

## CHAPTER THREE

### *DAMĀN* OF THE EQUIVALENT IN THE CONTRACT OF MORTGAGE

Since money is viewed as having importance, as it is the nerve of life, the edifice of the universe and the foundation of society, the Sharī'ah has laid down a system to protect it. Rules and restrictions have been established in order to ensure that it can play its role in serving society. The Sharī'ah has made documents which rights can be protected such as witness, guarantee and mortgage. Witness for fear of denial and for mortgage and guarantee for fear of bankruptcy – these are some of the biggest distinctions of the noble Islamic law made for fear of procrastination and an assurance from denial and protection for the wealth and preservation from loss of the owners so that people's money cannot be taken by illegal means.

We shall proceed in this chapter to the study of mortgage, of the exact equivalent in the contract of guarantee. And as such, it will be necessary to clarify the meaning of mortgage and its legal origins and the conditions of guarantee and its various kinds.

The research in this section has been divided into five sections:

**Section one:** Definition of mortgage and its legal origin

**Section two:** The essential requirements of the contract of mortgage

**Section three:** The rule of grasping of mortgage and its continuation

**Section four:** The benefit of the mortgage and how the mortgager can benefit

**Section Five:** The guarantee of mortgage and the amount of guarantee

## SECTION ONE:

### DEFINITION OF MORTGAGE AND THE ORIGINAL LEGALITY OF IT

The contract of mortgage is considered to be one of the documentary contracts in the Sharī'ah. First, this section clarify the meaning of mortgage (*Rahn*) according to the lexicographers and the jurists from the Ḥanafī, the Shāfi'ī, the Mālikī and the Ḥanbalī perspectives and the justification of the legal evidence in the contract of mortgage in the Islamic Sharī'ah based on the Qur'ān, Sunnah, and consensus. Second, it will focus on the explanation of why people need to mortgage in different periods and especially in the modern times, which are completely different in terms of trustworthiness. Because of this, it has become better to deal with the mortgage as a document. Thus, the topic will be divided into two parts as follows:

**Part one:** Definition of mortgage according to the lexicographers and the jurists

**Part two:** Explanation of the legality of the mortgage and the need for it

#### 3.1.1 Definition Of Mortgage According To The Lexicographers And The Jurists

##### 3.1.1.1 Its Literal Definition<sup>442</sup>

Literally, mortgage has several meanings. It is referred to as firmness,

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<sup>442</sup> Muḥammad Abū Bakr al-Rāzī, *Mukhtār al-Ṣiḥaḥ*, 1, p. 260.

continuity and detention. The definition of mortgage according to the convention of the jurists is as follows:

### 3.1.1.2 Its Juristic Term

The Ḥanafī School defined it: “as the keeping of money in return for a right for which it can be obtained, and that right is the real or provisional debt for which the mortgage is served.”<sup>443</sup> Ibn ‘Arafah, a Mālikī jurist, stated that “what is kept as a document in return for a debt which actually or potentially binding”.<sup>444</sup> This is a good representation of the Mālikī School. The Shāfi‘ī School defined a mortgage as making a monetary agreement as a document in return for a debt to be recovered from it when its recovery becomes impossible because of (the debtor’s) death”.<sup>445</sup> Finally, the Ḥanbalīs defined it, as “the money that is made, as a document with debt so as to use from its cost if the owner is not capable of fulfilling his promises”.<sup>446</sup>

### 3.1.1.3 Analysis Of The Definitions

Clearly, the Ḥanafī definition focuses on the keeping of the money as a qualification of the mortgage and that mortgage is the qualification of the mortgager and the act of the mortgager is expressed with the act of the mortgage. It is necessary

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<sup>443</sup> Al-Kāsānī, *Badāi’ Al-Ṣanāi’ fī Tarfīb al-Sharāi’*, 8, p. 372.

<sup>444</sup> Ibn ‘Arafah, *Ḥāshiyat al-Dusūqī ‘alā al-Sharḥ Al-Kabīr*, 3, p. 231.

<sup>445</sup> Ibn Shihāb, *Nihāyat Al-Muḥtāj ilā Sharḥ Al-Minhāj*, 4, p. 229 and 5, p. 180.

<sup>446</sup> Ibid, 5, p. 180.

from them to define a thing by what clarifies it and that is the explanation for the definition. Their insistence on “keeping the money” denotes both specified as well as unseparated shared property even though the latter according to them cannot be mortgaged, and rendered their definition, as incomplete and unexclusive.

In addition, their statement that it is possible to get it from him can take place if the mortgage is equal to the debt or more than it and if the debt is less than the mortgage even though it is legally a mortgage it cannot take place and the definition cannot be general. Again, the Ḥanafī, definition does not maintain the generality and exclusivity.

Whereas the Mālikī's position did not make “grasping” as a condition for the soundness of a mortgage. Obviously, when they required the continuity of the “grasping” it made their position defenseless. It is quite well understood that a prerequisite condition could be argued for as a necessary condition.

#### 3.1.1.4 Situations Of Mortgage

**First:** This is as if it falls on the contract based on debt, as a seller conditioned on the client to pay at a price in advance for the future on an exact period to receive the mortgage at a price. This is right according to the agreement of the jurists because the need calls for that.

**Second:** To take effect after the right is established. This is also right

according to the agreement because it is a fixed debt that calls for the need to accept the document.

**Third:** To take effect before the right is established as saying, I mortgage you my luggage with this hundred to be kept. This is accepted by the Mālikīs and the Ḥanafīs because it is a research document Its contract is accepted before being compulsory as in the case of sponsorship. This is reasonable but it is not allowed according to the Shafi'īs and the Ḥanbalīs in the clarity of the school because the document with truth cannot make obligatory what comes before it like the witness -in the oneness of Allāh – because a mortgage follows the truth and it cannot come before it.<sup>447</sup>

### 3.1.2 Clarification Of The Legality Of The Mortgage And The People's Need For It

#### 3.1.2.1 The Legality Of The Mortgage

The legality of the mortgage is confirmed by the Qur'ān, the Sunnah, the consensus and qiyas (analogy) reason.

**In the Qur'ān**, Allah says "if ye are on a journey and cannot find a scribe, a pledge with possession - may serve the purposes".<sup>448</sup> The verse simply means that

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<sup>447</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'i*, 1, p. 403.

<sup>448</sup> Al-Qur'ān, Al-Baqarah (2): 283.

when you are travelling and you take a loan from someone and you do not get a writer or a witness to document your debts, it is sufficient to have a mortgage from that and *rihān* (mortgage) in the verse is the plural for *rahn* - mortgage - and originally it is the infinitive. Then the word *al-marhūn* is referred to in the infinitive to the object. Al-Qāḍī said: the meaning of (a pledge with possession) is that you should mortgage and pledge because this is the infinitive of making the payment on condition associated with fulfillment and it became measured with this as in the word of Allāh (liberating a slave) to free a slave, like in the expression of Allāh (chop off the head) meaning chop off the heads and an expression I possess rather to say you keep it, which will give us: suggesting to remain with the possession of a sponsor and it does not stop with the possession of the mortgager himself. The three commands share the same linguistic formula and the focus here is on the linguistic formula, not on the content.<sup>449</sup>

There is an indication to conditioning the mortgage as a physical thing and it cannot be a debt contrary to the owner and there is no benefit according to the Shāfi'īs and the Ḥanbalīs because of the lack of the existence of the pledge in both. Describing the mortgage, as pledge is clear in that what is not pledged cannot be documented.

**In the Sunnah:** The Prophet by his actions and statements confirmed the issue of the mortgage.

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<sup>449</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 250.

Sunnah Fi'liyyah (The Actions of the Prophet): It has been confirmed in the books of Sunnah that it is documented with authenticity that the Prophet (PBUH) had mortgaged his armor to a Jew in return for a debt he owed him. In another narration through 'Abbās (may Allāh accept him) who said: Swearing to Allāh, the Prophet died and his armor was with a Jew for the amount of twenty units of cereal that he took for his family. And it is narrated through 'Ā'ishah – may Allāh agree with her – that the Prophet (PBUH) bought some food from a Jew for a period and he mortgaged it with his armor. Agreed upon<sup>450</sup>

Sunnah Qawliyyah (The Sayings of the Prophet): it is narrated from Abū Bakr (MAAWH) that the Prophet (PBUH) said: a (back) passenger rides with his fee, if he is mortgaged and milk is drunk with its fee, if it is mortgaged. Therefore, anyone who rides and drinks should have his fee.<sup>451</sup>

And through the narration of Abī Hurayrah, it is said that the Prophet (PBUH) said: A mortgager cannot be free from the person he mortgaged with. He has his sheep and the mortgagee will have to pay his due. This means that the mortgagee will be bound with the mortgager in case he cannot pay back. This also means that the mortgage cannot be free from the owner of the item and he does not deserve it if he cannot return it back at the agreed time. And this is what is rejected through the Jāhiliyyah time, that the mortgager keeps the mortgaged item and it will be his if in case the mortgage does not return the item at the agreed time. This is what

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<sup>450</sup> Al-Bayhaqī, *Al-Sunan Al-Kubrā*, (Beirut: Dār Iḥyā' Al-Turāth Al-'Arabī), 6, p. 88.

<sup>451</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 2, p. 472.

the Sharī'ah refuses.<sup>452</sup>

The jurists in all periods of time have unanimously agreed on the legality of mortgages while travelling and the derivative of this consensus is what has been confirmed from the clearly stated texts in the Qur'ān and the Sunnah of the Prophet (PBUH) and no one differs in its permissibility and legality even if there has been divergence on legality.<sup>453</sup>

The majority said that it could be legalized as it can be legalized on travelling based on the act of the Prophet (PBUH) when he was in Madīnah. As regarding his restriction on travelling in the verse, it took the idea of the majority because mortgage takes place in travelling in the majority of the time.

And Mujāhid and Al-Ḍaḥḥāk and the Al-Azhariyyāt said: a mortgage cannot be legalized only on travelling, justifying this with the verse and the *ḥadīth*.<sup>454</sup>

**This is an indication of the legality of the mortgage and this is a consensus on its permissibility.**

Based on the *ḥadīth* s mentioned earlier concerning the legality of mortgages, we can deduce the following:

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<sup>452</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 2, p. 472.

<sup>453</sup> Al-Tibrizī, *Mishkāt Al-Maṣābīḥ*, (Jeddah: Al-Maktab Al-Islāmī), No. 2887, 2888.

<sup>454</sup> Al-Sayyid Sābiq, *Fiqh Al-Sunnah* (Bayrūt: Dār Al-Ma'rifah), 3, p. 295.

1. Evidence on the permissibility of the treatment of the non-believers on what the liberation of a transactional physical thing does not fulfill and the lack of importance to the vicious aspects of their beliefs and their treatment among us.
2. Permissibility of selling a weapon and mortgaging it and renting it and other things to non-believers, if it is not for war.
3. Confirming the possession of the non-Muslims under their control.
4. Permissibility of buying with a price in advance and taking the armor and other things such as weapon materials even if this does not fulfill liability.<sup>455</sup>
5. Based on the Prophet's (PBUH) lifestyle in terms of modesty and ascetism in the world, giving less importance to it with his strength on it and the type of generosity that made him not save so that he resorts to mortgaging his armor and patience on the harshness of life and having conviction for easiness and the virtue of his wives on being patient on all that.<sup>456</sup>

The jurists said: The wisdom in the righteousness of the prophet in the easy treatment of the Jews by the disciples. Concerning the permissibility, it may be

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<sup>455</sup> Al-Šan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 52.

