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**TÍTULO:** El contrato hipotecario y sus efectos.

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**RESUMEN:** En este estudio se revisa el papel de la entrega en el contrato hipotecario, teniéndose como resultado que, en la Ley del Islam, los bienes muebles e inmuebles deben diferenciarse en términos de necesidad de entrega. En las propiedades móviles, la entrega y su continuidad deben considerarse como la condición para la validez de la hipoteca y en las propiedades inmobiliarias, se debe ignorar; por lo tanto, el resultado se sugiere para el legislador en futuras enmiendas.

**PALABRAS CLAVES:** entrega, condición de validez, condición de necesidad, contrato, bienes muebles e inmuebles.

**TITLE:** The Mortgage Contract and its effects.

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**ABSTRACT:** In this study the role of the delivery in the mortgage contract is reviewed, having as a result, that in the Law of Islam, movable and immovable property must be differentiated in terms of the need for delivery. In mobile properties, the delivery and its continuity should be considered as the condition for the validity of the mortgage and in real estate, it should be ignored; therefore, the result is suggested to the legislator in future amendments.

**KEY WORDS:** delivery, condition of validity, condition of necessity, contract, movable and immovable properties.

## **INTRODUCTION.**

Advent of nonfinancial properties in field of law on properties, which are valuable economically and commercially and can form major part of wealth of today's communities, has made the old frames and conventional theories of law and jurisprudence encounter new problems in field of setting transactional relations.

One of the most challenging fields in this field can be necessity of delivering these properties in real contracts such as mortgage, since many legal authors believe based on article 772 of Civil Code that the delivery of mortgaged property is the condition of validity of the mortgage contract and hence, impossibility of delivery of nonfinancial properties has led to cancellation of mortgage of the said properties. However, the problem of delivery of mortgaged property is not belonged to nonfinancial properties and it can't be applied on Iran legal system and needs revision. Hence, similar to Imami Jurists, the lawyers have only talked about necessity or lack of necessity of validity of delivery in conclusion of mortgage contract regardless of the subject of property. In fact, all duscission are summarized in this issue that whether the delivery is condition of validity of mortgage or has no impact on its realization?

However, variety of properties and features of them may affect the sentence of necessity of delivery and cause changing that.

### **The opinion of Imami Jurists and lawyers on role of delivery in mortgage contract.**

Some Imami Jurists have talked about necessity of lack of necessity of mortgage contract without delivery while talking about the role of delivery in mortgage status. On the contrary, some others have talked about invalidity of non-delivered mortgage (HusseiniAmeli, 1998, 425-457). However, only a few jurists have mentioned that delivery is the condition of validity of this contract (HusseiniHalabi, 1996, p.243; JafariLangerudi, 2003, p.343; HaeriShahbagh, 1997, p.675), but such statement has remained obsolete in law and jurisprudence.

In Shiite jurisprudence, the main dispute is between two groups of jurists. A group believes that delivery is the condition of validity of mortgage and the contract can't be realized without that (Mofid, 1992, p.622; Toosi, 1979, p.431; SalarDeylami 1983, p.192; IbnHamzehToosi, 1987, p.265; Ravandi, 1984, p.258; Tabarsi 1987, vol.1, p.1400; Ardebili, no date, p.456; MohagheghHelli, 1990, vol.2, p.66; FazelAbi, 1996, vol.1, p.540; Ameli, 1993, vol.2, p.183; HusseiniMaraghi, 1996, vol.2, p.256; MousaviBojnoordi, 1998, p.136; SivarihHelli 1983, vol.2, p.164-166; HusseiniAmeli, 1998, pp.435-437; Khansari, 1984, p.136; TabatabaiHaeri, 1997, p.189; MirzaGhomi, 1992, p.444; HusseiniRuhani, 1991, p.58; Mousavi Khomeini, 1995, vol.2; p.30). the other group believes that delivery has no effect on validity and realization of mortgage, but also it is an effect of that (Toosi, 1967, vol.2, p.198; ibid, 1986, p.223; IbnBarajTrablesi, 1990, p.65; IbnEdrisHelli, 1989, p.417; Allamehhelli, 1989, vol.1, p.193; FakhrUl-MohagheghinHelli, 1967, p.25; AsadiHelli, 1986, vol.2, 494; samiriBohrani, 1999, vol.2, p.153; AmeliKarki, 1993, p.94; AmeliJab'ei, 1989, vol.4, p.57; Bohrani, 1984, p.225; Ardebili, 1982, p.133; Najafi 1983, vol.25, p.99; NajafiKashefUl-Ghata, 1940, vol.2, p.297; Sabzevari, 2000, p.293;

MohagheghTehrani, 1986, p.327; Tabatabai Hakim, 1994, vl.2, p.21; Maghnieh, 2000, p.244; HusseiniShirazi, 1988, p.156).

Article 772 of Civil Code says: "The property which is pledged must be transferred to the possession of the creditor, or to that of a person agreed upon by the two parties; but it is not a necessary condition for the validity of the transaction that the property should remain in that possession".

Lawyers of civil law, in accordance with the note of the said article, believe that the legislator has followed opinion of jurists, who believe that delivery is the condition of validity of mortgage (Katuzian, 2006, p. 504 and 508; Emami, 2007, vol.2, p.414; Adl, 2006, p.384; BorujerdiAbdeh, 2001, p.360; Rah Peik, 2008, p.143).

Therefore, as the necessity of delivery is not publicly accepted and can't have significant effect (Najafi, 1983, vol.25, p.99), the evidence of two other groups are explained and evaluated. Hence, relevant evidence of necessity of delivery in validity of transaction is presented and assessed. Then, the evidences of lack of necessity of delivery in validity of transaction are explained.

