

Article 928. - Permission and order are deemed to be an agency if there is a context to that effect. A subsequent allowance (authorisation) is tantamount to an antecedent agency (delegation)*. A message is not deemed to be an agency.

Article 929. - (1)** Implementation of the agency is deemed to be an acceptance thereof but where the (offer of) an agency is rejected after the (offeree) has become aware of it the agency is voided and if (the subject matter of) the agency is implemented thereafter it is ineffectual.

(2) An agency is deemed as having been accepted if it is related to a business which falls within the scope of the profession of the agent or if the agent had offered his services publicly concerning the subject matter of the agency and did not reject it outright.

Article 930. - (1) In order for the agency to be valid the constituent (principal) must personally have the capacity to dispose of the thing which he delegates to another person (agent) to perform; it is not valid at all to commission an insane person or an imprudent minor not having the power of discretion nor will it be valid to commission a prudent minor to carry out a disposition which

* This means that a person who sells the property of another person without being commissioned to do so and if after the sale he reports it to the owner of the property who on hearing of the sale approves it the sale will be effectual. (Explanation of Article 1451 of Majallat Al Ahkam Al Adliyya).

** The basic element of agency is offer and acceptance such as where A tells B "I have commissioned you to do this matter", and B said: "I accept" or uttered such other words denoting acceptance the agency is concluded; the same thing applies if B said nothing but commenced acting on the mission: this is an implied acceptance of the agency; if the agent has rejected the agency after it had been offered to him the offer becomes void and no agency is concluded. (Explanation of Article 1451 of Majallat Al Ahkam Al Adliyya).

is purely harmful even though it has been allowed by the guardian; it will however be valid to commission him without obtaining the permission of his guardian to carry out disposals which are beneficial to him and if he is permitted to carry on trading activities disposals which are in between benefit and harm; the agency of an interdicted person will be concluded subject to the permission of his guardian.

(2) The agent must be of sound mind and prudent (have the power to exercise discretion); it is not a condition that he must be of major age; a prudent minor may be commissioned as agent even when he has not been authorised.

Article 931. - The agency will be valid if it is for performing a specific thing mentioned therein or general for performing all matters which are set down therein; a general commission given by one person to another vesting him with power to act for him in all his rights and to litigation in every right belonging to him the agency is valid even though the adversary has not been named nor has the thing the subject matter of the litigation.

Article 932. - It would be valid where the agent has been given the freedom of opinion to dispose in the matter mandated to him as he pleases; it would also be valid if the agent is restricted to a certain specified disposal.

Section (ii) - Rules governing agency

(1) Rules of Agency as between the Contracting Parties

Obligations of the Agent

Article 933. - The agent must perform the mandate (commission) without exceeding the limits fixed therein; he may however exceed these limits if he finds himself unable to notify his principal beforehand and if the circumstances

are such that it can be assumed that the constituent would not but have approved these disposals; in this case the agent must inform the constituent immediately of that which exceeded the limits of his commission.

Article 934. - (1) If the agency is gratuitous the agent must exercise in its performance the degree of care that he would give to his own business; where however the agent exercises in his own affairs more than the care of an ordinary man he will not be required to exercise more than the care given by an ordinary person.

(2) When the agency is for remuneration the agent must always exercise in its performance the care of an ordinary person.

Article 935. - The property which the agent has received for the account of his principal shall be a trust in his hand; if it has perished without encroachment on his part he shall not be liable; the constituent may demand proof of the perishing.

Article 936. - The agent must from time to time inform the constituent regarding the stage reached in the performance of the agency (mandate) and must render to him an account thereof after it has lapsed.

Article 937. - The agent cannot use the property of the constituent (principal) for his own benefit; he is liable for interest in respect of the sums which he has used for his own benefit as of the time of using them; he shall also be liable for interest in respect of sums which he owes the constituent from the account of the agency as of the date of formal service of notice on him.

Article 938. - (1) If a person has constituted two agents by means of one contract neither of such agents may dispose separately of that which has been delegated to him except

where an exchange of views is not essential such as the discharge of a debt or restitution of a deposit or if they cannot be present together to act on the delegation such as in litigation each one of them may act separately provided the other agent (attorney) has given his opinion on the litigation where his presence is not necessary.

(2) If they have been appointed by two (separate) contracts each one of them may act separately absolutely.

Article 939. - An agent may not appoint a substitute unless he has been permitted to do so by the constituent or where the matter was left to his discretion; the substitute is deemed to be an attorney for the constituent and will not be dismissed neither by the dismissal of the original agent nor by his death.

Obligations of the Constituent

Article 940. - (1) If a fee (remuneration) has been stipulated in the (instrument) of the agency the agent shall be entitled to the fee if he has performed the assignment; in the absence of a stipulation to that effect the agent shall receive the comparable fee if he carries on business against fees otherwise he shall be deemed to have volunteered (his services).

(2) Where a fee has been agreed for the agency it will still be subject to the assessment of the court unless it has been paid voluntarily after the performance of the agency subject to the provisions of specific laws.

Article 941. - (1) Whatever may be the chance of success of the agent in his assignment the constituent must reimburse to the agent any expenses he has incurred for the normal performance of the assignment together with interest thereon to run from the date of incurring such expenses; if the performance of the assignment requires the constituent to provide to the agent sums of money for expenditure in

respect of the assignment the constituent must advance such sums when the agent requests him to do so.

(2) The constituent shall save harmless the agent of all obligations which the latter has undertaken in his own name for the performance of the agency.

The Legal Consequences of the Agency vis-a-vis Third Parties

Article 942. - The rights of the contract belong to the contracting party: if the agent concluded a contract with a third party in the name of his constituent and within the limits of his delegation the contract and all its rights will belong to the constituent (principal).

Article 943. - If the agent at the time of concluding a contract with a third party has failed to declare that he is acting in his capacity as agent neither the contract nor the rights resulting therefrom will belong to the constituent unless it is inferred from the circumstances that the other party was aware of the agency or if it was immaterial for such other party whether he dealt with the constituent or the agent in which case he may claim from either the constituent or the agent and either of them may claim from him.

Article 944. - (1) Where the agent has in the name of the constituent concluded a contract with a third party but exceeded the limits of his delegation (acted ultra vires) or where a person has acted without being commissioned the effectuality of the contract against the constituent remains subject to his approval (allowance).

(2) Such third party may fix a suitable time limit for the constituent to approve the contract and if such approval is not issued he is disengaged from the contract.

Article 945. - If the person in whose name the contract was

concluded had not issued a commission and has refused to allow (approve) it recourse may be had against the person who had assumed the capacity of agent for the damages resulting from the ineffectuality of the contract unless such person proves that the other party to the contract was aware or must have been aware that the commission was non-existent.

Section (iii) - Termination (end) of the agency

Article 946. - The agency is terminated by the death of the agent, or of the constituent, or by either one of them forfeiting his legal capacity, or by the completion (performance) of the assignment or by the expiry of the term fixed for the agency.

Article 947. - (1) The constituent may revoke the agent or restrict his commission and the agent may revoke (resign) the agency; any agreement otherwise is ineffectual; but revocation or restricting the agency may not however be effected without the consent of a third party whose right is related to said agency.

(2) Termination of the agency by revocation shall not take effect except after notice thereof has reached the second party.

(3) Where the agency is for a fee (remuneration) the party revoking (the contract of the agency) is bound to pay compensation to the other party for the injury suffered as a result of the revocation at an inopportune time and without acceptable excuse.

Article 948. - The termination of the agency cannot be adduced against a bona fide third party who had concluded a contract with the agent before he became aware of the termination thereof.

Article 949. - The agent is bound regardless of the manner

in which the agency is terminated to carry through the work (assignment) he has commenced to such a condition which will not expose it to deterioration.

Chapter 4 - Deposit (Trust)

Article 950. - (1) A trust* is the property which has reached de facto or de jure the hand of a person with the permission of the owner thereof not for appropriation: it may be pursuant to a safekeeping contract such as a deposit (trust) or within a contract such as a thing leased or borrowed or without a contract and unintentional such as where the wind has blown into the yard of a person the property of another person.

(2) The depositary does not warrant the trust against perishing regardless of whether or not it (the perishing) is due to a precautionary cause; he will however warrant it against perishing by his act or by his encroachment or through negligence on his part.

Article 951. - A deposit is a contract by which the owner or any person acting for him entrusts another person to safekeep (preserve) his property and it is not completed except by receipt.

Section (i) - Obligations of the depositary

Article 952. - (1) A depositary shall take such care in preserving a deposit as that which he takes in preserving his own property and must place it in a safe (fortified) place as that in which he places his own property.

(2) He may preserve it himself or have it preserved by

* (In law) (a) the trust reposed in a person by giving him nominal ownership of property, which he is to keep, use, or administer for another's benefit; (b) property under the charge of a trustee or trustees... (Webster's New World Dictionary of the American Language, Second College Edition - 1980, Simon and Schuster).

a person whom he normally trusts for preserving his own property; he may by an excuse entrust it into the care of other than his trustee.

Article 953. - The depositary warrants the deposit against perishing or loss due to a precautionary cause where the deposit was against a remuneration.

Article 954. - (1) The depositary may travel having with him the deposit even when it is weighty (needs to be loaded) unless its owner forbade him against travelling with the deposit in his possession, or had designated the place wherein it is to be kept, or if the road is fraught with danger: in all these cases the depositary shall be liable if he travelled having the deposit with him and it perished.

(2) Where however the travelling was necessary and he travelled with the deposit in his possession together with his family or alone if he has no family and the deposit perished he shall not be liable at all but will be liable if he travelled alone (if he had a family) with the deposit which perished.

Article 955. - (1) If without the permission of the owner the depositary has mixed the deposit with his property or the property of a third party such as it would be difficult to separate the two properties he must warrant it regardless of whether the property mixed with it was of the same specie (kind) or not; where a third party has mixed the deposit with another property as it would be difficult to separate the two properties the person who did the mixing (mixer) shall warrant it.

(2) But where the depositary has mixed the deposit with his own property by permission of the owner or if it got mixed without his action such as it would be difficult to separate the two properties the depositary will become the partner of the owner of the deposit and if the property

has perished without default the partner depositary shall not be liable.

Article 956. - (1) The depositary may not without the permission of the owner use and take advantage of the deposit and if he did without having obtained the owner's permission he shall be liable if it perished.

(2) The depositary may not without having obtained the permission of the owner dispose by leasing, lending, or pledging the thing deposited and if he did and it perished in the hand of the lessee, borrower, or mortgagee the owner may claim from the depositary and may claim from the lessee borrower or the mortgagee if they were aware that the property was a deposit and the owner thereof had not given permission to dispose thereof.

Article 957. - (1) The depositary shall be liable if he has lent the dirhams (a money denomination) of the deposit or paid off a debt therefrom without having obtained the owner's permission or allowance (licence) to do so.

(2) If however the depositor has been continually absent and the court condemned him to pay alimony which the depositary had paid by order of the court out of the money deposited with him he shall not be liable thereon but if he has paid the alimony without a court order he shall be liable thereon.

Article 958. - (1) If the depositary has with the permission of the owner deposited the thing deposited with a third party his contractual obligation is extinguished and the third party becomes the depositary.

(2) If the depositary has deposited the thing deposited without the owner's permission with a third party whom he normally does not trust and if the deposit has perished through the encroachment of the second depositary the owner has an option to claim either from the first depositary or from the second depositary; if he had claimed

from the first depositary he may have recourse against the second depositary and if he claimed from the second depositary he does not have recourse against anyone; if the deposited thing has perished with (while in possession of) the second depositary without encroachment on his part and before it was separated from the first neither of them will be liable but if it has perished after being separated from him the owner may claim from the first depositary but not from the second depositary.

Article 959. - A stipulation imposed on the depositary which is included in the contract of the deposit must be observed and performed if it is beneficial and capable of being observed but if it is not beneficial or is beneficial but its observance is impossible it will be null and void and inoperative.

Article 960. - Where it is incumbent to warrant a deposit which is a fungible thing a comparable thing must be restituted but where it is a non-fungible the warranty will be against the value thereof on the day of the incumbency of the warranty.

Article 961. - (1) When the contract of deposit has expired the depositary shall when so required restitute the thing deposited together with any fruits thereof which he may have received; the restitution will be in the place wherein the deposit must have been kept; the expenses of the restitution shall be borne by the depositor subject in all the foregoing cases to an agreement to the contrary.

(2) Where the deposit has been placed in a locked box or in a sealed envelope and the depositary took delivery thereof without knowing the contents thereof if the owner has on having it restituted to him claimed that something thereof is missing the depositary shall not be obliged to take the oath except where the depositor has charged him with breach of faith.

Article 962. - If the deposit has perished without encroachment or default on the part of the depositary who by reason thereof obtained a sum of money or any other consideration he is bound to pay the same to the depositor and assign to him such other actions which he may have against third parties concerning the deposit.

Article 963. - Where two persons have deposited property which is jointly owned by them with a person if one of them claimed restitution of his share of the deposit the depositary must restitute it to him if it is a fungible thing even if his co-partner is absent and if it is non-fungible he may not restitute it without the consent of the other partner.

Article 964. - Where two persons have deposited with a third party a thing which is disputed he cannot restitute it to either of them without the permission of the other or a decision from the court.

Article 965. - Where the depositor is continually absent the depositary shall keep the deposit until he knows whether the depositor is dead or alive; if the deposit is of a kind which deteriorates by staying the depositary may sell it subject to permission from the court and keep the price thereof with him as a trust (amana) subject to the provisions of the other laws.

Section (ii) - Obligations of the depositor

Article 966. - The expenses of a deposit which needs expenditure and provision will be borne by the owner thereof; if he is absent and the deposit is something which can be hired the depositary may subject to leave from the court lease it out and spend on it from the rent; but if it is not capable of being hired he may after obtaining leave from the court spend on it from his own property and claim

from the depositor or sell it in accordance with the procedure determined by the court and keep the price thereof with him.

Article 967. - (1) If the deposit is dispossessed and the depositary has redeemed it he may claim the redemption sum from its owner.

(2) The depositor shall in general compensate the depositary for all the loss that he has suffered on account of the deposit if this loss resulted from the action of the depositor.

Article 968. - The depositary may not take remuneration for keeping the deposit unless there is a stipulation in the contract to that effect.

Section (iii) - Termination of a deposit

Article 969. - (1) The depositor may at any time claim restitution of the deposit together with its annexes (accessories) and the depositary may demand restitution thereof (to the depositor) whenever he wishes.

(2) If the deposit is for remuneration the depositary may not without lawful excuse restitute it prematurely but the depositor may claim restitution thereof any time he wishes provided he pays the remuneration agreed.

(3) The claim of restitution must be at an opportune time and an adequate time limit is granted to the depositary.

Article 970. - (1) If the depositary has died and the deposit was found in kind in his estate it will be a trust in the hand of the heir.

(2) If the depositary has died without unveiling the condition of the deposit and it was not found within his estate and the heirs did not know (identify) it it will be a debt payable out of the estate and the depositor will

participate with the other creditors of the depositary.

Section (iv) - Special cases of a deposit

Article 971. - Save where usage is otherwise, if the deposit is a sum of money or any other thing which perishes through use (consumed) and the depositary was permitted to use it the contract is deemed to be for a loan.

Article 972. - The owners of hotels, inns, and lodging houses in as much as they are under an obligation to exercise care in keeping the things which are brought by transients are responsible for every act of everyone who checks in or out of the hotel, inn, or lodging house but they are not responsible in that which concerns money, securities, and valuable things to pay a compensation exceeding 50 dinars unless they have undertaken to keep these things knowing their value, or had refused to take delivery thereof without justification as a trust in their custody, or where they had caused the harm through a fault on their part or that of their followers (personnel).

Article 973. - (1) A transient must inform the owner of the hotel of the theft, loss, or perishing of the thing as soon as he becomes aware of it; if he was late (delayed) in giving such information to the owner of the hotel without justification he forfeits his rights.

(2) An action by the transient against the owner of the hotel will not be heard after three months from the day on which the theft, loss, or perishing is unveiled.

Article 974. - (1) Where a person has found a thing which was lost and took it with intention to appropriate it he will be a usurper and shall be liable if the thing has perished even without encroachment on his part.

(2) But where he has taken the thing lost with the intention to restitute it to its owner it will be a trust

in his hand and he must hand it over to the owner in accordance with the procedure laid down in the law.

Title 4 - Aleatory Contracts

Chapter 1 - Gambling and Betting

Article 975. - (1) Every agreement relating to gambling or betting is void.

(2) A person who has lost in gambling or betting may notwithstanding any agreement to the contrary reclaim what he has paid within one year from the time when he made the payment he lost; he may prove that which he has paid by all the legal means.

Article 976. - (1) Bets between persons taking part personally in sports are excepted from the provisions of the preceding Article but the court may nevertheless reduce the stake if the sum thereof is excessive.

Chapter 2 - Life Annuities

Section (i) - Elements of the contract

Article 977. - (1) A person may for valuable consideration or gratuitously bind himself to pay another person periodical lifetime salary.

(2) This obligation may be created either by contract or by a will.

Article 978. - (1) A life annuity may be granted for the life of the obligee, or the person in whose favour it is made, or a third party.

(2) In the absence of an agreement to the contrary the annuity is passed to the heirs of the creditor if the latter has died before the death of the person in whose favour the annuity was made for the duration of his

lifetime.

(3) The obligation to pay the annuity shall also devolve upon the heirs of the obligee (the person indebted therefor) if the latter has died before the death of the person in whose favour the obligation was created for the duration of his lifetime.

(4) The annuity is presumed to have been created for the duration of the creditor's life if there is no agreement otherwise.

Article 979. - A contract bestowing (creating) the annuity shall not be valid unless it is in writing without prejudice to the requirements of the law as to a specific form for the contracts of gifts.

Article 980. - A stipulation in the contract that a life annuity is not attachable is only valid when the life annuity is settled gratuitously.

Section (ii) - The stipulations of the contract

Article 981. - The creditor shall not be entitled to the annuity except in respect of the days lived by the person on whose life the annuity has been settled. Where however advance payment is stipulated the creditor will be entitled to the instalment which fell due before the death of the person on whose life the annuity has been settled.

Article 982. - Where the contract is for valuable consideration if the debtor has failed to perform his obligation the creditor may claim performance of the contract or rescission thereof and the payment of damages if relevant.

Chapter 3 - Insurance Contracts (Policies)

Section (i) - General provisions

(1) The Elements and Conditions of Insurance

Article 983. - (1) Insurance is a contract whereby the insurer undertakes in consideration of premiums or any other pecuniary payment by the insured to him to pay to the assured or the beneficiary a sum of money, or an annuity, or any other pecuniary prestation upon the occurrence of the event insured against.

(2) The assured is meant to be the person who performs the obligations undertaken in consideration of the insurer's obligations; the beneficiary is meant to be the person to whom the insurer pays the value of the insurance and if the assured is the person entitled to the value of the insurance he will be the beneficiary.

Article 984. - (1) The object of the insurance may be everything which is legal and renders benefit to the person as a result of the non-occurrence of a specific risk.

(2) The insurance policy shall be null and void if it is revealed that the risk insured against had ceased or had been realised at the time when the insurance policy was concluded or where at least one of the parties was aware of the same.

Article 985. - Any of the following stipulations shall be null and void if it has been included in the insurance policy:

- (1) a stipulation providing for the forfeiture of the right to the insurance (benefit) on account of a breach of the laws and regulations unless such violation has involved a felony or a deliberate misdemeanour;

- (2) a stipulation providing for the forfeiture of the rights of the assured on account of delay in reporting to the authorities the occurrence of the risk insured or in producing documents if it appears from the circumstances that there was a reasonable excuse for the delay;
- (3) every printed stipulation relating to certain cases involving nullity or forfeiture if it is not shown in a clear manner;
- (4) the arbitration stipulation if it has been included in the general printed conditions of the policy and not made in the form of a special agreement distinct from the general conditions;
- (5) such other arbitrary stipulation the breach of which appears not to have any bearing on the occurrence of the event the subject matter of the insurance.

(2) Rules Governing an Insurance Policy

(a) Obligations of the Assured

Article 986. - The assured is under the following obligations:

- (a) he must pay the premiums or the other pecuniary payment on the date agreed;
- (b) he must admit at the time of execution of the policy all the circumstances known to him which the insurer considers important to know so that he will be able to determine the risks which he will be undertaking; what is important in this respect is deemed to be the facts which the

insurer made the subject of written questions;

- (c) he must inform the insurer about any circumstances which may occur during the (currency) of the policy which lead to increasing these risks.

Article 987. - (1) The insurer may demand rescission of the policy if the assured has deliberately concealed a matter or wilfully filed a false statement which in the opinion of the insurer will change the subject matter or reduce the significance of the risk in which case the premiums paid will be an acquired right of the insurer; he will also be entitled to claim the premiums which had fallen due but have not been paid.

(2) The provisions of the preceding paragraph shall apply in all the cases where the assured has breached fraudulently his obligations; but if the assured is of bona fide the rescission will entail the refund by the insurer of the premiums paid or such part thereof in respect of which he did not bear any risk.

(b) Obligations of the Insurer

Article 988. - When the risk has occurred or the term of the policy has expired the compensation or the sum due in pursuance of the insurance policy becomes payable.