<sup>456</sup> Ibid, 3, p. 53.

because there was no surplus food to their needs or because of the fear that they may not have a price or reward and therefore, there is no harshness. In this case, it is almost impossible to see that because probably it could not happen. Maybe he did not inform them but he was informed about it and did not feel easy about what happened.

Concerning the consensus, the jurists have agreed from the era of the Prophet (PBUH) until our days on the legality of mortgages.

Legally, since a mortgage is a document in terms of fulfillment, it is permissible as the document is permissible in necessity which is sponsorship and the receipt and the need to document it is vital from both sides: the creditor finds it very difficult to give his credit without a mortgage and the creditor documents the mortgage for his credit for fear of unfulfillment or incapability because there is a benefit for him as it is the case of sponsorship.<sup>457</sup>

### 3.1.2.2 The Wisdom Of The Legality Of Mortgage

Money is the nerve of life, which is indispensable and human beings are susceptible to all the changes and problems of life. An individual might not have enough money to be relieved from the harshness of life, therefore he resorts to taking credit and people like money a lot and they care for it a lot in their lives. Trust has gone and intentions have been bad and the people are stingy with their money, they do not give it in the name of Allāh and they refuse to give out money except with

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<sup>457</sup> Al-Sayyid Sābiq, *Fiqh Al-Sunnah*, 3, p. 298.

documents so as to assured against loss by taking mortgages to make documents with their money by law. Based on this, the mortgage is allowed to relieve hardship and solve problems and take away harm, document the right of the mortgagor and his comfort on his money. It is a hoped that if the people work on the laws of Allāh and stay on the path of the Prophet they will not live on the bad money of the people, on wrong doing and if they stay on that path we will not see properties lost and all families will live in happiness and harmony.

The wisdom of legalizing the mortgage is to document debts. Since sponsors personally document debts, the mortgage is documented financially for the smoothness of credit. The mortgage benefits the creditee by giving him distinction and preference over all the other great creditors.<sup>458</sup>

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<sup>458</sup> Narrated by the majority except Muslim and Al-Nasā'i. The previous reference, p. 182.

## SECTION TWO:

### CONDITIONS AND TYPES OF THE CONTRACT OF MORTGAGE

Having discussed the definitions of Mortgage juridically and explained the evidence of the legitimacy of Mortgage, it is appropriate at this juncture to shift our focus to the conditions, types of mortgage and mutual obligations of mortgage. This will be discussed in two parts:

**Part 1:** Conditions of Mortgage

**Part 2:** Types of Mortgage

#### 3.2.1 Principles Of The Contract Of Mortgage

Like all contracts, the contract of mortgage has a number of pillars on which it is built. These pillars on the other hand, have specific conditions, without which the contract cannot have any legal effect. These conditions are concerned with:

- a. The two contracting parties: The *rāhin*, (mortgagor), and the *murtahin*, the one who keeps the mortgage.
- b. Wording: Offer and acceptance.
- c. The debt: which is burdened by the *rāhin*.
- d. *Marhūn* (item being mortgaged): The mortgaged asset in the possession of the *murtahin* as a source of confidence and security for his debt.<sup>459</sup>

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<sup>459</sup> Muṣṭafā Al-Hasan et al., *Al-Fiqh al-Manhajī* (Dār al-Ulūm Al-Insānīyah, Ed. 1, 1989), 6, p. 91.

### 3.2.1.1 Conditions Of The Mortgage According To The Mālikīs

#### 3.2.1.1.1 Conditions Pertaining To The Parties

1. That the *rāhin* (mortgagor) be mature and sane: The contract of mortgage is, therefore, unacceptable and unsound if it is concluded by an insane person or a child who cannot differentiate between major and the minor transactions. However, such a contract is sound if concluded by a stupid person or a child who can tell the difference between major and minor transactions. It is, nevertheless, not binding until and unless the guardian of the two endorses it.
2. Conditions pertaining to wording: The wording should imply the responsibility of the *rāhin* to allow the *murtahin* to take possession of the mortgage.
3. Conditions pertaining to the mortgaged asset, the debt: That the debt is binding and either instantly due or deferred. The mortgage is also sound in *al-ja'l*, i.e., what one pays to another in return for a certain service/action.<sup>460</sup>
4. Conditions for the mortgaged asset: That it be an asset and a benefit and that it be saleable, i.e., it fulfils the conditions of a saleable commodity.<sup>461</sup>

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<sup>460</sup> 'Abd al-Raḥmān al-Jazīrī, *Al-Fiḥ al-'alā al-Madhāhib al-Arba'ah* (Dār Al-Ḥadīth), 2, p. 288, 290.

<sup>461</sup> Muṣṭafā Al-Iḥṣān et. al., op. cit., 99.

### 3.2.1.2 Conditions Of Mortgage For The Ḥanafīs<sup>462</sup>

The Ḥanafīs have classified these conditions into three categories:

- A. Conditions of conclusion.
- B. Conditions of validity.
- C. Conditions of obligation.

#### 3.2.1.2.1 Conditions Of Conclusion

- 1. That the mortgaged asset is a property.
- 2. That its substitute, i.e., the debt for which it is mortgaged, be guaranteed.

#### 3.2.1.2.2 Conditions For Validity Are Of Three Kinds

- 1. Concerning the contract, there are two kinds:
  - a. that it be attached to a condition not necessitated by the contract.
  - b. that it is not attached to the future, for example, a point of two or three months.
- 2. Concerning the Mortgaged asset.
  - a. that the asset be separated.

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<sup>462</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 2, p. 666. Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 2, p. 73.

- b. that the asset be during the lifetime of the *murtahin* after taking its possession.
- c. that the asset be freed from the *rāhin*'s control.
- d. that the asset is pure and clean.
- e. that the asset does not belong to the category of things that belong and are Lawful for everybody to use, like a pasture.<sup>463</sup>

### 3.2.1.2.3 Condition For Obligation, Is The Possession Of The Mortgage

If offer and acceptance take place and the conditions of conclusion are met, the mortgage contract is soundly made but it is not automatically binding until possession of the mortgage takes place. Before that, the mortgager still has the right to withdraw his acceptance and abstain from executing it. This is like the case of a gift, *hibah*,. The one who gives it free of charge will have the right to withdraw his gift before the one who benefits from it receiving it.<sup>464</sup>

The Shāfi'īs and the Ḥanbalīs have agreed to the effect that the conditions of mortgage are divided into two types:

The first type: Binding conditions, that is, taking possession of the mortgage.

If a house is mortgaged and the *murtahin* does not take possession of it, then the contract will not be binding. And as a result, the mortgager can withdraw his word.

<sup>463</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 261.

<sup>464</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 4, p. 126.

The second type: Conditions of validity.

- A. With regard to the contract: That the contract is not attached to a condition, which is not necessitated by the contract when the debt is due, because this will make the mortgage void.
- B. With regard to the contracting parties: In terms of the capacity of the parties, each one of them should be an actual actor, and none of them is declared *non compos mentis*.
- C. With regard to the mortgage asset. They are:
  - 1. That the *rāhin* has authority over the *al-marhūn*, that is, when his property is placed under an interdict and he is his guardian or tutor.
  - 2. That the mortgaged thing be an asset and not a benefit.
  - 3. That the asset does not decay very fast while the debt is deferred for a long period, a period before which the asset can decay.
  - 4. That it is pure and this excludes mortgaging impurities as explained earlier.
  - 5. That all is something that is legitimately beneficial.<sup>465</sup>

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<sup>465</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 4, p. 126.

D. With regard to the *marhūn bihi*, the thing for which the mortgage is served, there are four conditions:

1. That it be a debt. A mortgage cannot be valid if sets in return for something else like something borrowed or the like.
2. That the debt be established.
3. That the debt be compulsory either instantly or in the future.
4. That the debt be well defined in its asset and its amount.<sup>466</sup>

#### 3.2.1.2.4 Pillars And Conditions Of The Mortgage Contract

1. Wording; the wording is sound when the offer meets the acceptance of the other party or any thing that legally substitutes them.
2. The two contracting parties should be allowed to contract freely. Both of them should have the legal capacity to act. Thus it is illegitimate for the guardian to mortgage, even if he is the father of the owner of the asset.
3. The mortgage Asset; The first condition is that, the mortgage be an asset, which can be sold in general. Mortgaging a debt will, therefore, be

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<sup>466</sup> Wizārat Al-Awqāf Al-Shu'ūn Al-Islāmiyyah, *Al-Mausū'ah Al-Fiqhiyyah*, (Kuwait) p. 177.

unsound even if from that one who bears it.

4. *Al-Marhūn bihi*, the thing for which the mortgage is set; should not be a debt, so mortgaging in return for a guaranteed asset.

There are conditions in debt: That it be established, well known to the contracting parties and compulsory.

### 3.2.1.3 Conditions Of Mortgage For The Shāfi'is<sup>467</sup>

The first pillar of the mortgaged asset:

- That it be an asset. Therefore, it is not allowed to mortgage a debt because mortgage is a security for a debt in an asset.
- That its possession by the *murtahin* is not disallowed as in the case of mortgaging a copy of the Holy Qur'ān to a disbeliever or mortgaging a beautiful slave lady to one who is not upright.
- That the asset can be sold when the debt is due .So it is, therefore, not permissible to mortgage a slave mother (*Umm al-Walad*) and endowments.

The Second Pillar – *al-Marhūn bihi*:

- That the debt be established and compulsory,

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<sup>467</sup> Al-Nawawī, *al-Majmū' Sharḥ Al-Muhadhab* (Bayrūt: Dār Al-Ma'rifah), 10, p. 59.

The Third Pillar – Wording:

- It is already established that the wording must include an offer and acceptance plus all the conditions attached to that.

The Fourth Pillar – the Two Parties:

- It is only acceptable for those who have the capacity to buy and sell. In addition to that, they must have the capacity to donate. The guardian, as a result, cannot mortgage on behalf of his bequeathed except in few cases of obvious interest.<sup>468</sup>

#### 3.2.1.4 Conditions Of The Mortgage Contract<sup>469</sup>

1. That it is a property or something of that nature because a mortgage is a contract on property. It, therefore, should be served from someone who can transact in property.
2. The contract of mortgage must come after the debt is established.
3. What cannot be sold like endowments, pigs and dogs cannot be mortgaged.
4. Mortgaging or accepting a mortgage in return for a stolen or seized thing is unacceptable. But if they are mortgaged based on their values if they decay, it will become unsound because that will mean mortgaging for a

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<sup>468</sup> Ibid, 10, p. 60.

<sup>469</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfiʿī*, 1, p. 303.

debt before it is established.

