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

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

---

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 Ḥanafi 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.” Ibn ‘Arafaḥ, a Mālikī jurist, stated that “what is kept as a document in return for a debt which actually or potentially binding.” 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”. Finally, the Hanbalis 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”.

3.1.1.3 Analysis Of The Definitions

Clearly, the Ḥanafi 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

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.⁴⁴⁷

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".⁴⁴⁸ The verse simply means that

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 riḥān (mortgage) in the verse is the plural for rahnh - mortgage - and originally it is the infinitive. Then the word al-marḥān 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. 449

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.

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 upon⁴⁵⁰

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.⁴⁵¹

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

⁴⁵⁰ Al-Bayhaqī, Al-Sunan Al-Kubrā, (Beirut: Dār Iḥyā' Al-Turāth Al-'Arabī), 6, p. 88.
⁴⁵¹ Aḥmad Ibn Ḥanbal, Musnad al-Imām Aḥmad Ibn Ḥanbal, 2, p. 472.
the Sharī'ah refuses.  

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.  

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-Ḍāḥak and the Al-Aẓhariyyāt said: a mortgage cannot be legalized only on travelling, justifying this with the verse and the hadīth.  

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

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

--- 

452 Aḥmad Ibn Ḥanbal, Musnad al-Imām Aḥmad Ibn Ḥanbal, 2, p. 472.  
453 Al-Tibrizī, Mishkāt Al-Maṣābīḥ, (Jeddah: Al-Maktab Al-Islāmī), No. 2887, 2888.  
454 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.\textsuperscript{455}

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.\textsuperscript{456}

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


\textsuperscript{456} 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.\(^457\)

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

---

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.\textsuperscript{458}

\textsuperscript{458} Narrated by the majority except Muslim and Al-Nasāʾī. 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. Marhûn (item being mortgaged): The mortgaged asset in the possession of the murtahin as a source of confidence and security for his debt.459

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.460

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.461

---

461 Muṣṭafā Al-Ḥasan et. al., op. cit., 99.
3.2.1.2 Conditions Of Mortgage For The Ḥanafīs

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.

---

b. that the asset be during the lifetime of the *murtaḥin* 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.\(^{463}\)

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.\(^{464}\)

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 *murtaḥin* does not take possession of it, then the contract will not be binding. And as a result, the mortgager can withdraw his word.


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 componis*.*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. 465

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.⁴⁶⁶

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

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

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 bih*:

- That the debt be established and compulsory,

---

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.\(^{468}\)

3.2.1.4 Conditions Of The Mortgage Contract\(^{469}\)

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

\(^{468}\) Ibid, 10, p. 60.

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.\(^\text{470}\)

3.2.2 Types Of Mortgage

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

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.
4. Mortgage of benefit.\footnote{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.}

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.\footnote{Al-Sanhūrī. \textit{Al-Wasā‘īfī Sharḥ Al-Qānūn Al-Madānī}, 10, p. 268.}

Indeed, mortgage means a formal contract or 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.
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.\textsuperscript{473}

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 \textit{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 \textit{Majallah}\textsuperscript{473}

\textsuperscript{473} Al-Sanhūri. \textit{Al-Wasā'īt fi Sharḥ Al-Qānūn Al-Madani}, 10, p. 286.
*al-Ahkām 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.\(^{474}\) Zakī al-Dīn provides; (Anyone who inquires into the Islamic law will find in it some indications of its lawfulness).\(^{475}\)

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\(^{476}\)

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.

---

\(^{474}\) This view has been stressed by Zaki Al-Dīn Shaʿbān in *The Explanatory Pamphlet of the Kuwait Law*, p. 339.

\(^{475}\) Zaki Al-Dīn Shaʿbān, Ibid.

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,\textsuperscript{477} 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 Ḥanafi School\textsuperscript{478}

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.\textsuperscript{479}

"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."\textsuperscript{480}

3.2.2.2 Second: Possessive Mortgage

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


\textsuperscript{478} Al-Kāsānī, \textit{Badā‘ Al-Ṣanā‘ī‘ fī Tarīḥ al-Sharā‘ī‘}, 8, p. 3723.

\textsuperscript{479} Muḥammad Wahīd Al-Dīn Awār, \textit{Al-Shakī fi Al-Fiqh Al-Islāmī}. p. 92.

\textsuperscript{480} Zaki Al-Dīn Sha‘bān, \textit{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.  

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.  

