Statement of the promise terms of the mortgage.
3. Statement of the implications of the promise of the mortgage.

Research problem:

The problem of the research centers on the adequacy of the legal texts regulating the provisions of the mortgage, so that the legislator did not address the issue of the promise of the mortgage within these rules.

1. What is meant by a mortgage promise?
2. What are the terms to promise the mortgage?
3. What are the implications of a promise of a mortgage?
4. To what extent can the general rules relating to a promise by contracting a promise be waived?

Search divisions:

The first requirement: the terms of the promise of the mortgage.

Section one: general conditions of contract.

Subsection Two: Determining all the essential issues of the final contract.

Section Three: Specify the duration of the promise.

Section Four: formality.

The second requirement: Raise the promise of the mortgage

Section one: The effect of the promise before expressing the desire to contract

Section Two: I want to promise after expressing the desire to contract.

Section Three: the promise of the promise to refuse to conclude the final contract.

The first requirement

Terms of mortgage promise

The legislator did not specifically address the issue of the pledge, that is, through a special provision regulating this process. And since the legal texts read as one unit, we will refer to the general rules of promise in the contract, considering that the mortgage is originally a contract. Therefore, in this requirement, we will talk about the conditions necessary to fulfill the promise of the contract and drop it on the promise of the

mortgage. The duration of the promise and then the formality, so that we will talk about these terms each in a separate section.

First section

General terms of contract

As mentioned earlier, the legislator did not address the issue of the promise of the mortgage, but by dropping the general rules relating to the promise of contracting the promise of the mortgage, we find that it is possible to make a promise of the mortgage. In this section, we will talk about the first conditions of the promise to contract, which is the correct contract, and then drop this condition on the promise of the mortgage. Accordingly, it is understood from the definition of a valid contract that it is a contract complete with conditions and elements, and it is a contract that arose out of consent, then on the place and the reason correctly (1). It is stated in this proposition that according to the provisions of the valid contract in the Jordanian law that there are several conditions for the contract to be considered valid, perhaps Its basis is that the contract has been concluded in a valid agreement in all the elements of this consent and in a valid place in accordance with the conditions specified for it in the law.

It is clear from the foregoing that what distinguishes a valid contract from a void contract is the legality of its place and cause, and that the other ranks of the contract in the Jordanian civil law are other than the invalid contract, even if it is marred by defects that affect part of it, such as the corrupt contract or its expiry, such as the suspended contract. For a valid contract, where the element of mutual consent is the basis and foundation of the contract, and the civil law defines the element of mutual consent in the text of Article 90, and the text of the article is as follows: “The contract is concluded as soon as the offer is linked to acceptance, taking into account what the law determines above that of certain conditions for the conclusion of the contract” (2).

The offer is defined as “and an aspect of jurisprudence (3) defines the offer as “an expression issued by one of the contracting parties that contains all the essential elements of the contract expressing his desire to contract with the person to whom it was addressed.” It is also known as “the final, definitive, definitive expression that indicates the offeror’s desire to contract with the obligee in a manner that proves its effect on the contracted by any means, whether verbal, written, or electronic” (4).

As for acceptance, a part of jurisprudence (5) defines it as “the definitive expression of the will, and it is issued by the one to whom the offer is made, and if it matches the offer, the contract will be concluded.”

It should be noted in this regard that the contract must be binding, and liability cannot be established without an obligation (6).

By dropping this command on the promise of the mortgage, in the field of compromise, the contract is required to be issued by someone who is qualified to contract by both parties, whether from the point of view of the mortgagee creditor or the current debtor. This is because the mortgage contract is considered a revolving contract between benefit and harm in principle, and it requires the person from whom the

disposition is issued to be distinct, otherwise the disposition is subject to enforcement on the permission of the guardian or trustee or on the leave of the young when he reaches (7).

It should be noted in this regard that the guarantor in kind considers the mortgage contract for him to be a purely harmful act, but if he has taken compensation from the one who guaranteed him, it is considered in this case a disposition between benefit and harm (8).

Referring to the text of Article 1324 of the Jordanian Civil Code, it is permissible for “the mortgagor to be the same as the debtor or a real guarantor who presents a mortgage for his interest.” Accordingly, the researchers find that the real guarantor can make a promise of the mortgage according to the general rules.

