The Effects of Possessing on the Conclusion of Mortgage Contracts in the Statute Laws of Iran

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Abstract

There are some disagreements among legal experts about the role of possessing in real contracts. Some experts consider possessing; the same as offer and acceptance; as an essential principle for the fulfillment of contracts, and assume the completeness and truth of contracts dependent on this factor. Other experts also consider the realization of these contracts dependent on complete offer and acceptance; however, some of them regard possessing as a condition for the validity of contracts, and some others regard it as a constituent that is supposed necessary by the legislator. The difference between these points of view is not only theoretically important, but is also practically of great importance and a great number of effects are associated with them. For example, according to the view that considers possessing as a principle of contracts, the contracts are effective from the time that possessing happens; however, based on the view that possessing is a condition for the validity of contracts, the contracts are effective from the time that the contract is arranged. In this article the effects of possessing on the mortgage contracts is discussed and evaluated.

Keywords: Possessing, possession, real contracts, validity condition, effectiveness condition.
Introduction
The reason behind the conclusion of mortgage contracts is providing support for the mortgagee. The clause number 772 of civil law states “The mortgaged property should be possessed by the mortgagee or a person chosen by the mortgagee and the mortgagor; however, the continuity of possession is not a condition for the validity of contract” (Katozian, 2008, p. 239). Katozian (2008) believes that the first part of this clause is congruent with the view of the experts who have considered the delivery of the mortgaged property as one of the effects of the mortgage contract and as one of the obligations that the mortgagor is faced with, and believe that the mortgage contract is concluded by offer and acceptance and possessing has no role in its bindingness. Katozian also states that the second part of the clause; that is, “the continuity of possession is not a condition for the validity of contract”, shows the obligation of possessing for the completion of contract. Judicial precedent of the courts has a more flexible approach than civil law about possessing in mortgage contracts. Judicial precedent considers customary domination of the mortgaged property sufficient for the realization of contracts and, therefore, decreases the problems of physical possessing because through physical domination of the mortgaged property it becomes impossible for the mortgagor to have any rights of benefit regarding that property, while the registration of the mortgaged property in land records makes it possible to have intellectual domination of the property, regarding the right to sell the property and the utilization of the debt, without disturbing the manner of utilization of the property.

Mortgage Contract
The term mortgage means permanency and persistence in terminology and it is sometimes used with the meaning of ‘entail’. Mortgage is the thing which is taken for a loan or debt; that is, it is a lien on the property. The clause number 771 of the civil law defines mortgage contract as “a contract that the debtor gives a property to the creditor for security. The person who gives the property is called mortgagor and the other person who receives the property is called mortgagee.” According to this clause of the civil law, different lawyers have presented some definitions of the mortgage contract which are almost similar to this clause.

Based on the definition presented by Katozian (2008), the mortgage contract is a contract according to which the debtor’s property is taken as the security for the debt. This contract allows the creditor to have a real security and get ‘consequential chose in possession’ for the security so that the debtor is not able to occupy the property causing damage to the mortgagee, and the creditor gets preference over other creditors for the utilization of his/her own right to the price of the mortgage.

In another definition by Emami (2011) it is mentioned that “the mortgage is a contract according to which a property is taken as a security for a debt, and the mortgaged property is prevented from transfer and the proprietor cannot have a complete detention of the property” (p. 413) Some other lawyers have defined the mortgage contract as “a contract that is necessary for the mortgagor, and the mortgagor cannot possess the mortgaged property or take it back from the mortgagee unless he/she has paid the mortgagee’s debt” (Aghaei, 2008, p. 44).

Still in another definition of the mortgage contract, Jafari Langaroudi (1999) stated that The rights because of which a certain object is considered as the security for the right holder’s debt, and gives him/her the right to collect his/her debt from that security if the debtor refrains
from repaying the debt. The condition are similar to the condition when a creditor mortgages a property from a debtor to be assure of the repayment of the debt, and, as a consequence, he/she gets priority toward that property and can receive his/her debt from the mortgaged property following the regulations. The creditor’s right toward the mortgaged property, which is a right in possession, is not an independent right. On the contrary, it is dependent on the debt, and is terminated by the termination of the debt.