---

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.\(^{483}\)

3.2.2.3 Third: Mortgage On Benefit\textsuperscript{484}

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

**The First View:** The Ḥanafīs\textsuperscript{485}, Shāfī'īs\textsuperscript{486}, Ḥanbalīs\textsuperscript{487} and the Zāhīrīs\textsuperscript{488} 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\textsuperscript{489} and for the Ḥanafīs, in particular, benefit is not a property.

**The Second View:** The Mālikīs\textsuperscript{490} and some Imāmīs\textsuperscript{491}, 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).

\textsuperscript{484} 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.
\textsuperscript{486} Al-Ramli, *Nihāyah al-Muḥtāj*, 4, p. 233.
\textsuperscript{488} Ibn Ḥazm, *Al-Muḥllā*, 8, p. 89.
\textsuperscript{490} Al-Khurshī, *Sharḥ Al-Khurshī*, (Cairo: Maṭba‘ah Al-Amīrīyyah), 5, p. 238.
\textsuperscript{491} Miftāḥ 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 Mālikīs⁴⁹² Shāfi‘is⁴⁹³ Ḥanbalīs⁴⁹⁴ and Zāhirīs⁴⁹⁵ 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).

---


In the Qur'ān; Allāh mentions, (a mortgage in hand). 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.”

3.2.2.4.2 Second Group

Imām Abū Ḥanīfah and his disciples 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-muhayyah (rotational ownership); like when he says; I mortgage this asset for you every other

496 Al-Qur'ān, Al-Baqarah (2): 283.
497 Ibn Qudāmah al-Maqdisi, Al-Mughnī wa al-Sharḥ al-Kabīr, 4, p. 375.
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\(^{501}\) 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.\(^{502}\)

---


SECTION THREE:

**HUKM (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. 503

---

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.\textsuperscript{504}

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.\textsuperscript{505}

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

\textsuperscript{504} Ibn Qudāmah al-Maqdisī, \textit{Al-Mugnī wa al-Sharḥ al-Kabīr}, 4, p. 368.

\textsuperscript{505} Ibid, 4, p. 369.
substitutes the other and if their possession takes place at different times, the first substitutes the last.⁵⁰⁶

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.⁵⁰⁷

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

⁵⁰⁶ Al-Shirāzī, Al-Muhadhab fi Fiqh Madhab Al-Imām Al-Shāfi‘ī, 1, p. 405.
after possession.\textsuperscript{508}

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‘\textsuperscript{509} 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 Mālikī\textsuperscript{510} subscribe to the view that continuity of

\textsuperscript{508} Ibn Qudāmah al-Maqdisī, \textit{Al-Mughnī wa al-Sharḥ al-Kabīr}, 5, pp. 369-370.

\textsuperscript{509} Al-Shafi‘ī, \textit{Al-Umm}, 3, p. 143.

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\(^ {511}\) 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.\(^ {512}\)

3.3.3.2 The Preferred Views

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

---


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" because he owns it and thus should bear what makes its survive. 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.

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

513 Al-Tibrizi, Mishkāt Al-Maṣābih, (Jeddah: Al-Maktab Al-Islāmī), No. 2887, 2888.
515 Ibid, p. 188.
issue: mortgaged in its food, clothes, shelter and keeping is borne by the \textit{rāhin}.\textsuperscript{516}

Abū Hanīfah said that this is because it is a kind of maintenance borne by the \textit{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 \textit{rāhin} has to provide it. Abū Hanīfah added: the possession of the \textit{murtahin} is the possession of the one who is bound to the guarantee within the value of his death and any additional things are \textit{amānah} (trust) under him.

The same applies when the mortgaged slave dies, the expenses of his burial are borne by the \textit{rāhin}.\textsuperscript{517}

\textbf{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 \textit{rāhin}.\textsuperscript{518}

\textsuperscript{516} Ibn Qudāmah al-Maqdisī, \textit{Al-Mughnī wa al-Sharḥ al-Kabīr}, 4, p. 17.
\textsuperscript{517} Ibid, 4, p. 18.
\textsuperscript{518} Al-Māwardī, \textit{Al-Ḥāwī 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 hadīth 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.\footnote{Al-Mrghanānī, \textit{Al-Hidāyah Sharḥ Bidāyah Al-Muṣṭaḍī}, (Egypt: Maṭba‘ah Muṣṭafā Al-Bābī Al-Ḥalabī), 4, p. 130.}


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
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.\textsuperscript{521} 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.\textsuperscript{522}

\textsuperscript{521} Ibid, 3, p. 252.

\textsuperscript{522} Al-Māwardī, \textit{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”.\(^{523}\)

The aspect of proof from this hadīth 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 Shāfiʿī 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”.\(^{524}\)

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

\(^{523}\) Ağmad Ibn Ḥanbal, Musnad al-Imām Ağmad Ibn Ḥanbal, 2, p. 472.