By dropping this section on the Promise of the Mortgage and considering that the Promise of the Mortgage Contract must meet all the conditions that must be fulfilled in the Final Contract, the parties to the Promise of the Mortgage must be fully qualified for it. As we mentioned, the mortgage is considered an act between benefit and harm, so if it is issued by a non-distinguished boy, it is void. But if it is issued by a distinguished boy, the leave is suspended until he reaches the age of majority or on the authorization of the guardian or trustee, and if it is issued by a person who has reached the age of majority and his will is free from any defects (Forcing, deception, obscene injustice) and his capacity was free of symptoms (madness, foolishness, dementia) then his behavior was correct and if his will was defective or he was injured by one of the symptoms of eligibility, in this case each case takes its judgment according to the general rules.

With regard to the corner of the shop, the legislator stipulated several conditions in the shop in the mortgage contract, with a distinction between security mortgage and possession mortgage. Among the most important of these conditions are the following:

1. Regarding the subjectivity of the pledged money:

With regard to the insurance mortgage, the legislator stipulated that the mortgaged money be a real estate or a right in-kind real estate or movable subject to registration procedures, as the insurance mortgage is only returned to the money specified in the law. It is the real estate by its nature or any common share in it or the real estate right that may be sold in Public auction, for example (the right of surfaces, the right of usufruct separate from the ownership of the neck, the right of monopoly on buildings and plants that it creates on the monopolized land) (9). As for what is related to the possession mortgage, it responds to movables that do not require registration, and it may respond to real estate.

2. That the real estate is one that can be dealt with (10):

This is what was stated in the text of Article 1329 of the Civil Code (It is not permissible for a security mortgage to take place except on real estate in which it is valid to deal or a right in kind over the real estate).

For example, if there is a condition preventing the disposal of real estate and this condition is valid and completes all its conditions, then in this case it is not permissible to mortgage this property for several reasons, the most important of which are to prevent circumvention of the provisions of the law and the inability of the mortgagee creditor to implement on the money and take his right (11).

3. That the pledged money belongs to the mortgagor:

To begin with, it is not permissible to mortgage the property of others, because the person who loses the thing does not give it to him, except that in the mortgage contract, it may be imagined mortgaging the property of others, but in the context of possession mortgage in movables that do not require registration and the reason for the inability to mortgage the property of others as a security mortgage or a possession mortgage (in relation to the movable that requires Registration) that it is required to be registered before the notary public, so it cannot be imagined as a mortgage other than its owner.

We can say that it is not imagined that it is not possible to mortgage the property of others in an absolute way, but that it is envisaged with regard to mortgaging movables that do not require registration within the framework of the possession mortgage. In this case, the mortgagee creditor may adhere to the rule of possession of the movable title deed of the holder, and according to the general rules, the dispute is resolved by referring to the issue of the good or bad faith of the mortgagee creditor.

However, if the money was usurped, stolen or lost, the mortgagee creditor may not adhere to the rule of possession of the movable bond to the holder, even if it was in good faith, according to the text of Article 1190/1 of the Jordanian Civil Code (the owner of the movable or the bond to its bearer has the property if it was lost or stolen from him, or usurpation to recover it from whoever possessed it in good faith within three years from the date of its loss, theft or usurpation).

4. That the pledged money is present and present when the pledge is made:

Article 1328 of the Jordanian Civil Code states that (the mortgaged property must be an existing and existing security mortgage after making the mortgage), We note that this text is a departure from what was stated in the general rules that stipulate in Article 160/1 of the Jordanian Civil Code that “the future thing may be the subject of financial compensation if there is no ambiguity.”

The researcher believes in this that what the legislator has brought about the inadmissibility of mortgaging future money is correct. This is because if the mortgage may be received on a real estate or a movable property that requires a certain formality and does not exist on the ground, how can we register it in the competent department, and on the other hand, the debtor may fail to implement his obligation at any moment, so how can the creditor enforce the mortgaged money while he is not available to obtain his right.

5. The pledged money must be sufficiently specific:

Article 161/3 of the Jordanian Civil Code stipulated (if the place is not specified in the manner mentioned above, it is considered void) of the invalidity of the act in the event that the place has not been specified, denying outrageous ignorance, while in the

text of Article 1329/2 of the Jordanian Civil Code where the text of the article is as follows (The court may invalidate the insurance mortgage contract if the mortgaged property is not sufficiently specified) as it left the choice of the court to decide whether the contract is invalid or not.

Accordingly, the researchers believe that if any of the conditions of the pre-mentioned shop is breached, the corner of the shop is breached as a whole, and the contract is invalidated. Dropping this on to the promise of the mortgage, we find that the shop must be precisely specified in the absence of ignorance, and we talk about that in the third section of this requirement in some detail.