The mortgage contract is a contract through which the debtor or a third party gives a property (either movable or immovable) to the creditor as the security for a debt so that if the debtor is not able to repay the debt until the payment date, the creditor’s debt is paid though selling the security. The origin of this debt can be a contract or not. (p. 2071)

On the other hand, Shia lawyers have presented some definitions of the mortgage contract that some of them are presented here. For the definition of the mortgage contract, Shahid Aval stated that the mortgage is the security for the debt (Fahimi, 2005). Shahid Sani declared that “the mortgagee is not mentioned in Shahid Aval’s definition, so the definition of mortgage does not need dependence” (Fahimi, 2005, pp. 64–65). However, according to Shahid Sani, even if the mortgagee was mentioned, dependence was not made because the meaning of mortgagee is different from debtor and the recognition of the mortgagee is not dependent on the recognition of the mortgage (Fahimi, 2005). Shahid Sani continues:

Shahid Aval’s definition does not exclude other cases because there are some other cases that are not named mortgage but need security (e.g., deposit and loan), so that being creditor, the person has the debtor’s property as a deposit or loan. In these cases, if the debtor avoids the payment of the debt or completely denies the debt, the creditor can take back his debt from this property. (Fahimi, 2005, pp. 64–65).

Shahid Sani also believed that mentioning the word mortgagee in the definition of mortgage contract does not necessitate dependence (Fahimi, 2005). Momghani stated that “the mortgage includes a property that is considered as the security for a debt taken by the mortgagor so that if it is impossible to take back the debt from the obligor, the mortgagee can collect the debt from the security” (Fahimi, 2005, pp. 64–65). About this issue, Alame Heli believed that “the mortgage contract is a contract that is concluded to take back the debt” (Fahimi, 2005, pp. 64–65). He also stated that “the mortgage contract is concluded to have a security for demanding the debt” (Fahimi, 2005, pp. 64–65).

Possession
Different meanings presented for possession are as following:
- Taking hold of something or taking hold of something with the hands;
- Contraction which is opposite expansion;
- A document or a note that is exchanged between obligor and the promise, as it is usually said to give something and receive a bill;
- Domination and detention of something;
- Cease and desist getting something from someone.

Some authors of the civil law have stated that possession consists of:

- Putting the transactional property under the control of the other party of that transaction unless this is not permitted by the transaction;
The other party of the transaction being aware of the fact that the transactional property is under his/her control.

Therefore, if someone sells a sheep and puts it in the customer’s sheep fold (so that the customer can dominate it) without the customer’s attention, possession has not happened until the customer is aware of this event (Jafari Langaroudi, 1999). However, the necessity of the existence of the factor of awareness is sometimes faced with some problems; that is, in some cases according to some certain customs, the awareness of the promisee of the fact that the property is under his/her control is not necessary. For example, it is customary in some countries that the obligor puts some goods, such as milk, eggs, potatoes etc., behind the door of the promisee while he/she is sleeping and this is customarily called delivery. However, when the promisee has become aware of possessing a property by the obligor and the obligor has given the formal possession of the property to the promise, but the promisee is in a condition that is not able to utilize the property; that is, the promisee has a general excuse (e.g., earthquake, war, flood, and riot) or a personal excuse (e.g., severe illness), the delivery has not performed completely. The clause number 367 of the civil law states that “possessing consists of the domination of the object of sale by the customer” (Broujerdi Abde, n.d., p. 221). As it is stated in this clause, possessing consists of the fact that the object of sale is under the control of the customer or his/her deputy. Therefore, the civil law has also the same definition of the concept of possessing presented by custom. According to some authors, since possessing is a condition for the validity or bindingness of contracts, it includes both possessing when you can take hold of the property and when it is not possible to take hold of it. With this generalization, it is not possible to give a literal meaning for the concept of possessing, thus it has a meaning which includes both taking hold of the property by the hands and taking hold of it without using hands, and it consists of domination of something without the necessity of taking hold by hands. Therefore, this domination includes taking hold of something, or riding it, or having its key or transfer deed, or taking control of it in any other ways (Broujerdi Abde, n.d.).

Interpreted from the clause number 374 of the civil law that stated that “the vendor’s permission is not a required condition in getting possession, and the customer can take the possession of the object of sale without permission.”

The Effects of Possessing
Possessing and possession, the same as unauthorized sale, money exchange, and post-delivery sale, have always been a controversial issue in formal and real contracts. The question is if possessing is a condition for the validity of contracts or an obligation in contracts. Each of these is discussed separately below.

