

THE LAWSUIT OF THE TWO ALLOWANCES TEAMS AND THEIR TREATMENTS ACCORDING TO THE MODERN TRENDS OF THE COURTS OF APPEAL IN THEIR DISCRIMINATORY CAPACITY

Dr. Yousif Sami Yousif,

Law Department, Shatt Al-Arab University College, Basrah, Iraq

E-mail: yousifsamiyousif72@gmail.com

Abstract

This article examines the complexities surrounding the legal treatment of property sale contracts in Iraq, particularly focusing on the lawsuit regarding the difference between two property valuations. It highlights key findings, including the critical role of formalities in real estate transactions and the lack of a clear definition of property ownership transfer in the Iraqi Civil Code. The analysis reveals significant amendments to compensation guidelines through Revolutionary Command Council Decree No. 1198, aimed at aligning with economic realities and promoting justice. The study notes discrepancies in court decisions, particularly regarding the need for written contracts, the application of penalty clauses, and the procedural capacity for lawsuits involving deceased sellers. Furthermore, it addresses the limitations imposed by the Iraqi legislator on buyers seeking recovery of property prices and related compensation. The article concludes with recommendations for legislative reforms to standardize judicial practices, revise outdated legal texts, and extend protections to encompass all real estate rights.

Keywords: Lawsuit, Two Allowances Teams, Modern Trends of The Courts of Appeal and Discriminatory Capacity.

Introduction

Due to the importance of real estate ownership and the large number of transactions in it, and there is no doubt that real estate rights were and still are of great importance in the areas of legal relations among the rest of the other rights, since the seller sells his property to the buyer, and the buyer delivers the agreed price and receives the property does not mean that the ownership of that property has been transferred to the buyer, all this led the Iraqi legislator to surround these rights with a set of guarantees and considered them from the public order, so that it is not permissible Agreement on what is contrary to its rules, and also bestowed on it the element of formality so that these actions do not take place and do not have an effect unless they meet the form stipulated by the law, which is registration in the Real Estate Registration Department in accordance with what is stipulated in Articles (90/91, and 508) of the Iraqi Civil Code No. 40 of 1951 and Articles (2 and 3) of the Real Estate Registration Law No. 43 of 1971.

In this regard, the seller may breach his obligation to transfer the ownership of that property to the buyer by refraining from registering it in the Real Estate Registration Department, and since the prevailing picture of real estate prices in Iraq is the rise and that it is rare for a decline and fall in real estate prices, which is a restriction that pushes sellers to this contract, and since the general rule contained in the text of Article 508 of the Civil Code, which showed and obligated the registration of the property in the real estate registration departments, and unlike it, its failure entails the invalidity of the contract And to restore the situation to what it was as this provision is the effect of invalidity based on the provisions of paragraph (2) of Article 138 of the Civil Code No. 40 of 1951 in addition to the compensation provided for in Article (1127) of the Civil Code, may not be sufficient to compensate for the damage caused to the other party is not in breach, and in view of this great injustice that may be caused to one of the contracting parties, the dissolved Revolutionary Command Council Resolution No. 1198 of 1977 and amended Resolution 1426 was issued. For the year 1983 and the aim of the issuance of this legislation is to lift the injustice and achieve justice between the parties, by giving the non-Nakal party the right to request ownership and then register the property in his name according to the conditions contained in the decision, but the practical reality sometimes proved the difficulty of providing these conditions, which prompted the legislator to give this party the right to request compensation, and the importance of this subject we will focus our study on the second aspect, which is the request for compensation in accordance with the provisions of paragraph (a) of item (First) Resolution 1198 of 1977 through a lawsuit called the Suit of Difference of Allowances.

The importance of research:

The seller's denial of the completion of the sale transaction under an external sale undertaking or the so-called (sales contract) raises problems in terms of the buyer's right to return the price paid, the compensation to which the buyer is entitled, the effects that result from the sales contract in the event that the buyer builds on the property, as well as the death of the buyer or seller and other problems, the feasibility of the legislation in force in addressing the effects resulting from it and the extent of its ability to achieve a balance in the rights and obligations between the parties to the undertaking.

Research Methodology:

Since the subject of the research imposes on us a scientific methodology, in order to clarify its mysteries, and highlight its idea, we will address the subject of the lawsuit of the difference of allowances and their treatments according to the modern trends of the courts of appeal in their discriminatory capacity and the federal courts of cassation by following the analytical and descriptive approach, and research in the laws in force in Iraq and the decisions of the courts of appeal in their discriminatory capacity and the federal courts of cassation.

Literature review:

What is the claim for the difference of the two allowances (compensation)

The issue of owning real estate or real estate ownership is one of the most important pillars of the economic system in various societies, but it is considered in many countries one of the

most important elements of the national income of countries, hence the Iraqi legislator took care in dealing with this issue, deciding conditions and ways to protect it and protect its ownership, and to protect others who may be willing to deal with it, and has no knowledge of the actions that may respond to it, so we find that the legislator in most countries decided the need to register any behavior It responds to real estate, but despite these precautions, we find that the practical reality imposed a lot of problems, the most important of which is the nekol of one of the contractors in completing these formalities.

It is no secret to everyone that under the laws of ancient societies, the means of coercion were very harsh against the debtor, as the creditor's authority was absolute over the debtor to obtain his right (individual retaliation), and the creditor could direct his authority to the debtor's body as one of the means of general security for the creditor ⁽¹⁾.

At present, the situation is different from what prevailed in ancient societies, the state prevents people from demanding their rights themselves, as it is the one that does so with its sovereignty over its subjects, the public authority guarantees the creditor the fulfillment of his right from the debtor, and the law in modern societies determines the rights and provides them with legal protection and judicial protection in the event of an assault on them, and the legislator does not only provide protection, but also ensures the development of the necessary means that enable the creditor to require his right, through means One² of these means is to claim his right through the judiciary, and the request is not accepted by the judiciary unless it is based on a right established by law.

The obligation to transfer ownership or arrange the right in rem in this type of obligation, the debtor shall not be considered to have fulfilled his obligation and moved away from the penalty imposed by the legislator, unless he performs the acts that lead to the transfer of ownership or the arrangement of this right (right in rem), and these actions to be implemented vary according to the nature of the thing on which the right is focused, the thing may be a specific movable in particular or a specific movable in kind, and the thing may be real estate. Each of these things has a certain way. For the transfer of his ownership, or the transfer of any right in rem over him, and that method determines the acts that the debtor must perform, otherwise he will be subject to the penalty imposed by law, which is different, including the penalty of compensation³.