### **The evidence of necessity of delivery in mortgage and analyzing that.**

As it was mentioned, many Imami Jurists believe that delivery or transferring a property is the condition of validity of mortgage, so that some of them have attributed this statement to majority (SivariHelli, 2004, vol.2, p.60; Ardebili, no date, p.455; FeizKashani, 1965, vol.3, p.137) and some others have rejected that (TabatabaiHaeri, 1997, p.189). The followers of the theory have referred to verbal evidences, practical principle, holy Quran and consensus and narratives to prove their claim, which are explained in the following:

#### ***a) Verbal evidence.***

Some jurists have mentioned that the content of mortgage contract is not realized without delivery. In other words, mortgage and delivery have companionship with each other, so that delivery is a part of

concept and nature of mortgage (HusseiniAmeli, 1998, p.435; TabatabaiHaeri, 1997, vol.9, p.199; Khansari, 1984, p.342, SivariHelli, 2004, p.60; Adl, 2006, p.348). Therefore, according to this theory, a contract can be called as mortgage contract if the delivery is realized; otherwise, the title of mortgage is not true for that.

The inference is answered in this way that the term "mortgage" is not different from other terms and the trueness of contract is not devoted on non-contract such as delivery and so on. Moreover, verse 283 of Baqarah Surah has also used the term "surrounded" for the mortgage and this shows that delivery and surrounding is not involved in realization of nature and concept of mortgage (Najafi, 1983, vol.25, p.99; Maghnieh, 2000, vol.4, p.24).

Moreover, it could be mentioned that the creator of credit affairs is the will and intention of entities and financial affairs are not involved in its nature. Hence, if the legislator believes that additional condition is needed for formation of legal act in addition to the will in addition to existence of qualification and subject such as necessity of delivery of document; necessity of existence of such conditions is because of considerations considered by the legislator without involvement of the said condition in its creation; so that if the special legal sentence is not existed, the legal action could be realized by will and despite the absence of said conditions. Therefore, realization of no contract is depended on no condition other than basic conditions of validity of contract; unless the legislator considers additional conditions for validity of the contract. In this study, in regard with role of delivery in mortgage status, other evidences should be referred and if the necessity of delivery in realization of mortgage is not obtained; it could be mentioned that the mortgage contract is not true without delivery.

***b) Practical principle.***

Some jurists have referred to the principle of invalidity of contract to prove the necessity of delivery in validity of mortgage and believe that if there is doubt in validity of non-delivered mortgage contract, the principle of invalidity is dominated.

Moreover, the principle of lack of delivery is something that inhibits the mortgagor from occupation of own property and goes out of the inclusion of principle of lack of necessity; although other items remain under its inclusion (HusseiniAmeli, 1998, p.432; Ardebili, 1982, p.135). The issue is also answered in this way that with existence of general sentences such as "obey the contracts" (Al-Mai'dah/1), it is not turn to execute the practical principle (Najafi, 1983, vol.25, p.103; HusseiniShirazi, 1988, p.49). In other words, the practical principle can be referred at the time that there is no evidence; although in the assumption of the problem, there are evidences such as obeying the contracts, which encompass the mortgage too. Therefore, referring to practical principles is not evident.

*c) Holy Quran and analysis of the referred verse.*

The most underlying evidence used by jurists and commentators to consider the delivery as a condition for validity of mortgage is the verse "And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken" (Al-Baqarah/283). As the Almighty God has ordered to surrounded mortgage, it could be found that legal mortgage is not realized without delivery.

In fact, in this verse, the mortgagor is obliged to make delivery. Hence, it is same as agreement in commerce and justice in testimony. It means that as commerce is not realized without agreement and testimony is not realized without justice; mortgage is not also realized without delivery. As a result, the said verse has concept and legality of mortgage and its necessity can't be proved without delivery (HusseiniAmeli, 1998, p.433; Ameli, 1996, vol.3, p.359; Toosi, 1979, p.431; SivariHelli, 2004, vol.2, 60; Tabarsi, 1987, vol.1, p.224).

It should be mentioned that referring to the said verse to necessitate the delivery in validity of mortgage is criticized from several aspects:

First, using this verse is in field of concept of description; meaning that in the said verse, the delivered property is the description of mortgagee, which has no opposite meaning in accordance with popular

statement of fundamentalists (Ansari, 1990, p.183; AkhondKhorasani, 1988, p.206; Kazemikhorasani, 1996, p.503; Mozaffar, 2002, vol.1, p.172; Najafi, 1983, vol.25, p.103).

Second, if the delivery is effective in realization of mortgage, describing mortgagee with delivered property is redundancy and just using mortgage is enough and hence, it could be found that the concept of delivery is not hidden in the mortgage. In fact, this statement is ugly and is not true (AllamehHelli, 1992, p.400; FakhrUl-MohagheghinHelli, 1966, p.25; Najafi, 1983, vol.25, p.103).

Third, the said verse is guidance and necessity of taking mortgage and the condition of delivery in its validity can be proved by this verse. Suspension of taking mortgage to travel and absence of scribe shows that the verse is not in position of conditions and legality of mortgage, but also it has guided the mortgagor to get mortgage to preserve the property of loaner without necessity of obtaining mortgage. Therefore, all adjectives of this verse are guidance and necessity of delivery can't be got from them (Ardebili, 1982, p.136; Najafi, 1983, vol.25, p.103; AllamehHelli, 1992, p.400; Maghnieh, 2000, p.24; MousaviBojnoordi, 1995, vol.3, p.202; HusseiniRuhani, 1991, p.59).