Obligatoriness
If the mortgage contract was complete by offer and acceptance and possessing was one of the consequences of the contract, there would be no need for the mortgagor’s permission, as it is in the contract of sale that even though the object of sale needs to be delivered to the purchaser, there is no need for the vendor’s permission for possessing it, and the customer can dominate his/her property wherever he/she finds it (clause number 374 of the civil law). Javaher (as cited
in Safar, 2012) stated that “the proprietor has no right to prevent the mortgagee from possessing the mortgaged property.” Broujerdi Abde (n.d.) said that it is necessary to have the proprietor or his/her legal deputy’s permission whether possessing is a condition for the validity of contracts or it is an obligation in contracts. He continued that “without this permission, possessing is not correct and can have no consequence because possessing without permission is not legitimate and is prohibited and the necessity for its prohibition is lack of validity” (p. 223). About the new permission for a property that was previously under the control of a person and now is transferred to him/her though a contract that needs possessing, Broujerdi Abde distinguished two hypotheses and said that:

If the previous possession is documented by permission, the previous permission is considered valid and possessing happens by the owner’s permission and this is enough for acquiring possession even if the contract does not imply permission. However, if possessing the property is not documented by permission, this possessing needs permission because there is no previous permission and the contract does not imply permission, and the proprietor’s consent to the contract does not also imply consent to possessing, as it often happens that the proprietor has consent to intention but not to possessing. (p. 223)

Validity Condition

In this case possessing is considered as one of the principles of contracts and the mortgage contract is not complete before the delivery of the mortgaged property to the creditor. In fact, in this case offer and acceptance alone do not make judicial relationship and there should be possessing with the proprietor’s consent because offer and acceptance do not make the right for domination of the mortgaged property for the mortgagee and they cannot also force the mortgagor to deliver the property. Possessing must be with the mortgagor’s permission, except in case that the delivery of the mortgaged property is stated as an obligation of the contract and this obligation is originated from the original contract (Emami, 2005). If the mortgagee dominates and possesses the mortgaged property without the mortgagor’s permission, the mortgage contract is not concluded and the mortgagee’s domination of the property is domination of the other’s property. Therefore, the mortgagor can claim the restitution of the property. The conditions are also the same if the mortgagor permits the mortgagee to possess the property but revokes the permission before possession. In this case the domination is the domination of the other’s property and the mortgagor can claim the restitution of the property because the consequences of permission are removed by revocation and possessing without the mortgagor’s permission has no legal effect (Safar, 2012). However, if revocation happened after the property being possessed by...
the mortgagee, the revocation has no consequence. Even if the mortgagor possesses and has the control of the property through a number of ways such as deposit, loan, or lease, or the mortgagee has domination of the property by usurpation, the mortgagor’s permission is necessary, even though some experts believe that there is no need for new permission or passing of time to possess the property again. However, it seems that the mortgagor should also permit the domination of the property as mortgage (Emami, 2005).

Shahid Sani explains that “the reason behind this legal statement is that there is no reason for the validity of new possession after the contract”. He continues that “it is not important if the mortgagee previously possessed the property by the mortgagor’s permission or without his/her permission and by usurpation.” This is because of the fact that in both cases (i.e., by permission or usurpation), the property is named the possessed mortgage and there is no reason for new possession after the contract. However, it is not the case that possessing the property that the mortgagor had previously under his/her control by usurpation is forbidden, but forbidding wrongdoings does not void the act. Nevertheless, some experts have stated that a forbidden.

Certainly, when the mortgaged property is under the mortgagee’s control by deposit or loan, offer and acceptance implies permission for possessing, too, but this exterior approval shouldn’t be confused with lack of necessity of permission. Therefore, if the mortgagor declares that he/she wants to give the property for mortgage but will decide about its possession later, it is not possible to state that the mortgage is complete and the debtor cannot void it.

All discussed before about validity condition are the ideas of civil law experts; however, religious experts have three different kinds of idea about this issue. Some experts such as Shahid Aval stated that:

In this case after the contract, there is no need for new permission and passing of time for the renewal of possessing because acquiring new permission and passing of time for getting possession seems like acquiring what has already been acquired. In addition, the principle of invalidity is in this case dominant and, therefore, there is no need for any other conditions.

There are two other ideas stated contrary to this idea discussed below.