5. Mortgage in a written contract is not permissible. But it is permissible in the debt of *salam* and for the price of a thing or any debt that should be repaid.
6. It is unlawful to mortgage something that cannot be delivered like a bird in a tree.
7. It is unlawful to mortgage an asset without the permission of the *murtahin* because what is deserved by a binding contract can be a subject of another contract without the permission from the one who deserves it.
8. That there will not be in a mortgage a condition that contradicts it like when one says: mortgage this for your debt on condition that it cannot be taken possession of or this condition is void even if there are a hundred conditions.
9. What cannot be sold for ambiguity cannot be mortgaged for the same reason.<sup>470</sup>

### 3.2.2 Types Of Mortgage

Mortgage has various types and forms. Amongst them are; Mortgage under

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<sup>470</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfiʿī*, 1, p. 303, 309.

possession and formal mortgage. These two are well known today. There are other forms, like shared mortgage and mortgage of benefit .We shall explain them in the following points:

1. Formal Mortgage.
2. Possessive Mortgage.
3. Shared Mortgage.
4. Mortgage of benefit.<sup>471</sup>

### 3.2.2.1 First: Formal Mortgage

#### 3.2.2.1.1 Definition

It is a contract by which a creditor will acquire a specific real estate from which his debt can be recovered with priority over the ordinary creditors and non-ordinary creditors who come after him.<sup>472</sup>

Indeed, mortgage means a formal contract on real property that such a contract yields. It is a contract that is concluded between the *rāhin*, the creditor, and the *murtahin*. It is possible that the *rāhin* becomes a debtor.

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<sup>471</sup> That which is not valid unless it is recorded in a formal document. And formality here means that the contract is concluded based on legal requirements.

<sup>472</sup> Al-Sanhūri. *Al-Wasā'it fī Sharḥ Al-Qānūn Al-Madani*, 10, p. 268.

### 3.2.2.1.2 Characteristics Of A Formal Mortgage

Its characteristics are the following:

1. Formal mortgage is a real property.
2. That which is not valid unless it is recorded in formal document. And the formality here means that the contract is concluded based on legal requirements.
3. Formal mortgage is an attached right.
4. Formal mortgage is an inseparable right.<sup>473</sup>

### 3.2.2.1.3 The Position Of Fiqh, Islamic Law, With Regard To A Formal Mortgage

It is clear from this definition that it is not a condition for the validity of the contract of mortgage that the creditor has actual possession of the mortgaged asset. Because, the Islamic law does not know this type of mortgage "in which the debtor continues to have the actual possession of the mortgaged thing. Rather, the Islamic law regulates that one (in which the debtor, the *rāhin* is deprived of the right to have continuous possession of the mortgaged thing". Legitimate regulation of the two forms; Possessive and Formal would call for some questions about the position of Islamic law concerning the formal mortgage. Particularly, one may say that Islamic law does not know this type of mortgage, especially since article 706 of the *Majallah*

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<sup>473</sup> Al-Sanhūri. *Al-Wasā'it fī Sharḥ Al-Qānūn Al-Madani*, 10, p. 286.

*al-Aḥkām al-ʿAdliyyah* stipulates actual possession of the mortgage by the *murtāhin* as a condition for the validity of the contract of mortgage. Some contemporary jurists, however, have stressed that Islamic law does not invalidate the formal mortgage.<sup>474</sup> Zakī al-Dīn provides; (Anyone who inquires into the Islamic law will find in it some indications of its lawfulness).<sup>475</sup>

In order to know the existence or non-existence of this form of mortgage in the Islamic law, one has to look into the question of actual possession of the mortgaged asset.

Whether it is an essential requirement for the validity of the mortgage or not. If it is not a condition, then there arises a big possibility that this type of mortgage is acceptable to the Islamic law and the same thing happens if it is a condition for validity.

#### 3.2.2.1.4 Categorization Of Formal Mortgage In The Mālikīs School<sup>476</sup>

The Mālikīs and those who support them say that actual possession of the mortgaged asset is a condition for the obligation of mortgage. As such, offer and acceptance are the basis for the realization of mortgage. Once offer and acceptance take place, the mortgage is concluded even if actual possession does not take place.

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<sup>474</sup> This view has been stressed by Zakī Al-Dīn Shaʿbān in *The Explanatory Pamphlet of the Kuwait Law*, p. 339.

<sup>475</sup> Zakī Al-Dīn Shaʿbān, *Ibid*.

<sup>476</sup> Al-Khirshī. *Sharḥ Al-Khirshī* (Cairo: Al- Maṭbaʿah Al-Amīriyyah, 1333H), 5, p. 238.

And after the mortgage has taken place, the two contracting parties can then decide to postpone the question of possession, trust between them and its recording in the official documents,<sup>477</sup> because the mortgage, according to the Mālikīs school is a contract by mutual consent.

### 3.2.2.1.5 Categorization Of Formal Mortgage In The Ḥanafī School<sup>478</sup>

Zakī al-Dīn Sha'bān states that a formal mortgage can be concluded even according to the views of the majority of the jurists who stipulate actual possession of the mortgage, considering the fact that registering the mortgage in the official real estate document represents actual possession.<sup>479</sup>

“Assuming that possession is a must for the validity of mortgage, this possession is realized when the contract is registered in the official document. Because in this case, the official document replaces the creditor in keeping the mortgaged asset in check and as a result, maintaining confidence in favor of the creditor and this is exactly the role possession plays.”<sup>480</sup>

### 3.2.2.2 Second: Possessive Mortgage

Definition; a contract to the effect of which a person is obligated to produce a

<sup>477</sup> See Al-Dardīr. *Sharḥ Al-Ṣaghīr 'Alā Mukhtasar Khalīl*, 3, p. 104.

<sup>478</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 8, p. 3723.

<sup>479</sup> Muḥammad Wahīd Al-Dīn Awār, *Al-Shakī fī Al-Fiqh Al-Islāmī*. p. 92.

<sup>480</sup> Zakī Al-Dīn Sha'bān, *The Explanatory Pamphlet*, p. 342.

guarantee for a debt borne by him or by someone else and to deliver to a creditor or to a third person something specified by the two contracting parties which bears real property to be kept until the debt is recovered and the keeper of the real property will have priority over ordinary creditors and non-ordinary creditors who come after him.<sup>481</sup>

It is realized that the possessive mortgage is different from the formal mortgage in the possession of the mortgaged asset until payment of the debt is due.

#### 3.2.2.2.1 Characteristics Of Possessive Mortgage

1. The possessive mortgage is a contract by which consent binds both sides as soon as offer and acceptance are exchanged
2. This type of mortgage is most of the time subordinate to another contract and it guarantees a debt, which is the original contract. It may also be concluded to guarantee obligations resulting from a contract of sale.
3. Mortgage under possession is inseparable; every part of the mortgaged real property is a guarantee to the whole debt except if any part is exempted by law or agreement.<sup>482</sup>

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<sup>481</sup> Al-Sanhūri. *Al-Wasā'iq fī Sharḥ Al-Qānūn Al-Madānī*, 10, p. 738.

<sup>482</sup> Al-Sanhūri. *Al-Wasā'iq fī Sharḥ Al-Qānūn Al-Madānī*, pp. 741-744.

### 3.2.2.2.2 The Difference Between A Formal And Possessive Mortgage

1. **With regard to the contract:** a mortgage under the possession is a contract based on mutual consent needing no formality. Every offer met by acceptance is enough to create a possession mortgage. In contrast, a formal mortgage requires formalities.
2. **With regard to the Object:** the object of the contract of a possessive mortgage can be real estate as well as moveable, and recording is not a condition for its obligation upon a third party except if it is a contract on real estate.
4. **With regard to the Content:** a possessive mortgage gives the *murtahin* the right to put the mortgage under possession whether it is moveable or a real estate. This is unlike a formal mortgage in which the creditor has nothing but to follow the mortgage with priority over the creditors.
5. **With regard to the Possession:** in the contract of a possession mortgage, the *rāhin* is obligated to deliver the mortgage to the *murtāhin*, either to the creditor himself or to a third party who will keep it until the debt is paid back.<sup>483</sup>

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<sup>483</sup> Al-Sanhūri. *Al-Wasā'if fi Sharḥ Al-Qānūn Al-Madani*, 10, p. 746.

### 3.2.2.3 Third: Mortgage On Benefit<sup>484</sup>

The jurists have two views with regard to this type of mortgage;

**The First view:** The Ḥanafīs<sup>485</sup>, Shāfi'īs<sup>486</sup>, Ḥanbalīs<sup>487</sup> and the Zāhiri<sup>488</sup> school have the view that benefits cannot be mortgaged. The reason, according to them, is that a benefit cannot be delivered because it does not exist during the time of the contract signing and as such no stability of such a contract can be attained<sup>489</sup> and for the Ḥanafīs, in particular, benefit is not a property.

**The Second View:** The Mālikīs<sup>490</sup> and some Imāmīs<sup>491</sup>, opine that the benefit is like an asset in creating trust and compelling a debtor to pay back, and this is the purpose for mortgage.

**The Preferred View:** We are inclined to support the second view that states that mortgaging benefits is lawful because it realizes the same purpose and also is in analogy to a debt. This is understood from the verse (a mortgage possessed).

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<sup>484</sup> The example of this form is when a landlord leases the benefit of his compound for a period of a year in return for a debt on him.

<sup>485</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 4, p. 108.

<sup>486</sup> Al-Ramlī, *Nihāyah al-Muḥtāj*, 4, p. 233.

<sup>487</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 385.

<sup>488</sup> Ibn Ḥazm, *Al-Muḥllā*, 8, p. 89.

<sup>489</sup> Al-Suyūṭī, *Al-Ashbāh wa-al-Naẓā'ir fī Qawā'id wa Furu' Fiqh al-Shāfi'iyah*, 2, p. 514.

<sup>490</sup> Al-Khurshī, *Sharḥ Al-Khurshī*, (Cairo: Maṭba'ah Al-Amīriyyah), 5, p. 238.

<sup>491</sup> *Miftāh Al-Karāmah*, 5, p. 77. There it is mentioned, "Benefit can be mortgaged by renting the property and mortgaging".

### 3.2.2.4 Fourth: Shared Mortgage

**Definition:** a shared mortgage is defined as inseparable ownership specified for a natural or legal person like the ownership of a part of a house or animal or a company by somebody. The jurists have differed over the lawfulness of mortgaging such an inseparable shared property and fall into two groups;

#### 3.2.2.4.1 First Group

The Mālikīs<sup>492</sup> Shāfi'īs<sup>493</sup> Ḥanbalīs<sup>494</sup> and Zāhirīs<sup>495</sup> have ascribed to its lawfulness in the absolut sense. If, for example, a person is owed a debt by another, the latter can mortgage the former a part of his house in return for that debt even if the house is owned by the *rāhin*, as he can mortgage him his inseparable shared house with another person, except if he mortgages a part of a house he owns alone. In this case, the *murtahin* will keep its possession and not only one part. The Mālikīs state that if the remaining part is not mortgaged, the *murtahin* can occupy all without needing necessary permission, except by way of smooth dealings.

##### 3.2.2.4.1.1 Their Evidence

Their proof is both in the Qur'ān and based on reason (analogy).

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<sup>492</sup> Al-Khurshī, *Sharḥ Al-Khurshī*, (Cairo: Maṭba'ah Al-Amīriyyah), 5, p. 239; Al-Dardīr, *al-Sharḥ al-Kabīr*, 3, p. 235.

<sup>493</sup> Al-Ramlī, *Nihāyah al-Muḥtāj*, 4, p. 234; Al-Shafi'ī, *Al-Umm*, 3, pp. 194-195.

<sup>494</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 735.