For the foregoing, we divide this section into two requirements, the first to discuss the definition of the claim of difference allowances and the second requirement to discuss the conditions of the lawsuit difference allowances.

¹- **Hashem Al-Hafez and Adam Waheeb Al-Nadawi**, History of Law, Al-Atak Company for Book Industry, Lebanon, 2018, p. 35. **Mohamed El-Sayed Omran**, General Foundations of Law, Introduction to Law Theory of Commitment, First Edition, Alexandria Press, Egypt, 1999-1998, p. 137.

- **Thamer Jassim Mohamed Hadid**, Means of Forced Execution in Kind: A Comparative Study, PhD Thesis, Faculty ² of Law, Cairo University , 2014, pp. 1-2.

³ - Dr. **Yassin Muhammad Al-Jubouri**, Al-Mabsoot fi Sharh Al-Qanun Al-Civil, Part Two, Effects of Personal Rights (Provisions of Obligation), Volume One, First Edition, Dar Al-Thaqafa for Publishing and Distribution, 2011, p. 258.

Definition of the claim of the difference of the two allowances

The civil lawsuit in general consists of the facts of the case as well as the legal elements and the court through these facts and the defenses raised in the face of the evidence presented to prove the validity of these facts.

The work of the judiciary is to understand and apply these facts through procedural law after being provided by positive law and its role is limited to removing the generality of the law in the face of the total factual elements put forward for the dispute before the judiciary, which can be considered a specific or special case, and it is based on this that the litigants have the right to submit their requests and attribute them to the set of facts and clarify them to the court^{0,4}

If the general principle in contracts stipulates that the will of the parties determines the future of the contractual ties that unite them, which is embodied by the Iraqi, Egyptian and French legislators in the rule of "pacta sunt servanda", and that this principle has become in civil laws a fixed and stable principle with a fixed and accurate concept, which is called the binding force of the contract - it is the basis for the binding of the contract - which is the general principle or general rule in the field of contract theory and one of the consequences of the principle of the authority of the will, and it indicates that the origin of the contract that it binds its contractors with everything that comes in it, it guarantees a force that requires both parties to submit and acquiesce to it in everything it contains, that is, it includes binding force It⁵ follows that the contract is for its parties and within the limits of regulating the relations governed by the law, neither of them can be independent by revoking it or amending it, unless the agreement or the law allows him to do so⁶.

Judicial protection is the best way to protect the right, the debtor may appeal and insist on the blood of payment, hence the need for means and procedures that enable the creditor when the debtor refrains from implementing the purpose of forcing the debtor to pay, which is what is called " Forced execution", but it is not achieved in all the assumptions and cases, and therefore the creditor (and here is the buyer) only has to resort to the request for compensation to achieve⁷ protection for his rights, and the judicial ruling here aims to put the creditor (buyer) In the same situation as it would be if the debtor had performed its obligation arising from the contract in the sense that the expected interests were intended to cause the creditor to obtain the expected interest from the contract⁸.

⁴ - **Dr. Mohamed Mahmoud Ibrahim**, The General Theory of Legal Adaptation of the Lawsuit, Dar Al-Fikr Al-Arabi, Cairo, 1982, p. 220.

⁵Article 146 stipulates: "1. If the contract is executed, it is necessary and no contracting party may withdraw from it or amend it except by virtue of a provision in the law or by mutual consent." Article 147 of the Egyptian Civil Code stipulates: "1. The contract is pacta sunt servanda, and it may not be revoked or amended except by agreement of the parties or for the reasons prescribed by law." This principle is enshrined in the French Civil Code in Article 1193, which states: "Contracts may not be amended or revoked except with the mutual consent of the parties thereto, or for reasons determined by law." Dr. **Mohamed Hassan Qassem**, Civil Law, Obligations, Sources, Contract, Volume One, Definition of Contract and its Divisions - Contract Formation, Consent - Place - Cause and Invalidity, A Comparative Judicial Jurisprudence Study in the Light of Modern Legislative and Judicial Directives and the New French Law (2016), New University House, Alexandria, 2017, p. 80. For more information, see **Abdel Fattah Abdel Baqi**, The Theory of Contract and Unilateral Will (An In-Depth Study Compared to Islamic Jurisprudence), Dar Al-Kitab Al-Hadith, Kuwait, 1984, p. 538

⁶ - **Dr. Munther Al-Fadl**, The General Theory of Obligations in Civil Law, Part 1, Sources of Obligation, 1st Edition, 1991 AD, p. 40.

- ⁷**Laila Abdullah Al-Haj Saeed**, Al-Maqasa, A comparative study between Islamic law and positive law in Egypt and Iraq, without publishing authority or date, p. 26.

⁸ - **D. Nabil Ibrahim Saad**, The General Theory of Commitment, Provisions of Commitment, New University House, Beirut, 2009, p. 27.

Due to people's need for transactions and their diversity, it has resulted in multiple stages and destinations for submitting them, especially the procedures for transferring ownership of real estate. As the procedures for registering the property in the name of the buyer require a lot of time, effort and money, there is no way for those who want to buy a property except to conclude an external sale contract with the owner of the property, which is called in Iraq (sales contract), to get rid of these procedures or postpone these procedures for a period until then the transfer of ownership of the property is completed, but this often raises The contract is a form, especially if the seller renounces his undertaking to register the sale of the property in the Real Estate Registration Department, the buyer has no choice but to resort to the judiciary to claim his right ⁽⁹⁾.

Referring to the provisions of the Civil Code, we find that there is a consensus to give the status of invalidity to all these real estate transactions unless they meet the element of formality in them, represented by registration in the competent real estate registration department, as Article (508) Iraqi civil explicitly stipulated the invalidity of the legal disposition of the property and the non-convening of the sale when it is not registered with the competent real estate registration department, as well as articles (90, 137 and 1071) of the same law, which required formality and arranged its invalidity in the event of its default, as well as The case is with Article (247) thereof, which refers to the necessity of registering the consensual division of real estate with the competent real estate registration departments, 10as well as Article (1127) of the Civil Code, which dealt with the problem of undertaking to sell, and considered the contract of sale an indefinite contract, the breach of which had one legal effect, namely the obligation to compensate without the legislator specifying the amount of such compensation or the method of calculating it.