Article 989. - The insurer is bound to compensate the beneficiary in respect of the injury arising from the occurrence of the risk insured provided the compensation is not more than the value of the insurance.

Article 990. - (1) Actions arising from the insurance policy are barred by the lapse of three years from the time of occurrence of the event which gave rise to these actions.

- (2) This time limit shall not however run:

- (a) in case of concealment of particulars concerning the risk insured against or of providing incorrect or inaccurate information concerning this risk except from the day on which the insurer became aware thereof;

- (b) in case of the occurrence of the event insured against except from the day on which the interested parties became aware of its occurrence.

Article 991. - Every agreement which violates the provisions laid down in this chapter shall be null and void unless it is to the benefit of the assured or of the beneficiary.

Section (ii) - Specific provisions pertaining to different kinds of insurance

(1) Life Assurance

Article 992. - The assurance of the life of a third party shall be null and void unless such third party has consented thereto in writing prior to the execution of the policy; if such third party is under legal incapacity the policy will not be valid except with the approval of whoever represents him legally.

Article 993. - (1) The liability of the insurer in respect of his obligation is released if the life assured person has committed suicide; the insurer shall however be bound to pay to his successors in title a sum equal to the value

of the insurance reserve*.

- (2) If the cause of the suicide was a mental illness which caused the patient to lose his will power the obligation of the insurer remains in its entirety.

Article 994. - If the beneficiary of the life assurance is other than the person whose life has been assured the insurer will be released of his obligations if the beneficiary of the insurance has deliberately caused the death of the person whose life is assured or if the death was caused by his instigation; but if that which was committed by such person was a mere commencement of causing the death the assured person is entitled to substitute the beneficiary by another person even where the beneficiary would have accepted the insurance (benefit) stipulated in his favour.

Article 995. - Sums stipulated to be paid on his death either to certain specified beneficiaries or to his heirs in general shall not be included in the estate of the assured; the creditors of the assured may not claim these sums neither in the case of his being adjudged bankrupt nor in case of his insolvency nor in case of an attachment being levied against him; they are however entitled to recover the premiums paid if it is established that they were onerous as compared with the financial condition of the assured.

Article 996. - A life assured person who has undertaken to pay periodical premiums may release himself of the policy

* The insurance (mathematical) is the amount which at a given time constitutes the excess of the amount of premiums paid by all the assured persons of a class of insurance in excess of the total amount paid as "sums assured" by an assurance company, up to that date. The individual reserve relating to each policy of the class in question is obtained by dividing pro rate insurance reserve of the class between the policies still in force at that time.

at the time by written notice sent to the insurer prior to the expiration of the current period in which case he shall be released from payment of the subsequent premiums.

Article 997. - (1) It may be agreed in the case of life assurance that the sum of the insurance be paid either to certain specified persons or to persons who will be named by the assured at a later date.

(2) The assurance shall be deemed to have been made in favour of nominated beneficiaries if the assured stated in the policy that the assurance was made in favour of his spouse, or his children, or descendants be they born or unborn, or of his heirs without naming them; should the assurance be contracted in favour of the heirs without naming them such heirs shall be entitled to the sum assured each according to his share of the inheritance; this right will devolve upon them even if they have renounced their inheritance.

(3) By spouse is meant to be the person who is proved to have this capacity at the time of the death of the assured and by children are meant to be the descendants who are proved to have the right to inherit at that time.

Article 998. - In life assurance the insurer who has paid the sum assured shall not be entitled to be subrogated to the rights of the assured or of the beneficiary against the person who caused the event insured against or against the person responsible therefor.

(2) Insurance against Fire

Article 999. - In insurance against fire the insurer shall be liable on all injuries resulting direct from the fire and those which are an inevitable result thereof, particularly the harm suffered by the thing insured because of the means taken for salvage or for preventing the spread of the fire; he shall also be liable for the loss or

concealment during the fire of the things insured unless he proves that the same was the result of theft.

Article 1000. - (1) The insurer shall be liable for the fire which breaks out fortuitously or through a fault of the beneficiary but will not be liable where the fire was caused deliberately and fraudulently by the beneficiary.

(2) The insurer shall also be liable where the fire was caused by the followers (personnel) of the beneficiary even when caused deliberately by them.

Article 1001. - The insurer shall be legally subrogated to the rights of the beneficiary in respect of the compensation paid for a fire vis-a-vis whoever had by his act caused the harm which resulted in the liability of the insurer; the liability of the insurer is released vis-a-vis the beneficiary from all or part of the compensation if said subrogation became impossible due to a cause attributed to the beneficiary.

Article 1002. - The insurer shall be liable to compensate the damage resulting from the fire even where the fire has resulted from a defect in the thing insured.

Article 1003. - (1) If the thing insured is encumbered by a possessory or authentic mortgage or other securities in rem these rights will pass to the compensation due to the debtor pursuant to the insurance policy.

(2) Where such rights have been served on the insurer he may not pay that which he owes to the insured except with the consent of the creditors.

(3) If an attachment has been levied on the thing insured and the insurer has been served with notice to that effect he may not pay to the insured anything of that which he owes to him.

(3) Insurance against Liability

Article 1004. - In insurance against liability the obligation of the insurer will not produce its effect unless the victim (who suffered the harm) has claimed from the beneficiary after the occurrence of the event from which the liability arose.

Article 1005. - It would be valid to relieve the insurer of liability if the beneficiary (insured) had without the consent of the insurer paid to the victim a compensation or admitted responsibility; this agreement may not however be invoked if the admission by the beneficiary was confined to a material fact or if it is established that the beneficiary could not have refused to pay compensation to the victim or to acknowledge his right without committing obvious injustice.

Article 1006. - The insurer may not pay to other than the victim the entire or part of the sum of the insurance agreed as long as the victim has not been compensated for the harm he has suffered.

Section (iii) - The specific laws pertaining to insurance

Article 1007. - Matters pertaining to the insurance policy which have not been mentioned in this Law will be regulated by specific laws.

Title 5 - Suretyship

Chapter 1 - The Elements of Suretyship

Section (i) - General provisions

Article 1008. - Suretyship is the joining of one liability (financial obligation) to another in claiming the

performance of an obligation.

Article 1009. - (1) Suretyship is concluded by an offer and acceptance by the surety and by the person guaranteed respectively.

(2) Suretyship may take immediate effect or be made subject to a stipulation (suspensive) or operative on a future time (period).

Article 1010. - The surety may not release himself of the suretyship but he may do so before the debt became due from the debtor in case of a resolutive (subject to a condition) or a future date suretyship.

Article 1011. - Suretyship is allowable which provides that the surety will subject to permission of the debtor pay the debt from the debtor's property which is deposited with him; and the surety shall be obligated to pay the debt out of said property; if said property has perished the surety shall not be liable on anything; but where the surety has restituted the property to the debtor after having concluded the suretyship and before the discharge of the debt he shall warrant payment of that which he has guaranteed to the creditor and if he has paid he shall claim from the debtor.

Article 1012. - In case of a guarantee of property the thing guaranteed must be warranted by the principal*.

* "...that is to say that the discharge of the debt (property) is incumbent on the principal and a suretyship in respect of the price of a thing sold is valid. If the purchaser is an interdicted minor the guarantee of the price for him is not valid..." (Article 631 of Majallat Al Ahkam Al Adliyya: text and explanation).

Section (ii) - Subservience (dependency) of the surety's obligation to that of the principal

Article 1013. - (1) A delayed payment debt owing by the principal (debtor) which is guaranteed by a third party will also be delayed for the surety.

(2) Where the creditor has delayed payment of the debt owing by the principal (debtor) it will also be delayed in respect of the surety and the second surety of the first surety; if the creditor has delayed the payment of the debt in respect of the first surety it will also be delayed in respect of the second surety but will not be delayed in respect of the principal (debtor).

Article 1014. - If the surety has guaranteed the maturing debt to be paid on a future date it will be postponed in respect of the surety and the principal (debtor) unless the surety has stipulated that the delay applies in his respect only or if the creditor at the time of concluding the suretyship stipulated that the delay applies to the surety only; in these two cases the debt will not be delayed in respect of the principal (debtor).

Article 1015. - In the absence of an agreement otherwise surety extends to the accessories of the debt, to the expenses of the first demand for payment, and to the expenses that may be incurred after service of notice on the surety.

Article 1016. - (1) Suretyship which is entered into in respect of a commercial debt is deemed to be a civil act even where the surety is a trader.

(2) The suretyship resulting from backers' signatures and indorsements or negotiable instruments is always deemed to be a commercial act.

Section (iii) - Bail (of persons)

Article 1017. - That which is undertaken (guaranteed) in a bail (of a person) is to deliver the person guaranteed (bailed); where it is stipulated in the bail that the person guaranteed (bailed) must be delivered at a certain time the guarantor is obliged when called upon to do so to bring and deliver him to the creditor (plaintiff) at the time stipulated; if the person bailed has been brought (delivered) the guarantor is released of the bail but if he has failed to deliver him the court may condemn (order) him to pay a deterrent fine unless he can prove his debility or incapability of delivering the person guaranteed.

Article 1018. - When the person guaranteed is absent and his whereabouts are known the guarantor must deliver him if the creditor (plaintiff) has called upon him to do so; the creditor (plaintiff) may require the guarantor to provide a surety for him when he goes to fetch the person guaranteed; but if the person guaranteed is absent and his whereabouts are not known the guarantor shall not be asked to deliver him.

Article 1019. - (1) If the bail (guarantor) has undertaken to deliver the person bailed at a specified time and failing which he has to pay (discharge) such other person's debt the bail is obliged to pay the debt if he has failed to deliver him at the appointed time.

(2) If the bail has died and the heirs have failed to deliver the person bailed at the time fixed or if the person guaranteed has failed to surrender himself in satisfaction of the bail the debt must be paid out of the estate of the guarantor (bail)

Chapter 2 - Legal Consequences of Suretyship

Section (i) - The relationship between the surety and the creditor

(1) Sole Liability of the Surety

Article 1020. - (1) The creditor is entitled to call upon (summon) the surety to pay the debt guaranteed; the summons is for immediate payment if the debt is for immediate payment by the debtor and the surety; where the debt is payable on a future date even by either one of them the creditor will claim from the surety on the date of maturity.

(2) The vendor's surety who entered into a warranty against revendication* will not be summoned (to pay) if a beneficiary has appeared unless the vendor has been condemned on the revendication warranty and the rescission of the sale.

Article 1021. - (1) A suretyship is presumed to have been entered into subject to a stipulation of failure of the debtor to pay the debt unless the surety has waived this stipulation or had joined his liability to that of the debtor (became jointly liable with him).

(2) Where the proceedings have been taken in the first

* "Kafala bid darak": "Darak" is to provide compensation, indemnity (for loss, etc.); according to "Supplement Au Dictionnaires Arabes" - R. Dozy: it is utility, profit, interest; (Daman Ad darak) "when a ship arrived from abroad the Chinese Government's agents delivered the goods (merchandise) and locked it up in a certain house and warranted revendication for a period of six months"; according to the Melkites "darak" alone means the suretyship; there are two kinds of "darak" - darak al 'ayb, which is the warranty against defects of a thing and "darak al Istihqaq" which is the warranty against revendication; this word by itself means responsibility. According to the Hanafis it is where the buyer receives from the vendor a warranty on the price which he has paid to provide for cases of revendication of the thing sold."

place against the surety he may during the first proceedings commenced against him demand the creditor to collect (claim) his debt from the debtor's property and to take action against him (debtor) if it is revealed that his attachable property is adequate to satisfy the entire debt; the court will have discretion to estimate whether there is reason to suspend the proceedings temporarily against the surety until the entire debt has been satisfied.

Article 1022. - (1) When the surety has demanded from the creditor to claim his debt from the property of the debtor he must indicate such property to the creditor and to provide him with a sum which is adequate to pay for the costs of the proceedings.

(2) The indication will be ineffectual if the property indicated by the surety lies outside the territory of Iraq or is the subject of a dispute.

Article 1023. - If the suretyship was entered into to complement a security in rem and if the surety is not jointly liable with the debtor this suretyship does not bind the surety unless the security in rem has not settled the (entire) debt and (in this case it will be binding) up to the extent of the balance remaining of said debt.

Article 1024. - In case of several sureties where each one of them has undertaken separately to guarantee the debt by separate contracts the entire debt may be claimed from each one of them; if they have undertaken the guarantee of the debt in one single contract the debt shall be apportioned among them and each one of them may be summoned to pay his portion unless the guarantee was undertaken jointly among them; joint liability is not presumed among the sureties unless there is a stipulation of joint liability.

Article 1025. - Before discharging the debt the surety must serve formal notice on the debtor and if the creditor has

commenced proceedings against him he must join the debtor as party to the suit; if before settlement of the debt the surety has not served notice on the debtor or has failed to join him in the suit when the creditor has commenced proceedings against him his right of recourse against the debtor is extinguished if the latter had paid the debt or if he has proved reasons which will necessitate nullity or extinguishment of the debt.

Article 1026. - (1) At the time of payment of the debt the creditor is under an obligation to deliver to the surety the documents which are needed for exercising his right of recourse.

(2) If the debt was secured by a pledged or tied up movable the creditor must surrender it to the surety and if it is secured by an immovable the creditor is bound to carry out the proceedings which are necessary for alienation of said security to the surety and the latter will bear the costs of such alienation and will claim it from the debtor.

Article 1027. - (1) The creditor shall maintain the securities of the debt and in so doing he must observe the interests of the surety; the surety's liability shall be released to the extent of that which of these securities the creditor has lost through his fault.

(2) Securities are meant to be every security assigned to guarantee the debt, even when it has been settled after the guarantee and every security determined by the operation of the law.

Article 1028. - If the debtor has been adjudicated bankrupt the creditor must prove his debt in the bankruptcy otherwise his right of recourse against the surety is extinguished to the extent of the injury suffered by the surety as a result of the negligence of the creditor.

Article 1029. - If the creditor has accepted to take from the debtor another thing in settlement of the debt the surety's liability is released even where this thing has been revendicated except where the creditor has reserved the right of recourse against the surety in this case.

(2) The Joint Liability (Solidarity) Surety

Article 1030. - (1) No joint liability exists between the surety and the debtor unless it has been stipulated in the suretyship contract or in a separate contract.

(2) In the judicial legal and commercial suretyship the sureties will be jointly and severally liable one to the other and with the debtor.

Article 1031. - Where the surety is jointly liable with the debtor the creditor has an option (choice) to claim from either the debtor or the surety; claiming from one party shall not extinguish his right to claim from the other; after having claimed from one of them he may claim from the other or he may claim from both of them.

Article 1032. - Where one of the joint and several liability sureties has paid the debt he may on maturity have recourse against the other jointly liable sureties for their pro rata share of the debt and of the share of the insolvent among them.

Section (ii) - The relationship between the surety and the debtor

Article 1033. - (1) If the creditor has paid that which he had guaranteed out of his own property he may have recourse for that which he had paid against the debtor.

(2) The surety shall be subrogated to all the rights of the creditor regardless of whether the suretyship was by the order or without the order of the debtor.

Article 1034. - Where the surety has paid to the creditor the equivalent of the debt he will claim from the debtor that which he had guaranteed and not that which he has paid; but where he has concluded a composition with the creditor on a sum of the debt he shall claim the consideration of the composition and not the entire debt.

Article 1035. - In the case of several joint and several debtors of the same debt the surety who has undertaken the suretyship of all of them may claim from any one of them all that which he has paid of the debt.

Article 1036. - (1) If on the date of maturity the debt has not been paid the surety may demand from the debtor to release his liability on the suretyship or to provide him with a security; this right will remain open to the surety even where the creditor has granted the debtor a time limit without the consent of the surety; the surety shall be entitled to this right before the maturity of the debt if the debtor has been adjudged bankrupt or become insolvent.

(2) Where the creditor has on the maturity of the debt failed to claim it the surety may serve formal notice on the creditor requiring him to take legal proceedings to claim his debt within a period of not less than one month; if on the expiration of this time limit the creditor has failed to commence the proceedings the surety will be relieved of the suretyship.

Article 1037. - If the surety has paid to the creditor a delayed payment debt prematurely he shall not claim it from the debtor except on the date of its maturity.

Article 1038. - The surety shall claim from the debtor that which he had to incur on performance of the stipulations of the suretyship.

Article 1039. - A surety who guarantees the first surety to the creditor will be deemed in his relations with the creditor to be a (second) surety for the (first) surety and in his relations with the (first) surety the latter will be deemed as though he was the principal debtor.

Chapter 3 - Termination of the Suretyship

Article 1040. - Payment of the debt by the debtor the surety or the (second) surety entails the extinguishment of the liability of the debtor of the surety or of the (second) surety (as relevant).

Article 1041. - Release of the debtor's liability on the debt by the creditor entails the release of the surety's liability (on the debt); but where the creditor has released the surety's liability on the debt the debtor's liability is not released.

Article 1042. - Where the creditor had died and his succession devolved solely upon the debtor his surety's liability on the debt shall be released; if he has another heir the surety's liability shall be released in as much as it relates to the debtor's share of the inheritance and not in respect of the share of the other heir.

Article 1043. - (1) A draft in the sum of the debt which is guaranteed will when drawn by the debtor or his accommodation party on a third party and if accepted by the drawee and the creditor release the liability of both the drawer and the accommodation party on the debt.

(2) The liability of the accommodation party only and not that of the original debtor will be released if the former had drawn the draft and included it in a stipulation to this effect.

Article 1044. - Where the surety or the debtor has

concluded a composition (contract) with the creditor in consideration of payment of part of the debt the liability of both of them will be released if the composition stipulated the acquittal of both of them or of the debtor only or if there was no stipulation (in this respect); where the stipulation provided for the release of the surety's liability and not that of the debtor the former's liability is released only and the creditor has a discretion of taking the entire sum of the debt from the debtor or to receive the consideration of the composition from the surety and claim the remainder (balance) from the debtor.

Article 1045. - A surety who has guaranteed the price of a thing sold will be released of the suretyship if the sale has been rescinded or where the thing sold has been replevined or restituted on grounds of a defect.

Article 1046. - The surety will not be called upon to fulfil the provisional suretyship except within the time limit of the suretyship and where this time limit has expired the surety will be released of his obligation in respect thereof.

Article 1047. - In case of death the surety guaranteeing property the property which is guaranteed shall be claimed from his estate.

BOOK 3 - PRIMARY RIGHTS IN REM

Title 1 - The Right to Ownership

Chapter 1 - The Right to Ownership Per Se

Section (i) - The scope of the means of protection and the restrictions on the right to ownership

(1) The Scope and the Means of Protection of the Right to Ownership

Article 1048. - Perfect ownership vests unto the owner a right to dispose absolutely of that which he owns: through use, enjoyment, and exploitation he shall enjoy (avail himself of) the thing (ayn) owned as well as its fruits, crops, and produce and may dispose of the thing itself (ayn) by all the allowable means.

Article 1049. - (1) The owner of a thing also owns everything which is deemed by usage to constitute an essential element thereof such as it cannot be separated therefrom without the thing owned perishing, deteriorating, or changing.

(2) The ownership of land includes that which is above and below as far as can be usefully enjoyed in height and in depth.

(3) The ownership of the surface of the land may by agreement be separated from that which is above it and that which is below it.

Article 1050. - No one can be deprived of his ownership except in the cases and in the manner provided for by law and in consideration of a fair compensation payable in advance.

(2) Restrictions on the Right of Ownership

Article 1051. - (1) The owner may not dispose of his property in a manner which causes excessive harm to his neighbour; excessive harm will be eliminated whether it is recent or old.

(2) The owner whose property is threatened with sustaining harm as a result of excavation or other work being carried out in the neighbouring land may demand the taking of the necessary precautions to avert the harm and may also demand the suspension of the work or the taking of such urgent precautions which are necessary until the court has decided the dispute.

(3) Where a person who is disposing lawfully of his ownership has suffered harm as a result of the action of another person who has erected a construction near him he shall eliminate such other person's damage himself.

Article 1052. - The lower land will suffer (tolerate) the water which comes down by a natural act from the higher land such as rain water and the water of natural springs; the owner of the lower land may not erect a dam to prevent the flowing of the water and similarly the owner of the higher land may not carry out an act which may increase the tolerance of the lower land except within the limits provided for in the law.

Article 1053. - (1) The owner of the land may use the rain water which falls in his land and the water of natural spring emanating from his land; if however its use or the method of directing it tends to increase the burden of the rivulet (brook) which the lower land must tolerate in accordance with the provisions of the preceding Article a compensation must be paid to the owner thereof in consideration of such increase in the burden of the rivulet.

(2) If by sinking, digging, or such other means the

owner of the land has struck water in his land the lower land must tolerate the rivulet of this water and the owner thereof will be entitled to compensation for any harm resulting therefrom (caused thereby).

(3) The provisions of the preceding two paragraphs shall not apply to the houses, canals, orchards, and gardens which are attached to dwelling houses which will not be subject to any increase in the burden of the rivulet beyond that which is provided for in the preceding Article.

Article 1054. - The owner of the land who wishes to erect buildings thereon must arrange the construction of the roof so that the rain water does not flow therefrom into his own land, or into the public road, or in the adjacent land in accordance with the specific laws in force for the time being.