<sup>495</sup> Ibn Ḥazm, *Al-Muḥllā*, 8, pp. 88-121.

In the Qur'ān; Allāh mentions, (a mortgage in hand).<sup>496</sup> They say that Allāh (SWT) in this verse, describes a mortgage as that which is in possession without differentiating between a shared inseparable one and a separable one.

#### 3.2.2.4.1.2 Reason (Analogy)

As Ibn Qudāmah states in *al-Mughnī* “the purpose of mortgage is to create a trust and confidence for a creditor that his debt is guaranteed and this confidence is realized in any asset that can be sold except if prevented by obstacles and as such, mortgaging a shared asset is lawful because noting prevents its establishment.”<sup>497</sup>

#### 3.2.2.4.2 Second Group

Imām Abū Ḥanīfah and his disciples<sup>498</sup> said that a shared asset cannot be mortgaged.

Their position focuses on continuous keeping, because continuous keeping of an inseparable shared asset is impossible.

It is also because such a mortgage will become a form of *al-muḥayah* (rotational ownership); like when he says; I mortgage this asset for you every other

<sup>496</sup> *Al-Qur'ān, Al-Baqarah* ( 2): 283.

<sup>497</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 375.

<sup>498</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 21, p. 69; Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarṭīb al-Sharāi'*, 8, pp. 3722, 3723.

An example of that form is when a person mortgages something which is shared and then allows the *murtāhin* or an upright third party to sell that mortgaged shared thing the way he wants, whether as a whole or separated and he sells or mortgages a part of it in a distinguishable whole.

#### 3.2.2.4.3 The Preferred View

I see that the view of the majority is the best among all of the views. The reason is that it is more in line with the needs of the people and their commercial success. Islamic religion calls for easiness and not for hardship.

#### 3.2.2.5 The Role Of The Mortgage In Creating Trust And Guarantee

If the time of payment of a mortgaged debt is due and the *murtahin* asks the *rāhin* to pay his debt and the latter does so, then that is an accepted performance. As a result, the *murtahin* will be obligated to return the mortgaged thing back to the *rāhin* thus terminating their contract.

However, if he does not return it to the *rāhin* when he has the ability to do so, he will be under an obligation to pay its guarantee because this is a form of carelessness on his part and as a such, it necessitates a guarantee according to all the jurists. But if he fails to return it because of sickness or fear of the dangers of the road or with the permission of the *rāhin*, if it decays, he will not be under any obligation to pay a guarantee. However, if the *rāhin* fails to pay back the debt when

the *murtahin* demands it, the debt will be recovered according to the following:

Because of the fact that the mortgage remains under the ownership of the *rāhin* even after delivering it to the *murtahin*, based on the Prophetic saying, {mortgage shall not be locked up against its owner}, as explained earlier, the authority to sell the mortgage belongs only to the *rāhin*. Due, however, to the fact that the right of the *murtahin* is still attached to the mortgage, the execution of such a sale depends on his consent. Therefore, the *murtahin* can, according to all the jurists, sell the mortgage with the permission of the *murtahin*. If the *rāhin* dies, the authority of the sale will belong to his heir or the executor of his will.

The Mālikīs have explained in their books<sup>501</sup> some matters related to permissions given by the *rāhin* to sell mortgages. His permission can either be absolute or specific. If he restricts it, in the case of non-payment of the debt, to a particular period, it would not be allowed for anybody to sell it before that time. Rather, in such a case, it is obligatory to refer it to a judge to know whether the debt is paid back or not. But if the permission is absolute, there will arise no need to refer it to a judge and the sale is executed on condition that it does not involve cheating (*gharar*).

If the sale requires expenses, these expenses are borne by the *rāhin* because he is the owner who is under an obligation to pay back the debt. If he fails to sell it, the judge will sell it on his behalf according to the majority of jurists without forcing the owner.<sup>502</sup>

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<sup>501</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 251.

<sup>502</sup> Manṣūr al-Bahūti, *Kashaf al-Qinā'*, 3, p. 337; Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, p. 124.

## SECTION THREE:

### **ḤUKM (RULE) OF TAKING POSSESSION OF THE MORTGAGED ASSET AND CONTINUITY OF POSSESSION**

There is no doubt that taking possession of the asset mortgaged by the *murtahin*, is a necessary condition for the contract. This will allow the *murtahin* to keep it. I, therefore, will discuss the nature of possession, its kinds, conditions and continuity in the following headings:

**Part 1:** Nature and Method of Possession.

**Part 2:** Kinds and Conditions of Possession.

**Part 3:** Views of the Jurists on the Continuity of Possession.

#### **3.3.1 Nature And Method Of Possession**

The jurists differ on whether possession of the thing mortgaged is a condition for validity or a condition for the soundness of the contract of mortgage?

It is worth to note briefly that as far as the majority of the jurists are concerned, the possession of the thing mortgaged is a condition for the obligation of the contract. The contract will not be binding on its parties if there is no possession.<sup>503</sup>

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<sup>503</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 286.

### 3.3.1.1 Method Of Possession

Possession means putting a hand over something by removing all legal obstructions, to that possession by the owner of that thing. In doing so, the mortgage becomes under the possession of the *murtahin*. It is custom and the Shari'ah that decide whether a particular removal of those legal obstructions amounts to a possession or not. As for custom, possession of the real estate happens when the obstructions are removed and the right to keep the asset is given by the owner.<sup>504</sup>

### 3.3.2 Kinds Of Possession

Possession is of two types: by principal and by agency. The first type occurs when he takes possession by himself. But possession by agency is of two types: one type that refers to the possessor and another that refers to the possession itself. The former is represented by, for example, taking possession of something on behalf of one's son and an upright person taking possession on behalf of the *murtahin*. Even if the mortgage decays in his hand, he is not held responsible for it. This is because this is a debt recovery possession, which accepts agency.<sup>505</sup>

But that which refers to the possession itself is the fact that if a mortgaged thing is possessed during the contract, the question that arises here is whether that possession substitutes the possession of the mortgage? The origin here, as in the contract of sale and gift is that if their possessions are simultaneous each one

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<sup>504</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 368.

<sup>505</sup> Ibid, 4, p. 369.

substitutes the other and if their possession takes place at different times, the first substitutes the last.<sup>506</sup>

### 3.3.2.1 Conditions Of Validity Of Possessions

That the mortgaged thing is under possession, and what is meant here by possession is that it is wholly under possession and not partly. As a result, it is not permissible according to the Ḥanafīs to have a jointly possessed thing as a mortgage. But the Mālikīs and the Shāfi'īs do not ascribe to this view.

That the mortgaged asset be cleared i.e., not occupied by anybody and not occupied by anything which is not included in the mortgage, like mortgaging a piece of land with the exclusion of the crops grown on it.<sup>507</sup>

That it be distinctly separated from what is not a part of it. In all these cases, otherwise this would make the possession of the mortgage alone impossible and thus invalid. As a result, mortgaging a land without the buildings or crops over it is invalid.

That it is permitted by the *rāhin*, the one who gives it out. The jurists have agreed to the effect that for the validity of a mortgage and its possession that the *rāhin* permits it. After its permission, the *rāhin* cannot withdraw this permission

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<sup>506</sup> Al-Shirāzī, *Al-Muhadhab fi Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 405.

<sup>507</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, p. 370.

after possession.<sup>508</sup>

### 3.3.2.2 Permission Is Of Two Kinds: Explicit And Implicit

The explicit permission is when the *rāhin* says to another “I permit you to take possession on my behalf or I consent to that”.

Implicit permission is when the *murtahin* takes possession of the mortgaged thing during the contract time and the *rāhin* keeps silent, showing no objection to that possession.

### 3.3.3 Continuity Of Possession And The Views Of The Jurists Regarding It

The jurists can be divided into three groups in treating this question:

1. **Group One:** The Shāfi‘ī<sup>509</sup> jurists hold the view that continuity of possession is not a condition for the validity of a mortgage. If the owner withdraws it by replacing it with a trust, that is regarded as legally sound because a mortgage is a contract of possession primarily and not a contract of possession continuously.

2. **Group Two:** The Mālikīs<sup>510</sup> subscribe to the view that continuity of

<sup>508</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, pp. 369-370.

<sup>509</sup> Al-Shafi‘ī, *Al-Umm*, 3, p. 143.

<sup>510</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 206.

possession is a condition for the validity of a mortgage. If the *rāhin* replaces the mortgage by putting a trust, the mortgage is vitiated. The reason, to them, is that possession primarily serves as a source of confidence and this should be maintained at all time.

3. **Group Three:** The Ḥanbalīs<sup>511</sup> say that it is a condition for the validity of a mortgage that the possession continues. So, if the *murtahin* returns it voluntarily to the owner or someone else, whether it replaced by trust or not, then the mortgage is removed and the sale remains binding. And once the mortgaged asset is returned to the *murtahin*, the mortgage is based on the basic contract without a need to renew it.

#### 3.3.3.1 Their Legal Basis

They say that mortgage is meant to create confidence by putting under the creditor an asset he can buy to recover his debt once the debtor defaults in paying the debt and if that possession does not continue, then the meaning of the mortgage ceases to function.<sup>512</sup>

#### 3.3.3.2 The Preferred Views

The researcher is inclined to support the Ḥanbalīs view that continuity of

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<sup>511</sup> Maṣṣūr al-Bahūti, *Kashaf al-Qinā'*, 3, p. 331.

<sup>512</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, pp. 369-370.

possession is a condition for the obligation of mortgage. If it is removed from the *murtahin's* hand, whether voluntarily or involuntarily, the mortgage ceases to be binding and once it is returned, it becomes binding again.

#### SECTION FOUR:

#### EXPENSES OF THE MORTGAGED ASSET AND THE *ḤUKM* (RULE) IF THE *RĀHIN* REFUSES TO MAINTAIN IT

The majority of the jurists have agreed to the effect that the expenses of the mortgaged asset like the watering of trees, the expenses for its maintenance and the like should be borne by the *rāhin*. This is because the Prophet said that a mortgaged asset cannot be locked up against its *rāhin* mortgager, "he bears its pain and enjoys its gain"<sup>513</sup> because he owns it and thus should bear what makes it survive.<sup>514</sup>

The Ḥanafīs said that in this case, what the asset needs to survive like pasture for animals, the fees of its care-taker and the like, should be borne by the *rāhin*. However, if he refuses to pay the expenses, the ruler of the Muslim Ummah will force him to do so. If he still fails to pay, then the *hākim* (ruler) will take care of the matter within the limits of customs. If the *murtahin* pays the expenses without the permission of the ruler and the *rāhin*, he will then be regarded as voluntarily doing so and as a result, deserves nothing in return.<sup>515</sup>

The Mālikīyyah said that the *Murtahin* can go back to the *rāhin* if he spends money on the mortgaged asset either with or without the permission of the *rāhin* or the ruler.

And in the book *al-Mughnī*, by Ibn Qudāmah, there is an insight into this

<sup>513</sup> Al-Tibrīzī, *Mishkāt Al-Maṣābīh*, (Jeddah: Al-Maktab Al-Islāmī), No. 2887, 2888.

<sup>514</sup> *Al-Mawsū'ah Al-Fiqhīyah*, p. 187.