It is noticeable on the provisions of the Iraqi Civil Code that they did not give a specific definition of the pledge to transfer the ownership of the property or the right in kind of real estate, but referred to texts related to the organization of this undertaking, and in the face of this legislative deficiency in addressing the problem of Al-Nakul, the Revolutionary Command Council issued a decision No. 1198 of 1977, which was amended, which gave the option to the buyer to choose either the ownership lawsuit according to item (first / b) of it, where the buyer can request the court to issue its decision to own the property, although The sale was not registered in the Real Estate Registration Department, and without the need for the presence of the seller to this department, but the buyer takes the court's decision to it and the property is transferred in his name. Or that the buyer chooses to request compensation through a lawsuit called the lawsuit of the difference of the two allowances in accordance with paragraph (first / a) thereof, and the decision has determined the amount of compensation that is awarded, which must not be less than the difference between the value

⁹ Dr. Salah al-Din al-Nahi, Legitimate Abstention from Fulfillment, Publisher, Fouad I University, 1954, p. 419.

¹⁰ - See the text of Articles 90, 137, 1071 and 247 of the Iraqi civilian.

of the property mentioned in the pledge and its value at the time of the contract, and the buyer has the right to claim any other compensation for any damage^{0.11}

Conditions for filing a suit for the difference of the two allowances

The lawsuit is a method or means regulated by law through which a person resorts to the judiciary in order to obtain a determination of a right or protect it, and therefore the meaning of the lawsuit differs from litigation, on the basis that litigation is a public right attached to the personality guaranteed by the system to all persons without discrimination between them, and therefore it may not be waived and does not end in non-use. Any lawsuit requires procedures and means the mechanisms through which the desired goal can be reached from In order to claim or preserve a right, and this general meaning, but according to the legal concept, procedures are defined as a set of rules that must be subject to to reach a result outside any dispute, procedures as a legal means contribute to distinguishing between legitimate and illegitimate cases with the intervention of the judicial authorities (12).

All constitutions that included a reference to the rights enjoyed by individuals in societies included among these rights the right to resort to the judiciary, and the latter can only be done by following a set of procedures and the availability of a number of formal and objective conditions alike, and before these conditions the plaintiff must rely on a right that has been violated by the defendant, and for the purpose of protecting or restoring this infringed right, a lawsuit must be filed by The plaintiff to achieve this, so we find that legislation has set conditions for accepting the lawsuit, and the Iraqi legislator, like other legislation, has set a set of conditions for that, and without these conditions we cannot be in front of a lawsuit and one of the conditions imposed by the Iraqi legislator to accept a lawsuit is the difference of the two allowances that: -

First: The existence of an undertaking to transfer the ownership of a property (external sale contract issued by the owner):

The buyer must submit a valid written undertaking signed by the seller that includes the specifications of the property and the price and that there is no defect of forgery or manipulation, as well as if the buyer has withdrawn the real estate registration form only, which is called (opening the statement) without obtaining a pledge paper, some courts did not accept to hear the case based on this form even if it includes the required data because it is not considered an undertaking, while other courts accepted it (12)

¹¹ - The jurists differed in the basis of this compensation, some of them said that it is based on tort, and another opinion went to the fact that its basis is contractual liability, and the rulings of the judiciary have differed in that as well, and there is no practical impact on these differences.

¹² - The decision of the Qadisiyah Court of Appeal in its discriminatory capacity No. 30/T/2019 on 30/1/2019, in which it is serious (it is established that there is a real estate registration statement Form No. 59 real estate registration that was withdrawn in the Directorate of Real Estate Registration, and the signatures of the seller and buyer parties must be searched and verified on that bank... Thus, the real estate registration statement containing the agreement of the parties to sell and determine the allowance and the property number and containing the signature of the seller and the buyer are considered as gifts for the purposes of Resolution 1198 of 1977.) Unpublished decision . In contrast to this decision , the Baghdad Rusafa Court of Appeal went in its discriminatory capacity: (The judgment of this court settled that the real estate registration statement does not take the place of undertaking to transfer the ownership of the property, and when the court went to him in taking the statement on the pretext of the existence of the moral impediment is incorrect because Resolution 1198 came

Although part of the jurisprudence does not require that these undertakings be written, as writing is not considered a pillar of the undertaking, and their evidence is that the undertaking stipulated in paragraphs (a) and (b) of item I of resolution 1198 has been received absolutely and did not include a specific form, and this launch means that the pledge may be made in writing or orally, because the absolute is being launched unless the evidence of restriction is based on a text in terms of Article (160) of the Iraqi Civil Code ⁽¹³⁾

In this regard, to apply this condition to the lawsuit of the difference of the two allowances, we find that it can be analogous to the fact that some courts accept the ownership lawsuit, which is the availability of the condition of the existence of the pledge in which it is essential to accept the lawsuit, despite the absence of a paper undertaking, if there is a moral impediment prevented from taking the paper that includes the pledge, for example, that the brother sells his property to his sister and does not require him to sign a written pledge and then renounces the registration, but the Court of Appeal of Babylon as Discriminatory has gone further, as it has decided that the ownership claim does not require the buyer to submit a written undertaking because Resolution 1198 of 1977 did not require it, so the undertaking can be oral and the buyer must prove it before the court under the rules of the law of evidence¹⁴.

The undertaking to transfer ownership must also be issued by the owner of the property at the time of concluding the undertaking, and if this matter is under consideration, the rulings of the judiciary differed in this matter, if the seller does not own the property at the time of the issuance of the pledge from him to the buyer, meaning that the property was not registered in his name at this time, and then the ownership of the property was officially transferred to him after that and he renounced the registration, we see that the Federal Court of Cassation, in the context of a lawsuit that was challenged before it, ruled The lawsuit filed by the buyer is subject to the provisions of Resolution 1198 of 1977 and not to the general rules and justified this trend that the seller as long as he is the owner of the property at the time of the warning by the buyer, it can be relied upon here to the provisions of Resolution 1198 ⁽¹⁵⁾.

as an exception to the general rules in the transfer of real estate ownership and may not be expanded, so the year 1977 was decided to amend, so it was decided to overturn the decision.) T Decision number: 951/ Human Rights Defender 1999, dated 27/7/1999, **Hadi Aziz Ali**, Judicial Applications in the Judiciary of the Baghdad Court of Appeal in its Discriminatory Capacity, Undertaking to Transfer Ownership of Real Estate, Part Two, Judicial Applications of the Provisions of the Revolutionary Command Council Resolution (Dissolved) No. 1198 of 1977, as amended, Al-Zaman Press, Baghdad, 2001. P17. Qom) No. 1198 of 1977, as amended, Al-Zaman Press, Baghdad, 2001. P17.