\(^{524}\) Al-Tibrizī, Mishkāt Al-Maṣābīḥ, (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-Kāfī* 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.  

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.

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*.

---

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.\textsuperscript{527}

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.\textsuperscript{528}

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.\textsuperscript{529}

\textsuperscript{527} Al-Marghanānī, ʿAlī Ibn Abī Bakr. \textit{Al-Hidāyah Sharḥ Bidāyah al-Mubtadī}, 4, p. 130.

\textsuperscript{528} For the Ḥanafīs, see Ibn Mawdūd Al-Hanafi, \textit{al-Ikhtiyār li-Taʿlīl al-Mukhtār}, 2, p. 65.

\textsuperscript{529} Ibn Qudāmah al-Maqdisī, \textit{Al-Mughnī wa al-Sharḥ al-Kabīr}, 4, p. 430.
3.4.2.4 The Value (Ḫukm) 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 muttahin 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.⁵³⁰

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 muttahin 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.⁵³¹

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

---

⁵³¹ Al-Shirāzī, Al-Muhadhab fi Fiqh Madhab Al-Imām Al-Shāfī‘ī, 1, p. 412.
or what he actually spent.\textsuperscript{532}

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 Ḥukm (Rule) Of Maintaining The Mortgage

There has been a consensus of opinion among the juriststhat 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\textsuperscript{533}, 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 differeing views on the type of obligatory maintenance;

The Ḥanafīs provide\textsuperscript{534} that the expenses in this case are distributed to the

\textsuperscript{532} Wahbah al-Zuhaylī, \textit{Al-Fiqh al-Islāmī wa Adillatuhū}, 4, p. 250.
\textsuperscript{533} Wahbah al-Zuhaylī, \textit{Al-Fiqh al-Islāmī wa Adillatuhū}, 5, p. 251.
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.\textsuperscript{535}

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.\textsuperscript{536}

\textsuperscript{535} Al-Zayla'ī, Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq, 6, p. 69.

\textsuperscript{536} Waḥbah al-Zuhaylī, Al-Fiqh al-İslāmî wa Adillatuḥū, 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 Iṣḥāq. The majority of the jurists, however, hold the opposite view because the *ḥadīth*, they say, is not in their favor.\(^{537}\)

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-Tirmidhī have also reported it”.\(^{538}\)

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


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.\textsuperscript{539}

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 murtahīn.\textsuperscript{540} 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,\textsuperscript{541} 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 murtahīn because by giving the permission of usage to a third party, he will lose its mortgage

\textsuperscript{539} Aḥmad Ibn Ḥanbal, \textit{Musnad al-Imām Aḥmad Ibn Ḥanbal}, 2, p. 472.

\textsuperscript{540} Al-Shirāzī, \textit{Al-Muhadhab fi Fiqh Madhab Al-Imām Al-Shāfi‘ī}, 1, p. 411.

\textsuperscript{541} Ibn Qudāmah al-Maqdisī, \textit{Al-Mughni wa al-Sharḥ al-Kabīr}, 4, p. 436.
right, hence the mortgage reverts to the owner.\textsuperscript{542}

3.4.4 Second, Pertaining To The \textit{Murtahin}

The majority of jurists see that the \textit{murtahin} cannot use the mortgage in the absolute sense without the permission of the \textit{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.\textsuperscript{543}

The majority of the Ḥanafīs say that the \textit{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 (\textit{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.\textsuperscript{544}

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 \textit{sadd al-dharā‘i’}, (blocking the

\textsuperscript{542} Al-Khurshī, \textit{Sharḥ Al-Khurshī li Mukhtasār}, (Cairo: Al-Majba‘ah Al-Amīriyyah, 1333H), 5, p. 245.


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.\footnote{Ibid, 2, p. 645.}

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 hadīth.\footnote{Al-Qurṣūbī, \textit{al-Jāmi` li Aḥkām al-Qur`ān}, 3, p. 413.} 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 \textit{al-Ashbāh} that such a deal is reprehensible.\footnote{The prohibitional reprehensible according to the Ḥanafis is what the lawgiver commands man to abstain from doing in a strict sense based on the \textit{Ijtihād}, debatable evidence.}

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:
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. Ahmad 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.⁵⁴⁸

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 Ahmad said in another version: the murtahin cannot expect to benefit from the mortgage in return for voluntary expenses he incurs.⁵⁴⁹ He can use it in any way, that

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.”