<sup>515</sup> *Ibid*, p. 188.

issue: mortgaged in its food, clothes, shelter and keeping is borne by the *rāhin*.<sup>516</sup>

Abū Ḥanīfah said that this is because it is a kind of maintenance borne by the *rāhin* like food, and because the mortgage belongs to the mortgager. He is responsible for its maintenance. If, for example, the mortgage needs medication, the *rāhin* has to provide it. Abū Ḥanīfah added: the possession of the *murtahin* is the possession of the one who is bound to the guarantee within the value of his death and any additional things are *amānah* (trust) under him.

The same applies when the mortgaged slave dies, the expenses of his burial are borne by the *rāhin*.<sup>517</sup>

#### 3.4.1 Who Is Responsible For Maintaining The Mortgage?

The jurists have differed concerning who is responsible for maintaining the mortgage.

Al-Māwardī stresses:

Every expense that the mortgage needs like food, drink and medicine should be made by the *rāhin*.<sup>518</sup>

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<sup>516</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 17.

<sup>517</sup> Ibid, 4, p. 18.

<sup>518</sup> Al-Māwardī, *Al-Ḥawāʾi Al-Kabīr* (Al-Qāhirah: Dār Al-Fikr), 7, pp. 324, 325.

Abū Ḥanīfah states:

The expenses of food and drink are made by the *rāhin* and the expenses of care taking and protection are borne by the *murtahin*, and the expenses of medicine are considered with the value of mortgage. If they are equal to or less than the value of the right, they are then borne by the *murtahin*. But if the value is more, both are responsible. For example, when the rights are equal to half the value of the mortgage, its maintenance is shared between them fifty-fifty, This is incorrect because of the authority of Abū Hurayrah in a *ḥadīth* that provide that, "mortgage is from its mortgager, he enjoys its gain and endures its pain". The prophet declared that its burden is suffered by him and not by somebody else.<sup>519</sup>

And Imām Mālik states:<sup>520</sup>

He has to maintain it like he does with all of his property. Also because it is a form of maintenance incumbent upon the owner other than the mortgage.

Maintenance is of three kinds:

1. What is obligatory: that is the maintenance of food and drink for animals.  
He must bear the costs if it is an animal which needs pastures and needs food, the *rāhin* will have an option between taking them, to pasture or

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<sup>519</sup> Al-Mrghanānī, *Al-Hidāyah Sharḥ Bidāyah Al-Mubtadī*, (Egypt: Maṭba'ah Muṣṭafā Al-Bābī Al-Ḥalabī), 4, p. 130.

<sup>520</sup> Ibn 'Arafah, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 251.

feeding them except in cases where the former is considered risky. He will then be forced to feed them to maintain the confidence in the mortgage.

2. What is not obligatory: expenses of medicine and disease curing are not obligatory on the *rāhin*. This is because it may go without cure, if the *rāhin* intends to cure the animal or repair a cracked or destroyed wall, the *murtahin* will have no right to prevent him from doing so.
3. What is optional: expenses of keeping and sheltering the mortgage are obligatory on him. Like the expense of transporting the mortgage for a person who takes possession of it, it is borne by the mortgager.<sup>521</sup> However, the expenses of transporting it back to the *rāhin* after the debt is paid, are of two kinds:
  - A. Expenses to be paid by the mortgager because it is attached to the ownership.
  - B. Expenses paid by the *murtahin* because he has to transport it back. The expenses of transporting a slave and a horse which is loose are borne by the *rāhin* and also the clothing of those who die amongst his slaves.<sup>522</sup>

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<sup>521</sup> Ibid, 3, p. 252.

<sup>522</sup> Al-Māwardī, *Al-Ḥāwī Al-Kabīr*, 7, p. 325.

### 3.4.2 Maintenance Of The Mortgaged Asset

The jurists have held two views with regard to the maintenance of the mortgaged asset.

#### 3.4.2.1 The First View

The first view is that the expenditure of maintaining the asset is borne by the *rāhin*, the owner.

The proof for that is the prophetic saying: “the animal’s back is used by the one who maintains the animal if it is mortgaged and the milk of a mortgaged animal is consumed by the one who maintains it and it is incumbent on the person who rides on it to bear the expenses of its maintenance”.<sup>523</sup>

The aspect of proof from this *ḥadīth* is that it frankly stresses that the one who bears the expenditure is the one who uses it for riding and the consumption of its milk and that one is the *rāhin*. As Shāfi‘ī says, the maintenance is incumbent on him because he owns the thing and its benefit. The Prophet also says: “A mortgage shall not be locked up against its owner who mortgages it, he enjoys its gain and bears its liability”.<sup>524</sup>

The proof is that the mortgage belongs to the *rāhin*, the one who gives it out.

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<sup>523</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 2, p. 472.

<sup>524</sup> Al-Tibrīzī, *Mishkāt Al-Maṣābīh*, (Jeddah: Al-Maktab Al-Islāmī), No. 2887.

Its maintenance, therefore, is borne by him like any other property that belongs to him. This is supported by the phrase (its pain is incumbent upon him), and he has said in *al-Kāfi* in explaining what is not obligatory on the *rāhin*. “He is not obligated to serve the mortgage as the shepherd of livestock because that is not necessary for their survival to the mortgage incumbent upon him”. If the animal needs a shepherd, he will be responsible for finding one for them. If he intends to travel with it in order to find a pasture while there is one where they are, the *murtahin* will have the option either to agree or not because that means taking it out of his possession, but if the place where they are has no pasture, then he must support those who take on the responsibility of taking it to the best place. If they are equal, the argument of the *murtahin* prevails.<sup>525</sup>

If the *murtahin* spends something on maintaining the animal without the permission of the *rāhin*, while it is possible to seek that permission from him, he will have no right for a refund. But if he does so with the permission or when taking that permission becomes impossible, a Judge has to decide about the refund.<sup>526</sup>

### 3.4.2.2 The Second View

This opinion is treated in the following details:

1. Expenses of what maintains the life of the animal are borne by the *rāhin*.
2. Expenses of keeping it are borne by the *murtahin*.

<sup>525</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfiʿī*, 1, p. 411.

<sup>526</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 430.

The basis is that whatever implies right to ownership belongs to the *rāhin*, the owner, and whatever implies right to possession belongs to the *murtahin*. Or it is said; in the first case, what is needed for the interest of the mortgage and its attachments are borne by the *rāhin* because he still owns it. As a consequence, the food, drink and clothing of a slave, for example, are provided by the *rāhin*.<sup>527</sup>

In the second case; it is said: "when the right to keep the mortgage is enjoyed by the *murtahin*, he has to protect it until his debt is recovered".

Based on that, it is incumbent upon the *murtahin* to bear any expenses that result from the protection, either in whole or in part, of the mortgage.<sup>528</sup>

### 3.4.2.3 The Preferred View

The researcher is inclined to ascribe to the view of the *Jumhūr* (majority) of the jurists for the generality of the Prophetic saying (he shall bear the pain). Also because a mortgage is a form of trust, plus the fact that the maintenance of a property is borne by its owner. Finally, the Prophet also said; "harm shall not be inflicted nor reciprocated". Since the imposition of maintenance expenses on the *murtahin* represents a form of harm, as the majority stresses, the expenses of maintaining the mortgaged asset or animal are borne by the *rāhin*.<sup>529</sup>

<sup>527</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 4, p. 130.

<sup>528</sup> For the Ḥanafīs, see Ibn Mawdūd Al-Hanafī, *al-Ikhtiyār li-Ta'līl al-Mukhtār*, 2, p. 65.

<sup>529</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 430.

#### 3.4.2.4 The Value (*Hukm*) If The Mortgager Fails To Maintain The Mortgage

There are two distinct views on this question:

1. If the *rāhin* fails to maintain the mortgage and it needs maintaining, then the *murtahin* will pay its expenses and will later return to the *rāhin* to be fully refunded even if what he spends is more than the value of the mortgage. In this case, his expenses will be regarded as a debt shouldered by the *rāhin*.<sup>530</sup>
2. That in the event of failure to maintain the mortgage, the judge should force the *rāhin* to comply if he is present and able financially to do so. Otherwise, the judge will finance it by using the wealth of the *rāhin* if he has money. And in the case that the *rāhin* is poor the judge will take a loan or sell a part of the mortgage to maintain it, or he will command the *murtahin* to bear that expenses and will consider that a debt upon the *rāhin* is refundable with the permission of the judge or with the testimony of others.<sup>531</sup>

However, if that takes place without the judge's permission or testimony, he is a volunteer who has no right to any refund. If he spends money on it due to the absence of the *rāhin* or the impossibility of getting that permission, he will be refunded with the less of the two sums, either the maintenance according to custom

<sup>530</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 251.

<sup>531</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 412.

or what he actually spent.<sup>532</sup>

#### 3.4.2.5 Observation

It is not allowed for the mortgagor to refrain from spending on the mortgage. This is because its maintenance is borne by him.

#### 3.4.2.6 *Hukm* (Rule) Of Maintaining The Mortgage

There has been a consensus of opinion among the jurists that the maintenance of the mortgage is borne by the owner because the lawgiver has declared that both the liability and the gain belong to him [it cannot be locked up, it cannot be owned from the one who mortgages it, he endures its liability and enjoys its pains]. Both the expenses of the mortgage i.e., all what it needs to survive<sup>533</sup>, like the food of animals and watering of trees are on the *rāhin*, because the asset should exist first and he is forced to maintain its existence in order to secure the right of the *murtahin*.

They, however, have two differing views on the type of obligatory maintenance;

The Ḥanafīs provide<sup>534</sup> that the expenses in this case are distributed to the

<sup>532</sup> Wabbaḥ al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 250.

<sup>533</sup> Wabbaḥ al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 5, p. 251.

<sup>534</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 6, p. 68.

*rāhin* as the owner of the asset and to the *murtahin*.

1. Everything that the mortgage needs to maintain its survival is borne by the *rāhin* because it belongs to him.
2. Everything that what is needed to keep the mortgage is on the *murtahin* because he is the one who has to keep it.

Based on this, the mortgager should provide the food, drink, and the fee for the shepherd for an animal. It is also his responsibility to water a mortgaged tree. The mortgager is not allowed to spend or sell any part from the mortgage to maintain it without the permission of the *murtahin* because the mortgage is attached to the debt, so taking a part from it is an aggression to the debt.<sup>535</sup>

The *murtahin* bears the fees of safe-keeping like the fees for its shelter and the fees to those who carry it. As a result, it is not permissible to stipulate in the contract a fee for the *murtahin* in return to the safe-keeping of the mortgage because he should do so. It is reported from Yūsuf that the fee of safe-keeping is borne by the mortgager, but the expenses of transporting the mortgage back when it is lost and the expenses for curing its wounds and diseases are borne by both the mortgager and the *murtahin* within the limits of his guarantee.<sup>536</sup>

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<sup>535</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqa'iq*, 6, p. 69.

<sup>536</sup> Wabbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 251.

### 3.4.3 *Hukm* (Rule) If The Mortgage Possessor Uses The Mortgage

A contract of mortgage is a contract that strengthens confidence by guaranteeing the debt. Its purpose is not for investment or interest. That being the case, the *murtahin* is not allowed to use the mortgaged asset even if the *rāhin* permits him to do so, for in this case, it will belong to the category of a loan that yields benefit and that is *ribā* (usury).