¹³ - Article (160) of the Civil Code stipulates: "The absolute shall be released if the evidence of restriction does not provide a text or indication."

¹⁴ - Decision of the Babylon Court of Appeal in its discriminatory capacity No. 219/human rights/2020 on 21/12/2020, in which it was stated that the decision of the dissolved Revolutionary Command Council No. 1198 of 1977, as amended, did not stipulate that the pledge to transfer ownership must be written (written) ... Rather, it is sufficient to implement the provisions of the aforementioned resolution if there is an undertaking to transfer ownership, whether written or oral.). Unpublished decision

¹⁵ - The decision of the Federal Court of Cassation No. 760 / Appellate Body Real Estate / 2020 on 12/2/2020, which stated (that the sale was made under the external contract dated 3/8/2005, but the lesson is the date of the rejection, as the plaintiff has issued the warning numbered ... The plaintiff is required to appear for the purpose of transferring ownership and therefore the defendant is the owner of the property subject of the lawsuit on the above date... Therefore, the lawsuit is subject to the provisions of Resolution 1198 of 1977, as amended, and the judgment issued in it is not subject to appeal, but only by cassation). It should be noted that the Federal Court of Cassation took the same view as the courts of appeal in its discriminatory capacity that the contractor should be an owner, but it retracted its opinion in the above decision. See **Resolution No. 1337 / Civil Authority / 2006 Civil Cassation Authority / Baghdad / Rusafa**, which included (Upon

However, in the opposite direction, we find that the courts of appeal, in their discriminatory capacity, go in a direction contrary to what the Federal Court of Cassation went to, where the courts of appeal require that the contractor at the time of concluding the undertaking be the owner of the property in order for the case to be subject to the provisions of Resolution 1198⁽¹⁶⁾.

Second: - The obligation to pay the price

To award compensation in accordance with the provisions of Resolution 1198 of 1977, as amended, the value of the property must be specified in the pledge, but the buyer must have paid the full price or deposited it in trust to the seller, because the price is a pillar in the undertaking that was replaced by the conclusion of the sales contract, and this condition was not mentioned in Resolution 1198 of 1977, but the courts followed it under the pretext that if the buyer does not pay the price, the seller may not complete the registration procedures based on (the defense of non-performance), He is not considered to be a renouncer of the undertaking in this case because he asserts the right granted to him by law ⁽¹⁷⁾.

Also, the failure to determine a price for the property makes it impossible for the court to estimate the compensation that must be awarded, which is the difference between the value of the property at the time of the pledge and its value at the time of the rejection. If the price is found, but the buyer has not paid it or paid part of it, the court may require the buyer to complete the price by depositing the remaining price with the seller in order to continue the proceedings ⁽¹⁸⁾.

scrutiny and deliberation, it was found that the discriminatory appeal was submitted within the legal period, so it decided to accept it in form and upon consideration of the discriminatory judgment, it was found that it was correct and in accordance with the law for the reasons and merits on which it was based, as it was proven to the Court of First Instance that the conditions of Resolution 1198 of 1977 were not met in the lawsuit because one of the conditions of the decision is that the selling party in the undertaking (the contractor) is the owner of the property sold under the undertaking, On the date of the conclusion of the undertaking and registered in his name in the competent real estate registration department, it has been proven from the court investigations and the letter of the Real Estate Registration Department in Rusafa I No. 8834 dated 19/7/2006 that the ownership of the half belonging to (p) the inheritance of the selling party (the contractor) (q) (in the property subject of the lawsuit) is not fixed and its proof requires a transaction to register it because the real estate registry in which this half of the lost Turkish records is registered. Since one of the conditions of Resolution 1198 of 1977 is that the contractor is the owner of the property sold on the date of the pledge, which was not achieved in the lawsuit, it must be ruled to dismiss the lawsuit, which is what was ruled by the distinguished judgment, so it decided to ratify it, dismiss the discriminatory appeals and charge the distinguished fee for discrimination, and the decision was issued by agreement on 13 Rajab / 1427 AH corresponding to 9/8/2006 AD.

¹⁶- The decision of the Babylon Court of Appeal in its discriminatory capacity No. 149 / Human Rights / 2018 on 11/10/2018, which included (based on that, the defendant's shares have left his ownership, so one of the conditions for the pledge to transfer ownership stipulated in Resolution 1198 of 1977, as amended, which is the verification of the seller's ownership at the time of sale, may not then request the ownership of those shares.)

¹⁷ - The plea of non-performance is a means of compelling the contractor to fulfil his obligation arising in a contract binding on both sides. Without resorting to the dissolution of the contractual bond, i.e. without resorting to the request for rescission, the payment of non-performance is a response made by one of the contracting parties to the claim of the other contracting party to perform his obligations if the claimant for performance himself is negligent or refrains from performing his obligation, and if the seller requests the buyer to pay the price and the seller does not deliver the sale to the buyer, the buyer may pay the seller's claim for the price.

¹⁸ - **Dr. Ali Ghassan Ahmed**, Compensation for breach of the pledge to transfer ownership of a property, research published in the Journal of the College of Law - Al-Nahrain University, Volume 14, Issue 1, Rabi' Al-Awwal 1433 AH / December 2012, p. 193.

Third: - the limitation period Consideration

The lawsuit for the difference of the two allowances must be filed before the lapse of the period of time preventing the hearing of the lawsuit on the date of the undertaking according to article 429 of the Iraqi civilian, which is 15 years. The statute of limitations here is not raised by the court on its own but requires the litigant to invoke this plea before entering into the merits of the lawsuit in application of the provisions of article 443/1 of the Civil Code, and this condition is not explicitly mentioned in Resolution 1198, ⁽¹⁹⁾ but the general rules require it.

Fourth: - Warning

To award compensation in accordance with the provisions of Resolution 1198 of 1977, as amended, the buyer must send a warning to the seller of the need to attend the Real Estate Registration Department for the purpose of registering the sale within a certain period specified by the buyer in the warning, and the warning shall be through the notary public, and the buyer must prove that the seller has refrained from complying and attending on the date specified in the warning in order to prove his renunciation of the undertaking, and the buyer can prove this through the (citation) issued by the Real Estate Registration Department, which It supports the presence of the buyer and the non-appearance of the seller in front of it on the specified date.