As for the corner of the reason in order for it to be valid and valid, it must fulfill several conditions, namely that the reason be legitimate and that it existed at the time of the contract (12).

By dropping this element on the mortgage contract, as we mentioned that the insurance mortgage is only returned to real estate or movables that require registration, which is achieved with the necessity of registering the insurance mortgage. This is what the new Real Estate Ownership Law stipulates in the text of Article 63, whereby it is obligatory to register any disposal that takes place on real estate, so that the text of the article is as follows: Registration is considered null and void. Any act, contract, or transaction conducted otherwise. Article 160/c of the Real Estate Ownership Law stipulates in particular the registration of a mortgage on a real estate, as it stipulates the following (a mortgage of real estate shall not take place unless it is registered with the Registration Directorate).

It is clear from the previous texts that the mortgage contract must be registered, whether it is an insurance mortgage or possession (if it is signed on real estate). Accordingly, it is evident from the previous texts in the Real Estate Ownership Law (13) that if a mortgage contract is made on a real estate, it must be registered under pain of nullity.

By dropping this section on the promise contract, since the promise of the mortgage is subject to the formality required by the mortgage contract, But if the security mortgage is on a movable that requires registration, for example a car, this promise must be registered with the competent department. But if the mortgage is on a movable, then its mortgage does not require the formality of registration, so there is no problem with that.

Second Section

It sets out all the essential issues of the final contract

The promise of the contract must include all matters essential to this contract so that form is important to the conclusion of the final contract as soon as the promise has expressed his desire to him without the need to agree on something else (14).

Therefore, if we are in front of a promise to contract on the subject of selling a car, for example, then the promise in the contract must include all the essential issues included in the final contract, such as the type and price of the car.

With regard to the promise of a mortgage and the dropping of the general rules on the promise of the mortgage, and with reference to the special provisions of the mortgage, we find that the legislator in the text of Article 1329/2 of the Civil Code “It is permissible for the court to annul the insurance mortgage contract if the mortgaged property is not sufficiently specified” obliged to specify the place precisely as stated in the text of the article.

Therefore, by dropping the general rules on the promise of the mortgage, we find that the promise of the mortgage must contain all the essential matters. This is by assigning the money promised to be pledged to us in ignorance according to the text of Article 105/1 of the Civil Code “The agreement by which both or one of the contracting parties undertakes to conclude a particular contract. In the future, it will not take place unless you specify all the essential issues of the contract to be concluded and the period for which it must be concluded.” All these are essential issues. We can say that this promise is valid if all other conditions are met.

Third Section

Set promise duration

The legislator went in the text of Article 105/1 of the Civil Code, “An agreement under which both contracting parties or one of them undertake to conclude a specific contract in the future shall not be concluded unless all the essential issues of the contract to be concluded and the period for which it must be concluded are specified.” Until the promise of the contract must be specified and the one who is promised must express his desire to contract during this period, and as stated in the text of Article 105/1 of the Civil Code. .

The researchers believe that leaving the determination of the time period for the contracting parties is a form of the legislator’s desire to enhance the principle of legal trust and legal security between the contracting parties.

Either this period is explicitly released, or this period is released implicitly, and this period of time is explicitly released upon concluding the promise contract in order for the contracting parties to agree on this period, such as releasing one year, with the need to note that specifying the promise period is made by the one who makes the promise. (15).

This selection could be implicit. If a promise was made to sell on a property in which there is a lease contract, implicitly it can be understood here that the promise term expires when the lease term expires. Therefore, if the contract promise does not specify the term of time explicitly or implicitly, this promise is considered void according to Article 105/1 of the Jordanian Civil Code.

Dropping these general rules related to the contract promise to the promise of the mortgage, we see that if the promise of the mortgage is fulfilled and all the conditions related to the promise of the contract were fulfilled and the term is specified, this promise is valid and effective that if the promise of the mortgage is void of a specified term, this promise is void accordingly Article 105/1 of the Civil Code.

Fourth Section

Formality

The general principle in consensual contracts either requires the concerned formality, as it is an exception to this principle, and consensuality is available in money by the convergence of the offer and acceptance. But we find that the legislator in some contracts requires a certain formality in order for the contract to be valid. As for the promise of the contract, it applies to the promise to contract due to the original contract (which will be concluded in the future). Empty it in a specific mold, it must be emptied in a specific mold.

The legislator has stipulated as a general asset in some contracts a specific formality, whether this formality is the registration of the contract or its emptying in a specific form or writing so that the purpose of registration is the legislator's desire to inform the contracting parties of the importance of the legal action they perform, as it leads to an impact on their financial liability (17).