The above is so in a case where the mortgage is not an animal to be milked. If it is an animal to be milked or used for riding, the *murtahin* will then have the right to use it in return for feeding it. This is the view of Aḥmad and Ishāq. The majority of the jurists, however, hold the opposite view because the *ḥadīth*, they say, is not in their favor.<sup>537</sup>

#### 3.4.3.1 Evidence

A. From the Ashābi, from Abū Hurayrah, and from the Prophet (peace be upon him) who said: “Milk of a mortgaged animal and its back is used by the one who feeds it and its feeding is incumbent upon the person who rides on it and milks it.” Abu Dāwūd said: “and that according to us is correct, others like al-Bukhārī and al-Tirmīdhī have also reported it”.<sup>538</sup>

B. Abū Hurayrah reported that the prophet (peace be upon him) said: “The

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<sup>537</sup> Al-Sayyid Sābiq, *Fiqh Al-Sunnah*, 3, p. 277.

<sup>538</sup> Al-Bukhārī, *Al-Jāmi' Al-Ṣaḥīḥ*, (Damascus: Dār Al-Fikr), 3, p. 178.

back (of a mortgaged animal) is used by the one who maintains the animal. And its maintenance is incumbent on he who rides on and uses the milk of the mortgage animal.”<sup>539</sup>

#### 3.4.3.2 The First View

For the Shāfi‘ī, the *rāhin* has the right to benefit from the mortgage as long as it does not cause harm to the *murtahin*.<sup>540</sup> To them, the *rāhin* has the right to benefit from the mortgage by leasing it, for example, either by him or someone else. As a result, the *rāhin* can always use the mortgage as long as there is no harm caused to the mortgage.

#### 3.4.3.3 The Second View

For the Ḥanafīs, the Mālikīs and a single view from the Ḥanbalīs,<sup>541</sup> the *rāhin* cannot benefit from the mortgaged asset.

Their basis is that the asset is engaged and the *rāhin*, as a result, has no right to use it. Like a sold commodity kept with the seller to recover, he can no longer use its price. But for the Mālikīs, the usage depends on the permission of the *murtahin* because by giving the permission of usage to a third party, he will lose its mortgage

<sup>539</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 2, p. 472.

<sup>540</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi‘ī*, 1, p. 411.

<sup>541</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 436.

right, hence the mortgage reverts to the owner.<sup>542</sup>

#### 3.4.4 Second, Pertaining To The *Murtahin*

The majority of jurists see that the *murtahin* cannot use the mortgage in the absolute sense without the permission of the *rāhin* whether the mortgage needs expenses or not and whether it is milked or used for riding or not. Their evidence for that is the Prophetic saying: A mortgage should not be locked up, its owner enjoys its (benefit) and bears it pain.<sup>543</sup>

The majority of the Ḥanafīs say that the *murtahin* cannot use the mortgage if that usage is stipulated in the contract because that represents a form of loan that yields benefit. Some of them reject that usage in an absolute sense because, to them, it is usury (*ribā*). They assert that stipulating usage is forbidden by custom. In addition to that, people will probably fail to pay the debt if they can use the mortgage.<sup>544</sup>

Our comment on the Ḥanafīs' opinions is that the third opinion which stresses the impermissibility of benefiting from the mortgage in the absolute sense, is the best opinion because it is more in conformity with the objectives of the Sharī'ah than any other opinion. It is also in line with the concept of the *sadd al-dharāi'*, (blocking the

<sup>542</sup> Al-Khurshī, *Sharḥ Al-Khurshī li Mukhtaṣar*, (Cairo: Al-Maṭba'ah Al-Amīriyyah, 1333H), 5, p. 245.

<sup>543</sup> Al-Ṣan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 50.

<sup>544</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 2, p. 645.

means) that leads to *ribā*, (usury). If we observe the practice amongst people today, we will see that the prevailing practice between them judges that a debtor should provide the mortgage and what is known in custom is like what is conditionally stipulated.<sup>545</sup>

But if the *rāhin* permits the *murtahin* to use the mortgage, the situation is argued in the following rulings:

1. If the usage is without compensation or with an unjust compensation, then that will be impossible if the mortgaged debt is a loan by origin. For in this case, it will be the type of loan that draws benefit, which is strictly prohibited by a *ḥadīth*.<sup>546</sup> But if the mortgage debt is not a loan, its usage is then permissible. If the person who gives the loan benefits by paying just compensation as if the *murtahin* rents a mortgaged house by giving the *rāhin* an animal of the same value, then that renting will be permissible either in loans or otherwise. Ibn Nujaym declares in *al-Ashbāh* that such a deal is reprehensible.<sup>547</sup>

#### 3.4.4.1 The Opinion Of The Ḥanbalīs

But the Ḥanbalīs here differentiated between the rule of the mortgaged asset that does not need expenses and that which needs expenses:

<sup>545</sup> Ibid, 2, p. 645.

<sup>546</sup> Al-Qurṭubī. *al-Jāmi' li Ahkām al-Qur'ān*, 3, p. 413.

<sup>547</sup> The prohibitional reprehensible according to the Ḥanafīs is what the lawgiver commands man to abstain from doing in a strict sense based on the *Ijtihād*, debatable evidence.

#### 3.4.4.1.1 Benefiting From The Mortgaged Asset That Does Not Require Expenses

The Ḥanbalīs say that the mortgaged assets that do not require expenses like a house cannot be used by the *murtahin* without the permission of the *rāhin*. And even if the *rāhin* permits that, the above stated rule applies. These rules concern the explanation of benefiting without compensation or with unequal compensation. Aḥmad said: I disapprove of the house loan because it is pure usury i.e., if the house is mortgaged in return for a loan and the *murtahin* uses it, benefiting from the mortgaged asset that needs expenses.<sup>548</sup>

If the *rāhin* permits the use of the mortgage which require expenses, then the above stated rules of compensation apply. If the *rāhin* does not permit this, the situation here depends on whether the object of the mortgage thing is milked or can be used for riding or not.

##### 3.4.4.1.1.1 Benefiting From A Milkable Mortgage

Benefiting from this type of mortgage is permissible as long as the one who milks it and rides on it bears the expenses of feeding it. This is so whether the *murtahin* bears these expenses according to whether the *rāhin* can feed it or not. And Aḥmad said in another version: the *murtahin* cannot expect to benefit from the mortgage in return for voluntary expenses he incurs.<sup>549</sup> He can use it in any way, that

<sup>548</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 438.

<sup>549</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 439.

is the view of Abū Ḥanīfah, Mālik and Shāfi‘ī. This is because the mortgage belongs to someone other than the *murtahin* and its owner neither permits its use or allows anybody to spend money on it, and because the Prophet (PBUH) said: “A mortgage shall not be locked up against its owner, he bears its pain and enjoy its benefit.”<sup>550</sup>

#### 3.4.4.1.1.2 The Ḥanbalis’ Proof

The prophet said: “The back (of a mortgaged animal) is used by the one who feeds it and its milk is consumed by the one who feeds it and its maintenance is incumbent upon the one who rides on it and uses its milk.”<sup>551</sup>

They argued that it cannot be claimed that the *ḥadīth* implies that the *rāhin* spends and uses the mortgage for two reasons;

First, in another version it is reported (if the animal is mortgaged, it becomes incumbent upon the *murtahin* to feed it and its milk is consumed) the *ḥadīth* asserted that the one who feeds it is the *murtahin* and as such he is the one who benefits.

Second, that his saying (by feeding it) indicates that benefiting from the mortgage is in return for the expenses incurred and that is what fits the *murtahin* but the *rāhin*’s expenses and usage are not compensatory but a necessity of ownership.<sup>552</sup>

<sup>550</sup> Al-Tibrīzī, *Mishkāt Al-Maṣābīh*, (Jeddah: Al-Maktab Al-Islāmī), Ḥadīth No. 2887.

<sup>551</sup> Al-Ṣan‘ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 49. The *ḥadīth* is reported by al-Bukhārī.

<sup>552</sup> Ibid, 3, p. 50.

#### 3.4.4.1.2 Using The Animal, Which Can Neither Be Milked Nor Be Used For Riding

The preferred view of the Ḥanbalīs is that if the mortgage is an unmilkable animal, the *murtahin* will not be allowed to spend or use the mortgage. The reason is the fact that the *murtahin* does not use the mortgage without the permission of the *rāhin* except if a text specifies that. Another reason from Imām Aḥmad, provides that the *murtahin* will have the right to use it if the mortgager refuses to feed it.

#### 3.4.4.1.3 Using Non-Animal Mortgages Which Require Expenses

If the mortgage is not an animal and it, at the same time, needs expenses for its maintenance like a collapsed house repaired by the *murtahin*, he will not, merely by virtue of that repair, have the right to get any refund from the *rāhin* or to use the mortgage. This is because its repair is not obligatory on him.<sup>553</sup> As such no one else has the obligation to repair it on his behalf.

#### 3.4.4.2 The Opinion Of The Literalists (The *Zāhiriyyah*)

The Literalists (*al-Zāhiriyyah*) see that all benefits of the mortgage belong to the *rāhin*. The *murtahin* will have no right to use it except if the mortgage is milkable or fit for riding and the *rāhin* refuses to maintain it.<sup>554</sup> The *Zāhiriyyah*, even if they

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<sup>553</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, p. 433.

<sup>554</sup> Ibn Ḥazm, *Al-Muḥllā*, 8, p. 89.

agree with the Ḥanbalīs on the permissibility of the *murtahin* using the milkable mortgage without permission, differ with them in the following:

While the Zāhiriyyah stipulate the rejection of the *rāhin* to maintain the mortgage, the Ḥanbalīs do not.

While the Zāhiriyyah do not stipulate the quality between the expenses of the *murtahin* and the benefit he gets from the mortgage, the Ḥanbalīs do stipulate this.

#### 3.4.4.3 A Response To The Ḥanbalīs And The Zāhiriyyah

If the Ḥanbalīs and the Zāhiriyyah have disagreed on a number of details pertaining to the permissibility of using a milkable mortgaged animal, they have agreed on the general principle, which is the permissibility of that use.

As has already been stated, the majority of the jurists forbid the usage of the mortgage by the *murtahin* without the *rāhin*'s permission in an agreed sense.

The majority respond to the Ḥanbalīs and the Zāhiriyyah by invoking that al-Shā'bī, the reporter of the *ḥadīth*, on which the Ḥanbalīs and Zāhiriyyah base their arguments, issued a *fatwā* contradicting the *ḥadīth* whence he said: "the *murtahin* cannot use the mortgage in any sense."<sup>555</sup> They also said: "the *ḥadīth* contradicts *qiyās* (analogy), in two ways:

<sup>555</sup> Al-Qurṭubī. *al-Jāmi' li Ahkām al-Qur'ān*, 3, p. 412.

- i. Making riding and drinking the milk permissible for other than the owner.
- ii. Compensation in maintenance and not in value.”