Addressed issue with seller reluctance to register

The contract of sale of real estate in Iraqi law, as we mentioned, is formal, it is not held except by registration in the Real Estate Registration Department, and the law recognizes that the ownership of the property is transferred from the seller to the buyer as soon as the sale is held valid and effective, that is, once the registration procedures are completed. However, this matter is not always going this way, as the seller may fail to complete the registration procedures in the Real Estate Registration Department, and here the problem begins and these disputes that occur between the parties to the contract of sale of the property as a result of the refusal of one or both parties to the contract to transfer the ownership of the property to the name of the other party, and the inability of the party against whom the contract took place to force the relying party to implement his obligation in kind forcibly, as the Iraqi legislator does not give to the party that happened The money is small compared to the real price of the property at the time of the property due to the high prices of real estate in the property mostly.

Based on the above, we divide this section into two requirements, the first discusses addressing the problem of the seller's denial of registration in the Iraqi Civil Code, and the second requirement is devoted to addressing the problem of the seller's denial of real estate registration in accordance with the provisions of Resolution 1198 of 1977, as amended.

¹⁹- Article 429 of the Iraqi Civil Code stipulates: (A lawsuit for obligation, whatever its cause, shall not be heard against the vice after being left without a legitimate excuse for fifteen years, taking into account the provisions contained in it. Article 443/1 stipulates an Iraqi civilian: (1) It is not permissible to waive the plea of not hearing the lawsuit because of the passage of time before the right to such payment is established, nor may it be agreed that the lawsuit may not be heard after a period different from the period specified by law.)

Addressing the problem of the real estate seller's refusal to register in the civil law

The intended purpose of the sale is to transfer ownership of the thing or another financial right from the seller to the buyer, and to this end the contract of sale entails obligations for each party, which together are aimed at achieving the legal process intended by the ⁽²⁰⁾ contract.

The Iraqi Civil Code stipulates in Article (508) of the Iraqi Civil Code that the contract for the sale of real estate is one of the formal contracts in which the conclusion of the contract requires the fulfillment of the legal formality, as the contract focused on the sale of real estate explains an exception made by the Iraqi legislator on the principle of consent and made the consent of the parties insufficient to conclude the contract, but the form determined by the law must be fulfilled and not The act shall be interpreted as invalid and is registration with the Real Estate Registration Department ⁽²¹⁾.

The Iraqi Civil Code, by acknowledging the invalidity of the sale outside the Land Registration Department, but acknowledges the existence of a binding undertaking, which is an indefinite contract, and therefore if the debtor breaches his obligation, he creates an obligation to compensate ⁽²²⁾.

For the foregoing, we find that the matter between the contracting parties may not be in the form of a final contract for the transfer of a real estate right, but the agreement between the two parties to the contract may be limited to one of them undertaking to transfer a real estate right to the other party, and this is called "undertaking to transfer the real estate right". It should be noted that the seller's failure to register does not preclude the creation of the obligation to transfer ownership or right in rem, since this obligation arises from the contract, and registration only performs the obligation and does not create it ⁽²³⁾.

In application of the above, we find that the sale of real estate in Iraq is currently taking place and as usual under a pre-prepared and printed customary paper entitled (sales contract), although this title has no legal basis because of the confusion between the contracting contract and the contract of sale and undertaking, each of which differs from the other ⁽²⁴⁾.

By referring to the text of article 1127 civil, we find that this article dealt with the problem of the seller's denial of registering the property in the name of the buyer, although this treatment is marred by many defects, as we find that it gave the buyer the right to claim

²⁰ - By analyzing the sales contract, we find that it is considered a sale for the seller and a purchase for the buyer. This dual structure was taken into account by the Romans, who called the contract "emptio-venditio", because in Roman law, the predominant role in formalities and termination belonged to the buyer and not to the seller. For more see Dr. Mohsen Abdel Hamid Ibrahim Al-Bayh, Sale Contract, Dar Al-Nahda Al-Arabiya, 2008, p. 4.

²¹ - **Abdul Majeed Al-Hakim, Abdul Baqi Al-Bakri, Muhammad Taha Al-Bashir**, Sources of Commitment, Part One, 2007, p. 224. Article 508 of the Iraqi Civil Code stipulates that the sale of real estate shall not take place unless it is registered in the competent department and fulfills the form stipulated by the law. The first paragraph of Article (90) of the Iraqi Civil Code stipulates that: ((If the law imposes a certain form of contract, it shall not be concluded unless this form is fulfilled, unless there is a provision to the contrary)). Article 247 thereof stipulates that "the obligation to transfer ownership or any other right in rem shall transfer this right on its own initiative if the object of the obligation is a specific thing owned by the obligor, without prejudice to the rules relating to registration." Article (1126/2) of the same law also stipulates ((The contract transferring the ownership of real estate shall not be concluded unless the legally prescribed method is taken into account)). Article (3/3) of the Real Estate Registration Law No. 43 of 1971, as amended, also stipulates that ((real estate disposal shall not be held except by registration in the Real Estate Registration Department" and the above texts confirm that registration in Iraqi law is considered one of the pillars of the real estate sale contract).

Article ²²(137/3) stipulates an Iraqi civilian: "3. It shall also be null and void if some of its descriptions are violated, if the contract is unknown in obscene ignorance or the contract does not meet the form imposed by law."

²³ - **Dr. Qadri Abdel Fattah Al-Shahawi**, Natural Commitment. Civil. What it is. Its controls. Its limitations. Its effects. Its results. In the Egyptian Arab Foreign Legislation, Dar Al-Nahda Al-Arabiya, Cairo, without publication date, p. 31.

²⁴ Article 864 of the Civil Code defines a contracting contract as a : (a contract in which one of the parties undertakes to manufacture something or perform work in return for a fee pledged by the other party). The Iraqi Civil Code also defined in Article 506 the contract of sale as ((exchanging money for money)).

compensation, whether the compensation is stipulated in the pledge or not, and it is noted on this article that it did not refer to the issue of forced specific execution, nor did it indicate how compensation is calculated (25).