Article 1055. - Every person may irrigate his land from the water of rivers and public canals and may dig a passage for this water to his land all of which must be in accordance with the specific laws and regulations.

Article 1056. - A person who constructs a private rivulet or drain conforming with the laws and regulations in force for the time being has the exclusive right to the use thereof.

Article 1057. - (1) The precincts of wells, springs, private canals, as well as rivulets, waterways, and drains belong to the owners thereof and no others may in any way dispose of them: a person who sinks a well within the precincts of a well owned by another person will be forced to back-fill it but if the well has been sunk outside the said precincts he shall not be forced (obligated) to back-fill it even where his well takes the water of the first well.

(2) There is no precinct for a well which a person has

sunk in his own land; his neighbour may also sink a well in his own property even where it has attracted (wrested) the water of the first well.

Article 1058. - (1) The owner of a land must allow passage through his land of the water needed for the irrigation of the land of another person which is situated at a distance from the source of the water and which does not have water for agricultural purposes and there is no means for the water to reach it directly, as well as the drainage water coming from the neighbouring lands to flow into the nearest public drain provided he pays in advance to the owner of the land an annual fee and provided also that such flowing will not disturb significantly the enjoyment of the landowner; when the land suffers damage by a canal or drain which crosses it regardless of whether the same results from failure to clear the drain or by reason of the bad conditions of the bridges, dams, or otherwise the owner of the land has a right to claim compensation for the damage done.

(2) The owner of the land shall also allow the construction on his land of the technical installations which are necessary for the passage and the rivulet needed for the remote land provided that he receives in advance an annual fee in respect thereof; he may avail himself of these installations provided he bears such part of the construction and maintenance thereof which is commensurate with the advantage he obtained therefrom.

(3) Where the parties have failed to agree on the remuneration the court will estimate it.

Article 1059. - (1) The owner of a land which is cut off from or has no adequate exit on to a public road shall if he cannot obtain an exit to the public road without great expense or great difficulty have a right of way over the neighbouring land as may be necessary for the appropriate exploitation and use of his land subject to payment of an

annual remuneration payable in advance provided that he does not exercise this right of way except over the land and at the place where the passage causes the least possible burden.

(2) Where however the cut off from the public road was the result of the division of an immovable (real estate) in consequence of a legal disposition and it is possible to provide an adequate right of way over parts of the land so divided the right of way cannot be claimed except over these parts.

Article 1060. - Every owner may erect a fence around that which he owns provided this does not bar the exercise of a right belonging to an adjacent immovable; he may compel his neighbour to place boundary marks along the borders of their adjoining ownerships and the costs of such delimitation will be shared between them.

Section (ii) - Special kinds of ownership

(1) Joint Ownership

The Rights of the Landowners in Joint Ownership and Their Duties in the Management of the Joint Ownership

Article 1061. - (1) When two or more persons own a thing they are co-owners of the joint ownership and their shares will be equal save proof to the contrary.

(2) Every co-owner in common is the absolute owner of his joint ownership share and is entitled to avail himself of and exploit it in such manner which does not cause harm to his co-owners and may dispose of it by sale, mortgage, or other kinds of alienation even without their permission.

(3) A co-owner in common may lease his common share of the ownership to a co-owner or a third party.

Article 1062. - (1) Every co-owner of the common (joint)

ownership is a stranger as far as concerns the jointly owned share of the other co-owner and may not dispose of it in such manner which is in any way prejudicial to it without such other co-owner's consent.

(2) Where a co-owner has disposed of a part of the joint ownership property such disposal shall not have any effect except where such alienated part falls to that co-owner in case of a partition of the jointly owned property.

(3) The joint share of every co-owner is a trust in the hand of the other co-owners and if he has damaged it through his encroachment he shall warrant.

Article 1063. - (1) The co-owners may avail themselves of the entire jointly owned thing.

(2) Each one of the co-owners is entitled to avail himself of his joint share; if he has availed himself of all the thing without having obtained leave from the other co-owners such as dwelling (habitation/occupancy), sharecropping, hiring out, or other kinds of enjoyment he is bound to pay them the comparable rent; but if he has rented out the thing for more than the comparable rent he is bound to give every co-owner his share of the nominate rent charged.

Article 1064. - (1) Unless there is an agreement otherwise the co-owners of a jointly owned property shall manage it jointly.

(2) In the normal course of the management the resolutions passed by the holders of the majority of the shares will be binding on all even the minority which had dissented; in the absence of a majority the court shall upon being petitioned by a co-owner take such action as is necessitated by the circumstances and may in case of necessity appoint someone to manage the joint property; the majority may also choose a manager and fix the extent of his powers of management.

(3) Where a co-owner has assumed the management

without any objection being raised by the other co-owners he is deemed to be their agent acting on their behalf.

Article 1065. - (1) The co-owners who own the major part of the shares may subject to leave being given by the court and in order to improve the use (enjoyment) of the jointly owned property introduce such basic changes and amendments to the object for which the property has been destined which are beyond the limits of ordinary management.

(2) The court may order such measures as it deems fit and may in particular order that the dissenting co-owner be given a guarantee which will secure to him payment of the remuneration to which he will be entitled.

Article 1066. - Every co-owner of the common (joint) property is vested with a right to take such means as are necessary for the maintenance (preservation) of the thing even where said means were adopted without the approval of the other co-owners.

Article 1067. - The management and maintenance expenses of the common (joint) property as well as the taxes levied thereon and such other costs which result from the communality or which are prescribed on the property shall be borne by all the co-owners each according to his share.

Article 1068. - (1) All the co-owners of a common (joint) property shall contribute each according to his share towards any repairs or renovations that may be needed therefor.

(2) Where some of the co-owners are absent or where some of them have refused to carry out the repairs or renovations and some of them approved it those who wish the repairs and renovations to be carried out may subject to leave from the court carry them out and claim (the costs) from the other co-owners each according to his share of the common property.

Article 1069. - Where the thing in common (joint) ownership has collapsed totally and some of the co-owners wished to reconstruct it and the others refused the co-owners who refused shall not be obligated to the reconstruction.

Elimination of the Communality

Article 1070. - Every co-owner may demand the partition of the common property unless he is obliged to remain in the communal ownership pursuant to a provision or stipulation; the partition may not be prevented pursuant to the stipulation for a period exceeding five years; an agreement by the co-owners to maintain the communality for a longer or an indefinite period shall not be effectual except for five years; the stipulation of maintaining the communality shall be enforced against the co-owner and against anyone who succeeds him.

Article 1071. - (1) If none of the co-owners has been interdicted they may partition the common property among themselves by mutual consent in the manner they deem to be expedient.

(2) A mutual consent partition of a real estate is not concluded until registration in the Real Estate Registration Department.

(3) The creditor of every co-owner may contest the partition if it contained fraud detrimental to their interests.

Article 1072. - (1) If the owners have failed to agree on the partition if one of them is interdicted the co-owner who wishes to withdraw from the joint ownership will refer to (petition) the magistrate's court to order elimination of the joint ownership.

(2) If it is revealed to the court that the joint ownership is susceptible to partition it will order that it

be carried out; the joint ownership is deemed susceptible to partition if it can be effected without any co-owner forfeiting the benefit intended therefrom prior to the partition.

(3) Where the joint ownership is a realty the land will be surveyed and then parcelled on the basis of the least (smallest) share provided consideration in so doing is made of the location, the quality, and all the other attributes; consideration shall also be had that each share will have a separate right of way to irrigation and drainage and to the other servitudes; the value of the shares will be fixed by a consensus of the co-owners themselves and if they cannot agree the court will do so using the services of an expert; where it is impossible for each co-owner to receive his whole share in kind (in rem) he shall be compensated for the shortage commensurately even by a payment in cash (money); the shares shall be allotted by lottery draw and on being completed the partition is concluded and the court will make a decision approving it.

(4) Where the joint ownership is a movable it will be divided into equal shares by using the measure which is normally used in measuring things of the same kind (specie) and then distributed to the co-owners by a lottery draw.

Article 1073. - (1) If it is revealed to the court that the joint ownership is not capable of partition it will order the sale thereof.

(2) In this case the court will by using the services of an expert estimate the comparable consideration upon application being made to it by the plaintiff or by a co-owner: if the plaintiff has accepted to sell his share for the estimated consideration the court will offer it to the other co-owners in order to express their wish of buying within 15 days from the date of the service of notice on them to that effect; if all or some of the co-owners have expressed a wish to buy for the estimated consideration the

share will be sold to those wishing to buy and apportioned equally among them but if a co-owner has offered a higher price than that estimated an auction will be carried out in which the co-owners only will participate and the share will be sold to the highest bidder.

(3) If the plaintiff has refused to sell at the estimated consideration or if none of the co-owners has expressed the wish to buy and the plaintiff insisted on his claim the entire joint ownership will be sold in the legally prescribed manner and the price will be divided among the co-owners each one of them receiving according to his share.

Article 1074. - If the joint ownership consisted of several movable things of the same kind (specie) the joint ownership shall be eliminated by dividing them mathematically.

Article 1075. - In a partition parcelling has preference over exchange: every partitioner will be deemed as having always been the owner of the parcelled share which devolved upon him and that he did not at all own anything of the other shares.

Article 1076. - The co-partitioners warrant each other against interference (impediments) or dispossession of some of the shares due to a cause that existed previous to the partition; each one of them will be liable in proportion to his share to indemnify the beneficiary of the warranty where the thing must be estimated as at the time of the partition; if one of the co-partitioners happens to be insolvent the share due from him will be borne by the beneficiary of the warranty and by all the solvent co-partitioners.

Article 1077. - (1) An application may be made to revoke a partition which was effected by mutual consent if any one

of the co-partitioners has established that he has suffered excessive lesion as a result thereof; an action in that respect will not be heard after the lapse of six months to commence from the conclusion of the partition; the defendant may suspend the proceedings and prevent a re-partition if he has replenished in cash or in rem the discrepancy in the share of the plaintiff.

(2) An excessive lesion exists if it is one quarter of a tenth in dirhams (a money denomination) and one half of one tenth in things ('arudh) and one tenth in animals and one fifth in realties.

Article 1078. - (1) The co-owners may agree with each other to an alternate use partition (mohaya'at) of the joint property whereby each one of them will enjoy a parcelled part equal to his share of the jointly owned property; an agreement of alternate use partition for a period of more than five years will not be valid and if no time has been fixed for the alternate use partition it will be deemed to be for one year renewable if the co-owner has not served notice on the other co-owner of his wish not to renew three months before the expiration of the current year.

(2) Alternate use partition which is based on time is valid where all the co-owners agree to alternate the enjoyment of the entire joint property each one of them enjoying it for a certain period of time commensurate with his share of the joint property.

Article 1079. - Partition by way of alternate use as much as regards the legal capacities, rights, and obligations of the co-partitioners shall be governed by the provisions relating to the contracts of lease in as much as these provisions are not inconsistent with the nature of the alternate use partition.

Article 1080. - If the co-owners have not agreed on alternate use of a movable and where none of them has asked

for elimination of the joint ownership a co-owner who demands alternate use partition must petition the magistrate's court to carry it out (put it into effect).

Article 1081. - The co-owners in a joint ownership property may not apply for the elimination of the joint ownership if it is revealed from the object for which this property was destined that it necessitates that the property must remain always a joint ownership.

(2) Upper and Lower Levels, Party Wall and the Joint Private Road

The Upper and Lower Levels

Article 1082. - Where a person owns an upper level and another person owns the lower level the owner of the upper level has a right of permanency* on the lower level and the ceiling is for the owner of the lower level; the owner of the lower level has a right on the upper level which will shelter it from the sun and protect it from the rain.

Article 1083. - If the door of the upper and the lower levels is the same each one of the owners may use it

* The explanation of Article 1192 of Majallat Al Ahkam Al Adliyya concerning this Article reads: "...and as a result the owner of the upper level may not build anything or place tree trunks thereon nor may he build a toilet (rest room) if the same is detrimental to the lower level; if he did that which has been constructed will be demolished (Al Hamidiyya and Al Khayriyya); similarly the owner of the lower level may not open a door or aperture therein if the same is detrimental to the upper level. Therefore each one of them may do anything which is not detrimental to the other." This was what Al Imamayn said which interpretation has been adopted in Al Majalla. Al Imamayn opined that the said acts are absolutely prohibited except where they are not beyond any doubt harmful such as driving in a small or medium nail; but if it is uncertain whether the act is harmful or not Al Imamayn opined that it will be forbidden; this latter interpretation has been preferred (refer to Al Khaniyya and Jami'e Al Fosolayn).

jointly with the other and neither of them may prevent the other from using it for entry and exit.

Article 1084. - Where the owner of the lower level has wrongfully demolished his lower level he must and will be forced to rebuild it.

Article 1085. - (1) If the lower level has been demolished or needed restoration the owner thereof must rebuild or restore it; if he has abstained to do so and the owner of the upper level has rebuilt it after having obtained permission from the court or the owner of the lower level he may claim from the latter that which he had incurred on the restoration up to the universally accepted limit but if he has restored it without having obtained leave to do so he has no recourse except for the lesser of the two values of the building at the time of the reconstruction or at the time of the recourse (claiming).

(2) The owner of the upper level may in both cases prevent the owners of the lower level from enjoying it until he has paid him his right; he may subject to leave from the court lease it out and recoup his right from the rent.

Article 1086. - (1) The owner of the upper level may not erect a new construction on his level nor may he increase the height thereof without leave given by the owner of the lower level except where the same is not detrimental to the lower level in which case he may carry it out without need for permission.

(2) The owner of the lower level may not carry out any innovation which is detrimental to the upper level; if the lower level has been dilapidated (demolished) and the owner thereof has restored it he may increase its height such as will not be detrimental to the owner of the upper level subject to the laws governing construction.

Party Walls

Article 1087. - (1) Either co-owner of a party wall may place thereon wooden or other (beams) equal to the number placed by the other co-owner provided that neither of them will place thereon such wooden or other beams which exceed the support capacity of the wall; neither of them may increase the number of wooden or other beams placed thereon without having obtained the permission of the other.

(2) If the party wall has become unserviceable* for the purpose for which it has been customarily destined the expenses of its repair or restoration will be borne by the two parties equally.

Article 1088. - (1) If a party wall has weakened and it was feared that it will collapse and if a co-owner wanted to demolish it but the other has refused the latter will be compelled (forced) to accept the demolition.

(2) Where a co-owner is willing to reconstruct a party wall which has collapsed and the other has refused to agree to the reconstruction the latter will be forced to (agree) to the restoration; the willing co-owner may subject to leave being granted by the court restore the wall and claim from the delinquent to pay his share of the costs of restoration.

Article 1089. - (1) Neither of the co-owners of a party wall may proceed to raise or add to the construction without the permission of the other co-owner.

(2) If however either co-owner has a serious interest in raising the wall he may do so provided he does not cause great damage to the other co-owner; he solely shall pay the expenses of the raising and maintenance of the raised part and must also do whatever is necessary for rendering the

* More details can be found in Article 1210 of Majallat Al Ahkam Al Adliyya.

wall capable of bearing the excess weight arising from the raising without losing any of its strength; if the party wall is incapable of bearing the raising the co-owner who wishes to do the raising shall reconstruct (rebuild) the entire wall at his own cost such as the increased thickness lies as much as possible on his side of the wall and the reconstructed wall of the upraised part shall remain the joint ownership of the parties and the neighbour who had erected the rise shall not be entitled to compensation.

Article 1090. - The neighbour who has not contributed to the costs of raising (of the wall) may become a co-owner of the raised part thereof if he pays his share of the costs incurred (for the raising) and the value of that part of the land on which the increased thickness lies, if any.

Article 1091. - In the absence of proof to the contrary a wall which at the time of its construction separated two buildings is deemed to be a party wall up to the point at which it ceases to be a common wall (of bifurcation of) the two buildings.

Article 1092. - (1) A neighbour may not compel his neighbour to erect a wall or other thing on the boundaries of his property or to assign to him part of his wall or of the land on which the wall is standing except in the case provided for in Article 1090 (hereof).

(2) The owner of a wall may not however without strong cause demolish it on his own initiative if the demolition injures his neighbour whose property is closed in (screened) by it.

A Jointly Owned Private Road

Article 1093. - A co-owner of a jointly owned private road may not do anything on it - be it injurious or not - except pursuant to a permission given by the other co-owners.

Article 1094. - Where a co-owner of a private road has barricaded (blocked up) his door which opens on this road he shall not as a result thereof forfeit his right of passage on the jointly owned private road: he and his successors after him may re-open the door on this road.

Article 1095. - The restoration of a jointly owned private road is the responsibility of the respective co-owners where the owner of a house lying at the place of entry to the road will together with the other co-owners of the road contribute to the restoration costs but he will not contribute with any one of them to the costs of restoration of the remaining part of the road and so on until the end of the road where the last co-owner will bear alone the costs of restoration after having contributed to the restoration costs of the respective shares of the other co-owners*.

Article 1096. - A jointly owned private road may neither be partitioned nor may it be sold separately (independently).

* Article 1326 of Majallat Al Ahkam Al Adliyya deals with a case like this one: "An example is given of a river which is jointly owned by 10 persons which needed dredging where the costs of dredging will be borne as follows: the person nearest to the access will bear a share with the other nine as far as the end of his land; from thence the other nine will each bear the costs to the end of his land and so on until the last owner of the land is reached who will bear the cost of the last part alone after having contributed to all the costs of the shares of the other nine who preceded him; the ninth will contribute to the costs of eight shares in addition to the cost of his share and so on in reverse order.

"All this was according to the interpretation of the greatest imams which was opposed to that of the two imams: the assumption being that the first will need to dredge the distance in his property wherein flows the river and thereafter he does not need the water flow. Reference is made to Article 87 of Al Majalla which provides that the benefit obtained must be equal to the sufferance endured".

Article 1097. - (1) No other than the co-owners of a jointly owned private road have a right of passage or of opening a door thereon.

(2) Passers on a public road may however in cases of congestion have access to the private road; the owners of the private road may not block access thereto.

Chapter 2 - The Causes of Acquiring Ownership

Section (i) - Acquisition of ownership ab initio (acquisition)

Article 1098. (1) A person will appropriate a free ownerless movable who took possession thereof with the intent of owning it.

(2) The acquisition will be real by actual (physical) taking possession of the thing such as reaping, grass cutting, wood from mountain trees, and will be ipso facto (of legal consequence) by preparation of the cause for acquisition such as where one places a container to collect the rain water or sets a snare for game.

Article 1099. - (1) Water, grass, and fire are free and the people (general public) are partners in these three: they may benefit therefrom (take advantage thereof) and acquire water and grass provided no harm is caused.

(2) The grass which grows in the property of another person incidentally (without the intention of the owner) is deemed to be ownerless (free) but the owner may prevent a third party from entering his property.

(3) Human beings (man) and animals are entitled to drinking (lip) water which has not been acquired and to the water of drinking places (fountains) and canals which are owned by third parties provided no harm is caused.

Article 1100. - (1) Every person may cut from ownerless (free) mountains (which have not been designated from olden

times as forests and firewood collecting sites for the inhabitants of villages and towns) trees, (fire)wood, stones and other materials which are needed for construction fuel and the making of agricultural implements and man's other needs.

(2) Where a pasture (grazing land) (other than pastures which have been allotted from olden times to the inhabitants of villages and towns) lies within the boundaries of a village the inhabitants of this village may graze their cattle therein and benefit from its plants without having to pay any dues; other villagers may if this is not detrimental to the villagers of this village graze their cattle in this pasture and may also benefit from its plants in accordance with the provisions of the law.

Article 1101. - A buried or hidden treasure the ownership of which no person is able to provide will belong to the owner of the immovable property if the land is owned and to the State if it is an Amiri land and it will belong to the waqf (dedication/endowment) if the land has been validly constituted as a waqf.

Article 1102. - (1) Hunting and fishing are permissible and may be taken as a profession.

(2) It is a condition for hunting/fishing that the animal is out of reach of man by its capacity to run away where the hunter/fisher acquires it by his action intending to hunt/fish it.

Article 1103. - The right to hunting/fishing, things found (recovered) or archeological things will be regulated by specific laws.

Article 1104. - A movable thing becomes ownerless if its owner has abandoned it intending to give up the ownership thereof.

Article 1105. - (1) If an Iraqi national fills up pursuant to a permission granted by the Government part of the sea he becomes the owner of the filled up part; but if such person has obtained a permit but failed within three years to fill up the permit is cancelled where a third party may fill up after having obtained a licence for himself.

(2) If the filling up was carried out without a government permit that part which has been filled up becomes the private ownership of the State and will be sold to the person who filled it up against a comparable price; if he does not accept (to buy) it shall be sold (by public auction) to whoever is successful in the bidding; the person who has filled up (part of the sea) and has erected thereon constructions shall not be required to pay except the comparable price of the land to the exclusion of the constructions (works); where the immovable property has been sold by public auction the Government will take from the price thereof the value of the land and will give the remaining balance to the person who carried out the filling up.

Section (ii) - Acquisition of ownership through death

(1) Inheritance

Article 1106. - (1) An heir will acquire by inheritance the movable and immovable property of and the rights which exist in the estate.

(2) Determining the heirs and fixing their shares of the inheritance and the conveyance of the property of the estate will be governed by the provisions of the Islamic Shari'a and the specific laws.