Ibn ‘Abdul Bārr said: “This *ḥadīth*, as far as the majority of jurists are concerned, has been rejected by fundamental principles and established practices whose authenticity cannot be denied by anyone”.<sup>556</sup>

The majority does not only disallow the benefiting by the *murtahin* of the mortgage without permission, but also, they assert that it is forbidden even with permission. If it is used without permission, they said: “The *ḥadīth* reported by ‘Umar that no one shall milk the animal of another without the latter’s permission is violated. And if it is used permission, it will also not be permissible for the existence of *al-gharar* (vagueness/cheating) and selling what one does not actually possess”.<sup>557</sup>

#### 3.4.4.4 Responses To The Claims Of The Majority

Their argument that the *ḥadīth* is contradictory to *qiyās* is refuted by the fact that an authentic *ḥadīth* is a primary source of the Sharī‘ah, which cannot be rejected except by another source superior or equal to it. And also that the Sharī‘ah rulings are not under the same category and the law-giver makes the usage in this sense in compensation of maintenance, as it is in the case of selling what belongs to a rebel by

<sup>556</sup> Al-Ṣan‘ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, 49.

<sup>557</sup> Al-Qurṭubī. *al-Jāmi‘ li Ahkām al-Qur‘ān*, 3, 412.

the ruler without the permission of the latter.

But regarding the claim of *al-naskh* (abrogation), it is responded that abrogation must be resorted to since we are not sure about the exact dates of the two texts. In this case, where we can reconcile the apparent contradiction it is advisable to do so. The *ḥadīth* of Ibn 'Umar is general and the *ḥadīth* of "the back occupied" is specific, therefore, the general one can be specified by the other. As a consequence, the *ḥadīth* of Ibn 'Umar applies here to all cases except those exempted by the Al-Awza'ī, al-Layth bin Sa'd and Abū Thawr who hold the view that the *murtahin* deserves to benefit from the mortgaged animal by riding or milking it in return for feeding it when the *rāhin* fails to feed it on condition that the value of the benefit is not higher than the value of his expenses.<sup>558</sup>

This is supported by what is reported by Ḥammād bin Salāmah in *Jami'ah* in these words "if he takes possession of a she goat as a mortgage, he deserves to use its milk in a value equal to its feeding". This is so because the animal has to live and its feeding is obligatory. This case is likened to the case of a married lady whose husband fails to maintain her. She, in this case, will have the right to take possession of her husband's property to maintain herself justly.<sup>559</sup>

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<sup>558</sup> Al-Ṣan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 50.

<sup>559</sup> Al-Qurṭubī. *al-Jāmi' li Aḥkām al-Qur'ān*, 3, p. 413.

#### **3.4.4.5 The Preferred View**

Having exposed the views of the jurists and their evidence, we prefer the view that stresses the permissibility benefiting from the mortgaged asset if the mortgage is a milkable animal and the value used is equal to the value incurred on maintenance.

**SECTION FIVE:**  
**GUARANTEEING THE MORTGAGED ASSET AND THE MEASURE OF**  
**THE GUARANTEE**

Guaranteeing the mortgaged asset is one of the significant subjects discussed in this dissertation. The question, which poses itself here is what will the case be if the *murtahin*'s (the party who keeps possession of the mortgage) carelessness leads to the perishing of the mortgaged asset? Will the *murtahin* be held responsible to pay back its value or something similar to the destroyed asset? This question is what we will attempt to answer in the following sections.

**I:** Guaranteeing the Mortgaged thing.

**II:** Method of Estimating the Guarantee.

**3.5.1 Guaranteeing The Mortgaged Thing**

**3.5.1.1 *Hukm* (Rule) Pertaining To The Perishing Of The Mortgage**

All schools of thought have agreed that paying a guarantee in return for a destroyed mortgaged asset is obligatory. And in this case, the value of the guarantee substitutes the mortgaged asset. The jurists, however, have differed over the details of that individual who is entitled to demand this guarantee and the time the value of this guarantee is estimated.

The Hanafis say that if the asset perishes, the *rāhin* has to pay its guarantee. If

it is fungible, he has to pay something similar to it and if it is non-fungible, he has to pay its value on the day that it perishes. In this case, it is the *murtahin* who demands its payment. And it is also he who keeps that guarantee until the debt is paid back. And when the debt payment is due, the *murtahin* recovers his debt from that value.<sup>560</sup>

If the *murtahin* destroys the mortgage deliberately or carelessly, he will be obliged to pay back its guarantee whether fungible or non-fungible and its value is determined based on the day of possession.

If a third party destroys it, then that third party will pay its value based on the day on which it was destroyed.

And whether it is destroyed by an outside party or by the *murtahin* the guarantee will either be (fungible or non-fungible) a mortgage in the place of the original mortgage. And the one who demands the guarantee will become the *murtahin*, and the mortgaged asset will be removed from the person under whose control it was to the new *murtahin*.<sup>561</sup>

The Shāfi'īs and the Ḥanbalīs say that the one who deliberately aggresses the mortgage will pay back its value and something like it based on the day of aggression and what is paid will become itself a mortgage.

Opponent who demands a substitute: the one who demands the replacement

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<sup>560</sup> Al-Kāsānī, *Badā'ī 'Al-Ṣanā'ī fī Tarfīb al-Sharā'ī*, 6, p. 163.

<sup>561</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqa'iq*, 6, p. 87.

of the mortgage is the *rāhin* because he is the owner, but its possession is done by the person under whose hand the asset is, from the *murtahin* or an upright third party.

The Mālikīs say the value of a mortgage destroyed by a *rāhin* or an outsider is determined as of the day of destruction. The value is paid if the one who destroys it fails to produce something like it.

And if the *murtahin* is the aggressor, he will pay its value as of the day of destruction, although some say the day of possession.<sup>562</sup>

If the mortgaged thing perishes in the hands of the *murtahin*, its destruction can be by deliberate aggression, by carelessness or otherwise, each one of those possibilities will be explained in the following:

The majority of the jurists<sup>563</sup> say that the *murtahin* is considered as faithful and the mortgage under him is regarded as a trust but not a guarantee. If he does not deliberately cause its destruction and as a result, if some of it perishes, the rest remains a mortgage for the whole debt. If the *murtahin* claims the destruction of the mortgage without explaining the reason, his words should be considered because he is a trustee. But if he mentions a reason, he must prove it with evidence. However, if he claims that he returns it, his words will not be considered because he took its possession of it primarily for his benefit, like a tenant.

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<sup>562</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ al-Kabīr*, 3, p. 247.

<sup>563</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, 140; Ibn Ḥazm, *Al-Muḥllā*, 8, 96.

### 3.5.1.2 Their Proof: They Produce The Following Evidence

It is reported from Abū Hurayrah that the Prophet (PBUH) is reported to have said:

*"A mortgage shall not engage the one who keeps it, he endures its liability and enjoys what it produces."*<sup>564</sup>

#### 3.5.1.2.1 The Aspect of Proof from this *Ḥadīth*

The Prophet, they say, made it a law that the liability and pain of the mortgage is endured by the *rāhin* and the pain comes in the event of destruction because he has to pay back the debt to the *murtahin* if the mortgage perishes when it is in trust. But if it perishes when under the guarantee, the pain will be endured by the *murtahin* because in this case this right does not fall on the *rāhin*. However, this contradicts the established text.

They state that it is not permissible to burden the *murtahin* except by a text because that means devouring someone's property unjustly which Allāh prohibits in the verse that says: "And do not devour their wealth amongst you unjustly"<sup>565</sup> and the Prophet (PBUH) says: "Indeed your blood and your wealth are prohibited amongst you".<sup>566</sup>

They furthermore stress that the contract of mortgage is enjoined to create

<sup>564</sup> Al-Bukhārī, *Al-Jāmi' Al-Ṣaḥīḥ*, (Beirut: Dār Al-Fikr), 3, p. 178.

<sup>565</sup> Al-Tibrīzī, *Mishkāt Al-Maṣābīh*, (Jeddah: Al-Maktab Al-Islāmī), No. 288.

<sup>566</sup> Ibn 'Abd Al-Barr, *Al-Tamhīd*, (Egypt: Muṣṭafā Al-Bābī Al-Ḥalabī), 6, p. 439.

confidence in debt exchange. If it collapses with the perishing of the mortgaged object, it would then mean the undermining of the confidence.

For this reason, the mortgaged asset is strongly linked to a debt and not to a commodity and the debt cannot collapse by its perishing.

The second opinion put forward is that, if the mortgaged thing belongs to the category of things, which are always visible and cannot be hidden like fruit on a tree or a slave or some real estate, he will not be held responsible for its destruction. However, if the thing belongs to a category that proves otherwise, his claim, for example, of its being stolen cannot be accepted. He, in this case, will be under the obligation to pay it back unless a witness with his oath proves his innocence.<sup>567</sup>

Imām Mālik said: "If witnesses have proved the perishing of what belongs to the category of perishable things, he will then not be held responsible". It is the same view held by Ibn Qāsim. The reason is that a guarantee in this case is a charge that is removable by evidence. The basis of differentiation in this case, according to them, is when the mortgage is in the hands of the *murtahin*, but if it is in the hands of a trustworthy party, the *murtahin* will not be responsible in any sense.<sup>568</sup>

If the *murtahin* claims that he has refused the mortgage and the *rāhin* denies that, the latter will be believed because he is in conformity with the origin which is the lack of guarantee and as such, the Mālikīs obligate the *murtahin* to carry the

<sup>567</sup> For the Mālikī, see Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, 309.

<sup>568</sup> Ibn 'Arafah, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 253.

burden of the proof of the mortgage in some forms but not in all forms.<sup>569</sup>

Their evidence for that is *istihsān* (juristic preference). They say that accusation hangs over what can be hidden and not over what cannot be hidden such was the practice of the Madīnah people in surety. Its meaning according to Mālik is to reconcile contradictory evidence.

But the reason that the mortgage is not for the benefit of only its owner to be considered *wadī'ah* (something put under the voluntary care of another), it is also not imposed for the benefit of only its taker to be considered a loan. It is rather a mixture of the two.

Indeed, it is easy to claim the destruction of something, which is easy to hide unlike that which is not easy to hide. It is therefore more acceptable to impose a guarantee for the former to prevent claims of destruction.<sup>570</sup>

### 3.5.1.3 The Third Opinion

Those who ascribe to this view<sup>571</sup> say that the *murtahin* should be obligated to pay the value of the mortgage if it perishes. They base their stance on two *ḥadīth*:

It is reported that the Prophet (PBUH) said: "mortgage is in what it stands

<sup>569</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 310.

<sup>570</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, 254.

<sup>571</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 6, 64.

for" i.e., it perishes as a substitute for the debt for which it is set. In another report he said: "... mortgage is in what it<sup>572</sup> apparently stands for".

The aspect of proof from these two *ḥadīth* is that the *murtahin* shall bear the pain of destruction because his debt will also collapse in return for the perishing of the mortgaged asset and this is a clear indication that the possession of the *murtahin* is the possession of one who should guarantee.

1. Standing of the debt to the time of perishing. If the debt collapses without a substitute and then if the mortgage perishes in the hands of the *murtahin*, it perishes without anything and no guarantee should be paid by him, be it in the sense of trust in this case, just like if the *murtahin* releases the *rāhin* from the debt and then the mortgage perishes in the hands of the *murtahin*, here it perishes without return.
2. That the destruction of the mortgaged asset takes place while the mortgage is still possessed as a mortgage. If the perishing occurs when the mortgage is out of possession, it then cannot be a guarantee. For example, if someone seizes the mortgaged thing and it perishes in his hand, the *murtahin* will not be held responsible for it and nothing will be deducted from the debt.<sup>573</sup>

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<sup>572</sup> This means that when the value of the mortgage causes disagreement between the parties after it had perished, it is then valued according to the debt. And this explained by another *ḥadīth* reported from 'Aḥā' that a man his horse mortgage to another and informed the Prophet who said to him you have lost your right.