Compensation is a monetary amount or any other satisfaction of the type of injury equivalent to the benefit that the creditor would have received had the performance of the obligation not been breached. Compensation as defined by the Code of Judicial Judgments in Article (416) as: "giving such a thing if it is homosexual and its value if it is valuable" and jurists point out that resorting to compensation can occur in several cases, the first of which is that the specific performance of the obligation is possible, but it is burdensome for the debtor, and at the same time the failure to rule for specific performance does not cause the creditor serious damage, while the second is that the specific performance is not possible, whether the inability is due to the impossibility of specific performance as a result of For the fault of the debtor, or is it due to the debtor's insistence on not performing his obligation, and his personal intervention was necessary for its conduct. Third, the specific performance of the obligation is possible and not cumbersome, but the parties have agreed to resort to compensation instead of specific performance. This does not preclude compensation from being anything other than money, such as publication in newspapers or magazines, or warning of the plaintiff's right to the award (26).

Whatever the cases of this compensation, it is divided into two types, the first is compensation for non-performance, and the second is compensation for delay in implementation, and compensation for material damage includes two elements, namely the loss suffered by the creditor and the loss of gain, and this is confirmed by Article (2/169 civil), which stipulates that: Compensation shall be for every obligation arising from the contract, whether it is an obligation to transfer ownership, benefit or any other right in rem or an obligation to work or by refraining from acting, including the loss and loss of profit suffered by the creditor due to loss of the right or due to delay in its performance, provided that this is a natural consequence of the debtor's failure to perform the obligation or his delay in performing it."

The Iraqi judiciary has established that the existence of damage is an essential condition for the realization of liability, whether such liability is contractual or tort, which, by providing the element of damage, obliges the debtor to compensate for this damage. The Iraqi legislator has clearly stated his intention when dealing with the issue of contractual compensation, as it stipulates in paragraph (2) of Article (170) of the Civil Code No. (40) of (1951), as amended (27) The requirement of contractual liability damage, since non-performance or delay in the

²⁵ Article 1127 of the Iraqi Civil Code stipulates: "The undertaking to transfer ownership of real estate shall be limited to the obligation to compensate if one of the parties breaches his undertaking, whether or not compensation is stipulated in the undertaking."

²⁶ Compensation is a language, the compensation, which is the allowance, says his compensation is compensation if you gave him instead of what went from him, and compensate him and retire, take the compensation. Conventionally, compensation is an amount of money equal to the benefit that the creditor would have received if the debtor had performed his obligation in the manner required by the principle of good faith and mutual trust between people. See **Dr. Mahmoud Abdel Rahman Abdel Moneim**, Dictionary of Terms and Jurisprudence Words, Dar Al-Fadila, Cairo, Egypt, p. 478. And see **Dr. Hassan Ali Al-Dhanoun**, Provisions of Commitment, Al-Mustansiriya University Press, Baghdad, 1976, p. 348.

²⁷ Article 170, paragraph 2, of the Civil Code No. 40 of 1951, as amended, stipulates that: "Contractual compensation shall not be due if the debtor proves that the creditor has not suffered damage..."

obligation does not entitle the creditor to compensation unless it is proved that it has suffered damage as a result (28).

As for how to estimate compensation, the Iraqi Civil Code went that compensation is represented by the loss and loss of profit suffered by the creditor, as we mentioned as a result of the debtor's failure to perform his obligation or delay in the implementation of this obligation, resulting in the loss of a right or delay in its fulfillment, or the loss of a certain benefit, or the arrangement of new obligations on the shoulders of the affected creditor, and the Iraqi legislator has stipulated that the judge is the one who assesses the compensation, and it is then called judicial compensation, and most often the judge estimates Compensation in money, so the compensation is then in cash, but the compensation is not always cash, it may be in kind and non-cash, the judge may rule to restore the situation to the state it was before, such as ordering the demolition of the wall built by the neighbor arbitrarily in the use of his right to build his property, or the judge may rule to perform a specific order, such as publishing the judgment on the claim of slander and insult, which includes the conviction of the defendant, so the judgment is necessary to publish in newspapers as compensation, and the judgment may be a refund The same in lesbians, such as when the usurper is sentenced to return the homosexual thing that he usurped to the usurper him, and all these examples are only the application of one type of compensation is judicial compensation, but the reality imposes other types of compensation, the parties may estimate the compensation due on the assumption of a breach of the implementation of the obligation, which is called contractual compensation or penalty clause, and the law may sometimes determine the amount of compensation due and in predetermined proportions, and it is called Legal compensation or interest (29).

For the foregoing, the court, when presenting the dispute to it, verifies the availability of breach from one of the parties to the undertaking, whether the seller or the buyer, the court has no choice but to refer to the general rules in the civil law, and the application of the text of paragraph (2) of Article (169) of the aforementioned Civil Code, and from the text of the article it is clear to us that the buyer has two lawsuits that he can file, the first of which is a claim for compensation for the damages suffered as a result of that breach, The second is a restitution action, in which he claims the recovery of the price paid to the buyer. However, in many cases, the contractor and the institute may agree to him in the same undertaking on the amount of compensation to be paid in the event that one of them breaches his undertaking, and the provisions of the Iraqi judiciary have differed on whether or not to rule on this amount, as some courts ruled on it and others went to the inadmissibility of ruling on the penalty clause because the contract is originally invalid and therefore invalidates the condition according to this invalidity⁽³⁰⁾.

²⁸ -D. **Abbas Ali Muhammad Al-Husseini**, The Civil Responsibility of the Journalist, A Comparative Study, PhD Thesis, Submitted to the College of Law, University of Baghdad, 2003, p. 100.

²⁹ - See Article 170 and 169 Iraqi civilian , and see **Dr. Suleiman Markos**, Origins of Obligations, Part I, Sources of Obligation, Legal Library, Egyptian Universities Publishing House Press, Cairo, Egypt, 1960, p. 588.

³⁰ - See, in this regard, the decision issued by the Iraqi Court of Cassation No. 469/Third Civil/1971 on 28/7/1977, published in the Judicial Bulletin, No. III, second year 1973, p. 24. It states: "If the seller of the property outside the title deed department undertakes to transfer the ownership of his property to the buyer and specifies in the contract the amount of compensation that he is obligated to pay in the event that he is responsible, he shall be obliged to pay the compensation specified in the contract in the event that it is proven that he violated his undertaking."