Article 1107. - (1) The ordinary creditors of the estate as well as the devisees will prove their claims in order to gain their rights in the estate which the heirs have conveyed to a third party or had created rights in rem

thereon.

(2) This right (of theirs) is extinguished after the lapse of three years from the date of the debtor's death; where this time limit has expired the disposal of the heirs in the estate shall be effectual as regards them unless the disposal was made in collusion with a third party to harm them.

(2) Wills

Article 1108. - (1) A devisee acquires by a will the property to be devised to him.

(2) A will may be made to an heir or other than an heir up to one third of the estate; it will not be executed in regard to the surplus exceeding the one third except by being allowed by the heirs.

Article 1109. - (1) Every disposal conveying property made by a person during the illness of death* which is intended to be a donation or favouritism contained therein be deemed a disposal to be effectual after the death and is governed by the provisions concerning wills regardless of the nomenclature given to it.

(2) Release by the sick person during the illness of his death of his debtor's liability is deemed tantamount to the provisions governing wills regardless of whether he is

* According to Majallat Al Ahkam Al Adliyya (Article 1595): "The illness of death is that in which prevails the fear of death when the patient in the case of a male (sick person) is incapable of attending to his interests outside of his house." Explanation by Baz: "Such as when a jurist is incapable of going to the mosque and the marketer (businessman/shopkeeper) to come to his shop" (Durr Mukhtar); in "Radd Al Muhtar" it is stated that the intention must be the incapacity to do similar acts like coming to the mosque or to the shop to transact the business that is carried out by the person concerned; a person whose profession is a hard one such as a muleteer, porter, stone breaker or carpenter, etc...such occupations cannot be carried out in case of a minor sickness which is not an illness of death; the illness of death or no illness depends on the occupation being carried out by the person concerned. This applies in regard to a person who was unable to go out of his house prior to the illness but if he was unable to go out prior to the illness because of old age or a defect in his feet; the main thing that must be considered is the fear or perishing.

"Abu Layth said that being confined to bed is not a condition for considering a person to be in the illness of death but what counts is the prevalence of the fear of perishing or where in most cases the illness results in death although the man was able to leave his house because the sickness must be such that the likelihood of dying prevails; this interpretation must be adopted because I knew that it was the 'fatwa' opinion of Sadr Ash Shaheed... The tenor however of the statements of some of them (the jurists) maintain that even where a person suffers an illness which results in death which illness was suffered when the man was still able to go out and look after his interests he will not be considered as being ill in such case; there is however a medium course between the two theories which says that when it is known that he is suffering from an illness which is on the increase to cessation of life is maintained but if it was not known the incapacity to leave home and transact business will be considered. This is my inference."

an heir or not; the same thing applies to a guarantee entered into during the illness of death.

Article 1110. - No person may during his illness of death pay the debt of any of his creditors and nullify the rights of his other creditors; he may however pay the price of the property which he has purchased or the loan which he has contracted during his illness.

Article 1111. - (1) If a person has during the illness of death acknowledged a debt to an heir or other than an heir and if the acknowledgement was by way of alienation it will be tantamount to a will or if it was by way of information or was an admission of having received a trust (deposit) belonging to him or the consumption of a trust (deposit) entrusted into his care which has been established without his acknowledgement the acknowledgement will be effectual against all his property even where the heirs have not allowed it; confirmation by the heirs of the acknowledgement during the lifetime of the legator is binding on them.

(2) The person in whose favour the acknowledgement has been made by the sick person shall not be entitled to that which has been acknowledged in his favour in accordance with the provisions of the preceding paragraph except after payment having been made of the debts of health (the debts which had been incurred when the person was in good health); the debts which have been established as being due from the sick person at the time of his illness without being acknowledged by him are deemed to be tantamount to debts of health; these will also be paid together with the debts of health before the debts that have been established by the admission of the sick person at the time of his sickness.

Article 1112. - (1) If during the illness of his death a person has acknowledged having received a debt owing to him from a third person and if the debt had been established to

be due from the debtor when the creditor was in good health the acknowledgement shall be effectual vis-a-vis the creditors (whose debts had been incurred during the debtor's good health); but where the debt has been established to be due from the debtor during the illness of the creditor the acknowledgement shall not be effectual vis-a-vis the said creditors.

(2) If the (sick) person has acknowledged having stood security while he was in good health for a debt owing to a third party his acknowledgement shall be effectual on all his property but after the debts incurred during his good health as well as the debts tantamount thereto have been discharged.

Section (iii) - Acquisition of ownership among living persons

(1) Accession

(a) The right of accession in respect of immovable property

Accession by Act of Nature

Article 1113. - The alluvium which is brought by a river to the land of a person will belong to that person; but if the alluvium formed a new land it will belong to the State even when it is connected with the land of a third party; the neighbours are entitled to acquire it against payment of the comparable price.

Article 1114. - The alluvium of lakes and of the sea as well as the islands that are formed in the streams of rivers or in lakes belong to the State.

Article 1115. - Land uncovered by the sea, lakes, or rivers will be the private property of the State; the neighbours

may acquire it against payment of the comparable price.

Article 1116. - If a river has taken a new stream leaving its previous stream the owners of the neighbouring immovable are vested with a right to acquire this previous stream (course) against payment of the comparable price each taking that part lying in front of his land up to a notional line lying in the middle of the old stream and the price of the old stream will be distributed to the owners of the land which has been occupied by the new stream each according to the part of the land he lost to the stream.

Accession by Act of Human Beings

Article 1117. - All buildings, plantations, or other constructions existing on or below ground will be deemed as having been carried out by the owner of the land at his own expense and will belong to him save proof to the contrary.

Article 1118. - Buildings, plantations, or other constructions carried out by the owner with materials belonging to another (a third party) will belong to the owner of the land if it is not possible to remove or uproot them without causing gross damage to the owner of the land: he must pay the value thereof and compensation if relevant; but where it is possible to remove or uproot them without causing gross damage the owner thereof (of the materials) may recover them if he is willing to do so and the owner of the land will bear the expenses of the removal or of the uprooting.

Article 1119. - If a person who with his own materials has erected a building or constructed other installations (works) or planted trees on a land which he knows to be owned by a third party whose consent has not been obtained the latter may demand the removal or the uprooting of that which has been constructed or planted at the cost of the

person who carried out the works; if the removal or the uprooting is injurious to the land he may acquire such works at their value due for removal/uprooting (at their break up value).

Article 1120. - If a person has erected a building, planted plantations, or constructed other installations with materials supplied by himself on land which is owned by another person alleging to have lawful grounds for so doing if the value of the works as existing is more than the value of the land the person who carried the works may appropriate the land against payment of the comparable price; but if the value of the land is not less than the value of the works the owner of the land may appropriate them against payment of their value as existing.

Article 1121. - Where a person has with own materials constructed installations on the land of another person with his permission the owner of the land may not in the absence of an agreement between them as to the fate of the work demand the removal thereof; if the owner of the work carried out has not demanded the removal (break up) thereof the owner of the land shall pay to him the value thereof as existing.

Article 1122. - Where a person has carried out plantations or other installations with materials belonging to another person on the land of someone the owner of the materials may not demand the restoration thereof to him but he may claim compensation from the person who carried out the work and may also claim from the owner of the land up to the balance remaining due from him to the owner of the work of the value of such work.

Article 1123. - If after a co-owner has without obtaining the permission of the other co-owners carried out work or built a house for himself on the jointly owned property

which is susceptible to partition if the other co-owners have demanded partition of the property it will be partitioned; if such construction falls within the share which fell to the builder he becomes the owner thereof; but if it fell within the lot of another co-owner he may require the builder to demolish the work.

Article 1124. - Where a third party has sown seeds in the land of another person without his permission and the seeds sprouted the owner of the land has an option to appropriate the seeds against something similar or to leave the land in possession of the stranger until the harvest against payment of the comparable rent.

(b) The right of accession in respect of movable property

Article 1125. - If two movable things belonging to two different persons have become joined together such as it would be impossible to separate them without being damaged or causing great expense and in the absence of an agreement between the owners thereof the owner of the movable having the greater value shall own the other movable against payment of its value provided the accession was fortuitous.

(2) Acquisition by Contract

Article 1126. - (1) The ownership of movable and immovable things is conveyed by contract.

(2) A contract of conveyance of ownership shall not be concluded unless the legally prescribed procedure has been observed.

Article 1127. - The undertaking to convey the title of an immovable property is confined to an obligation for damages if either party has breached its undertaking regardless of whether or not damages have been stipulated in the

undertaking.

(3) Pre-emption

Article 1128. - Pre-emption is a right to appropriate an immovable property which has been sold even forcefully against the purchaser for the price of purchase as well as the usual expenses.

Article 1129. - Pre-emption is established first for a co-owner of a jointly owned immovable property; secondly for a joint right of servitude over the immovable sold; thirdly for the contiguous neighbour in the following two cases:

(a) if the two immovables - the subject matter of pre-emption and the property for which pre-emption is incumbent - are houses or plots for building houses thereon;

(b) if the immovable sold has a right of servitude over the immovable of the neighbour or where the immovable of the neighbour has a right of servitude over the immovable sold.

Article 1130. - (1) A co-owner of the land of a wall is deemed to be tantamount to a co-owner of the same immovable property and ranks immediately after a co-owner of a jointly owned property.

(2) Where the lower and the upper levels belong to two different persons each one of them is deemed to be a contiguous neighbour of the other.

Article 1131. - (1) In the case of several pre-emptors the exercising of the right of pre-emption shall be according to the arrangement laid down in the preceding two Articles.

(2) In the case of several pre-emptors of the same degree the entitlement shall be among them equally; in

case of co-owners of accessory rights the singular co-owner pre-emptor shall however have precedence over the universal co-owner; he who has a right to irrigation from the penetration branching from the private river shall have precedence over he who has a right of irrigation from the river; joint rights of irrigation shall have precedence over the co-rights of passage.

Article 1132. - If the purchaser of the immovable property the subject matter of the pre-emption satisfies the conditions which qualify him to be pre-emptor he shall be preferred to those pre-emptors who rank equally with him or who are of a lower degree than him but those who rank higher shall have precedence over him.

Article 1133. - (1) Pre-emption is not established except by the sale of the immovable property which is the subject matter of the pre-emption and the existence of the cause necessitating it at the time of the sale.

(2) The property the subject matter of the pre-emption must be an immovable which is owned and the sale thereof must have been effected legally; the immovable rendering incumbent the pre-emption must be the property of the pre-emptor at the time of the sale of the immovable the subject matter of the pre-emption and must remain owned by him until the pre-emption has been adjudged or until an amicable settlement has been reached in respect thereof.

(3) When the pre-emption has been established it shall not be voided by the death of the vendor, the purchaser or the pre-emptor.

Article 1134. - An action for pre-emption shall not be heard:

- (a) if the sale has been effected by public auction through the judiciary of the administration;

- (b) if the sale was effected between the spouses, the ascendants and the descendants, or between the collaterals to the fourth degree;

- (c) if the immovable has been sold to be made a place of worship or to be annexed to a place of worship and has been registered as such in the Land Registration Department;

- (d) if even before the sale the pre-emptor has renounced his right to the pre-emption expressly or impliedly;

- (e) if the immovable rendering the pre-emption incumbent is a waqf;

- (f) if six months have elapsed from the day when the sale was completed; this time limit runs even against interdicted and absent persons.

Article 1135. - Pre-emption is indivisible: the pre-emptor may not claim by pre-emption some of the immovable the subject matter of the pre-emption and leave the other part but in case of several purchasers who purchase from one vendor the pre-emptor may take the share of some of them even though it is jointly owned and leave the remainder.

Article 1136. - (1) The pre-emptor must claim the entire thing pre-empted (the subject matter of the pre-emption) even here there are several pre-emptors who qualify for pre-emption; a pre-emptor who has abandoned his right to pre-emption before a judgment is rendered or before mutual agreement shall forfeit his right and the other pre-emptors shall take all (the entire) thing being pre-empted but a pre-emptor does not forfeit his right if he has abandoned his right after a judgment has been returned or after a mutual agreement has been reached.

(2) No pre-emptor may assign his right (of pre-emption) to a third party or to another pre-emptor and if he did he forfeits his right.

Article 1137. - Where a person has purchased an immovable property susceptible to pre-emption and then sold it before the pre-emptor claimed his right of pre-emption such right lapses and a (right) of pre-emption is revived for him against the second purchaser.

Article 1138. - A person who intends to exercise his right of pre-emption must declare his wish of so doing to both the vendor and the purchaser or to the Department of Land Registry within 15 days from the date of service on him of a formal notice of the sale by the vendor or the purchaser and failing which he shall forfeit his right (of pre-emption): said notice must contain a clear statement of the immovable and of the price and the conditions of the sale and the names of the vendor and the purchaser and their domiciles otherwise the notice will be null and void.

Article 1139. - (1) On pain of forfeiting his right (of pre-emption) the pre-emptor must commence proceedings of the pre-emption against both the vendor and the purchaser within 30 days from the date of declaring his wish (to exercise his right).

(2) The proceedings of pre-emption are deemed to be among the cases to be dealt with urgently (dispatched).

Article 1140. - The pre-emptor shall on commencing the proceedings of pre-emption deposit in the treasury of the court within the jurisdiction of which lies the immovable the subject matter of the pre-emption a sum equal to one half of the real price of the sale; if he has failed to make said deposit he shall forfeit his right of pre-emption.

Article 1141. - The pre-emptor's ownership of the immovable the subject matter of the pre-emption is established on enforcement of the judgment of pre-emption by registration in the Land Registry Department or on registration in the Land Registry Department in case of mutual agreement on the pre-emption.

Article 1142. - (1) The pre-emptor shall vis-a-vis the vendor be subrogated in all the rights and obligations of the purchaser but he may not take advantage of the time limit granted to the purchaser for payment of the price unless the vendor has agreed.

(2) Where the immovable which has been taken by pre-emption has been revendedicated the pre-emptor may not claim the revendication warranty except from the vendor.

Article 1143. - (1) If the purchaser has erected constructions or planted trees on the immovable the subject matter of the pre-emption before he has been served of the intention to exercise the right of pre-emption the pre-emptor is bound to pay to the purchaser the increase occurring to the value of the immovable by reason of the construction or plantation.

(2) Where however the construction or plantation was effected after notice has been served of the intention to exercise the right of pre-emption the pre-emptor may demand the demolition/uprooting of the work; if the demolition/uprooting is detrimental to the immovable he may retain the construction or plantation against their value due for break up.

Article 1144. - Any disposal of conveyance or any right in rem charged on the immovable the subject matter of the pre-emption shall not apply to (be effectual against) the pre-emptor if the disposal or charge has been made after notice has been served of the intention to exercise the pre-emption right; the registered creditors will however retain

their rights of preference on that part of the price of the immovable which reverted to the purchaser.

(4) Possession

Article 1145. - (1) Possession is a material situation by which a person dominates (controls) actually directly himself or by an intermediary a thing which may be the subject of dealings or exercises actually a right.

(2) Possession does not result from an act done by a person because it is merely permitted or tolerated by a third party nor will it result from recurrent acts.

Article 1146. - If possession has been coupled with coercion or was obtained secretly or if it contained confusion (was dubious) it shall not have an effect vis-a-vis the person who was the subject of coercion, or from whom possession has been concealed, or who has been confused in respect thereof except from the time when these defects have ceased.

Article 1147. - Where a dispute has arisen between several persons as to the possession of one and the same thing the person who has actual possession thereof will be deemed to be the possessor until proof to the contrary has been adduced unless it would be revealed that the actual possessor (for the time being) has obtained the possession from a third party by defective means.

Article 1148. - (1) A person is of good faith who has possession of a thing not knowing that he is encroaching on the right of a third party; good faith is always presumed unless there is proof to the contrary.

(2) The good faith of the possessor shall not cease except from the time when he becomes aware that his possession is an encroachment on a third party's right; a person is also considered of bad faith who has usurped

possession from a third party by coercion even though he believed that he has a right to a possession.

(3) Unless there is proof to the contrary possession will retain the capacity which commenced at the time of acquiring it.

Article 1149. - (1) Possession is transmitted with all its features to a universal successor in title; if however the successor in title has established that he was in his possession of good faith he may invoke the same even where his predecessor was of bad faith.

(2) The successor in title - be he singular or universal - may add to his possession the possession of his predecessor as regards the effect which results from the law.

Article 1150. - (1) If dispossessed the possessor of an immovable may apply to the magistrate's court within one year from the date of dispossession to have the realty restituted to him; if the dispossession was made clandestinely the time limit begins from the time when it has been revealed; a person who exercises possession on behalf of another person may also claim to be reinstated in possession.

(2) If the person who has been dispossessed has not been in possession for one year from the time of dispossession he may not recover possession except from a person who does not have a better possession; the best possession is that which is based on a legal title; where each party has produced a legal title the holder of the title bearing the precedent date shall have preference regardless of whether the realty was received from the same or from different persons; if either of them has received the realty from the other the holder of the title with the latter date shall have preference; if the titles are of equal value or if neither possessor has a title the person with the prior possession shall have preference and if the

possession was on the same dates possession will be adjudged jointly to them.

(3) Where the person who has been dispossessed has without resorting to legal means reinstated his possession by coercion and dominance and the other party has claimed reinstatement of his previous hand (possession) a judgment will render reinstating his possession and the first possessor shall thereafter have to resort to the legal means for having his possession reinstated.

Article 1151. - If the possessor has commenced proceedings of dispossession for reinstatement of his possession he may demand that the defendant be prevented from erecting buildings or planting trees on the disputed realty for the duration of the proceedings provided he provides adequate securities for any damages that might be suffered by the defendant if it would be revealed that the plaintiff had no right to his case (unsuccessful in the proceedings).

Article 1152. (1) If the defendant had erected buildings or planted trees on the disputed immovable prior to the issue of an order preventing him from doing so he may demand that the buildings and trees remain in his possession until the case of ownership has been decided provided he provides securities which are adequate for such damages as may be suffered by the plaintiff in case the defendant has failed to establish his ownership and also provided that he commences the proceedings of ownership within one month from the date of providing the aforementioned securities; if he has failed to provide said securities or delayed commencing the ownership proceedings beyond the aforesaid time limit the immovable shall together with all the constructions and trees introduced thereon be delivered to the plaintiff if he has provided the adequate securities and failing which the said things will be handed over to a person who is known for his trustworthiness and respectability ('adl).

(2) If the construction or plantation lies on a part of the disputed immovable these provisions shall not be applied except on said part and the plaintiff's possession will be reinstated on the remaining part of the immovable.

Article 1153. - (1) If the defendant has crops on the disputed immovable which have ripened and has been ordered to give up possession he will be ordered to reap (harvest) the crops and deliver the immovable vacant to the plaintiff.

(2) If the seeds have not grown to fruition the plaintiff has an option either to give the comparable, or the value, of the seeds and acquire ownership thereof or wait until the crops have ripened and been harvested in consideration of payment of the comparable rent of the immovable.

(3) If the seeds have sprouted but not ripened yet the plaintiff has the option of either waiting until the crops have ripened and have been harvested in consideration of the payment of the comparable rent of the immovable, or taking delivery of the immovable with all the crops thereon if he has provided adequate securities for the damage that may be suffered by the defendant if his ownership has been established thereto. The plaintiff will however be liable for the value of the seeds only if the ownership of the defendant has not been established.

Article 1154. - A person who has possession of an immovable which continued (uninterruptedly) for one full year and then his possession was impeded he may within one year from the date of the impediment commence proceedings for elimination of this impediment before the magistrate's court.

Article 1155. - (1) A person having possession of an immovable which continued for one full year who on reasonable grounds fears that he be impeded by new work

which threaten his possession thereof may file a claim in the magistrate's court pleading the suspension of said work provided they have not been completed and provided also that one year has not elapsed on the commencement of said work.

(2) The court will render an interlocutory judgment to suspend or continue the work; it may in both cases order the presentation of a suitable security which in case of rendering a judgment suspending the work be a security for reparation of the damage resulting from said suspension where it has been revealed by a final judgment rendered on the subject that the objection to the continuity of the work was baseless; the security will in case of a judgment ordering the continuation of the work be a security for removing all or some of the work in reparation of the damage which will be suffered by the plaintiff if it will be revealed that he was rightful in his claim by a final judgment on the subject.

Article 1156. - A judgment of dispossession and reinstatement of possession, a judgment eliminating impediment, or a judgment suspending new work does not entail the successful party to acquire the ownership of the immovable.

Article 1157. - (1) Until the contrary has been established a person who has possession of thing will be deemed to be the owner thereof.

(2) Where a person has claimed that his possession is based on a personal right or on a right in rem other than ownership possession is deemed as a presumption of the existence of this right until the contrary has been established; the possessor may not adduce this presumption against the person from whom he has obtained the possession.

Article 1158. - (1) A person who has possessed a movable or an immovable which is not registered in the Land

Registration Department on the assumption that it is his own property or has possessed a right in rem over a movable or a right in rem which is not registered over an immovable and if this possession has continued uninterruptedly for 15 years in case of denial a case claiming ownership or a right in rem brought by any person without lawful excuse will not be heard against him.

(2) If the possession was of an immovable or of a right in rem which has not been registered in the Land Registry Department and if the possession was coupled with good faith and was based at the same time on valid grounds the time limitation preventing the hearing of the case will be five years; the existence of good faith must not exist except at the time of receiving the right.