Paying attention to the said verse and second part of this verse confirms this perception, since the Almighty God has said in verse 282: "O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So, let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her; And let not the witnesses refuse when they are called upon. And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate

transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you. And fear Allah. And Allah teaches you. And Allah is Knowing of all things".

Also, in verse 283, in the assumption that parties are trusted in each other, they are exempted from getting mortgage. Therefore, there is no doubt that the Almighty God in these verses has guided people to guarantee their rights and there is no doubt that there is no necessity to get mortgage (Najafi, 1983, vol.25, p.103).

If the mortgage is taken, it is not depended on traveling or absence of scribe and the mortgage is true even in presence of scribe just same as the time that Prophet Mohammad mortgaged his armor to a Jewish when he was in Medina (Anvari, 1987, vol.2, p.494; Najafi, 1983, vol.25, p.98). Moreover, it is not right to compare the delivery-free mortgage with agreement-free contract, since agreement the nature of contract and contract can't be realized without it; although existence of mortgage is not depended on delivery and the same is justice for the testimony.

***d) Narrative and analyzing that.***

Other evidence referred by the jurists is the narrative "mortgage is not true without delivery" (HusseiniRuhani, 1991, p.60). The owner of Meftah Al-Kiramah refers to this narrative and says: Denial of validity of mortgage in this narrative is close to denial of perfection of validity and authentication from mortgage to denial of reality (HusseiniAmeli, 1998, p.433).

Moreover, some others say that weakness of document of this narrative can be compensated with popularity and appearance of verse 283 of Baqarah (HusseiniMaraghi, 1996, p.256).

It should be mentioned that reference to the said narrative for necessity of delivery in validity of mortgage has been disrupted from several aspects and various jurists have shown response to that as follows:

First, the said narrative is weak in terms of document, since the narrator (Mohammad Bin Qeis) is weak in view of some jurists and according to others; as he is common between two persons; he is common between confirmation and weakness (Ardebili, 1982, p.137; AllamehHelli, 1992, p.416; FakhrUl-MohagheghinHelli, 1966, p.25; AmeliJab'ei, 1989, p.11; Maghnieh, 2000, p.25). However, other jurists believe that the evidence is not weak and have confirmed the narrative through referring to some evidences; although they believe that the narrative can't prove the necessity of delivery in mortgage contract (Najafi, 1983, vol.25, p.104; HusseinShirazi, 1988, 13-15; HusseinAmeli, 1998, p.435). Moreover, other jurists have narrated the hadith from Imam Bagher (PBUH) (Ardebili, 1982, p.136) and some others have mentioned that it is belonged to Imam Sadegh (PBUH) (AmeliJab'sei, 1991, p.11).

Second, assuming that the hadith is reliable, it could be found from the appearance of the narrative that if the mortgaged property is not delivered, it has no advantage and can't be reliable and it doesn't mean that mortgage is not realized (HusseinShirazi, 1988, p.15; Najafi, 1983, vol.25, p.104).

Third, what is denied in the said hadith is the subject of mortgage and not the contract, which can be valid or invalid (Najafi, 1983, vol.25, p.104). In fact, the term "delivered" shows that the aim by mortgage is the mortgaged property and not the mortgage contract (Bohrani, 1984, p.226). Therefore, the property which is not delivered can't be a mortgaged property and this doesn't mean that the mortgage contract is null and void.

Fourth, if the delivery is considered as condition of validity of mortgage based on the narrative; the appearance of narrative shows that continuity of delivery is also needed, since the mortgage without delivery is cancelled (AmeliJab'ei, 1989, p.457; Najafi, 1983, vol.25, p.104). However, no jurist has confirmed this and the delivery if not condition of validity of mortgage based on consensus and many jurists have consensus on validity of this claim (AllamehHelli, 1993, p.198; Najafi, 1987, vol.25, p.108; HusseinAmeli, 1998, p.444; FeizKashani, p.137; AmeliJab'ei, 1992, p.15; SamiriBohrani, 1999, vol.2, p.214).

*e) Consensus.*

Some Imami Jurists have consensus on necessity of delivery for validity of mortgage (Tabarsi, 1987, p.686) and some others have mentioned that opposite idea is weak and just consensus is enough for necessity of delivery even if there is no other evidence in this field (even in this study that has presented other evidences) (HusseiniAmeli, 1998, p.433).

In response to this claim, it should be mentioned that regardless of the validity or invalidity of consensus, many jurists have mentioned that delivery has no impact on status of contract and believe that mortgage can be realized by mean of offer and acceptance and the delivery is the effect if mortgage and the mortgagor can ask for the delivery of the mortgaged property after conclusion of mortgage contract. As many people believe in this theory, it is unlikely to accept the opposite statements and even the claim of realization of consensus, especially when the said consensus is despite to the most famous statement on necessity of delivery in validity of mortgage (HusseiniHalabi, 1996, p.243).

**Evidences on lack of necessity of delivery in validity of mortgage.**

As it was mentioned, many jurists believe that delivery of mortgaged property is not condition for validity of mortgage contract. These jurists refer to 2 groups of evidences to prove their claim: cancellation evidence and rejection of the evidence of the opposite group including principle of no requirement, generalities of the loyalty to contracts and applying the mortgage evidence.

*a) Principle of no requirement.*

There is no reliable evidence on the principle of no requirement and those evidences referred to necessitate the delivery are disputed and rejected. Therefore, when it is doubt on necessity of delivery for mortgage, the principle of no requirement is realized (AmeliJab'ei, 1993, p.11; AmeliKarki, 1993, p.94; Najafi, 1983, vol.25, p.102).