As for the mortgage contract and dropping the rules that promise to contract it, you will be faced with the following:

By dropping this element on the mortgage contract, as we mentioned that the insurance mortgage is only returned to real estate or movables that require registration (18), which is achieved with the necessity of registering the insurance mortgage and this is what the new real estate property law came with in the text of Article 63 so that it is necessary to register any disposal that takes place on real estate so that the text came. The article is as follows: (Dispositions, contracts, or any transactions conducted on real estate and water shall not be valid in the areas where the settlement has taken place, unless they are registered in the registration department, and every act, contract or transaction conducted to the contrary shall be considered void). Article 160/c of the Property Law In particular, real estate on the registration of the mortgage on real estate, as it stipulated the following (A mortgage of real estate does not take place unless it is registered with the Registration Directorate).

It is clear from the previous texts that the mortgage contract must be registered, whether it is an insurance mortgage or possession (if it is signed on real estate). Accordingly, it appears from the previous texts in the real estate ownership law that if a mortgage contract is made on a real estate, it must be registered under pain of nullity.

By dropping this column on the pledge contract, since the promise of the mortgage is subject to the formality required by the mortgage contract, a movable requires registration, for example a car. This promise must be registered with the competent department. But if the mortgage is possessive on a movable, then its mortgage does not require the formality of registration, so there is no problem with that.

Accordingly, the security mortgage can only be entered into by registering it in accordance with Article 1323 of the Civil Code. Therefore, I promise to pledge that if it is placed on the security mortgage, it must be registered according to the text.

As for the promise of the possessory mortgage, the legislator did not adhere to a specific formality for it, because most of the time this mortgage falls on movables and therefore does not require a specific formality.

By dropping this section on the Promise of the Mortgage and considering that the Promise of the Mortgage Contract must meet all the conditions that must be met in the Final Contract, the parties to the Promise of Mortgage must be fully qualified for it. As we mentioned, the mortgage is considered an act between benefit and harm, so if it is issued by a non-distinguished boy, it is void. But if it is issued by a distinguished boy, the leave is suspended until he reaches the age of majority or on the authorization of the guardian or trustee, and if it is issued by a person who has reached the age of majority and his will is free from any defects (compulsion, deception, obscene injustice) and his capacity was free of symptoms (madness, foolishness, dementia) his behavior was correct and if his will was defective or injured by one of the symptoms of eligibility, in this case each case takes its judgment according to the general rules.

The second requirement

Effects of promise contract

As a general rule, a contract will have its effects as soon as it is concluded fulfilling all its conditions. With regard to the promise of a contract, if a promise is made to the contract and fulfills all of the conditions mentioned above in the first requirement of specifying all the essential issues, as well as specifying a period for which the parties to the promise are bound, the effects of a promise vary according to the time period. So there are effects on the period prior to expressing the promised desire to contract, and other effects after expressing the desire to contract, and there is also an effect on the promise's refusal of his promise to conclude the contract, and we will talk about these effects, each in a separate section.

First Section

Effect of promise before expressing a desire to contract

The contract of promise entails personal obligations only, whereby the one who is promised becomes a creditor of the personal right and he is required to conclude the final contract if he so desires, while the promisor owes his obligation to conclude this contract in the future if the promised expresses his desire to do so (19).

In addition to arranging personal rights, the promisor remains obligated to conclude the promised contract as soon as the promised expresses his consent or desire to contract within the period agreed upon in the promise contract, the right to accept or decline the promise within the agreed period (20).

Accordingly, the researcher believes that it follows from the foregoing that the promisor remains the owner of the promised place and its consequences. In return, the one who is promised does not have any right over the promised thing and does not bear the consequences of its destruction and does not have the right to dispose of it, otherwise it will enter into a framework of disposition in the property of others.

Second Section

Effect of promise before expressing a desire to contract

If the promised expresses his desire, expressly or implicitly, to conclude the final contract, the contract is concluded and there is no need for a new acceptance from the promiser. At that time, obligations arise from the parties to the contract if the final contract is binding on both sides, or from one of its parties if it is binding on one side. If it is a promise to sell a specific movable thing, its ownership will pass to the one who is promised, as soon as he expresses his desire to buy, and the seller must deliver the thing sold free of defects, and the buyer must pay the price(21).