(3) A valid ground is a title or an event which establishes the possession of the immovable by any of the following means:

- (a) acquisition of wastelands (mawat);
- (b) transmission of property by inheritance or will;
- (c) gifts (donations);
- (d) sale or conveyance.

Article 1159. - Save proof to the contrary if possession has been established at a certain previous time and if it is still existing (for the time being) this is a presumption of the existence of possession during the intervening period (period separating the two periods).

Article 1160. - (1) No one can set up prescription contrary to his title: that is to say that no one may by himself and in his own interests change the cause and origin of his possession.

(2) A person may however set up time limitation if the

nature of his possession has changed either by the act of a third party or by setting up (himself) an adverse claim against the owner; the running of the prescription in this case will not run except from the date of such change.

Article 1161. - Prescription is not interrupted by the loss of possession if the possessor has regained it or he has commenced the proceedings of repossession within one year.

Article 1162. - The rules of prescription preventing the hearing of a case of an obligation will apply to the prescription which prevents the hearing of a case claiming ownership as much as regards computation of the time limit, the suspension, interruption, and setting up of prescription before the judiciary and abandonment thereof and agreeing to amend the time limit to the extent where these rules do not conflict with the nature of the prescription preventing the hearing of a case claiming ownership and subject to the preceding provisions.

Possession of Movables

Article 1163. - (1) No case by any person who claims ownership may be heard against a person who has possession of a movable thing or note to bearer and whose possession is based on a valid cause.

(2) Possession itself is a presumption of the existence of good faith and of the valid cause unless there is proof to the contrary.

Article 1164. - By exception to the provisions of the preceding Article the owner of a movable thing or a note to bearer who through loss, theft, usurpation, or abuse of confidence has lost possession thereof may recover it from the possessor in good faith and for valid cause within three years from the time of the loss, theft, usurpation or abuse of confidence.

Appropriation of Surpluses and Benefits and Recovery of Expenses

Article 1165. - A possessor of good faith will appropriate the surpluses he has received and the benefits he has collected during the time of his possession.

Article 1166. - A possessor of bad faith will be liable as of the time when he became of bad faith for all the fruits which he will receive and those which he has failed to collect; he may however obtain reimbursement of that which he has spent on producing these fruits.

Article 1167. - (1) The owner to whom his property has been restituted shall pay to the possessor all the necessary expenses he had incurred: the necessary expenses are those expenses which are not normal which the person had to incur to preserve the object from perishing.

(2) Beneficial expenses shall be governed by the provisions of Articles 1119 and 1120.

(3) The possessor may not claim reimbursement of any of the luxury expenses and therefore he may dismantle anything he has added thereto provided he reinstates the thing to its original state unless the owner prefers to keep them in consideration of paying their value due for removal.

Article 1168. - If the possessor is of bad faith he shall be responsible for the perishing or deterioration of the thing even where the same has resulted from a fortuitous event unless he has proved that the thing would have perished or deteriorated even if it had been kept in the hand of the person to whom it is due.

*Title 2 - The Rights Derived from the Right of
Ownership*

**Chapter 1 - The Right to Dispose (Tasarruf)
and Emphyteusis**

**Section (i) - The scope and the means of protecting
the right of disposing (tasarruf)**

(1) The Scope of the Right to Dispose (Tasarruf)

Article 1169. - (1) A person who is holder of tasarruf* (disposal) in amiri land (government-owned land) may take advantage (enjoy) the land and its appendages (accessories) and may grow crops and erect agricultural buildings thereon and may plant vineyards and trees thereon and may use it as a garden, an orchard, a forest, or pastureland (grazing land); he may build thereon houses, shops, and factories for agricultural purposes; he may tear down the buildings existing thereon and convert the land into a farm; he may uproot its trees and take firewood therefrom; he may benefit of its earth and sell its sand and stones to the extent permitted by the specific regulations and may make thereon threshing floors.

(2) He may alienate, lease out, lend it, and may encumber his right of disposal (tasarruf) by a possessory or authentic mortgage and may collect the debt from the consideration of the right even where the land has been disengaged after his death.

(3) He may in general benefit of the land and exploit it and dispose of his right thereto in accordance with the legal provisions; in all cases the bare title of the land remains owned by the State.

* As distinguished from Hiyaza (possessionion).

Article 1170. - The vineyards and the trees planted by the holder of the tasarruf in the amiri land as well as the buildings erected thereon will together with the accessories and derivatives be appended to the land as regards disposition (tasarruf) and alienation as well as the trees which grow on the amiri land which will be disposed of and alienated together with the land.

Article 1171. - The right of tasarruf shall on the same par as (pari passu) the other properties of the debtor constitute a general security for his creditors; they may levy attachment on said right and receive their rights from its substitute (recompense) even after the debtor's death regardless of whether the debtor owns only this right or has other property.

(2) Restrictions on the Right of Disposition (Tasarruf)

Article 1172. - The holder of tasarruf in amiri land may not constitute a waqf in respect thereof nor may he bequeath it.

Article 1173. - Legal as well as contractual restrictions imposed on the right of ownership shall apply also to the right of disposal (tasarruf).

Article 1174. - (1) That which existed from ancient times (time immemorial) such as the right of irrigation, of stream, of rivulet, pasture (grazing) and the other servitudes imposed on the amiri land shall remain honoured (in force).

(2) Injury cannot be ancient (old): cattle may not be left (to graze) in plantations, vineyards, and orchards although in olden times they had been left (to graze therein): the owner thereof shall be liable on the damage caused by the cattle.

(3) After harvesting the crops the cattle may not be

left (to graze) except in the places whereon they used to be left (for grazing) in olden times.

(3) Protection of the Right of Disposal (Tasarruf)

Article 1175. - No person may exploit an amiri land to which a third party has a right of disposal (tasarruf); he is not entitled to acquire its produce whether planted or grown naturally; he may not pass through it if he does not have a right of way nor may he make it a pastureland or use it as a threshing ground or uproot its trees; he may not collect firewood therefrom and may not in general encroach on it in any way; every encroachment renders the trespasser liable on compensation.

Article 1176. - (1) Where a person has usurped an amiri land (state domain) the person who is entitled to dispose (the holder of a tasarruf right) may recover it from him and may claim the comparable rent in respect of the period during which that person had held possession thereof.

(2) If on restitution (repossession) of the land it contained plantations or buildings belonging to the usurper, or if a person without lawful right had planted trees or grapes, or erected buildings thereon the holder of the right of tasarruf may demand the uprooting of the trees and grapes and the demolition (tearing down) of the buildings; if the uprooting or the tearing down is harmful to the land he may appropriate these installations (works) at their break up value.

(3) But if the land contained seeds the holder of the right of tasarruf has the option of appropriating it against a comparable thing or its value or alternatively leaving the land to the owner of the seeds until they have been harvested against the comparable rent.

Article 1177. - A person who has the right to dispose (holder of tasarruf) of amiri land may repossess it and may

demand cessation of his disposal thereof and the stoppage of the new work in accordance with the rules and conforming with the procedure laid down for the cases of possession.

Article 1178. - The person who has the right to dispose (tasarruf holder) of an amiri land may not be deprived of his said right except in the cases and in the manner prescribed in the law which thing will be against a fair compensation payable to him in advance.

(4) Joint Ownership of the Right of Disposal (Tasarruf)

Article 1179. - If the right to dispose of amiri land belongs to more than one person no one of the co-owners who disposes of a forest or a jungle lying within said lands may make it, without the permission of the other co-owners of the right, a farm and if he did the other co-owners can participate in the farm without having to pay any consideration and can take their share of the trees which have been cut or their value standing (before cutting); but if the transformation of the forest or jungle was made with the consent of the other co-owners all of them shall bear the costs of such transformation.

Article 1180. - If one of the co-holders of a joint tasarruf in an amiri land had grafted naturally grown trees and tended them he shall own such trees to the exclusion of the other co-owners.

Article 1181. - (1) The provisions governing the joint ownership of land will apply to the joint right of disposal (tasarruf) except such provisions which are derogatory to a specific provision or are in conflict with the nature of the disposal (tasarruf).

(2) The provisions governing in particular the rights and obligations of the co-owners, their continuance (perseverance) in the joint ownership, and the management

and the alternate user partition of the jointly owned property shall apply.

Article 1182. - (1) Partition of the amiri lands between the persons having a joint right of disposal (tasarruf) thereof shall be final; conveyance thereof to eliminate the joint right of disposal (tasarruf) is subject to the provisions applicable to the property jointly owned.

(2) Partition however of amiri lands even when it is amicable is not allowed unless these lands are susceptible to partition and provided that the co-owner is able to exploit his parcelled share to the extent he was able to exploit his jointly owned share.

Section (ii) - The causes of acquiring the right of disposal (tasarruf)

(1) Acquisition of the Right of Disposal (Tasarruf)

Article 1183. - Assignment in accordance with the relevant (ad hoc) laws in force (for the time being) of amiri lands by the State to individuals is valid.

Article 1184. - (1) If a person has been permitted in his capacity as the holder of tasarruf in an amiri land and has sowed (cultivated) it for 10 consecutive years without being contested (disputed) a right of consistency thereon is established for him regardless of whether he holds a title or not; the person authorised (occupier) will in this case be issued with a title of the disposal (right of tasarruf) in this land without payment of any consideration after this right has been recorded in the Land Registration Department.

(2) But if the possessor has admitted that the land was free and he is disposing thereof without being entitled to do so or if the period during which he has possessed the land was less than 10 years the time limitation is

disregarded and the land will be offered to him against a comparable consideration and if he rejects the offer it shall be assigned to the successful bidder in an auction.

(3) In all cases the comparable rent will be claimed from him in respect of the period during which he has possessed the land without being entitled to do so.

Article 1185. - Where a tasarruf holder has leased out the land in which he is entitled to dispose or if he has concluded a contract of sharecropping or has lent it and the lessee farmer or the borrower has sown and disposed of (exploited) it for 10 years or more and still acknowledges to be a lessee a sharecropping farmer or a borrower his right of constancy (occupancy) will not be established where the tasarruf holder of the land may claim repossession thereof at any time.

Article 1186. - (1) Every Iraqi (citizen) may subject to leave from the Government take possession without a consideration of a wasteland (uncultivated) lying in the legally permitted areas; if he has revived it a right of disposal therein is established for him and a title establishing his (said) right will be issued to him after it has been registered in the Land Registration Department; but if he left the land without tilling or sowing for three consecutive years without excuse the land will be taken away from him and assigned to another person.

(2) If he has taken possession of the land without having obtained permission from the Government it will not be assigned to him except after he has paid the comparable consideration as at the time of taking possession.

**(2) Acquisition of the Right of Disposal (tasarruf)
by Reason of Death (Transfer)**

Article 1187. - Where a tasarruf holder in an amiri land has died the land is transferred without consideration to

his successors in interest (those having a right to a transfer) arranged according to the order provided for in the following Articles. Every rank in the order bars the lower ranks without prejudice to the provisions of Articles 1192 and 1193.

Article 1188. - (1) The first order in the rank of the successors in interest are the branches of the deceased: children, grandchildren; males and females taking equal shares.

(2) In this rank the right of transference will in the first place be for the children and then to the grandchildren who succeed them; then to the children succeeding the latter and so on and so forth: every descendant who survives the tasarruf holder bars his descendant (branch); but if the descendant has died before the death of the holder of tasarruf the descendants (branches) of this descendant (branch) will replace him (take his place) rank after rank and his share will devolve upon them; where the descendant had several children who died before him the share of each such child will devolve upon his branches rank after rank; where a child of the holder of tasarruf has died before him without having branches the right of conveyance will be confined (limited) to the remaining other children or their branches.

Article 1189. - (1) The successors in interest in the second order are the parents of the descendant and their branches.

(2) If both parents are alive (surviving) the succession in interest is confined (limited) to each one of them taking a share equal to that of the other; and if one of the parents has died before the death of his child his branches will substitute him rank after rank and if he has no branches the succession in title is confined to the surviving parent; if either of the parents has no branches his share devolves upon the other branch.

Article 1190. - (1) The successors in title in the third order are the descendant's grandfathers and grandmothers and their branches.

(2) If the paternal and maternal grandfathers and grandmothers are all survivors they take equal shares by representation and if any of those has died his branches will substitute him (take his place) rank after rank (per stirpes) and if he has no branches his share shall devolve upon his living spouse and if the spouse is not living his share will devolve upon his spouse's branches; if his spouse does not have branches the representation will be confined to the grandfather and the grandmother on the other side.

Article 1191. - If the branch in any of the three orders has become entitled to several shares from different sides he shall take them all.

Article 1192. - If the parents of the person having a right of disposal (tasarruf holder) are living or if either of them is living on the death of the holder of tasarruf and if there are individuals of the first order who are entitled one sixth will devolve upon the parents equally or to whomever of them is alive (surviving).

Article 1193. - (1) If the husband or the wife existed with the persons entitled in the first order he/she will take one fourth and if he/she existed with (at the same time as) the persons entitled in the second order or alongside of the grandfather and the grandmother he/she will take one half; if it is incumbent that the branches of the grandfather and the grandmother must take with them according to the representation pursuant to Article 1190 he/she will take also the share of these branches; if there is no one in the first or second order and if there is no grandfather or grandmother the representation will be

confined to the living spouse.

(2) The right of representation of each of the spouses is established even where either of them has died before the valid repudiation or before the expiration of the count of (al'idda) a revocable repudiation*; where the husband has repudiated irrevocably his wife during the illness of death and died before the expiration of the count (al'idda) the right of representation is established to the wife.

Article 1194. - (1) Consideration must always be had in representation that the male will have a share equal to the share of the female irrespective of the order upon which this right has devolved.

(2) Consideration shall also be had in all the orders of succession that the branch will substitute the originator if the latter had died before the death of the person having the right of disposal (tasarruf holder).

Article 1195. - Where there is a foetus among the successors in interest the representation will be delayed until it is born.

Article 1196. - Where the rightful alienee has been continually absent such as it is not known whether he is alive or dead his share shall be given to the alienee who comes after him; if however he has returned within three years from the date of the death of the holder of disposition (tasarruf) or if it has been revealed within the said time limit that he is alive he shall recover his share from whomever has taken it.

Article 1197. - (1) If the holder of tasarruf has been continually absent for three years and it is not known

* Al'idda is the legally prescribed period of waiting during which a woman may not re-marry after being widowed or divorced (Jamal J. Nasir - The Islamic Law of Personal Status, 1986, Graham & Trotman, London)

whether he is alive or dead his amiri land is conveyed to the rightful alienees; if none of these exists the share becomes due to (someone who is entitled to register it) in the Land Registration Department; in the absence of any such transferees it will be awarded to the applicant who is the successful bidder in an auction.

(2) Where however the holder of tasarruf in the amiri land is a soldier (serviceman) who has been absent from his country on account of his military service his land will be conveyed to the rightful alienees (successors in title) and if there is none of these it will be handed as a deposit (trust) to any of his relatives or trustees for cultivation and payment of its rights (dues?); where the holder of the disposal (tasarruf) has returned he shall be entitled to recover his land from the possession of the rightful alienees or from whatever possession it may be in; but where his death has been ascertained his land shall be conveyed finally to whomever has the right thereto.

Article 1198. - The land of a murdered person shall not pass to the murderer or to his accessory.

Article 1199. - The right to conveyance is not established between persons disputing a debt nor between an Iraqi (citizen) and a foreigner.

(3) Acquisition of the Right of Disposal (Tasarruf) Among Living Persons

Contiguity

Article 1200. - Where a person in good faith and alleging lawful grounds has planted trees in or erected buildings on amiri land to which he does not hold a right of disposal (tasarruf) and the land has thereafter been revendicated if the value of the works as existing is higher than the value of the land the land will be conveyed to the owner of the

work against payment of the comparable consideration; if the value of the land is not less than the value of the work as existing the owner of the land will appropriate the work after having paid their value.

Article 1201. - The provisions laid down concerning the right of ownership in respect of the gradual alluvium of rivers, the diversion of the stream of a river and the erosion of land as well as the status of the work done on the land by the owner and the other provisions relating to contiguosness of immovables shall apply to the amiri lands to the extent which does not conflict with the nature of these lands.

Assignment of Rights

Article 1202. - The holder of a disposition (tasarruf) in amiri land may cede it to whomever he wishes against a consideration in cash or other than cash or without any consideration whatever.

Article 1203. - A cession shall not be effective unless it has been made and recorded in the Land Registration Department in accordance with the legally prescribed procedure.

Article 1204. - Disposals of amiri lands may not be contested on the pretext of being fictitious after having been registered in the Land Registration Department.

Article 1205. - (1) Where the holder of a disposal (tasarruf) has ceded his land without naming a consideration neither he nor his heirs after him may claim thereafter a consideration therefor.

(2) Where the holder of tasarruf has ceded the land against a certain specified consideration but the assignee has not paid the consideration the assignor and his heirs

after him may claim payment of the consideration and may also claim revocation of the cession if the consideration is not paid; they shall also have the same privilege as that of a vendor on the right of disposal of the land which has been ceded.

Article 1206. - (1) Where the boundaries, area, and total price have been named of a land which has been ceded, the boundaries not the area will have effect and the price named must be paid irrespective of whether a deficiency or an increase in the demarcated land has appeared.

(2) Where the boundaries and area of a land which has been ceded has been named and the price quoted on the basis of a unit the area shall be considered and not the boundaries: if a deficiency or an increase is revealed in the land the assignee shall have an option either to revoke the cession or to take the existing area against payment of the price computed on the basis of the unit.

Article 1207. - (1) Natural as well as planted trees and the constructions erected on the land will be included in the cession without the need to mention them.

(2) The accessories of the land ceded in accordance with the rules prescribed for sales shall also be included in the cession without being mentioned.

Article 1208. - (1) Where the holder of disposal (tasarruf) of an amiri land is interdicted his guardian may subject to leave from the court on lawful grounds cede the land.

(2) The guardian may accept a cession made in favour of the interdicted person subject to permission from the court provided the same is beneficial to the interdicted person.

Article 1209. - If it is impossible for the guardians of an interdicted person to administer his land estate without causing harm to the interdicted person and if the contents

of and the constructions on the land estate are of great value and if it is feared that they will suffer deterioration and must be sold due to the existence of a lawful justification and if the injury has been realised in the separation of the land and the construction (work) existing thereon the court may grant leave for cession of the land estate against the comparable consideration; the interdicted person may not thereafter have it restituted to him.

Article 1210. - If the holder of a disposition (tasarruf) in an amiri land is an interdicted person and if the land contained trees or buildings owned by him and if the guardian has sold these trees or buildings after being granted leave by the court to do so on lawful justification the guardian may as well subject to leave from the court cede the amiri land.

Article 1211. - (1) The cession of amiri land will be concluded conditionally if the cession has arisen under duress and coercion by a person who is capable of enforcing his threat; if the assignor has died before allowing (approving) the contract not leaving any person entitled to succession the land shall not be disengaged but will remain in the possession of the assignee or his successor(s).

(2) All the rules of coercion exercised in concluding contracts shall apply to the coercion which is exercised in the cession of amiri lands.

Article 1212. - (1) The cession of amiri lands will be concluded conditionally where an error in the cession has occurred or if it contained fraud accompanied by deception; consideration in all the foregoing shall be had of the rules prescribed for contracts.

(2) If however the assignor has died before allowing the contract and did not leave anyone who is entitled to conveyance (of the land to him) the land will not be

disengaged (freed) but will remain in the hand (possession) of the assignee or whoever succeeds him.

Article 1213. - Amiri lands may not be ceded during the illness of death where it is without consideration or against a consideration containing partiality.

Article 1214. - (1) Where a holder of disposal (tasarruf) in an amiri land has ceded said land which is under his disposal (tasarruf) and included in the assignment deed a written stipulation that the assignee has to provide for him for the duration of his life the cession will be valid and the stipulation effectual, whereupon the assignee as well as his successor(s) who are entitled to conveyance (of the land) shall provide for the assignor according to the stipulation; they may not before the death of the assignor cede the land to a third party nor may they give it as an authentic or possessory mortgage and their creditors may not levy attachment thereon.

(2) If the assignee or his successor(s) in title has failed to provide for the assignor in accordance with the stipulation the assignor may demand rescission (revocation) of the cession and restitution of the land to him and have it re-registered in his name (in the Land Registration Department); where the assignee has died without leaving any successor in title the land will also revert to the disposal (tasarruf) of the assignor.

Article 1215. - (1) In the absence of any provision governing the sales and the grants as well as the general provisions governing contracts shall apply to the cession of the right of disposal (tasarruf).

(2) The following shall be applied in particular: the provisions related to the warranty of encroachment (impediment) and revendication, the warranty of inherent defects, delivery of the thing with its accessories and the rules prescribed for (legal) capacity and the guardian who

concludes a contract with himself, the defects of consent, exploitation and rescission.

Precedence

Article 1216. - Where the holder of disposal (tasarruf) in amiri land has ceded his land for or without consideration the following shall have precedence to take it for the comparable consideration according to the following order:

- (1) the joint owner of the ceded land;
- (2) joint servitudes on the land ceded;
- (3) the owner of the trees or buildings existing on the land ceded;
- (4) he of the village population within the area of which lies the land has need of the land ceded; in this case the provision laid down in Article 1220 (hereof) shall be observed.