***b) Generalities of loyalty to contracts.***

The fans of this theory believe that generalities referring to necessity of loyalty to contracts such as the verse "be loyal to contracts" and hadith "the believers are committed to their conditions" also include mortgage (Toosi, 1986, p.421; Ardebili, 1982, p.138; Najafi, 1983, vol.25, p.102; Fakhru-MohagheghinHelli, 1966, p.26; AmeliKarki, 1993, p.94; Maghnieh, 2000, p.24). Therefore, mortgage needs loyalty even without delivery and the mortgagee needs to submit the mortgaged property to mortgagor. This is because; there is no difference between necessity of delivery and lack of necessity of delivery (Najafi, 1983, vol.25, p.103).

***c) Applying the mortgage evidences.***

Some jurists have mentioned on lack of necessity of delivery that frequency news referring to authority of mortgage are not promised to delivered mortgage (ibid, vol.25, p.102; Bohrani, 1984, p.226).

For example, Davoud Bin Sarham has quoted from Imam Sadegh (PBUH) that ImmaSadegh says about mortgaging in credit transaction that "it has no problem" (HorrAmeli, 1988, vol.15; p.379; Sadoogh 1992, vol.3, p.79; Toosi, 1986, p.210).

Moreover, Yaghoob Bin Shoaib says: I asked Imam Sadegh about a person who sales for credit and gets mortgage instead of the sold object and he answered: "it has no problem" (Kalini, 1986, vol.5, p.223; HorrAmeli, 1988, vol.15, p.381; Toosi, 1986, vol.7, p.124).

As a result, it could be found from the narratives that validity of mortgage is not depended on delivery of mortgaged property; unless, it was necessary to certify the term delivery in them.

According to the mentioned it could be found that the referred evidences to necessitate delivery in validity of mortgage are not valid and necessity of delivery in mortgage contract could not be confirmed based on them; although the opposite evidences are prior and it is necessary to change the article 772 of Civil Code. However, this study is not just aimed in making such insignificant change, but also the study tends to answer the question that whether the delivery is the condition of validity of the mortgage for all

properties including movable and immovable properties and the mortgage can be realized just by agreement of parties or not? For example, a person who gives some gold to the bank to get loan or a debtor who is supplier of electric devices submits the devices to pay the debt back but maintains the subject of mortgage in his own occupation.

Whether it can be claimed that with no delivery and just for such agreement the aim of mortgage as making confidence to settle the receivable is guaranteed or not? Is there any difference in terms of necessity of delivery among different properties? Whether other legal establishments can be used instead of delivery of the mortgaged property or not? to answer these questions, the legal and juridical system should be referred and look that must the different properties differentiated in this field or not.

**Necessity of separation of different properties in term of necessity of delivery.**

About the role of delivery in mortgage in Imami jurisprudence and Iran Legal System, no difference is considered till now among different properties and all jurists and composers of civil law have taken all effort regardless of different features of different properties that whether delivery is the condition of validity of mortgage or delivery of the subject of mortgage has no effect on realization of mortgage contract and whether the non-delivered mortgage is binding or not?

Only one of the professors of civil law has differentiated movable and immovable properties in field of occupation despite to rights of mortgagee and has said: "On movable properties that the subject of dealing is assigned and its circulation speed is high, likely the assignment of property endangers the existence and health of that; the buyer who can hide or waste the subject of mortgage easily or consider different subjects of assignment that the mortgagor can't have access to that. Hence, with credit of the different dangers, assignment is in conflict with nature of pledge. However, on immovable properties, which can't be hidden or change their location and the right of mortgagor is also registered in the registry and can't be referred against the probable buyer; why the occupation should be loss of mortgagor and why it should

be doubted?" (Katuzian, 2006, vol.4, p.383). However, analysis of nature of mortgage shows that movable and immovable properties should be differentiated on necessity of delivery in validity of mortgage in Iran Law.

### **Role of delivery in mortgage status in immovable properties.**

In regard with immovable properties, it is not necessary to consider delivery as condition of validity of mortgage, since the risk of waste of property of mortgage is unlikely on one hand and assignment of property can't make it expose to waste and such risks are neglected in the society and in procedure of wise people and on the other hand; as it is common in mortgage contracts that mortgagors suffice to visual delivery of mortgaged property and don't occupy that practically and avoid moment delivery of mortgaged property and redelivery of that to the mortgagee; it should be mentioned that not only there is no persuading reason for necessity of delivery of property to mortgagor, but also the unwritten law should be respected and be accepted as legal and rational rule and delivery of immovable mortgaged property should be eliminated from the conditions of validity of immovable mortgage.

Acceptance of such theory is not only agreed with the legal and religious foundations, but also can also confirm that. This is because; as it was observed, no persuading reason is presented in Iran law and jurisprudence to necessitate delivery in validity of mortgage. Moreover, taking such method can prevent providing conditions to encourage people to cheat the law and disrupt the legal system against people. Also, the experience of France Legislation can be used in this field.

It seems that the best solution for immovable properties for Islamic state us to replace delivery by official registration of mortgage and certify that non-registered mortgage is not referable against registered mortgage, so that can be supported by contractual parties and also follow opinion of third parties trusted legally and apparently and have had no means to be informed of the reality. A solution is predicted also in article 50 of Marine Law. However, some immovable properties needing special protection and taking

special measures to save their value should be totally be neglected and be agreed in delivery of mortgagor or third party.

**Role of delivery in status of mortgage in movable properties.**

On movable properties, analysis of philosophy of explanation of mortgage and its requirements shows that the delivery of mortgaged property shall be condition of validity of that and the continuity of delivery should be also necessitated; otherwise, the aim by pledge that is guarantee for settlement of the creditor and providing support for that can't be met. Is it reasonable that someone can mortgage a movable property that has no official document, so that he/she can settle his receivables in deadline through selling that and leave the mortgaged property to the mortgagee and endanger the property, which is against provisions of mortgage? Such serious threat is originated in this issue that on movable properties, the risk of hiding, wasting and various assignments of mortgaged property is too high that leaving that for the mortgagor can waste the aim of pledge and is in conflict with its requirements.