3.4.4.1.1.2 The Ḥanbalīs’ 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.”

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.

---

552 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 *murtahīn* will not be allowed to spend or use the mortgage. The reason is the fact that the *murtahīn* 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 *murtahīn* 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 *murtahīn*, 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.\(^{553}\) As such no one else has the obligation to repair it on his behalf.

3.4.4.2 The Opinion Of The Literalists (The *Ẓāhirīyyah*)

The Literalists (*al-Ẓāhirīyyah*) see that all benefits of the mortgage belong to the *rāhin*. The *murtahīn* will have no right to use it except if the mortgage is milkable or fit for riding and the *rāhin* refuses to maintain it.\(^{554}\) The *Ẓāhirīyyah*, even if they


\(^{554}\) Ibn ʿAzīz, *Al-Muḥillā*, 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 Zāhiriyah stipulate the rejection of the *rāhin* to maintain the mortgage, the Ḥanbalīs do not.

While the Zāhiriyah 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 Zāhiriyah

If the Ḥanbalīs and the Zāhiriyah 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 Zāhiriyah by invoking that al-Shābī, the reporter of the *ḥadīth*, on which the Ḥanbalīs and Zāhiriyah base their arguments, issued a *fatwā* contradicting the *ḥadīth* whence he said: “the *murtahin* cannot use the mortgage in any sense.”\(^{555}\) They also said: “the *ḥadīth* contradicts *qiyyās* (analogy), in two ways:

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”.

The majority does not only disallow the benefiting by the murātah 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”.

3.4.4.4 Responses To The Claims Of The Majority

Their argument that the ḥadīth is contradictory to qiyyās 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

---

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 hadīth of Ibn ʿUmar is general and the hadīth of “the back occupied” is specific, therefore, the general one can be specified by the other. As a consequence, the hadīth of Ibn ʿUmar applies here to all cases except those exempted by the Al-Awzaʿī, al-Layth bin Saʿd 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.⁵⁵⁸

This is supported by what is reported by Ḥammād bin Salāmah in Jamiʿah 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.⁵⁵⁹

---

⁵⁵⁸ Al-Ṣanʿānī, Subul al-Salām, Sharḥ Bulāḡ al-Marām, 3, p. 50.
⁵⁵⁹ Al-Qurtubī, al-Jāmiʿ li Aḥkām al-Qurʿān, 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 mutrahin's (the party who keeps possession of the mortgage) carelessness leads to the perishing of the mortgaged asset? Will the mutrahin 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 Ḥukm (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 Ḥanafis 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.\textsuperscript{560}

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.\textsuperscript{561}

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

\textsuperscript{560} Al-Kāsānī, \textit{Badā‘i‘ Al-Šanā‘ī‘ fi Tarīb al-Sharā‘ī‘}, 6, p. 163.

\textsuperscript{561} Al-Zayla‘ī, \textit{Tabyīn al-Haqā‘īq Sharḥ Kanz al-Daqqā‘īq}, 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.\(^562\)

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\(^563\) 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.


\(^{563}\) Ibn Qudāmah al-Maqdisī, Al-Mugnī wa al-Sharḥ al-Kabīr, 4, 140; Ibn Ḥazm, Al-Muḥtār, 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."\textsuperscript{564}

3.5.1.2.1 The Aspect of Proof from this Hadīth

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”\textsuperscript{565} and the Prophet (PBUH) says: “Indeed your blood and your wealth are prohibited amongst you”.\textsuperscript{566}

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

\textsuperscript{564} Al-Bukhārī, \textit{Al-Jāmi' Al-Šaḥīḥ}, (Beirut: Dār Al-Fikr), 3, p. 178.

\textsuperscript{565} Al-Tibrizī, \textit{Mishkāt Al-Maṣābīh}, (Jeddah: Al-Maktab Al-Islāmī), No. 288.

\textsuperscript{566} Ibn 'Abd Al-Barr, \textit{Al-Tamhīd}, (Egypt: Muṣṭafā Al-Bābī Al-Jalābī), 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.\footnote{For the Mālikī, see Ibn Rushd, \textit{Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid}, 2, 309.}

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 \textit{murtahin}, but if it is in the hands of a trustworthy party, the \textit{murtahin} will not be responsible in any sense.\footnote{Ibn ‘Arafah, \textit{Ḥāshiyat al-Dusūqī ‘alā al-Sharh Al-Kabīr}, 3, p. 253.}

If the \textit{murtahin} claims that he has refused the mortgage and the \textit{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 \textit{murtahin} to carry the
burden of the proof of the mortgage in some forms but not in all forms.569

Their evidence for that is istihsan (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.570

3.5.1.3 The Third Opinion

Those who ascribe to this view571 say that the murtahin should be obligated to pay the value of the mortgage if it perishes. They base their stance on two hadith:

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

571 Al-Zayla’ī, Tabyīn al-Haqqi‘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 apparently stands for".

The aspect of proof from these two hadith 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.