Article 1217. - (1) In other than the aforementioned provisions the provisions relating to pre-emption shall apply to precedence.

(2) These provisions shall in particular apply: in case of several persons claiming precedence, or conveyance of this right to the heirs and the stipulations of its effectuality, the causes of its lapsing and the results devolving upon the use thereof, the procedure to be followed in said use such as notice, expressing a wish, deposit of the consideration and initiation of proceedings and the time limits to be observed in all the aforementioned.

Time Limitations (Prescription)

Article 1218. - (1) Where a person has possession of an amiri land in his capacity as holder of disposal (tasarruf) over it which has not been registered in the Land Registration Department proceedings by a third party against him may not be heard in case of denial if 10 consecutive years have elapsed since the time when the defendant had possession of the land and if the plaintiff had no lawful justification to prevent him from initiating proceedings.

(2) Without prejudice to the provisions of the preceding paragraph the provisions concerning time limitations prescribed for the right of ownership will be applicable.

Section (iii) - Causes for the lapse of the right of disposal (tasarruf)

(1) Prescription (Time Limitations)

Article 1219. - (1) Where a person has possession of land in his capacity as the owner thereof action in the event of a denial may not be heard against him when initiated by the Government claiming the bare title thereto on the basis that the land is amiri if 36 consecutive years have elapsed on the possession of the land by the defendant.

(2) The provisions concerning prescription in respect of the right of ownership shall apply without prejudice to the provisions of the preceding paragraph.

(2) Disengagement (Dissolution) of Amiri Lands

Article 1220. - If the holder of disposal (tasarruf) over an amiri land has died without leaving any successor in interest his land will be dissolved and the following persons who have a right to register in the Land

Registration Department arranged according to the following order are entitled to take it within one year from the death of the disposal holder against the comparable consideration:

- (1) the heirs of the holder who inherit the trees and buildings existing on the amiri land which had not been added to the land and remained the holder's ownership;
- (2) the joint holder of disposal (tasarruf) over the amiri land;
- (3) the joint servitude holders over the amiri land;
- (4) a third party other than an heir who owns trees or buildings existing on the amiri land;
- (5) whoever of the village population within the area of which lies the amiri land has need of the amiri land; in case of several of the village population having need (of the land) where all of them showed interest in taking it it will be divided among them equally: if the land is not susceptible to partition or if the partition thereof is prejudicial a lottery draw will decide the person who wins.

Article 1221. - (1) The running of the period of one year provided for in the preceding Article shall not be suspended on the pretext of a person being a minor, lunatic or rash (impudent) (safeeh) person or any other pretext; the right to register in the Land Registration Department will lapse if it is abandoned expressly or impliedly by the person entitled thereto or where the time limit has expired and no claim was made in respect thereof.

(2) Where the person entitled to register in the Land

Registration Department has claimed his right within the prescribed time limit and paid the comparable consideration at the time of making the claim the entire or part of the land will be assigned to him even where it had already been assigned to someone who is in the same or lower order than himself.

Article 1222. - In case of the existence of several persons who are entitled to registration in the Land Registration Department who happen to be of the same order the land will be assigned to them all equally; if one of them has abandoned his right the others may claim assignment of the land to all of them.

Article 1223. - (1) Where a person who has a right to register in the Land Registration Department has abandoned his (said) right the land will be offered to the person who comes after him in the order of rank.

(2) Where the person entitled to register in the Land Registration Department has died before the land has been assigned (committed) to him his right shall not pass to his successor.

Article 1224. - If the person entitled to register in the Land Registration Department is an interdicted person his abandonment of his right - whether effected by himself or by his guardian - is not effectual.

Article 1225. - (1) If the person entitled to register in the Land Registration Department has been interdicted or absent uninterruptedly his guardian may take the land against payment of the comparable price of the land after having obtained leave from the court if such action is beneficial to the interdicted or absent person.

(2) The impossibility to assign (commit) the land to an interdicted or absent person does not prevent assigning (committing) it to the persons existing in the same rank of

order or in a lower order and the interdicted or absent person will have his right reserved in registering in the Land Registration Department until the end of the legally prescribed time limitation.

Article 1226. - Neither the murderer (assassin) nor his accessory in the fact has a right to register the victim's land in the Land Registration Department.

Article 1227. - The right to register in the Land Registration Department of persons who are disputing a debt or between an Iraqi national and a foreigner will not be established.

Article 1228. - In the absence of any person who is entitled to register in the Land Registration Department or where all of those entitled to register have abandoned their right the free (disengaged) land will be assigned to an applicant who is the successful bidder in an auction.

Article 1229. - (1) A case of revendication shall not be heard in respect of a free (disengaged) land which has been assigned to the successful bidder if the action has been initiated after the final award has been made.

(2) If the case has been initiated before the final award (of the bidding) and the court has decided because of the case to delay the auction and if it later appeared that the plaintiff lost the auction he shall be liable on the damages which resulted from delaying the auction.

Article 1230. - (1) Where an amiri free (disengaged) land has been assigned to any of the persons who are entitled to register in the Land Registration Department against a comparable consideration or where it has been awarded in the bidding to any person no revocation may be made thereof even where it is revealed that a third party offers more than the comparable consideration or than the price at

which the land was awarded even where such offer is made before a title of his right is issued to whomever the land has been assigned (committed).

(2) But if the free land has been assigned (committed) to a person entitled to register in the Land Registration Department or to the successful bidder for a price which contained excessive fraud* it would be allowable within one year from the date of assignment (of the land) to require the person to whom the land has been assigned to complement the price up to the extent of the comparable consideration: if he abstained the assignment will be revoked and the land will be taken away from him after the price he had paid has been returned to him.

Article 1231. - Where a free amiri land has been assigned to a person entitled to register it in the Land Registration Department or to the successful bidder (in an auction) the assignee of the land may not take over the plantations grown thereon nor claim from the heirs of the first holder of disposal the comparable rent as such plantations will be included in the estate of said holder in the same way as plantation, or grass whether self grown or planted and irrigated.

Article 1232. - If a person has disposed of an amiri land and later withdrew from it when it was flooded with water, the land will not be deemed as being free unless he or any successor in interest who is entitled to register it has failed without excuse to farm it (plant it) for three successive years after the water had been drained therefrom and it became arable.

* (Ghohn Fahesh) "excessive fraud" is provided for in Article 165 of Al Majalla as: "that which amounts up to one half of one tenth in ('arudh) commodities; one tenth in animals and one fifth and more in immovables."

(3) Rejection of Exploitation of Amiri Lands

Article 1233. - (1) The holder of a disposal (tasarruf) over an amiri land shall forfeit his right of disposal over it if he has failed to exploit it himself or by lending or renting it out and left it without growing any crops thereon for three consecutive years without having any valid cause for said failure.

(2) After that the land shall be offered to him: if he claims it it will be assigned (committed) to him a second time for the comparable consideration; but if he has died it will be offered to his successors in interest*: if it is claimed it will be assigned to them against the comparable consideration; if it is not claimed by him or by any successor in interest it will be assigned to the highest bidder in the auction where the persons entitled to register in the Land Registration Department are disregarded.

Article 1234. - The following cases will be deemed to be a valid excuse which suspends the running of the three year time limitation provided for in the preceding Article:

- (a) where the land was flooded with water or it was necessary to give the land an intermission of repose;
- (b) if the holder of disposal was taken prisoner (of war) or had to leave his village due to a force majeure provided he will re-exploit the land before the lapse of three years from the

* "Successor in interest is one who follows another in ownership or control of property. In order to be a 'successor in interest', a party must continue to retain the same rights as original owner without change in ownership and there must be change in form only and not in substance..." (Black's Law Dictionary, fifth edition 1979, West Publishing Company.)

cessation of the force majeure;

- (c) where the holder of the disposal is in (active) service in the army in other than the village within which the land lies unless his death has been ascertained;
- (d) diminished capacity of the holder of the disposal; if the guardian has not exploited the land for three consecutive years he shall be asked to exploit it himself or by an intermediary: if he has abstained the land will be hired out against a comparable rent which will be paid to the guardian for the account of the interdicted person; upon termination of the interdiction of the holder and the disposal he will recover his land from the lessee;
- (e) any other force majeure which prevents the holder of the disposal (tasarruf) from exploitation of the land.

Article 1235. - It will not be a valid excuse where the successor in interest was at the time of the death of the holder of tasarruf in a far away country or was continually absent: in the former case if he has failed to come and exploit the land within three years from the death of the holder of tasarruf he shall forfeit his right; in the latter case the land will be assigned to his successor in interest (whoever becomes entitled to it after him) and if he (the absent person) has returned or if it has been revealed that he is alive within three years from the date of the death of the holder of tasarruf he shall recover the land from whomever had taken it.

Article 1236. - (1) In calculating the three year term during which the land is left without being exploited the

period of the predecessor shall not be added to that of the successor and each term remains separate from the other except where either of the two terms has reached three years and the right of the holder of tasarruf is not forfeited.

(2) Where the holder of tasarruf has failed without excuse for two consecutive years to exploit the land and then ceded it to another (third party) or if he has died and it has devolved upon the successors in interest and if the transferee or the successors in interest have neglected the land for two consecutive years in the wake of the first two years the right of tasarruf shall not be forfeited.

Article 1237. - (1) Where a person holds a right of tasarruf over a summer or winter crop land and then neglected it in the season and has failed without excuse to pay the fees (dues) in respect thereof for three consecutive years the right of tasarruf is forfeited and the land becomes free (disengaged).

(2) Also where a person who holds a right of tasarruf over a pastureland has failed to harvest it and without excuse has failed to pay the dues in respect of three consecutive years the right of tasarruf will lapse (be extinguished) and the pastureland becomes free (disengaged).

Article 1238. - (1) Where an amiri land has been assigned provisionally to a person who has built thereon or planted therein (trees) against payment of a fixed annuity for as long as the construction is existing or fees so long as his trees were existing, if thereafter the building was extinct or the trees eliminated without leaving any traces the land becomes free (disengaged) and will be offered to the owner of the building or of the trees against payment of the comparable consideration and if he has turned down the offer it may be assigned to whomever claims it and is successful in the auction.

(2) If however the right of disposal (tasarruf) has passed to the person who erected constructions or sown plantations as a result of the right of representation or of any other cause the land shall not be disengaged nor will the owner of the buildings/plantations be dispossessed thereof even where the buildings have become extinct or the trees had disappeared so long as he continues to pay the prescribed dues and taxes and for as long as he has not left without excuse the land without being exploited (cultivated) for three consecutive years from the time of extinction of the buildings or the elimination (extirpation) of the trees.

Article 1239. - (1) If a waqf building has been erected on an amiri land which has been temporarily assigned to the authority (superintendent) of the waqf against payment of an annuity for as long as the building remains standing (existing) and later on the building became extinct without leaving any trace and if the superintendent of the waqf has failed to reconstruct the building and to pay the rent the land becomes free (disengaged).

(2) The provisions of the preceding paragraph will also apply where the trees planted on the amiri land were owned by the waqf.

Section (iv) - Closing provisions

Article 1240. - Places which have since time immemorial been taken as summer resorts and winter resorts which are under the disposal (tasarruf) of individuals who pay the dues of the winter and summer resorts will be treated in the same manner as that for the amiri lands; as regards summer and winter resorts which are under the joint disposal (tasarruf) of the inhabitants of one or more villages they will remain a jointly owned property.

Article 1241. - (1) The land of a village may not be

assigned to one or more persons to take (use) it as a country estate for himself/themselves as long as its inhabitants are existing (living) thereon; if however the population of the village have been dispersed and the land belonging to them has been revendicated in the Land Registration Department and if the village cannot be reinstated to its previous (original) state (condition) by bringing and assigning the land to new residents it may be assigned to one or more persons to be used as a country estate.

(2) A country estate is an extensive agricultural land inclusive of the buildings, cattle, seeds, and agricultural implements existing thereon. If the owner thereof has died leaving no successor in interest and if such buildings and contents had devolved upon the heirs the land will be assigned to them against payment of the comparable consideration and failing which the land alone (exclusive of the contents) will be assigned to the successful bidder in the auction.

Article 1242. - (1) The ('uqr) emphyteusis rights will remain in possession of their holders if their disposal over it is established by documents which are legally effectual.

(2) Any person not holding a title (document) whose disposal over the right of emphyteusis is established to have been for 40 years will be treated in the same manner as that applied to the holder of a disposal (tasarruf) on the strength of a legally effectual title.

Article 1243. - The owner of (holder of tasarruf over?) an amiri land may at any time appropriate the 'uqr (emphyteusis) rights thereto in consideration of a cash compensation which he pays to the holders of these rights in accordance with the rules and procedures prescribed in Law No.55 of 1932.

Article 1244. - The 'uqr rights will lapse (be extinguished) if they have devolved upon the owner of the land for any cause whatsoever; these rights may not be revived once more.

Article 1245. - The Minister of Finance shall represent the State in cases and proceedings concerning amiri lands such as the bare title right of disposal (tasarruf) or otherwise if the State was a party to such cases or proceedings.

Article 1246. - The Land Rights Settlement Law No.29 of 1938, as amended, as well as the Lazma (franchise/official concessions) Law No.51 of 1932 and the Procedure of Registration of Immovable Property in the Land Registration Department (Tabu) Law No.59 of 1925 shall remain in force provided in all cases that none of the provisions of these laws is repugnant to any provision of this Law.

Article 1247. - In the absence of a provision the provisions which apply to the right of and the causes for acquiring ownership will also apply to the right of disposal (tasarruf) over amiri lands provided it does not conflict with the right of disposal (tasarruf).

Article 1248. - The provisions which apply to the amiri lands pursuant to the aforementioned provisions or pursuant to any other provision shall also apply to waqfs (dedications) which are not valid (ghayr sahiha) which are in the form of 'takhssissat' (appropriations) but one tenth tax (tithe) and dues such as the cession fees and the consideration of free (amiri lands) and others will revert to the waqf authority and not to the State.

**Chapter 2 - The Rights of Usufruct, User, Habitation
(Dwelling) and of Musataha (Surfacing)**

Section (i) - Usufructs

(1) The Causes of Acquiring a Usufruct

Article 1249. - The appropriation of things - be they movables or immovables - but not their bare title is valid.

Article 1250. - The right of usufruct is acquired by a contract and by will (bequest); the holder of this right may adduce prescription (time limitation) in support of his claim.

(2) The Rights and Obligations of a Usufructuary

Article 1251. - Consideration shall be had of the title which created the right as well as of the provisions which follow in respect of the rights and obligations of the usufructuary.

Article 1252. - The usufructuary may use the thing the subject matter of the usufruct and its accessories; he may acquire the fruits thereof during the period of enjoyment and the products of cattle belong to him; he shall replenish anything of the principal thing which has been expended.

Article 1253. - (1) Save provision (stipulation) in the document (title) which created this right to the contrary the usufructuary may dispose of (enjoy) his right against or without a consideration.

(2) The right of usufruct will remain existing after disposal thereof has been made for the person of the usufructuary and will lapse (be extinguished) by his death and not by the death of the person who received the benefit

from him.

Article 1254. - (1) The usufructuary must enjoy the thing for the purpose for which it has been destined and must exercise the care which is exercised by a normal person and he will warrant the perishing thereof even when the perishing was without encroachment if the restitution thereof to its owner has been delayed beyond the expiration of the right of usufruct.

(2) The owner may object to the unlawful enjoyment of the thing or such enjoyment which is inconsistent with the nature of the thing; if he has established that his rights are in danger he may demand the provision of securities; if the usufructuary fails to provide such securities or if he has continued in spite of the owner's objection to enjoy the thing in the unlawful manner or in a manner which is inconsistent with the nature of a thing the court may take it away from him and deliver it to an ('adl) (a person whose virtues outweigh his vices) to manage it; the court may depending on the gravity of the situation order termination of the usufruct without prejudice to the rights of third parties.

Article 1255. - (1) The usufructuary is liable during the period of his enjoyment of the thing on the ordinary costs and expenses which are necessary for maintenance works of the thing being enjoyed.

(2) But the extraordinary costs and the major repairs which had not resulted from the fault of the usufructuary will be borne by the owner without being imposed on him and the usufructuary will be under an obligation to pay to the owner the interest on sums incurred by the owner in so doing unless in all cases there is an agreement otherwise.

Article 1256. - An inventory must be taken of the movable property the subject matter of a usufruct and the usufructuary must provide a warranty to have it restituted

after expiration of the period of enjoyment; if he has failed to provide such warranty the property will be sold and the price thereof will be invested in (applied to) the purchase of public bonds or otherwise and the usufructuary will take the resulting profit.

(3) The Cases Where a Usufruct Lapses (is Extinguished)

Article 1257. - The usufruct ends by expiration of the time limit fixed therefor: if no time limit has been fixed it will be deemed as having been determined for the duration of the usufructuary's lifetime; it will in every case end by the death of the usufructuary even where the death takes place before the lapse (expiration) of the time limit fixed for it.

Article 1258. - (1) The usufruct ends by the perishing of the thing; if however the owner has been indemnified for the perishing the usufruct is transferred to this compensation.

(2) Where the perishing was not due to the fault of the owner he shall not be forced to reinstate the thing to its original state but if he had reinstated it the usufructuary regains his right of enjoyment if the perishing was not due to a cause on his part in which case the provisions of Article 1255 (2) shall be applied.

Article 1259. - The usufruct ends if the usufructuary is at the same time the owner; the usufruct shall not however be deemed as having ended if the owner had an interest in retaining it such as when the title has been mortgaged.

Article 1260. - The usufruct ends (is extinguished) by not being enjoyed for 15 years.

Section (ii) - The right of user and of habitation

Article 1261. - The alienation of a benefit which is restricted to enjoyment (use) or habitation is valid.

Article 1262. - The scope of the right of user (enjoyment) and of habitation is determined according to the personal need of the right holder and of his family.

Article 1263. - Neither the right of user (enjoyment) nor the right of habitation may be assigned to a third party except pursuant to an express stipulation or a strong justification.

Article 1264. - (1) If the house in respect of which a right of habitation has been determined needs repairs the holder of said right shall carry them out provided that buildings which are constructed by him will be purely his ownership and are transferable to his heirs.

(2) If the holder of the right has refused to carry out said repairs the court shall lease out the house to another person who will carry out the repairs and deduct the costs thereof from the rent and on the expiration of the term of the lease he will restitute the house to the holder of the right of habitation.

Article 1265. - Besides the foregoing provisions, the provisions concerning the right of usufruct shall apply to the rights of user (enjoyment) and of habitation inasmuch as they do not conflict with the nature of these two rights.

Section (iii) - Surface right (musataha)*

Article 1266. - (1) The surface right is a real (in rem) right which vests unto its holder a right to construct a building or other installations, other than plantations, on the land of another person pursuant to an agreement concluded by him and the owner of the land setting down the rights and obligations of the holder of the right (surfacers/musateh).

(2) The surface right must be inscribed in the Land Registration Department.

Article 1267. - (1) The term of the surface right may not be for more than 50 years; if the term has not been fixed either party (the surfacer as well as the landowner) may terminate the contract ('aqd) after three years from the time when notice has been served on the other party to that effect.

(2) The surface right is not extinguished by the alienation of the building before expiration of the term fixed.

Article 1268. - Where a rent was stipulated (in the contract) as consideration of the right and the surfacer has delayed payment thereof for three consecutive years the landowner may demand rescission of the contract if there is no agreement to the contrary.

* 'Musataha': This Arabic word is a derivative of the word 'Sat'h' which among other things means 'surface'; in view of the fact that Musataha is a right to use the surface of the land, for building thereon, it was considered convenient to use the words 'surface right' to signify the meaning and the holder of the right 'surfacers' (Translator).

According to Black's Law Dictionary: "Surface: This term, when used in law, is seldom, if ever, limited to mere geometrical superficies, although when used without any qualifying phrase in a deed, it ordinarily signifies only the superficial part of land..."

Article 1269. - (1) Buildings or other installations (works) carried out by the surfacer (musateh) will be wholly owned by the latter and he may dispose of them together with the surface right by sale mortgage and by such other rights of alienation in the Land Registration Department without prejudice to the right of the landowner and the object for which the building or works are destined unless in all cases there is an agreement otherwise.

(2) The surface right of the surfacer as well as the building and works are transferred by inheritance and by will.

Article 1270. - On the extinction of the surface right the ownership of the building and of the other works will be transferred to the landowner provided he pays the value thereof due for break up unless there is a stipulation otherwise.

Chapter 3 - Servitudes

Section (i) - Creation of servitudes

Article 1271. - A servitude is a right which limits the enjoyment of an immovable for the benefit of another immovable belonging to another owner.

Article 1272. - (1) The right of servitude is acquired by a contract by inheritance and by will.

(2) Time limitations may be adduced in regard to the right of way, the right of stream, the right of drain and the other apparent rights of servitudes.

Article 1273. - (1) Apparent servitudes may be created by assignment by the original owner (takhssis).

(2) There is a specific assignment by the original owner if it is revealed by any of the methods of proof that the owner of two detached immovables had erected between

them a building or other apparent mark thus creating a relationship of subordination between them which tends to indicate the existence of a servitude had the two immovables belonged to two different owners; in this case if the two immovables have passed into the hands of different owners without any change to their conditions, the servitude is deemed as created to the benefit of and as a burden on the two immovables unless there is an express stipulation to the contrary.