If the contractor and the undertaker do not agree on the amount of compensation, the court, through the dispute before it, considers according to the case in which the non-breach party will be if the undertaking is actually implemented, thus compensating for the loss and loss of gain, and here the legislative wisdom stipulated in paragraph (2) of Article (169) of the Iraqi Civil Code is manifested. In order to achieve this, the court may elect experts specialized in estimating this compensation, and here the judge It is worth noting that the assessment of the experts affected by the court is not binding in all cases, and this method of compensation is not free from inaccuracy in its calculation, and that the decision of the judgment issued by the Court of First Instance is subject to appeal if the value of the lawsuit exceeds one thousand dinars, and the appeal against it is cassation before the Federal Court of Cassation, and the judgment is subject to appeal by correcting the discriminatory decision ⁽³¹⁾.

Addressing the problem of the real estate seller's denial of registration in accordance with the amended Revolutionary Command Council Resolution No. 1198 of 1977 The buyer cannot force the seller to transfer the ownership of the property to him by forcing him to go with him to the Real Estate Registration Department to conduct registration, and in Iraq, in view of the social and economic necessities and the inability of the Civil Code to address the problem of real estate sales and the large number of criticisms directed at the text of Article (1127) Iraqi civilian. The dissolved Revolutionary Command Council Resolution No. (1198) amended in 1977, which dealt with the problem of the seller's refusal to register the property in the name of the buyer under the "undertaking to transfer the ownership of the property or the right to dispose of it", as it included specific conditions and stated a number of provisions, that the aforementioned decision included a general provision and a special provision, we address the special provision first Being not concerned with this research, which is the forced implementation in kind on the contractor to transfer the ownership of the property, by obliging him to register in the Real Estate Registration Department through the judiciary, in a lawsuit filed before the Court of First Instance, called the ownership lawsuit, but according to the conditions mentioned in the stages of the decision, including the residence of the contractor in the property subject to the contract, or the latest buildings or facilities, or the planting of plantings, Such conduct had been made by the contractor without written opposition from the landlord (the contractor). ⁽³²⁾.

³¹ - Dr. Ali Ghassan Ahmed, Compensation for breach of the pledge to transfer ownership of a property, previous source , p. 12.

³²The dissolved Revolutionary Command Council Decree No. 1198, as amended in 1977, stipulates: "In accordance with article (a) of article forty-two of the interim Constitution, the Revolutionary Command Council has decided the following: First: (a) The undertaking to transfer ownership of real estate shall be limited to the obligation to compensate if one of the parties breaches his undertaking, whether or not compensation is stipulated in the undertaking, provided that its amount shall not be less than the difference between the value of the property specified in the pledge and its value at the time of the contract, without prejudice to compensation for any other damage. If the contractor has inhabited the property subject to the undertaking or has created other buildings or installations or plantations therein without a written objection from the contractor, this shall be considered a valid reason that allows the contractor to own the property at the value specified in the pledge or claim compensation in the manner mentioned in paragraph (a) of this clause plus the value of the updates existing at the time of the contract. Second, (a), the Court of First Instance shall decide on cases arising from the application of the provisions of this decision, and its decision shall be subject to appeal by cassation to the Court of Appeal of that court within thirty days from the date of notification thereof, and the decision of the Court of Appeal in this regard shall not be subject to appeal by correction of the decision. (b) Cases covered by the provisions of this resolution shall be considered urgent actions. Third: Any legal provision, decision or agreement that conflicts with the provisions of this resolution shall not apply to reduce the amount of compensation mentioned in the preceding paragraphs. Fourth: This decision shall be implemented from the date of its publication in the Official Gazette and shall apply to the above facts or undertakings unless a court

As for the general provision, which is the same as the judgment resulting from the effect of the repudiation of the undertaking to sell the property and not registering it in the Real Estate Registration Department, which is the entitlement of the non-indemnity party to compensation, whether compensation is stipulated in the pledge or not, and also the aforementioned decision included the value of the compensation to which the injured party is entitled, and made the value of the compensation to which the buyer is entitled Not less than the difference between the value of the property specified in the undertaking and its value at the time of renulation, without prejudice to compensation for any other damage, in the event that compulsory performance in kind is not possible by registering the property in the name ⁽³³⁾ of the buyer.

With reference to Resolution 1198 of 1977, as amended, we note that it gave the party to the contract for the sale of the property against whom the contract was obtained the right to resort to the judiciary to request compensation according to a lawsuit called the lawsuit of difference of the two allowances, but who is the court that hears this lawsuit?

The court that has specific jurisdiction to hear the suit of the difference of allowances is the court of first instance of the location of the property. Where the court assigns the plaintiff to prove the contract for the sale of the property subject of the lawsuit and prove the contract, when it is proven to the court that the contractor (seller) was able to implement his obligation and did not perform it with no reason to prevent him from doing so, and the court proved the availability of the conditions of contractual liability from the fault (Al-Nakul), damage and causal relationship, it sentenced the defendant (seller) to compensate ⁽³⁴⁾.

The competent court, when calculating compensation, resorts to electing experts specialized in real estate evaluation, but these experts are not free to calculate compensation, but these experts abide by the method included in the decision in calculating this compensation, which is that their estimate is not less than the difference between the value of the property mentioned in the pledge and its value at the time of the contract.

The aforementioned compensation does not prejudice the right of the non-dependent party to claim compensation for other damages, which may be caused to the other party, such as

judgment has been issued thereon that has acquired the final degree. This decision was published in the Iraqi Gazette No. 2621 on 14/11/1977.

³³- The English law included a provision close to the judgment of Al-Nakul in the case of the award of compensation brought by Resolution 1198, in the event that the seller of a property sells it a second time and delivers it to the second buyer, it is decided in English law that the sold property is a trust in the hands of the seller before delivery, if he sells it again and delivers it to the second buyer, he is considered a traitor of this trust, and therefore the first buyer may demand him to return the price plus the amount of difference from the second sale, even if this difference exceeds Loss of the first buyer. **Ibrahim Bashir Abdullah Idris**, Provisions of Extradition and Arrest and their Effects on Contracts in Law Compared in Islamic Jurisprudence, Thesis submitted to the University of Khartoum to obtain a doctorate of philosophy in law, 1995, p. 234.