---

572 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 hadith reported from 'Aţâ that a man his horse mortgage to another and informed the Prophet who said to him you have lost your right.

573 Al-Zayla'i, Tabyîn al-Haqâ'iq Sharh Kanz al-Daqâ'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.⁵⁷⁴

### 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. Makhład reported to us, Aḥmad b. Ghālib 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-raḥn bimā fihi* (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

---

narrated it via Ismāʿīl b. Abū Umayyah that Hamād b. Salāmah reported from Anas and he said that this is unsound from Hamād. This corrupted the hadīth. As a result, this hadīth 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.575

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 Qurʾān, the Sunnah, and ijmāʿ (consensus) in order to emphasize the need for it as a source of confidence as declared by the majority.576

The fact is that the mortgaged asset is a trust in the hands of the murtahin.577 Nothing from the debt can be reduced when the mortgage perishes. In the Shāfiʿī school of thought578 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

576 Ibid, 2, p. 311.
577 Al-Sayyid Sābiq, Fiqh Al-Sunnah, 3, 278.
578 Al-Shirāzī, Al-Muhadhab fi Fiqh Madhab Al-Imām Al-Shāfiʿī, 1, p. 405.
responsible unless he deliberately causes its destruction.

In the Ḥanafi school of thought,\textsuperscript{579} 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\textsuperscript{580} 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.\textsuperscript{581}

\textsuperscript{579} Al-Kāsānī, \textit{Badā‘i‘ Al-Ṣan‘ā‘i‘ fi Tarīb al-Sharī‘}, 6, p. 167.
\textsuperscript{581} Ibid, p. 41.
However, assets, which are not guaranteed, 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 mortahin less than the debt and less than the value because the mortgaged asset is also guaranteed.  

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-Rawdah that if the mortahin 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

583 Al-Sarakhsi, al-Mabsūḥ, 21, p. 112.
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.\textsuperscript{585}

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

\textsuperscript{585} 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.\textsuperscript{586}

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. Sharīh 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.

\textsuperscript{586} Ibn 'Arafah, Ḥāshiyat al-Dusāqī 'alā al-Sharb 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 ʿĀli. The report implies this meaning.\textsuperscript{587}

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 Hanafis have gone into lengthy details with regard to this question.\textsuperscript{588}

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

\textsuperscript{587} Ibn Hazm, \textit{Al-Muḥālā}, 8, p. 99.

\textsuperscript{588} For more about their views, see their debate over this subject.
demands it, the debt will be recovered according to the following:\textsuperscript{589}

Because of the fact that the mortgage remains under the ownership of the 
\textit{rāhin} even after delivering it to the \textit{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 \textit{rāhin}. Due, however, to the fact that the right of the \textit{murtahin} is still attached to the mortgage, the execution of such sale depends on his consent. Therefore, the \textit{murtahin} can, according to all the jurists, sell the mortgage with the permission of the \textit{murtahin}. If the \textit{rāhin} dies, the authority of the sale will belong to his heir or the executor of his will.\textsuperscript{590}

The Mālikīs have explained in their books\textsuperscript{591} some matters related to permissions given by the \textit{rāhin} to sell mortgages. His permission can either be absolute or specific. If he restricts its 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 involves cheating (\textit{gharar}).\textsuperscript{592}

If the sale requires expenses, these expenses are borne by the \textit{rāhin} because

\textsuperscript{589} Al-Sayyid Sābiq, \textit{Fiqh Al-Sunnah}, 3, p. 280.

\textsuperscript{590} Manṣūr al-Bahūtī, \textit{Kashf al-Qinā}, 3, p. 337.

\textsuperscript{591} Ibn 'Arafaḥ, \textit{Ḫāshiyat al-Dusūqī 'alā al-Sharīḥ Al-Kabīr}, 3, 251.

\textsuperscript{592} Al-Khāṭīb Al-Sharḥīnī, \textit{Al-Muğnī 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.\textsuperscript{593}

\textsuperscript{593} Maṇṣūr al-Bahūtī, \textit{Kashaf al-Qinā‘}, 3, 337; Al-Khatīb Al-Sharbīnī, \textit{Al-Mughnī al-Muḥtāj}, 2, 124.