Article 1274. - (1) In the absence of an agreement to the contrary, if specific restrictions have been imposed limiting the right of the owner of a immovable to build as he pleases thereon, such as a prohibition to build above a certain height or beyond its area, such restrictions constitute servitudes which are burdens on this immovable in favour of the immovables to the benefit of which these restrictions have been imposed.

(2) Every injury which results from a breach of these restrictions gives rise to a claim for material redress unless it is revealed that the adjudgment of a compensation is a fair and adequate penalty.

Section (ii) - Rules governing the rights of servitude

Article 1275. - The rights of servitude are governed by the rules laid down in the deed which created them, by current usage and by the following provisions.

Article 1276. - (1) The owner of the dominant immovable is entitled to carry out such works as are necessary to exercise his right of servitude and that which is needed to maintain it; he must however exercise his right in such manner that will not give rise except to the least possible harm.

(2) New requirements of the dominant immovable cannot entail any increase in the burden of the servitude.

Article 1277. - (1) In the absence of an agreement to the contrary, the cost of the work which is necessary for the exercise and preservation of the right of servitude will be borne by the owner of the dominant immovable; if the owner of the servient immovable is responsible for carrying out the works at his own cost, he has always the right to free himself of this burden by abandoning the entire or part of the servient immovable to the owner of the dominant immovable.

(2) If the work also benefits the owner of the servient immovable, the cost of maintenance shall be borne by both parties, each according to the benefit derived by him.

Article 1278. - (1) The owner of the servient immovable may not do anything which will tend to impair the exercise of the right of servitude or to make exercising it harder (more difficult): he may not, in particular, change the existing condition (status quo) or change the place originally designated for exercising the right of servitude to another place.

(2) Where, however, the place originally fixed has become such as will increase the burden of the servitude or where the servitude has become a hindrance to introducing improvements to the servient immovable, the owner of this immovable may demand transference of the servitude to another place of the immovable or to another immovable belonging to him or to a third party who consents thereto provided in all these cases that the owner of the dominant immovable is able to exercise his right of servitude in these new conditions as easily as he was able to do so before the change.

(3) It would also be valid for the owner of the dominant immovable to demand the change of the place specified for the exercise of the right of servitude if he has proved (established) that such change gives him a concrete benefit without involving any harm to the servient

immovable.

Article 1279. - (1) If the dominant immovable is divided, the servitude continues to benefit each part thereof, provided that the burden on the servient immovable is not increased.

(2) If, however, the right of servitude does not in fact benefit except some of these parts the owner of the servient immovable may demand cessation of this right as regards the other parts.

Article 1280. - (1) If the servient immovable is divided, the servitude continues to subsist in respect of each part thereof.

(2) If, however, the right of servitude is not actually being exercised in respect of some of these parts nor is it possible to exercise it over them the owner of every part thereof may demand the elimination (cessation) of this right in respect of the part belonging to him.

Section (iii) - Lapse of the servitude right

Article 1281. - The servitude right lapses by the expiration of the term fixed for it, and by the total perishing of the servient immovable or of the dominant immovable and by the two immovables being in the hand of one owner, but in the latter case if the ownership of one person of the two immovables had ceased with retrospective effect the right of servitude is revived.

Article 1282. - (1) The right of servitude lapses where it has not been exercised for 15 years; but if the servitude was created for the benefit of a waqf property the time limit shall be 36 years.

(2) The exercise of the right of servitude by one co-owner of a jointly owned immovable interrupts the prescription in favour of the other co-owners; in the same

way, the suspension of prescription in favour of one of the co-owners, suspends prescription in favour of the others.

Article 1283. - The servitude ceases to exist if the condition of the things has changed such as the right can no longer be exercised; the right is revived if the things have changed to such condition as it would be possible to exercise the right.

Article 1284. - The owner of a servient immovable may free himself wholly or partially of the servitude if the servitude has lost every utility for the dominant immovable or if its actual utility has been reduced out of proportion to the burden imposed on the servient immovable.

BOOK 4 - ACCESSORY RIGHTS IN REM (SECURITIES IN REM)

Title 1 - Authentic Mortgages

Chapter 1 - Constitution of an Authentic Mortgage

Article 1285. - An authentic mortgage is a contract by which a creditor acquires over an immovable destined to pay his debt a right in rem by which he obtains preference over ordinary creditors and the creditors who come after him in rank (order) for the repayment of his right out of the price of the immovable no matter into whose hands (possession) the immovable has passed.

Article 1286. - (1) A mortgage will not be concluded except by inscribing it in the Land Registration Department; each one of the contracting parties shall elect a domicile in the town wherein the inscription was effected and each one of the parties will be given one copy of the deed of the mortgage signed by both parties after they have acknowledged the (fact) in front of witnesses.

(2) Save agreement otherwise the costs of the deed of mortgage shall be borne by the mortgager.

Article 1287. - The mortgager may be the debtor himself and may be a surety (accommodation party) in rem who offers a mortgage in favour of the debtor; in both cases the mortgager must be the owner of or holder of a disposal (tasarruf) over the immovable mortgaged.

Article 1288. - (1) The mortgagee may be a juristic person, such as a waqf, a bank or a company all of which must be within the scope of the law.

(2) Where a juristic person has taken a mortgage on an immovable it may not be awarded the immovable in case of an auction in order to obtain its right except to the extent permissible for juristic persons to own immovables.

Article 1289. - (1) A father may constitute an authentic mortgage on his property in favour of his minor (child/son) and may take a mortgage of the child's/son's property in favour of himself; he may also mortgage the property of his child/son against a debt owed from him and for a debt owed by the minor; and if he has mortgaged it for a debt owed by him and the mortgaged property has perished he shall not be liable.

(2) No guardian other than the father may constitute a mortgage on his property in favour of an interdicted person nor may he take a mortgage in his own favour on the property of an interdicted person; he may subject to leave from the court have it mortgaged in favour of a third party against a debt owed by the interdicted person.

Article 1290. - (1) An authentic mortgage may not be constituted except on an immovable or on a right in rem over an immovable.

(2) The mortgaged immovable must be susceptible to being dealt in and sold validly and must be designated.

Article 1291. - (1) Where a partner of a jointly owned immovable has constituted a mortgage on his jointly owned share the mortgage will after the partition has been made be transferred to the parcelled share which fell to the lot of this co-owner.

(2) A mortgage which is constituted by all the owners or holders of tasarruf over a jointly owned immovable shall remain effectual whatever the result may be which at a later date arises from the partition sale or cession of the immovable due to the indivisibility thereof.

Article 1292. - (1) An authentic mortgage includes the accessories of the thing mortgaged which are deemed to be an immovable.

(2) An authentic mortgage includes in particular the trees and buildings which existed at the time of constitution of the mortgage or those which have been introduced thereafter as well as the rights of servitude and the immovable specifically and all improvements and installations which have been made on the mortgaged immovable.

Article 1293. - An authentic mortgage may be constituted to secure a conditional future or contingent debt: it may be constituted to secure an opened credit or the opening of a current account provided that the amount of the debt secured or the maximum amount which such debt may attain has been fixed in the mortgage deed.

Article 1294. - Every part of the mortgaged immovable or immovables is a security for the entire debt and every part of the debt is secured by the whole of the mortgaged immovable/immovables.

Chapter 2 - The Effects of an Authentic Mortgage

Section (i) - The effects of an authentic mortgage as regards the contracting parties

(1) As Regards the Mortgager

Article 1295. - (1) The mortgager may dispose of the mortgaged immovable by sale or otherwise which disposal shall not have any effect as regards the mortgagee's right.

(2) He is entitled to administer the mortgaged immovable and collect the fruits thereof until such time when they become incorporated in the immovable in accordance with the rules of execution.

Article 1296. - (1) The mortgager who has constituted an authentic mortgage warrants the safety (effectiveness) thereof; the mortgagee may oppose every act which tends to diminish his security.

(2) If acts have been done which tend to render the mortgaged immovable vulnerable to perishing, becoming defective or rendering it insufficient to secure the debt, the mortgagee may apply to the court to order the cessation of such acts and the taking of measures which will prevent the occurrence of the injury.

Article 1297. - (1) If the mortgaged immovable has accidentally perished or sustained a defect the perishing or defect shall be borne by the mortgager; if in such case the mortgagee does not accept to leave the debt without any security the mortgager will have an option either to provide adequate security or to discharge the debt immediately prematurely; where the mortgager has opted to pay immediately the debt and if the debt did not carry interest independent thereof the creditor shall have no right except to receive (collect) a sum equal to the value of the debt less interest at the legal rate in respect of

the period intervening between the date of payment (of the debt) and the date of maturity of the debt.

(2) If the mortgager has through his own fault caused the perishing or the defect to the mortgaged immovable the mortgagee will have an option either to demand an adequate security or to exact immediate payment of the debt.

Article 1298. - If the mortgaged immovable has perished or suffered a defect the right of the mortgagee is transferred to the property which substitutes it, such as compensation, the sum of the insurance paid and the payments on account of expropriation for public utility; the mortgagee may collect (receive) his right therefrom according to his rank.

(2) The Effect of an Authentic Mortgage vis-a-vis the Mortgagee

Article 1299. - A mortgagee may obtain his right in the mortgaged immovable in accordance with the relevant procedure; if the immovable is insufficient to pay his right the mortgagee may collect the sum remaining of his debt in his capacity as an ordinary creditor from the other properties of the debtor.

Article 1300. - If the mortgager in case of an authentic mortgage is other than the debtor no execution may be levied on any of his property which had not been designated as security for the creditor's right and his responsibility in respect of the said right shall not exceed the property he has given in security; he may not however demand from the mortgagee to dispossess the debtor before an execution has been levied on the mortgaged immovable save where there is an express agreement otherwise.

Article 1301. - A mortgage is not foreclosed: every agreement shall be null and void which vests unto the

mortgagee a right in case of failure to pay the debt on the date of maturity to appropriate the immovable which is the subject matter of an authentic mortgage against the (sum) of the debt against any price or to sell it without observing the procedure laid down in the law even where such agreement had been executed after the constitution of the mortgage.

Article 1302. - A mortgagee may assign the debt owing to him together with the authentic mortgage which secures this debt in accordance with the rules governing the assignment of a right.

Article 1303. - (1) A lease (contract) with an immediate effect given by the mortgager shall not be effectual against the mortgagee unless it has an established date (date certaine) that it was before the mortgage.

(2) A lease (contract) taking effect on a future date which begins to run on the expiration of the immediate effect lease (contract) shall not at all be enforced against the mortgagee except where it has been registered in the mortgage deed.

**Section (ii) - The effects of an authentic mortgage
vis-a-vis a third party**

(1) The Right of Precedence

Article 1304. - Creditors mortgagees will receive their rights before the other ordinary creditors out of the price of the mortgaged immovable or out of the property which substituted this immovable where each one of them will receive his right according to his rank (in order of precedence).

Article 1305. - If the rate of interest has been included in the mortgage deed the authentic mortgage will secure,

together with the principal sum of the debt and according to the same rank (order), the interest accruing in respect of the year which preceded the application for execution as well as the interests which will accrue from this date to the day of awarding of the auction sale.

(2) Right to Legal Action

Article 1306. - (1) A mortgagee may upon the maturity of the debt and after having served notice on the third party holder (stakeholder) to pay the debt take proceedings for the expropriation of the mortgaged property unless this stakeholder has chosen to pay the debt or redeem the mortgage of the property.

(2) A person is deemed to be the stakeholder of the mortgaged immovable to whom ownership of or any other mortgageable right in rem over the immovable has after the constitution of the mortgage been transferred by any of the causes of ownership without being personally responsible for the debt secured by the mortgage.

Article 1307. - (1) A stakeholder who has paid the debt secured by the mortgage is subrogated to the creditor's rights except such rights which are related to securities provided by a third party other than the debtor.

(2) The right of the stakeholder to pay off the debt remains existing until the day of awarding the auction bidding in which case he shall be bound to pay off the sums sustained in respect of the proceedings from the time of service of notice on him; he will however claim all the foregoing from the debtor and the previous owner of the mortgaged immovable.

Article 1308. - (1) A third party holder retains his right to redeem the mortgaged immovable until the day of levying attachment thereon by the mortgagee.

(2) A third party holder who wishes to redeem the

mortgaged immovable shall serve upon the inscribed creditors, at their elected domiciles, a summons containing the following particulars:

(a) a summary of his title deed setting down the nature and date of the disposal and a precise demarcation of the immovable and the name of the previous owner thereof; where the disposal was by way of sale the price and its accessories must be mentioned;

(b) particulars of the rights that have been inscribed on the immovable before the inscription of the title deed of the third party holder evaluates the immovable which must not be less than the reserve price in the case of expropriation nor in any event less than the sum remaining to be paid by the third party holder of the price of the immovable if the act of disposition was a sale.

(3) He must indicate in the same summons that he is prepared to pay the debts inscribed to the extent of the value at which the immovable has been evaluated but he is not obligated to attach to the offer the sum in cash, as the offer will be restricted to expressing his preparedness to pay a sum payable immediately (forthwith) regardless of the date of maturity of the debts inscribed.

Article 1309. - Within 30 days from the service of the last summons every (inscribed) creditor mortgagee and every surety of the inscribed right may apply for the sale of the immovable required to be redeemed; the application will be by a summons addressed to the third party holder and to the previous owner; the applicant must deposit in the treasury of the court a sum which is adequate to cover the expenses of sale by auction; if the auction has not been awarded to

any person he may not recover the part of this sum which has been expended on the costs.

Article 1310. - (1) Where an application has been made for the sale of the immovable, the formalities laid down for compulsory sales must be followed in accordance with the Execution Law: the sale shall be concluded at the request of the applicant or the third party holder whoever has an interest in expediting the sale; the applicant must mention in the notices of sale the price at which he has evaluated the immovable; the auction sale of the immovable must not be awarded at less than this sum plus one half of one tenth.

(2) The successful bidder (purchaser) shall reimburse to the third party holder who has been dispossessed the expenses which he had incurred on the title deed and of the notices, in addition to his (purchaser's) liability on the price at which the auction has been awarded and the costs necessitated by the proceedings of the redemption.

Article 1311. - If within the time limit fixed no application has been made for the sale of the immovable in accordance with the prescribed procedure or where an application has been made but no bid was made for a price which is higher than the price offered by the stakeholder by one tenth of the sum offered by the stakeholder if he had deposited the sum at which he evaluated the immovable in the treasury of the court.

Article 1312. - Where the proceedings of redemption have been concluded either by confirmation of the ownership of the stakeholder or by awarding the auction to another person the rights inscribed on the immovable shall be extinguished definitively even where the ownership of the stakeholder has been revoked for any cause whatsoever.

Article 1313. - (1) Where an application has been made for

the sale of the mortgaged immovable the stakeholder may take part in the auction sale even when the same takes place after the proceedings of the redemption have been taken; if an application has been made for the sale of the immovable while the immovable is still in possession of the stakeholder who has not applied to redeem it he may not offer in the auction (bid for) a price which is less than the sum of the price still owing from him; if the auction sale was awarded to him he shall be deemed to be the owner of the immovable on the strength of his original title deed and the immovable will be freed of every right inscribed on it if the stakeholder has paid the price at which the auction was awarded or has deposited it in the treasury of the court.

(2) If a person other than the stakeholder acquires the immovable through the auction - regardless of whether the stakeholder has taken part in the auction or not - he will hold his right by virtue of the judgment of adjudication from the stakeholder.

Article 1314. - If the price at which the immovable the subject matter of an authentic mortgage has been sold in the auction exceeds the total of the sums due to the inscribed creditors the excess (surplus) will belong to the stakeholder; the creditors mortgagees may claim from the stakeholder their pro rata shares of this surplus if the sale in the auction has been awarded to other than the stakeholder.

Chapter 3 - Lapse (Extinguishment) of the Authentic Mortgage

Article 1315. - (1) The right to an authentic mortgage lapses (is extinguished) by the lapse (extinction) of the debt secured and it will be revived (re-created) if the cause on the strength of which the debt has been extinguished has ceased without prejudice to the rights of

a bona fide person which he would have acquired legally within the period intervening the lapse and the revival of the debt.

(2) The debtor may pay the debt prematurely and demand freeing the mortgage; if the creditor fails to accept payment the debtor may deposit in the department having jurisdiction the sum of the debt together with its accessories and such compensation which may have been stipulated regarding the premature payment of the debt whereupon the mortgage shall be freed.

Article 1316. - (1) If the debt secured by an authentic mortgage has not been paid on the date of maturity the mortgagee may without having to obtain a judgment present the authentic mortgage deed to the department concerned and demand the sale of the mortgaged immovable in accordance with the proceedings laid down in the Execution Law; the proceedings of the auction, sale and eviction (freeing) shall not be delayed even where the mortgager or a third party had filed an objection in the court but it is allowed to compel the mortgagee to provide a security by order of the court.

(2) Where the immovable has been sold by public auction, regardless of whether it is vis-a-vis the mortgager or the third party holder, the rights inscribed on this immovable will lapse (be extinguished) by the deposit of the sale price in the treasury of the court; the sums falling to the creditors who did not claim will be placed in the names of those entitled thereto in one of the well-known firms.

Article 1317. - If the authentic mortgage has been extinguished by a merger of liability in the mortgagee or the owner of the immovable and if afterwards the cause of transfer of the owner's right or the right to the mortgage has ceased with retrospective effect the mortgage will be reinstated to its original state.

Article 1318. - Assignment by the creditor mortgagee of the right to an authentic mortgage exclusive of the debt is valid.

Article 1319. - (1) Where the time limitation prescribed for a debt secured by a mortgage has expired the mortgager may apply for a judgment to release (free) the mortgage.

(2) If the mortgaged immovable has passed to a third party holder he may adduce prescription if the mortgagee has failed without excuse to initiate proceedings of the mortgage against him for a period of 15 years.

Article 1320. - Neither the death of the mortgager nor of the mortgagee will nullify the authentic mortgage.

Title 2 - Possessory Mortgages

Chapter 1 - Constitution of a Possessory Mortgage

Article 1321. - A possessory mortgage is a contract by which the mortgager gives property to be held in possession of a mortgagee or of an ('adl)* against a debt which the mortgagee may collect (claim in whole or in part from such property having precedence over the ordinary creditors and the creditors who come after him in the order of precedence regardless of whoever has possession of said property.

Article 1322. - (1) In order for a possessory mortgage to be completed and become binding on the mortgager the mortgagee must receive (take possession of) the thing mortgaged.

(2) Save agreement otherwise the costs of the contract .

* Article 1705 of Majallat Al Ahkam Al Adliyya defines ('adl) as being a man whose virtues outweigh his vices: thus a man who is in the habit of being in a state and moves in a manner which is prejudicial to honour, such as a dancer, stooge, or persons known to be liars, will not have their evidence admitted.

(deed of the mortgage) will be borne by the mortgager.

Article 1323. - (1) The hand (possession) of the ('adl) is like that of the mortgagee: the mortgage will be completed and be binding if the mortgager and the mortgagee have agreed to deposit the thing mortgaged with a trustee who has accepted and received (took possession of) the thing mortgaged; where at the time of the contract it was agreed that the thing mortgaged be received in possession of the mortgagee it would be valid if thereafter both the mortgager and the mortgagee have agreed to place the thing mortgaged in the hand (possession) of an ('adl).

(2) An ('adl) may give the thing mortgaged neither to the mortgager nor to the mortgagee without the consent of the other so long as the debt is still existing; if he did give it he may have it restituted to him and if it has perished before the restitution the ('adl) will warrant the value thereof.

(3) If the ('adl) dies the thing mortgaged will be placed with the consent of both parties with another ('adl) and in the absence of a consent of an ('adl) the court will place the thing mortgaged in the hand of an ('adl) whom it selects.

Article 1324. - Where the subject matter of a possessory mortgage is an immovable it is necessary that the mortgage be registered in the Land Registration Department in accordance with the legally prescribed rules in order to be completed.

Article 1325. - Any person who mortgages property as security for a debt owing from him or from a third party must be the owner of or the holder of disposal over the thing mortgaged.

Article 1326. - The provisions of Article 1288 relating to an authentic mortgage shall be applied where the mortgagee

is a juristic person.

Article 1327. - (1) The provisions of Article 1289 concerning authentic mortgages shall subject to the following section be applied where a father has constituted a possessory mortgage over his property in favour of his minor child or where the father has taken a possessory mortgage over his child's property in favour of himself and when he constitutes a possessory mortgage over his child's property to secure a debt owing from him or from the minor; and also where any of the guardians has constituted a possessory mortgage over his property in favour of an interdicted person or taken a possessory mortgage over an interdicted person's property in favour of himself.

(2) Where the father has constituted a mortgage over his minor child's property to secure a debt owing from him if the property has perished he shall not be liable except to the extent of the sum of the debt which has been extinguished.

Article 1328. - The object of a possessory mortgage may be everything which can be dealt in and may be sold such as an immovable, movable, and debts; a possessory mortgage may in particular be constituted over amiri lands.

Article 1329. - A jointly owned property may be the object of a possessory mortgage and the provisions of Article 1291 concerning the provisions governing authentic mortgages shall apply in respect thereof.