Firstly, some believe that any possessing that has happened before the mortgage contract, whether through usurpation or by the mortgagee’s permission, is not valid and for the completion of possessing there is a need for new permission and passing of time after the conclusion of contract. For the confirmation of their idea, this group of experts has stated that the possessing which happens after the contract is legally valid and its validity and completeness depends on the fact that it happened by the mortgagor’s permission and consent, such as possessing consequent to mortgage that after the accomplishment of contract the mortgagor gives the security to the mortgagee and the mortgagee uses this permission and acquires the security. Therefore, permission is needed for getting the control of the mortgaged property by the mortgagee, and it is obvious that one of the integral possessing is not sufficient because if possessing is considered valid as one of the obligations of the mortgage, it is, therefore, considered as one of the principles of the mortgage, and because the forbidden possessing in not qualified to be considered as a principle, a new possessing is needed after the contract. Regarding the fact that possessing is a wrongdoing in mortgage and forbidding it does not void it, it needs to be mentioned that it is a thoroughly true statement, but forbidding the wrongdoings does not necessarily void the act if only the principles of that wrongdoing were realized before forbidding.
Therefore, this statement is not true if a principle is found after forbidding, as it is the case for the discussion about possessing in mortgage. Because if possessing, as one of the obligations of the mortgage, happened by usurpation is completely forbidden, it is not possible to consider it as a principle after the contract; therefore, if after the contract the mortgagee possesses and takes the control of the security without the mortgagor’s permission, this possession is not sufficient. Parts of this acquisition is passing some time. As a result, a valid and legal possessing has two significations, one of which is the signification of concordance and the other one is the consecutive signification.

The signification of concordance consists of the signification of acquiring security by the mortgagee, and the consecutive signification has signification for passing and expiration of time and getting permission. However, the presumption of the signification of concordance is negated because the security is under the control of the mortgagee before and after the mortgage; therefore, this signification is invalid and mentioning this signification is unreasonable because it results in acquiring what has already been acquired. As a result, only consecutive signification is valid and, therefore, after the contract there is a need for permission and passing of time to the amount that the qualification for possessing the property has been acquired.

Some experts have considered this argument a weak argument and have stated that this argument is weak because it is based on the fact that only the possessing which happens after the contract is valid, while this is not the case and possessing, which means acquiring security by the mortgagee, is valid whether it happens before or after the contract. However, regarding the validity of time and its expiration after the contract, it should be stated that this issue is one of the integral parts of possessing after the contract. In other words, the consecutive signification of possessing is restricted to after the contract and is prior to it, and it is obvious that if such a kind of possessing is considered invalid, its consequences are void, too. However, about the previous possessing which has happened by usurpation and without the mortgagor’s permission, the validity of permission and passing of time is true, and considering the reasons mentioned before the validity of permission and passing of time is confirmed, but not about previous possessing. Therefore, it is said that until nothing is stated by the mortgagor to void guaranty from the mortgagee, the security is possessed by the mortgagee as a guaranty.

However, according to the second idea, some experts stated that new permission and passing of time are valid in a possessing that has happened incorrectly and they are not valid in possessions which happened correctly and legally. Therefore, if the mortgaged property is under the mortgagee’s control through usurpation, after the mortgage contract the new permission and passing of time is necessary.

Conclusion
Real contracts like other contracts are concluded through offer and acceptance; however, their consequence and realization depend on possessing. The civil law differentiates between conclusion of contracts and their realization which is related to the consequences of contracts. The civil law considers the conclusion of these contracts completed through offer and acceptance, and their consequence and realization dependent on possessing. Therefore, the consequence of these contracts is effective from the time of possessing, and possessing or permission for possessing has transferring role in the concerned consequence. On the other hand,
possessing the transactional property is not because of the inability of intention in the conclusion of these contracts; however it is considered necessary by law or custom because of some pragmatism. Whether these contracts are mentioned as a corollary condition or affirmative condition in other contract, and whether possessing is one of the principles of the contract or a condition for its validity, the person against whose favor the condition is made is responsible for giving the possession of the property to the other person. Otherwise, insertion of these contracts as an incidental condition in contracts is a literally null and void affair.

According to the civil law, mortgage contract is a real contract; that is, possessing contributes to its realization. The clause number 772 of civil law stated that “The mortgaged property should be possessed by the mortgagee or a person chosen by the mortgagee and the mortgagor; however, the continuity of possession is not a condition for the validity of the contract” (Katozian, 2008, p. 239). The first part of this clause only specifies the necessity of possessing the mortgaged property and it does not explicitly specify that possessing is a condition for the validity of the mortgage contract. However, the second part of the clause; that is, “the continuity of possession is not a condition for the validity of the contract” implies that possessing, even for a short while, is a condition for the validity of the contract; however, the continuity of possessing has no effect on the validity of the mortgage contract, and formal realization of possessing is enough.

For solving the problem of security in commercial documents, there can be a resort to the idea of those experts that consider possessing as a necessary condition for the validity of the mortgage contract. However, it seems that the only effect of possessing on the mortgage contract is that the mortgaged property becomes security for the debt. In fact, the reason behind the conclusion of the mortgage contract is providing support for the mortgagee. Therefore, if the mortgagor does not possess the mortgaged property, the theory behind security is not realized because providing security depends on possessing and legislators have mentioned possessing for the security of mortgage.
References