However, the will may be expressed explicitly or implicitly, and the expression of the will shall be by showing the contractor's intention to conclude the contract. The principle is that there is no specific form of expressing the will, so it can be explicit, and it is every action that the contracting party does to disclose and reveal his will directly, according to what is customary among people, and that is in several ways, such as wording and writing issued by the contracting party or as a sign that is customary among people, and the will can be expressed implicitly. (22).

By dropping this on the promise of the mortgage, the one who was promised will either reject the promise or accept it. If the promised decides, within the agreed period, to reject the promise, the promise will be void and will not have any legal effect and will also forfeit the personal right of the promise to conclude the final contract.

But if the one who was promised accepts the mortgage within the agreed period, then the one who promises the mortgage is hereby obligated to conclude the final contract, and the contract is considered to be concluded from the date of expressing the desire to contract, except if the law stipulates the formality of registration, then the contract is concluded from the date of its registration. Article 63 of the Real Estate Ownership Law, this promise must be registered under pain of nullity, as the text of the article states: "The dispositions, contracts, or any transactions conducted over real estate or water shall not be valid in the areas in which settlement has been made unless they are registered with the Registration Directorate. And it is considered void." Every disposition, contract or transaction conducted otherwise." Likewise, if the mortgaged property is movable and requires registration, this requires its registration with the competent department. But if the mortgaged place does not require formality, then the contract is concluded as we mentioned from the date of the promised expression of the desire to contract.

Third Section

Promising to conclude the final contract

The law emphasized that if the one who was promised had disclosed his desire to contract within the agreed period, then the one who promised had to fulfill his promise (23).

This is what is stated in Article 106 of the Civil Code, where the text of the article states: "If a person promises to conclude a contract and then give up, and the other sued him, requesting that the promise be fulfilled, and the conditions necessary for the

contract, especially those related to the form, are fulfilled, the judgment shall take the place of the contract when it acquires the strength of the case in place of the contract (24).

Accordingly, the researchers believe that the promise of the contract must be true and complete with its conditions, especially the formality, so that the one who is promised can obtain a judgment from the court according to which he can go to the registration department to transfer the right in rem (ownership or any other right) in his name, if the promise is a real estate or movable property that requires a formal registration. If the promise does not respond to a place that requires a formality of registration, the court ruling is sufficient to transfer its ownership.

But if the specific implementation is impossible, but if the specific implementation is impossible, if the subject of the contract for which it is promised is a specific movable in person and the promisor disposes of it to others, then the promised person has no choice but to claim compensation (25). It does not affect the promise if the promised satisfaction is issued within the period specified for the promise of sale or purchase (26).

By dropping the foregoing on the promise of the mortgage, if the pledgee expresses his desire to conclude the final contract and the promisor fails to perform his commitment within the period specified in the agreement, the promised may resort to the court in accordance with the provisions of Article 106 of the Civil Code to issue a court judgment and the judgment shall be considered as a mortgage contract. The contract must be registered with the competent department if it refers to a real estate or movable that requires a formality of registration, but if the mortgage contract responds to a movable, the court ruling is sufficient for the transfer of ownership. But if it is not possible to implement in kind, such as if the one who made the pledge has sold the money in the place of the promise contract, then the one who was promised the mortgage can only claim compensation, because in this case the money went out of the property of the one who made the pledge and became the property of others, so it is not permissible to mortgage the property of others as stated in Article 1324/ 1 of the Civil Code, which states that “the mortgagor must be the owner of the mortgaged property and be qualified to dispose of it.”

Conclusion:

We reached the end of the research so that the researcher reached a set of results and recommendations, which are as follows:

Results:

1. The rules of promise can be dropped by contracting promise by mortgage.
2. Several conditions must be met in the promise of the mortgage, which are (the general conditions of the contract, specifying a period of time for the promise, completing the formality specified in accordance with the law, and specifying all the essential issues of the final mortgage contract).

3. The promise arranges by mortgage several effects divided into before expressing the promise's desire to conclude the final contract and after expressing the promise's desire to conclude the final contract.

4. If the promisor refrains from concluding the final contract within the specified period, the promised may resort to the judiciary to compel the promisor to carry out his obligation.

Recommendations:

The researcher recommends from the honorable legislator the need to find special legal rules related to the mortgage promise within the legal provisions governing the mortgage due to the importance of this topic.

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Footnotes:

1- Article (167) of the Jordanian Civil Law No. (43) of 1976 states: "A valid contract is a legitimate contract with its origin and description in that it is issued by its people, added to a place subject to its judgment, has an existing, valid and legitimate purpose, and its descriptions are correct and not accompanied by a spoiling condition. for him " .

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