Article 1330. - A possessory mortgage includes the fruits and accessories of the thing mortgaged in accordance with the provisions of Article 1292 concerning authentic mortgages.

Article 1331. - (1) A possessory mortgage may be constituted to secure the debts which may be secured by an

authentic mortgage; a possessory mortgage may be constituted as security for a trust (amana) in cases (circumstances) where the depositary will be liable.

(2) A thing which is the subject of a possessory mortgage may be in security for several debts if the person (stockholder) who takes delivery thereof has accepted that his possession is for the account of the creditors even where the possessor is one of them.

Article 1332. - (1) Every part of the thing mortgaged is a security for all the debt and every part of the debt is secured by all the things mortgaged.

(2) If the mortgager has paid some of the debt the mortgagee shall mortgagee shall not be required to hand over some of the thing mortgaged but may withhold it until he has received the balance remaining of the debt even if it is insignificant; but where the mortgage was in respect of two things to which a sum of the debt was assigned, if the mortgager has paid the sum owing from him in respect of either of these two things he may take back that thing.

Article 1333. - Sale with a right of redemption is considered to be a possessory mortgage.

Chapter 2 - The Effects of a Possessory Mortgage

Section (i) - As between the contracting parties

(1) Its Effect in regard to the Mortgager

Article 1334. - The mortgager may dispose by sale or otherwise of the thing which is the subject of a possessory mortgage and any disposal made shall not be prejudicial to the right of the mortgagee.

Article 1335. - The mortgager of a possessory mortgage guarantees the safety of the mortgage and may not do

anything which diminishes the value of the thing mortgaged or which prevents the mortgagee from exercising his rights.

Article 1336. - (1) If the thing the subject matter of a possessory mortgage has perished or sustained fortuitously a defect the perishing or defect shall be on the mortgager; the provisions of Article 1297 concerning authentic mortgages shall be applied where the debtor or creditor is given an option where the thing mortgaged has perished fortuitously or through the fault of the mortgager.

(2) Where the thing mortgaged has perished the mortgagee's right is transferred to the property which will substitute it in accordance with the provisions concerning an authentic mortgage laid down in Article 1298.

(2) Its Effects as regards the Mortgagee

Article 1337. - (1) The mortgagee in case of a possessory mortgage may retain possession of the thing mortgaged until the mortgage has been extinguished; if for any reason the mortgager has regained possession of the thing mortgaged the mortgagee may have it restored to him as long as the mortgage deed remains in existence without prejudice to the rights of third parties.

(2) The mortgager of an immovable, in case of a possessory mortgage, may however take it on lease from the mortgagee; the lease if agreed at the time of constitution of the mortgage must be mentioned in that mortgage deed; if it has been agreed thereafter an inscription to that effect must be made in the margin of the registration of the mortgage in the Land Registration Department.

Article 1338. - (1) The mortgagee must in preserving and maintaining the thing the subject matter of a possessory mortgage exercise such care as is exercised by an ordinary person and shall pay the costs needed for its preservation and must pay the taxes and dues accruing in respect thereof

which he may claim from the mortgager; he is responsible for the perishing of part or the entire thing mortgaged unless he proves (establishes) that the perishing was due to a cause beyond his control.

(2) If the thing mortgaged is threatened by perishing or by depreciation of its value the mortgagee must immediately serve notice to that effect on the mortgager otherwise he will be held liable; in case of service of notice the mortgager may regain possession of the thing mortgaged if he provides another security to the mortgagee and if he has failed to do so the mortgagee may apply to the court for sale of the thing mortgaged and place the price thereof as a mortgage in his hand (possession).

Article 1339. - (1) The mortgagee shall manage the thing the subject matter of a possessory mortgage and may not dispose of it by sale or by mortgage; he shall in managing it exercise the care which is exercised by an ordinary (normal) person; he may not change the method of exploitation of the thing mortgaged save with the mortgager's consent.

(2) If he has mismanaged the thing mortgaged or if in managing it he has committed gross negligence the mortgager may apply to have the thing mortgaged placed in the hands (possession) of an ('adl) or may have it restored to him against payment of that which is owing in respect thereof; in the latter case if the debt secured by the mortgage does not have separate interest and if the term thereof has not fallen due (matured) the mortgagee shall only have that which remains of the (sum) of the debt after the deduction of the sum of the legal interest in respect of the period intervening the day of payment and the day of maturity of the debt.

Article 1340. - The creditor mortgagee may not derive any gratuitous advantage from the thing mortgaged; the net revenue and the benefit obtained from the use of the thing

(by the creditor) will be deducted from the sum of the debt secured by the mortgage even if it has not fallen due (matured) provided that the deduction shall be applied first to the value incurred for preservation of the thing, the taxes and costs paid by him, and the compensation which accrued to him, and then to the expenses and interest, and lastly to the principal sum of the debt.

Article 1341. - (1) The possessory mortgagee has the same right as that of the authentic mortgagee in regard to levying execution on the thing mortgaged and then on the properties of the debtor where the provisions of Article 1299 (hereof) shall be applied.

(2) A possessory mortgage is like an authentic mortgage in that it is confined to levying execution against the thing mortgaged, if the mortgager is other than the debtor, and to nullifying every agreement which vests unto the mortgagee a right to appropriate the thing mortgaged if he does not receive the sum of the debt, and to permitting the mortgagee to assign the debt as well as the mortgage which secures this debt to a third party. In all the foregoing cases the provisions of Articles 1300, 1301 and 1302 shall be applied.

**Section (ii) - The effects of a possessory mortgage
vis-a-vis a third party**

(1) The Right of Retention (Withholding)

Article 1342. - The mortgagee may retain (withhold) the thing mortgaged without prejudice to the rights of third parties which have been acquired in accordance with the law; if the thing mortgaged goes out of the mortgagee's hand (possession) without his will (consent) or knowledge he has a right to have it restored to him in accordance with the provisions concerning possession.

(2) The Right of Precedence

Article 1343. - (1) The possessory mortgage vests unto the mortgagee a right to receive the debt out of the price of the thing mortgaged in accordance with his rank of priority and before the ordinary creditors.

(2) The possessory mortgage is not confined to securing the principal sum of the debt but secures also in the same rank the necessary expenses incurred on the thing mortgaged, the compensations for damages resulting from defects in the thing mortgaged, the expenses of the deed which constituted the mortgage as well as the expenses needed for execution (enforcement) of the mortgage and the rate of interest stipulated in the deed and the principle of its running and all the delay interests.

Article 1344. - (1) A possessory mortgage which is constituted over an immovable shall not prejudice the rights in rem which have been acquired over the mortgaged thing prior to the registration of the possessory mortgage.

(2) In order to be effectual against a third party a possessory mortgage which is constituted over a movable thing must have been recorded in a paper with an established date describing adequately the sum secured by the mortgage and the thing mortgaged; this established date will fix the rank of the mortgage.

(3) Right to Legal Action

Article 1345. - The mortgagee may receive (collect) his right out of the thing which is the subject of a possessory mortgage even if the ownership thereof has been transferred (passed) to a third party; the third party may however pay the creditor his right and be subrogated in his right except where the mortgage was offered (given) by other than the debtor as security for the same right.

Chapter 3 - Extinguishment of a Possessory Mortgage

Article 1346. - The right of a possessory mortgage is extinguished by the extinction of the secured debt and it is revived with the debt if the cause which extinguished the debt has ceased without prejudice to such rights of a bona fide person which he had acquired legally within the period separating the extinction and revival of the debt.

Article 1347. - The provisions of Article 1315 shall be observed when purging a possessory mortgage constituted over an immovable and when paying prematurely the debt secured by the mortgage.

Article 1348. - If the debt which is secured by a possessory mortgage is not paid on the date of maturity the mortgagee may demand the sale thereof and receive the debt from the price thereof.

Article 1349. - The possessory mortgage will also lapse (be extinguished) by any of the following causes:

- (a) if the thing mortgaged has been sold to pay off another debt in accordance with the legally prescribed procedure;
- (b) if the right to the mortgage and the ownership are in the hand (possession) of one and the same person; the mortgage is revived if the cause of the merger of liability has ceased with retroactive effect;
- (c) if the mortgagee has abandoned the right to the mortgage even when it is independently of the debt; abandonment may be inferred impliedly where the mortgage has voluntarily abandoned the thing mortgaged or if he has given his approval to

dispose thereof without any reservations;

- (d) if the thing mortgaged has perished.

Article 1350. - (1) Where the possessory mortgage has been extinguished when the thing mortgaged was still in the hand (possession) of the mortgagee the latter must restore it to the mortgager.

(2) If the mortgagee has died without divulging the mortgage and it did not exist in his estate (succession) the value of the mortgage will become a debt payable out of his estate.

Article 1351. - The possessory mortgage shall not become null and void by the death of either the mortgager or of the mortgagee.

Article 1352. - Besides the transference of possession the mortgage of a movable must in order to be effectual against a third party be constituted by a document having an established date (date certaine) setting out adequately the sum secured by the mortgage and the thing mortgaged.

Article 1353. - If an opportunity arises for the sale of the thing mortgaged and if the transaction is profitable the mortgager may apply to the court for leave to sell this thing even before the date of maturity of the debt and the court when granting leave to sell will fix the conditions of the sale and resolve the matter concerning the deposit of the price.

Chapter 4 - Pledging the Debt

Article 1354. - The mortgage of a debt will not be complete until when the mortgagee has possession of the document establishing the debt pledged and it will not be effectual against the debtor except upon notification or to

acceptance by the debtor; the rank of precedence of the mortgage will begin to run from the established date of service of the notification or of the acceptance.

Article 1355. - The mortgage of bills to order and nominal bills will be in accordance with the method laid down for the transfer of these bills in the Commercial Law provided a mention (note) is made that the transfer (negotiation) has been made by way of mortgage: the mortgage will be enforced without need for service of notice.

Article 1355 (bis). - A debt which is neither negotiable nor attachable may not be mortgaged.

Article 1356. - A mortgaged debt may not be extinguished pursuant to an agreement unless the mortgagee has given (expressed) his consent thereto; the same thing applies to any amendment which involves this debt and tends to be prejudicial to the right of the mortgagee.

Article 1357. - (1) The mortgagee may acquire the maturing interests of the secured debt and those which mature after the constitution of the mortgage; he may also acquire all the periodic accruals pertaining to this debt provided he deducts that which he has acquired from the debt secured by the mortgage in accordance with the provisions of Article 1340.

(2) The mortgagee is under an obligation to preserve the debt secured by the mortgage; if he is vested with power to receive anything of this debt without the intervention of the mortgager he shall receive it at the time and the place fixed for receiving the same and shall immediately inform the mortgager accordingly.

Article 1358. - In case of a mortgaged debt the debtor may set against the mortgagee the defences open to him vis-à-vis his principal creditor as well as the defences relating

to the validity of the debt secured by the mortgage in all these cases to the extent allowable to the debtor in the case of transference (a draft) to invoke these defences against the transferee (subrogee creditor).

Article 1359. - (1) If a mortgaged debt matures before the maturity of the debt secured by the mortgage the debtor may not discharge the debt except to the mortgagee and the mortgager jointly where either of them may demand the debtor to deposit the amount paid with an ('adl) and the mortgage rights will be transferred to that which has been paid by the debtor.

(2) Both the mortgager and the mortgagee shall co-operate in investing that which has been paid by the debtor which must be in the most profitable manner to the mortgager and without any harm to the mortgagee.

Article 1360. - If both the mortgaged debt and the debt secured by the mortgage have matured for payment the mortgagee may if he has not received his right receive out of the secured debt that which is due to him or apply to the court for the sale of this debt or for appropriation thereof at its value after having deducted that which is due to him.

Title 3 - Privileged Rights

Chapter 1 - General Provisions

Article 1361. - (1) The privilege is a priority (precedence) of receiving a certain debt in deference to the cause of this debt.

(2) A debt will not be privileged except pursuant to a provision in the law.

Article 1362. - The law shall fix the rank of a privilege; in the absence of an express provision regarding the rank

of a privilege it will rank after every privilege the rank of which has been provided for.

(2) In the absence of a provision (in the law) to the contrary, privileged debts of the same rank shall be paid rateably.

Article 1363. - (1) General privileges extend to all the movable and immovable property of the debtor, but special privileges are limited to a certain specific movable or immovable.

(2) It would be valid if the right to dispose of amiri lands is charged with a privileged right.

Article 1364. - (1) The privileged right may not be adduced in evidence against the possessor in good faith of a movable.

(2) A possessor according to the provisions of this Article is deemed to be the lessor of an immovable as much as regards the movables existing in the leased immovable and the owner of a hotel as much as regards the effects deposited by the transients in his hotel.

Article 1365. - (1) The special privileged rights on an immovable shall be governed by the provisions concerning the authentic mortgage inasmuch as they do not conflict with the nature of the said rights.

(2) The general privileged rights on an immovable shall be governed by the provisions concerning the authentic mortgage inasmuch as they do not conflict with the nature of the said rights.

(2) The general privileged rights even where the object thereof is an immovable shall not however need to be recorded and the right of legal action in respect thereof is not established; there is also no need for registration of the privileged rights over immovables securing sums which are due to the treasury.

Article 1366. - The provisions concerning the perishing of a thing or its sustaining a defect which are applicable to the right of an authentic and possessory mortgage shall apply to a privileged right.

Article 1367. - Save provision otherwise, a privileged right is extinguished in the same way and in accordance with the provisions concerning the extinguishment of authentic and possessory mortgages.

Chapter 2 - Privileged Debts

Article 1368. - Besides the debts which are privileged pursuant to specific provisions the debts set down (provided for) in the following Articles shall be privileged.

Section (i) - General privileges and special privileges over movables

Article 1369. - (1) The costs of legal proceedings incurred in the common interest of all creditors for the preservation, sale and distribution of the property of the debtor have a privilege over the price of such property.

(2) Such costs will be collected before any other debt be it privileged or secured by a mortgage; the costs incurred for the sale and preservation of the property will have precedence over those incurred for the procedure of the distribution.

Article 1370. - (1) Amount due to the (State) Treasury for taxes, duties, and other duties are privileged in accordance with the conditions laid down in the laws and regulations issued in this respect.

(2) Such amounts shall be collected from the price of the property charged with this privilege in whomsoever's hands it may be, after the judicial costs, and before any

other right whether privileged or secured by a mortgage.

Article 1371. - (1) Expenses incurred for the preservation of, and repairs of a necessary kind to a movable are secured by a privilege over the movable as a whole.

(2) Such expenses are payable directly out of the proceeds of the sale of the movable so charged and rank immediately after the costs of legal proceedings and sums due to the (Public) Treasury. As between them said expenses will rank in the inverse order of the dates on which they were incurred.

Article 1372. - (1) The following debts are, to the extent of that which thereof is due in the last six months, secured by a privilege over all the debtor's property whether movable or immovable.

- (a) amounts due to servants, clerks, workmen and every other wage-earner for wages and salaries of whatever kind;
- (b) amounts due for foodstuffs, clothes and medicines supplied to the debtor and his dependents;
- (c) alimony due by the debtor to those to whom he must pay it.

(2) These debts rank immediately after the costs of legal proceedings, amounts due to the (Public) Treasury and expenses for the preservation of, and repairs to the property; as between them such debts are paid rateably.

Article 1373. - (1) Amounts disbursed for seeds, manure and other fertilisers and insecticides, and amounts disbursed for cultivation and harvesting are secured by a privilege over the crop for the production of which they have been spent.

(2) Such amounts will be collected directly from the price of the crop after the costs of legal proceedings, amounts due to the (Public) Treasury, the costs of preservation and repairs and amounts secured by a general privilege; as between them they shall be paid rateably.

(3) Sums due in respect of agricultural implements shall also have a privileged right in the same rank over these implements.

Article 1374. - (1) The rents of constructions and agricultural land for three years or for the term of the lease if less than three years, as well as any other right to the lessor pursuant to the contract of lease, are all secured by a privilege over all attachable movables and agricultural produce existing on the leased property and belonging to the lessee.

(2) The privilege is also enforceable over movables and crops belonging to the sublessee if the lessor has expressly prohibited subletting; if subletting was not prohibited the privilege shall not be enforceable except over amounts which are due to the head lessee from the sublessee at the time when the lessor serves notice on the sublessee not to pay these sums to the head lessee.

(3) If the property charged with the privilege is removed from the leased property in spite of the lessor's objection, or without his knowledge, and no property remained therein which is adequate to secure the privileged amounts, the privilege remains existing over the property so removed subject to the right acquired over said property by a bona fide third party.

(4) The privileged amounts will be collected from the price of the property charged with the privilege after the debts enumerated in the preceding Articles except such debts thereof which are not enforceable against the lessor in his capacity as bona fide holder.

Article 1375. - (1) Amounts due to hotel proprietors by a

traveller for accommodation, food and expenses incurred for his account are secured by a privilege over the effects brought by the traveller to the hotel or its annexes.

(2) The privilege is enforceable over the effects, even if they are not owned by the traveller, if it is not proved that the hotel owner was aware at the time of bringing the effects into the hotel of the third party's right thereon provided such effects are not the subject of an offence or lost.

(3) If the effects charged with a privileged right have been removed from the hotel notwithstanding the owner's objection, or without his knowledge, the privileged right remains in force over the effects which have been removed without prejudice to the right acquired by a third party in good faith over these effects.

(4) The privileged right over these debts has the same rank of precedence as that of a lessor's privilege; if the effects in question be subject to both claims the first in date will have priority (precedence) unless it is not enforceable against the owner by reason of possession which is coupled with good faith.

Article 1376. - (1) The price and accessories which accrue to the vendor of a movable shall have a privileged right over the thing sold and the privileged right remains in force so long as the thing sold retains its identity, without prejudice to the rights acquired by a bona fide third party and subject to the provisions relating to commercial matters.

(2) This privileged right ranks immediately after the aforementioned privileged rights; it will however apply against the lessor and the owner of the hotel if it is established that at the time of placing the thing sold in the property leased or in the hotel they had been aware thereof.

Article 1377. - (1) Where co-owners have partitioned a

jointly owned immovable the right of each one of them in claiming from the other co-owners by reason of the partition and in receiving the share determined for him will be secured by a privileged right over all the parcelled shares which fell to the lot of the other co-owners.

(2) This privileged right has the same rank as that pertaining to the privileged debts due to the vendor; precedence shall be for the claim having a prior date where two claims exist.

Section (ii) - Special privileged rights over immovables

Article 1378. - (1) The price and accessories due to the vendor or assignor of an immovable have a privileged right over the immovable sold or ceded.

(2) The privileged right must be recorded in the Land Registration Department and its rank is fixed by the date of recording.

Article 1379. - (1) Amounts due to contractors and architects who have been entrusted with the erection, reconstruction, repair or maintenance of buildings or other works have a privilege over such works to the extent of the increase resulting from such works to the value of the immovable at the time of the sale.

(2) A formal note must be made showing the works which have been completed and the sums due in respect thereof; the privilege must be recorded in the Land Registration Department on the strength of said note; the rank of this privilege is acquired at the date of the recording.

(3) As regards these works the holder of this privilege shall have precedence over the mortgagee of the land on which these works have been carried out (erected) if covered by the mortgage regardless of whether this mortgage is authentic or possessory.

Article 1380. - (1) Where a jointly owned movable is partitioned among the co-owners, the right of each one of them to claim from the other co-owners by reason of the partition and to receive the share that was determined for him are secured by a privileged right over all the parcelled shares which fell to the lot of the other co-owners.

(2) This privileged right must be recorded in the Land Registration Department and its rank runs from the time of recording.

Article 1381. - (1) As of the date of operation of this Law, the provisions contained in Majallat Al Ahkam Al Adliyya, except Book XIV regarding cases and Book XVI concerning the Judiciary*, shall not be operative unless a provision contained in these two Books is expressly or impliedly inconsistent with the provisions of this Law.

(2) Articles 64 (as amended), 80, 81, 82, 83, 89, 90, 91, 96 and Articles 106 to 112 of the Civil Procedure Law and Articles 13 to 22 of the Magistrate's Courts' Law are hereby repealed.

(3) Law No.17 of 1936 concerning the legal interest, Law No.54 of 1943 concerning Securities and the Method of Adjudging Them, and Articles 1 and 4 (as amended) and 5 and 6 of the Civil Status of Foreigners Law No.78 of 1931 are hereby repealed.

(4) The Land Law, the Law of Disposing of Immovable Property, the Law of Partitioning Immovable Property, the Law of Conveyancing, and the Law of Placing Movable Property to Secure a Debt are hereby repealed.

(5) In general all other legal provisions which are expressly or impliedly in conflict with the provisions hereof are hereby repealed.

* These two Books of Majallat Al Ahkam Al Adliyya have been repealed by the Civil Procedure Law No.83 of 20 May, 1969.

Article 1382. - This Law shall be enforced after the lapse of two years from the date of its promulgation in the Official Gazette.*

Article 1383. - The Minister of Justice shall enforce this Law.

Made at Baghdad on the thirtieth day of Sha'ban, 1370 A.H. and the fourth day of June, 1951 A.D.

Hassan Sami Tatar
THE MINISTER OF JUSTICE
Abdel Ilah
Nuri As Sa'id
THE PRIME MINISTER

* Promulgated in Official Gazette issue no.3015 dated 8 September 1951.