The above mentioned inference is also true for the pledge of physical and material properties, for which usually no ownership document is set. However, on financial movable properties with official document and with insertion of right to pledge in the said document and the holder of pledge and third parties are supported; the mortgaged document submission can be replaced instead of delivery of mortgaged property. Hence, there is no necessity to deliver the mortgaged property in regard with these properties. For example, some movable properties such as boat, airplane, car and train are made for transportation and hence, they can't be remain in pledge despite to nature of these vehicles and can't be neglected; especially because many of these properties have official document and mortgage properties are registered in them. Therefore, with registration of mortgage in relevant documents and Registry, the rights of mortgagee and third parties can be observed.

Moreover, on necessity of delivery of nonfinancial properties, it seems that different examples should be differentiated: on commercial documents and unknown stock of companies, it is necessary to consider their delivery as condition of validity of contract, since these financial rights are same as movable properties in terms of risk of hiding and various assignments of subject of pledge and obey same sentence. However, on known stock, registration in the registry for firms is sufficient (article 40 of Amended Bill of Commerce Law approved in 1968). On mortgage of goodwill, as immovable properties are involved in these rights; it shall also follow the overall sentence of the said properties and there is no necessity to deliver the subject property. On intellectual creators, the aforementioned inference based on risk of waste and hiding property is not true and hence, delivery of subject of mortgage should be neglected in the said rights.

As a result of discussion and to provide general rule, it could be mentioned that if the subject of mortgage is material movable property, not only delivery, but also its continuity should be condition of validity of contract to observe the requirements of contracts or the legislator should specify that in such cases, the subject of mortgage should be assigned to a third party or be pledged in safe box of banks; except for cases that such aim is possible in other ways. In these cases, according to realization of the objective of pledge contracts and guaranteeing the settlement of receivables, necessity of delivery loses its foundation. In such cases, setting document can be replaced instead of delivery.

On non-material properties, where the subject of mortgage is exposed to risk of waste, so that pledge of the said properties without delivery is in conflict with the goal of pledge contracts; the property of said right should be delivered. However, in other cases, there is no necessity on delivery and no one shall insist on unfounded sentence. Hence, the sentence shall be based on validity of the said mortgage even without delivery of that subject. Selecting and taking such method is in consistence with the current legal system and is not also in conflict with juridical foundations. On the contrary, in the narratives on

mortgage of movable property; material mortgaged property is delivered to the mortgagee and it could be found that mortgage and guarantee for settlement of receivables can't be realized without that.

For example, Sheikh AbolfathiRazi has said in his narrative that Prophet Mohammad bought food from a Jewish and pledged his armor. Abu Rafe says: one day a guest came to Prophet Mohammad. The Holy Prophet sent me to one Jewish and ordered to tell that I was sent by the Prophet to sell some flour as pledge to the early of Rajab Month. When I said the Jewish; he said that I swear to God that I never sell something in pledge without mortgaging. I returned to Prophet and retell what happened. He said: I swear to God that I tended to pay instead, because I am honest person on the earth and in the heavens; let take my iron armor to him as pledge (Noori, 1987, p.418; TabatabaiBroojerdi, 2008, p.24).

Moreover, Ibn Abbas narrates that HazratFatemeh (PBUH) said to Salman: take my dress and carry it to Jewish Sham'un and say that the daughter of Mohammad said borrow me 3kg date and 1kg barley instead and I will pay soon. Salman get the clothes and went to Sham'unand said: O Sham'un, this is the dress of Fatemeh, daughter of Mohammad, she asked to take 3kg date and 1kg barley instead to pay for that as soon as possible. Sham'un get the dress and ... (Noori, 1987, p.417, TabatabaiBroojerdi, 2008, 214).

Hence, the necessity of delivery in physical movable properties is not only inconsistency with the goal and philosophy of mortgage, but also it seems in consistency with juridical narratives of Imami jurisprudence. Maybe some authors have criticized the necessity of delivery in validity of mortgage absolutely and have said: "what if the composers of civil code used not to transact the mortgaged delivery with such use of condition of transaction and many problems could be avoided through this without violating any regulation or losing any benefit" (Katuzian, 2006, vol.4; p.508; MousaviBojnoordi, 1995, p.203). For this reason, all properties shall not obey unit sentence on delivery of subject of mortgage, but also different properties should be separated.

## **CONCLUSIONS.**

According to article 772 of Civil Code of Iran, delivery is condition of validity of mortgage contract and this is the sentence, which is rooted in statement of majority of Imami Jurists based on confession of many lawyers and some jurists have also attributed that to majority of scholars in this field. However, deep analysis of this issue in votes of Shiite jurists shows that majority of Shiite thinkers consider no value for the delivery of subject of mortgage and hence, it is hard to confirm popularity of the sentence accepted by legislator in Imami jurisprudence. The evidences presented by jurists following the necessity of delivery in validity of mortgage contract are also criticized by the opposite group, so that the recent jurists have rejected the evidences of opponents and believe that delivery is an effect of mortgage and is not involved in its realization.

However, what is neglected by Iran law and Imami jurisprudence to the date is the features and variety of different properties, which can affect the necessity of delivery. Hence, the legislator can change the article 772 of Civil Code and eliminate the phrase of necessity of delivery of immovable properties and replace necessity of registration of mortgage instead and refer unregistered mortgage instead of registered mortgage. On movable properties, the legislator shall consider delivery and its continuity as conditions of validity of mortgage and mention the exceptions.