<sup>573</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 6, p. 64.

One of the conditions stipulated by the Ḥanafīs to imply the responsibility of the *murtahin* is that the mortgaged asset be purported to be a source for the mortgage. This means that any addition resulting from the mortgage, or anything in that sense like fruit, milk, etc., is not guaranteed by the *murtahin* when the mortgage perishes and no part of the debt will be reduced because of that.<sup>574</sup>

### 3.5.1.4 The Preferred View

Having exposed the views of the majority and the Ḥanafīs and Mālikīs, the researcher supports the view of the majority who hold that the hand of the *murtahin* is a hand of *amānah* (possession of trust) and not a possession for guarantee. This view is preferred because of the strength of their evidence and the weakness of the proofs of their opponents. We base our position on the following reasons:

1. The Ḥanafī proofs: Their basis is the above-stated *ḥadīth*. And this *ḥadīth* has been declared weak by the majority of the tradition. Dar al-Quṭnī, the reporter, reported it based on the following *sanad* (chain of narrators):

Muḥammad b. Makhlad reported to us, Aḥmad b. Ghālīb reported to us, ‘Abdul Karīm b. Ruh reported to us from Hishām b. Ziyād from Ḥamīd from Anas from the Prophet (PBUH). He said: *al-rahn bimā fīhi* (mortgage is in what it stands for). Dar al-Quṭnī provides: this is not authentically established from Ḥamīd from him to our master all are weak and then he

<sup>574</sup> Al-Zayla‘ī, *Tabyīn al-Haqā’iq Sharḥ Kanz al-Daqā’iq*, 6, p. 64.

narrated it via Ismā'il b. Abū Umayyah that Hamād b. Salāmah reported from Anas and he said that this is unsound from Hamād. This corrupted the *ḥadīth*. As a result, this *ḥadīth* cannot be used as a basis.

2. As for the proofs of the Mālikīs: It is equally responded to by the fact that the Prophet did not specify a particular mortgage, so something the destruction of which is obvious and whose destruction is not obvious are the same because the name mortgage is correct for both of them and there is no context to specify one of them and also no textual or *ijtihād* proof to specify either.<sup>575</sup>

What is correct then is to support those who hold that there is no guarantee in the absolute sense. Meaning that if the mortgage perishes, the *murtahin* will only have the right to demand the recovery of his debt. As a result, the legitimacy of the mortgage is established in the Qur'ān, the Sunnah, and *ijmā'* (consensus) in order to emphasize the need for it as a source of confidence as declared by the majority.<sup>576</sup>

The fact is that the mortgaged asset is a trust in the hands of the *murtahin*.<sup>577</sup> Nothing from the debt can be reduced when the mortgage perishes. In the Shāfi'ī school of thought<sup>578</sup> a mortgage is a form of trust in the hands of the *murtahin*, if it perishes in whole or part, nothing will be reduced from the debt and he is not held

<sup>575</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 310.

<sup>576</sup> Ibid, 2, p. 311.

<sup>577</sup> Al-Sayyid Sābiq, *Fiqh Al-Sunnah*, 3, 278.

<sup>578</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 405.

responsible unless he deliberately causes its destruction.

In the Ḥanafī school of thought,<sup>579</sup> a mortgage is guaranteed in the hands of the *murtahin*. If it perishes in whole or in part, the debt for which it stands will collapse in whole or in part respectively.

But to explain what can serve as *marhun bihi* (something for which a mortgage is set), we say<sup>580</sup> that debts can serve as a basis for a mortgage in any case whether there is a sale or not.

### 3.5.1.5 But The Guaranteed Assets Are Of Two Kinds

That which is guaranteed in itself, like a seized asset – a mortgage can be served for that, this type is mortgaged by paying either its like or its value in non-fungibles.

The other type is guaranteed in something else. A mortgage is not permitted in this type like a sold commodity in the hands of the seller. It is guaranteed by price, not by itself that if the asset sold perishes, its price collapses because the guarantor is not under any obligation because of the perishing of the mortgage.<sup>581</sup>

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<sup>579</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 6, p. 167.

<sup>580</sup> Al-Samarqandī. *Tuḥfat al-Fuqahā'* (Al-Qāhirah: Maṭba'ah Muṣṭafā Al-Bābī Al-Ḥalabī), 3, p. 41.

<sup>581</sup> Ibid, p. 41.

However, assets, which are not guaranteed,<sup>582</sup> like a rented place, cannot be mortgaged. Because what is not guaranteed cannot be a source for debt-recover when it perishes.

It is permissible to serve a mortgage in return for a dowry because dowries are guaranteed by themselves. If a dowry perishes, its like or value should be provided.

And if the mortgaged object perishes, and the mortgaged asset is in the hands of a mortgage keeper, he will be told: deliver the asset under your control and take from the *murtahin* less than the debt and less than the value because the mortgaged asset is also guaranteed.<sup>583</sup>

If the mortgaged asset is destroyed before the perishing of the mortgage, the mortgage will become a mortgage within the value of the mortgaged asset and if the mortgage perishes after that, it is owned in less than its value and the value of the asset which was its mortgage. He said in *al-Rawḍah*<sup>584</sup> that if the *murtahin* claims the destruction of the mortgaged asset in his hand, his claim will be accepted when he produces a witness and an oath. If he claims returning it to the owner, the Iraqis said: that in this case, the *rāhin* is believed when he produces a witness and an oath. They also said that the same thing applies to a tenant if he claims returning the place rented, as the words of an agent are accepted with his oath. A partner in a *muḍarabah*

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<sup>582</sup> Ibid, p. 242.

<sup>583</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 21, p. 112.

<sup>584</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 311.

partnership and a hired worker, whether they are guarantees is debatable, and the best view about this debate is that their words are accepted with the oath because they took the asset for the benefit of the owner. Their benefit is in working on the asset and not from the asset itself unlike the *murtahin* and a tenant. This view is the view of most of the companions, especially the old ones. Some Khurasānīs from *al-Marawizah* and others said that any trustworthy person should be believed in a claim of return, like perishing. They have agreed to believe all of them in the claim of destruction. And in al-Ghazzālī's words, no disagreement over it has not been traced. And that it is strictly not so.<sup>585</sup>

### 3.5.2 Method Of Estimating The Guarantee

The jurists have differed over the method used in estimating the security. Their disagreement goes as follows:

1. The Mālikīs: This school hold the view that the guarantee is valued in accordance with the value of the perished mortgage without regard to the value of the debt. It is known that the Mālikīs do not obligate the *murtahin* to pay a guarantee except if the destruction is caused by a hidden reason and both a witness and an oath from the *murtahin* do not exist.

And accordingly if it perishes from his hand, and the thing belongs to the category of those things, which are easy to hide, the *murtahin* is bound to pay a

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<sup>585</sup> Ibid, 2, p. 312.

guarantee if the following conditions are met:

- a. If it is something easy to hide like jewelry or clothes.
- b. If it is in his hands and not in the hands of a trustee.
- c. That nobody witnesses in the favor of the *murtahin* for the destruction of the thing.<sup>586</sup>

The basis of distinguishing between what can easily be hidden, so that he is bound to pay his guarantee and what cannot be easily hidden so that he does not have to guarantee it, the action that cannot be disagreed upon because the mortgage is neither taken for the benefit of its owner only and nor for the taker only. It is a mixture of both.

2. Sharih holds the view that a mortgage is guaranteed by the debt in whatever value the debt is. This means that the perishing of the mortgage will ultimately result in the collapse of all the debt whether its value is higher or lower than that of the mortgage. For example, if the debt is RM100 and the value the mortgage is RM1500 and then the latter perishes, the debt will substitute it and the *murtahin* does not have to pay the difference.

And if the value of the mortgage is RM1000 and the debt RM1500 and the former perishes, the debt collapses in return and the *rāhin* does not have to pay the difference i.e., RM500 to the *murtahin*.

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<sup>586</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, 260.

3. One group says that there is an addition. Those who hold this view base their opinion on a report by Imām 'Āli. The report implies this meaning.<sup>587</sup>

And as a result of this rule, if the value of the mortgage is equal to the debt, the former substitutes the latter and if the value of the mortgage is more than the debt, the *murtahin* will have to pay the *rāhin* the difference. But if the value of the mortgage is less, the *rāhin* will be obliged to pay the difference to the *murtahin*. But the Ḥanafīs have gone into lengthy details with regard to this question.<sup>588</sup>

### 3.5.2.1 The Role Of A Mortgage In Creating Trust And Guarantee

If the time of payment of a mortgaged debt is due and the *murtahin* asks the *rāhin* to pay his debt and the latter does so, then that is an accepted performance. And as a result, the *murtahin* will be obligated to return the mortgaged thing back to the *rāhin* and that terminates their contract.

However, if he does not return it to the *rāhin* when he is able to do so, he will be under an obligation to pay its guarantee because this is a form of carelessness on his part and as a such, it necessitates a guarantee according to all the jurists. But if he fails to return it because of sickness or fear of the dangers of the road or with the permission of the *rāhin*, if it decays, he will not be under any obligation to pay a guarantee. However, if the *rāhin* fails to pay back the debt when the *murtahin*

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<sup>587</sup> Ibn Ḥazm, *Al-Muḥllā*, 8, p. 99.

<sup>588</sup> For more about their views, see their debate over this subject.

demands it, the debt will be recovered according to the following:<sup>589</sup>

Because of the fact that the mortgage remains under the ownership of the *rāhin* even after delivering it to the *murtahin*, based on the Prophetic saying: "mortgage shall not be locked up against its owner", as explained earlier, the authority to sell the mortgage belongs only to the *rāhin*. Due, however, to the fact that the right of the *murtahin* is still attached to the mortgage, the execution of such sale depends on his consent. Therefore, the *murtahin* can, according to all the jurists, sell the mortgage with the permission of the *murtahin*. If the *rāhin* dies, the authority of the sale will belong to his heir or the executor of his will.<sup>590</sup>

The Mālikīs have explained in their books<sup>591</sup> some matters related to permissions given by the *rāhin* to sell mortgages. His permission can either be absolute or specific. If he restricts it in the case of non-payment of the debt, to a particular period, it would not be allowed for anybody to sell it before that time. Rather in such a case, it is obligatory to refer it to a judge to know whether the debt is paid back or not. But if the permission is absolute, there will arise no need to refer it to a judge and the sale is executed on condition that it does not involve cheating (*gharar*).<sup>592</sup>

If the sale requires expenses, these expenses are borne by the *rāhin* because

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<sup>589</sup> Al-Sayyid Sābiq, *Fiqh Al-Sunnah*, 3, p. 280.

<sup>590</sup> Maṣṣūr al-Bahūtī, *Kashaf al-Qinā'*, 3, p. 337.

<sup>591</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, 251.

<sup>592</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, p. 124.

he is the owner who is under an obligation to pay back the debt. If he fails to sell it, the judge will sell it on his behalf, according to the majority of jurists, without forcing the owner.<sup>593</sup>

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<sup>593</sup> Manṣūr al-Bahūti, *Kaṣaḥ al-Qinā'*, 3, 337; Al-Khaṭīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, 124.