## **BIBLIOGRAPHIC REFERENCES.**

- 1- Emami, Seyyed Hassan, 1386, Civil Rights, Tehran, Islamic Bookstore.
- 2- RouderdAbdeh, Mohammad, 2001, civil rights, by the efforts of Mohammad Reza Bandarchi, Qazvin, Tae
- 3- JafariLangroudi, Mohammad Jafar, 1382, Elemental Culture, Tehran, GanjDanesh
- 4- ..... 1386, Safeguard Agreement on Civil Rights, First Printing, Tehran, GanjDanesh Library

- 5- ..... 1380 AH, Civil Rights Philosophy, C 1 & 2, First Printing, Tehran, GanjDanesh Bookstore, Ahmadi Printing.
- 6 ..... 2009 Policymaking Rights, Twenty-first edition, GanjDanesh Library.
- 7 ..... 1380, Property Rights, Tehran, GanjDanesh Library.
- 8 ..... 1381, Extensive in Terminology of Law, Tehran, Iran. Library of GanjDanesh.
9. HaeriShabagh, Seyyed Ali, 1996, Explain Civil Code, Tehran, GanjDanesh.
10. Rahpik, Hassan, 2008, Civil Rights: Moein (2), Tehran, Khorsandi.
11. Shahidi, Mahdi, 2001, Formation of Contracts and Commitments, C 1, Second Edition, Tehran, Majd Publications.
- 12- SharifiEshkevari, 1385, Jurisprudence, 5th and 6th editions, Soleimanzadeh Publishing House, Qom.
- 13- Adl, Mostafa, 2006, civil rights, by Mohammad Reza Bandarchi, Second Edition, Qazvin, Tae.
- 14- Amid, Moses, 1349, Habea and Wills in Civil Rights, Tehran.
- 15- Katouzian, Naser 1385, Civil rights: Determine contracts, C 3 and 4: Acquisition contracts, Bonds of Religion, Fifth Edition, Tehran, Public Joint Stock Company
- 16- ..... 1374, General Rules of Contracts, C 1, Third Edition, Tehran, Public Joint Stock Company
- 17- ..... 1381, Civil Code in Current Order of Law, Sixth Edition, Tehran, Publishing
- 18- ..... 1369, Wills in Civil Rights of Iran, Second Edition, Center for Attorneys at the Center of Justice
- 19- MohagheghDamad, SeyyedMostafa, 1379, the rights of the contracts in the Imamiyah jurisprudence (in collaboration with JalilGhanavati, Hassan VahdatiShobeiri and Ibrahim Abdipour), Tehran, the first edition, the Ministry of Foreign Affairs's publications and publications
- 20- ..... 1388, rules of jurisprudence (civil part), twentieth edition, Islamic science publishing center
- 21- Madani, SeyyedJalaluddin, 2006, Civil rights, Determination contracts, C 4, First edition, Tehran, Paydar Publications

- 22- HashemiShahroudi, Seyyed Mahmoud, 1404 AH, The Culture of Jurisprudence According to the religion of the Ahlul-Bayt (AS), Qom, the Encyclopedia of the Islamic Jurisprudence Institute on the religion of the Ahl al-Bayt (AS)
- 23- AkhundKhorasani, Mohammad Kazem, 1409, Ayatollah, Qom, Al-Bait Institute
- 24- IbnIdrissHelli, Mohammed bin Mansur ibn Ahmad, 1410, Al-Ra'ri al-Hawi, Lahtiqr al-Fatwi, second edition, Qom, Islamic Publications Office
- 25- IbnBarajTrabellsi, Qazi Abdul Aziz IbnNahrir, 1411 AH, Javaher al-Fiqah, Qom, Islamic Publications Office
- 26- IbnHamzaTusi, Muhammad ibn Ali, 1408 AH, Al-Wasila Eli Nil al-Fadhila, Qom, Ayatollah MarashiNajafi Library
- 27- Ansari, Morteza, 1996, Makbas, Second Edition, Tabriz, Legal Information
- 28- Ansari, Morteza, Matarah al-Anzar, Qom, Al-Beit Institute, Al-Bayt
- 29- ..... 1415 AH, Book of Al-Mekasf, C 6, First Edition, Qom, Congressional Publishing
- 30- Bahrani, Yusuf bin Ahmad, 1405 AH, Al-Hada'gh al-NazarahFayr al-'Atrah al-Taha, Qom, Islamic Republic of Iran
- 31- HosseiniAmeli, SeyyedJavad Bin Muhammad, 1419 AH, Muftah al-Karama Fe Description of the Rules of the Al-Alemama, Qom, Islamic Publications Office
- 32- HosseiniMaraghi, Mir Abdolfattah, 1417 AH, Al-Avawanin Al-Fiqhieh, Qom, Ismaiylia Publication Office
- 33- Khansari, Seyyed Ahmad ibn Yusuf, 1405 AH, Jameel Al-Mardak Fi Description Al-Muqat-e-Pahla, Second Edition, Qom, Ismaiylia
- 34- Ravandi, Qutb al-Din Sa'idibnHebh Allah, 1405, Qur'an, Second Quran, Qom, Ayatollah MarashiNajafi Library

- 35- SalarDeylami, Abu Ali Hamza bin Abdul Aziz, 1404, Al-Murshim al-Awlowieh and Al-Ahmak al-Nawbiah, Qom, al-Harmian
- 36- SiouriHeli, JamaloddinMoghadad ibn Abdullah, 1404 AH, Al-Taqiyyar Al-Razi, Lamakhthir al-Shariah, Qom, AyatullahMarashiNajafi Library
- 37- Sabzevari, Seyyed Abdul Ali, 1413 AH, Mah'zebAlakham, 18th J, Fourth Edition, Qom, Ayatollah Sabzevari Office
- 38- Siveri, Moghadadibn Abdullah (FadhilMoghdad), 1425 AH, Imam Khomeini, Qom, Mortazavi
- 39- Sadouq, Muhammad ibn Ali ibnHusaynibn Musa ibnBabuyeh, 1413, I Layehzayar al-Faghih, Second edition, Qom, Islamic Publications Office
- 40- ..... 1415 AH, Al-Mutaan, First Printing, Qom, Imam Hadi Institute (AS)
- 41- SamiriBahrani, MoflehibnHasan, 1420 AH, Gayyah al-Marum Fi Description Shara'yas al-Islam, Beirut, Dar al-Hadi
- 42- TabatabaiBoroujerdi, SeyyedHossein, 1429 AH, JameadAhadi-e-Shiyah, Tehran, Green Culture
- 43- TabatabaiHaeri, Seyyed Ali ibn Mohammad Ali, 1418 AH, Riyadh al-Masa'ali Fi-Bayah al-Ahakam with Ledla'il, Qom, Al-Bait institute
- 44- Tabatabai Hakim, Seyyed Mohammad Saeed, 1415 AH, Manghaj al-Salaheen, Beirut, Ph.D.
- 45- ..... Nahj al-Bukhaha, First edition, Qom, Publication 22 Bahman, Bey.
- 46- Tabresi, FazlibnHasan, 1408 AH, Assembly of the Faith of Al-Quran, Beirut, Dar al-Ma'rafah
- 47- Tahrighi, Sheikh Fakhruddin, 1362 Sh., Assembly of Al-Bahrain, Rajai, Tehran, Mortazavi Bookstore
- 48- Tusi, Mohammad ibn Hassan, 1387 AH, Al-MubsouatFiqqul al-Amamiyah, Third Printing, Tehran, Al-Mektah al-Martazaviyah Allah al-Ataar al-Jufriya.
- 49- ..... 1400 AH, Al-Nahi Fi Montré al-Fiqah and Al-Fatwi, Second Edition, Beirut, Al-Dara al-Kitab

- 50- ..... 1407 AH, Tahzib al-Akkam Fi, Al-MutawahLelishik Al-Mufid, Fourth Edition, Tehran, Dar Eleg-al-Islam
- 51- ..... 1407 AH, al-Khalaf, Qom, Islamic Publications Office
- 52- Amali, Shamsuddin Mohammad bin Maki, 1417, Al-Duras al-ShariafiFiqq al-Amamiyah, Second edition, Qom, Islamic Publications Office
- 53- ..... Al-Qawawad and al-Fawahid Qom, Useful Bookshop
- 54- ..... 1414 AH, Ghaemi Al-Muradifi Explanation of Al-Sharad, Qom, Islamic Propagation Office
- 55- AmeliJebbe, Zayn al-Din bin Ali, 1410 AH, Al-Razda al-Behayee, Fayyat al-Lama'a al-Dushqiya, Qom, Davari
- 56- ..... 1413 AH, Masalak al-AlafamEllyTnnihayahSharahiye al-Islam, Qom, the founder.
- 57- AmeleyKareki, Ali ibn Hussein, 1414 AH, Jami'at al-Majtasid Fi Description Al-Qawa'ad, Second Edition, Qom, Al-Bait Ali.
- 58- AllamehHelli, Hassan ibn Yusuf ibnMotahar, 1410 AH, ErshadAlazahan Eli Ahqam Al-Ameen, Qom, Islamic.
- 59- ..... 1411 AH, Note of Al-Mota-ul-Fin-i-Fahm al-Din, Tehran, Publishing & Publishing Institute
- 60- ..... 1420 AH, Tahrir al-Hakam al-Sharia Ali's religion al-Ammoniya, Qom, Imam Sadiq (AS)
- 61- ..... 1414 AH, Tadzekar al-Bufha, Qom, Al-Bait Institute.
- 62- ..... 1413 AH, Different of al-Shi'a Fiqh al-Sharia, Second Edition, Qom, Islamic Publications Office
- 63- FadhilAbi, Zayn al-Din Hassan ibnAbiTaleb, 1417 AH, Discovery of AlmouzuzFei Brief description of Al-Nafa, Third Printing, Qom, Islamic Publications Office.
- 64- Fakhrol Moghqaghin Helli, Abutaleb Muhammad ibnHasan, 2008 AD, Isfah al-Fawaed Fi Description of the problems of al-Qawada, Qom, Ismailis.

- 65- FaizKashani, Mohammad Mohsen ibn Shah Morteza, Mu'tayyah al-Shariah, Qom, Ayatollah MarashiNajafi Library.
- 66- KazemiKhorasani, Mohammad Ali, 1417 AH, Benefits of Allah, Excerpts from the lesson of GhareenNaeini, Qom, Islamic
- 67- Kellini, Mohammad ibnYa'qub, 1407 AH, Al-Afaye, Fourth Edition, Tehran, Dar al-Kabul al-Islam
- 68- Majlesi, Mohammad Baqir, 1410 BC, Bihar Al-Anwar Al-Jaya Lederar News Al-Mut'ah, Beirut, Al-Taba and Al-Nashr Institute
- 69- MohagheghTehrani, Sheikh Mohammad Reza, 1365, Facts of AlFagheh, Qom, Al-Muttah Al-Ommiyeh
- 70- MohagheghHelli, NajmddinJa'faribnHasanHadzali, 1418, Al-Muqtat al-NafaFiqq Al-Ammia, 6th Printing, Qom, Al-Mutapur Al-Dinhay Institute
- 71- ..... 1408 AH, Shariah al-Islam al-Fahis al-Hilal and al-Haram, second edition, Qom, Ismailis
- 72- Maraghi, Mir Abdolfattah, 1418 AH, Al-Jawin, J 2, First Printing, Qom, Al-Nashr al-Islami Institute
- 73- Mozaffar, Mohammad Reza, 1423 AH, The Principles of Al-Fiqah, Qom, Al-Nashr al-Islam
- 74- Moghaniyeh, Mohammad Javad, 1421 AH, Jurisprudence AlamamJafar al-Sadeq, Second Edition, Qom, Ansariyan.
- 75- Mofid, Mohammad bin Muhammad bin NomanAmarkhi Baghdadi, 1413 AH, Al-Maqnah, Qom, World Sheikh Mozhra
- 76- MakaremShirazi, Nasser 1427 AH, New Essays, Second Edition, Qom, Imam Ali School
- 77- MousaviBojnourdi, SeyedHasan, 1419 Gh, Al-Qawad Al-Fiqahi, Qom, Al-Hadi
- 78- ..... 1385, jurisprudential rules, c 1, first edition, Majd Publications
- 79- Musavi Khomeini, SeyyedRuhollah, 1425, Tahrir al-Waslah, Qom, Dar al-Alam
- 80- ..... 1410 AH, Eliya, Ismailian Institute

- 81- MousaviKhoiyi, SeyyedAbolghasem, 1410 AH, Manghaj al-Salaheen, 2, 28, Qom, Madinah Al-Alam Publication
82. MominQomiSabzvvari, Ali, 1421 AH, Jame al-Khalaf and al-Wefaq between al-Amamiyah and between the Imams al-Hijaz and al-Iraq, Qom, the founders of the advent of Imam Ali (as)
- 83- Mirza'iQomi, Abolqasemibn Muhammad Hassan, 1413 AH, Jame Al-Talat Fi Ayubabeh al-Suwalat, Tehran, Kayhan
84. Nayeni, Mirza Mohammad Hussein, 1413 AH, Al-Mekasfas and al-Bai, J 2, First Printing, Qom, Nasr-e-Islami Institute
- 85- ..... 1373 AH, Monaye al-Tolib, J 1, First Printing, Tehran, Maktobeh Al-Mohammadiyah
- 86- NajafiKashif al-Ghatha, Mohammad Hussein ibn Mohammad Reza, 1359 AH, Tahrir al-Mujahleh, Najaf, Al-Mektah al-Marqadjouyeh
- 87- Nuri Tabarsei, Hussein ibn Muhammad, 1408 AH, Mustardak al-Wasael and Mussel Al-Masaleh, Beirut, Al-Ubith
- 88- Aboat, Mohammad, 2008, Bet on mortgage bills in Iranian and French law, Journal of Faculty of Humanities, Semnan University, 7: 7-27
- 89- Amini, Mansour, 2009, 49. The role of document registration in immovable property in French law and its admissibility in Iranian law, Journal of Legal Research, 7: 43-59
- 90- BagheriAsl, Heidar, 2013. The Role of Bills on Trade Documents, No. 2, Journal of Civil Rights Research, 38-52
- 91- Habiba, Saeed and ShabaniKhondsari, Hadi, 1395, Reproductive Investigation of Mortgage Accounts, No. 14, Civic Jurisprudence Teachings, Razavi University of Social Sciences, 4: 38-56
- 92- Khodabakhshi Abdullah, 2010, 71, another analysis of Article 22 of the Law on the Registration of Documents and Real Estate, Legal Journal of Justice, 43-58

93- Sikouti, Reza, 2005, jurisprudential and legal review of the role of the bill in the book and its effects, J 7, Journal of jurisprudence and the foundations of law, University of Tehran, 38-69

94- TalebAhmadi, Habib, 2011, Legal nature of the will of the custom in jurisprudence and law of Iran, p. 4, Journal of jurisprudence and Islamic law, 3: 47-67.

95- Foroughi, Nasser, Ataei, Soraya, 1391, The time of creation of the right to be executed in the will of the commission, 12th and 13th, Journal of jurisprudence and Islamic law, 4: 188-202.

96- MohagheghDamad, Mostafa and HaddadiManesh, Majid, 2010, The sentence of the Sahman in Bey-e Salam, p. 26, Islamic Law Magazine, 7: 8-28.

97- Meshkini, Ali, 1419 AH, Mosta'lat al-Fiqah, Qom, Office of the Publishing House

98- Mahdavi, Seyyed Mohammad Hadi, 2009, Terms of validity of the bill in objective contracts, No. 17, Journal of jurisprudence and the foundations of law, 6: 150-171

99- Musavi Bojnourdi, Seyyed Mohammad, 1374, The role of bills in mortgage agreement, No. 3, Ahl al-Bayt jurisprudence magazine, 17: 23-48

100- Nowroozi, Behrouz, 1394, Bills and Works in Iran's Law, No. 12, Kannan Monthly, 5: 18-38

***Theses.***

101- Esmā'iliDehghi, NargesKhatun, 2000, The Bills and Works of Imamieh and Civil Rights Jurisprudence, Qom University, Faculty of Humanities.

102- Ardestani, Gholamreza, 1392, Legal Analysis of the Will of Intellectual Property in Iran, Qom University, Law School.

103- Iranpour, Sahar, 1388, Bills on Wagq in terms of jurisprudence and law, Payame Noor University, Law Group.

104- Faryadi, Safara, 1389, The sentence and works of the bills in contracts and agreements in the Imamiyah jurisprudence, Islamic Azad University, Tehran Branch, Faculty of Literature and Humanities, Department of Law and Fundamentals of Law.

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