³⁴ - Lawyer Dr. **Ghazwan Ghanawi Al-Zuhairi**, Procedures of Forced Execution in Kind in the Transfer of Real Estate Ownership , Dar Zahran for Publishing and Distribution, Jordan, 2017, p. 158. It should be noted that many of the decisions of the Iraqi judiciary reject the request for compensation because the price of the property mentioned in the pledge is greater than its value estimated by the experts at the time of the contract. For example, Decision No. 245/HR/2012 on 22/4/2012 issued by the Karkh Court of Appeal in its discriminatory capacity, which stated (The value of the agreed sale It is much higher than its value on the date of the rejection, which the lawsuit is subject to restitution.) The decision is mentioned by lawyer **Tariq Aziz Jabbar Al-Ezzi**, Undertaking to transfer ownership between ownership and compensation, Legal Library, Baghdad, 2015, p. 42. See also **Dr. Ali Hussein Manhal**, The Theory of Effective Breach of Contract: A Comparative Study in the Light of the Economic Analysis of Law, Arab Center for Publishing and Distribution, 2020, p. 53.

missing a winning opportunity or losing fees, detection expenses and transportation expenses, in accordance with the text of paragraph (I : a) of Resolution 1198, which referred to "without prejudice to compensation for any other damage."

The legislator by giving the buyer the right to claim compensation in accordance with Resolution 1198 of 1977, does not lose his right also to claim a refund of the price of the property he paid to the seller, but the Iraqi legislator prevented the combination of the two claims in one lawsuit because the methods of appeal in each of these two lawsuits are different, as the judgment of compensation according to Resolution 1198 can be challenged by the seller before the Court of Appeal. The area in which the property is located in its discriminatory capacity, as the decision of the Court of First Instance to compensate is issued in a final degree. As for the verdict issued under the claim of recovering the price of the property is issued in the first degree, and therefore the sentenced party can challenge it before the Court of Appeal and before the Court of Cassation, in addition to that, the buyer may not claim with the price with interest because the interest is due in the event of a valid contract and that the legislator considered the contract for the sale of the property outside the real estate registration department invalid⁽³⁵⁾.

It should be noted that the reality may impose in some cases that the buyer, under the pledge concluded between him and the seller, to erect constructions on the sold property, and before completing the registration procedures, and when the seller refrains from registering, what is the fate of these constructions?

If the buyer has created installations on the property to which the seller refrained from completing the procedures for transferring his ownership, he has added a building to it, he may claim the value of these constructions because the existence of the undertaking to sell makes the establishment of the facilities obtained in good faith. On the other hand, the seller may not demand the buyer for a fee such as the period that the property remained in the hands of the buyer, because the seller's delivery of the property to the buyer is considered (permissible) for him to use it and it is not permissible to take a fee. With permissibility, unless such permissibility ends when the seller institutes an action against the buyer to prevent opposition where the buyer's hand is then transformed into a usurping hand and therefore the seller can claim reciprocity⁽³⁶⁾.

One of the things that may be imposed by the practical reality is also that the sale may occur from several sellers when the property is owned on the common, here the buyer must file a lawsuit against the partners (sellers of the owners) to claim compensation, but it may happen and that among the partners is a minor and the sale took place without the approval of the Directorate of Minors Welfare, if the buyer filed a lawsuit for the difference of the two

³⁵ - Consider the decision of the Federal Court of Cassation No. 217 / Civil Extended Authority / 2018 on 28/8/2018, which stated (that the plaintiff, after obtaining the judicial ruling to return the allowance, is not entitled to legal interest for the amount sentenced because it is based on a void contract, which makes his claim lose its legal basis and requires restitution.)

³⁶ - Considering the decision of the Federal Court of Cassation No. 811 / Expanded Authority / 2017 on 29/1/2017, which was serious (where it was confirmed to the court that the respondent had previously sold part of the numbered property ... To the appellant with an external sale contract and that the latter exploited the property because of the contract and therefore there was a reason for permissibility and his hand was not a usurping hand, but after filing a lawsuit to prevent opposition against him on ...He became a usurper of the property and deserved the same wage).

allowances, it is judged on adults only and the amount of their shares, and the minor's share has nothing to do with this compensation⁽³⁷⁾.

In this article, we do not fail to mention that the contractor and the undertaking may mention in the pledge the amount of compensation due to the party in breach of his obligation, which is called the penalty clause, and through research we found that the courts in Iraq differed regarding the (penalty clause) if mentioned in the pledge, so they ruled that the pledge if it includes a penalty clause and the value of this condition is less than the difference between the two values mentioned in Resolution 1198, the court must raise the compensation until it reaches the amount of this difference⁽³⁸⁾. However, if the value of the penalty clause is greater than the difference, we found that the practical application gave the court discretion according to the gravity of the damage, then it may rule on the value of the condition in full or decrease, provided that the compensation is not less than the amount of the difference between the two values mentioned in all cases⁽³⁹⁾.

One of the problems that may face the buyer and when resorting to filing the lawsuit and the presence of the seller is dead, he can and this case to establish it on the heirs of this seller, and the courts have differed in the capacity under which the lawsuit must be filed, some of them went that the lawsuit must be filed against the seller's heirs (in addition to the estate of their testator) and not in their personal capacity, and caused this that the debts of the testator do not move to his heirs with the money, but remain related to his estate and must be taken out of this estate, in addition to the fact that this The lawsuit is a personal lawsuit, so the litigation is not directed at it except by adding the lawsuit to the estate, where the heirs cannot be obliged to pay an amount that resulted from the obligations of their testator more than what accrued to them from the estate of their testator, as only the net amount of the estate after payment of debts is transferred to the heirs in accordance with the rule (no estate until after payment of debts)⁽⁴⁰⁾.

Another justification cited by the owners of this trend is that the compensation represented by the difference of allowances is a manifestation of compensation for contractual liability represented by (error, damage and causal relationship) If the seller (contractor) refrains from fulfilling his undertaking, it has been proven to the undertaker (buyer) a personal right in the contractor and whether the contractor died or not died, the undertaker has the right to request compensation for the difference of allowances on the heirs of the contractor in addition to

³⁷ - See Article 56 of the Minors Welfare Law No. 78 of 1980.

³⁸ Article 170 stipulates that (1) the contracting parties may determine in advance the value of compensation by stipulating it in the contract or in a subsequent agreement, taking into account in this case the provisions of Articles 168, 256, 257 and 258. 2. Contractual compensation shall not be due if the debtor proves that the creditor has not suffered any damage and may be reduced if the debtor proves that the assessment was gross or that the original obligation has been partially performed and any agreement contrary to the provisions of this paragraph shall be null and void. 3. If the damage exceeds the value of the contractual compensation, the creditor may not claim more than this value unless he proves that the debtor has committed fraud or gross error.

³⁹ - See decision No. 1809/Human Rights/1992 issued by the Baghdad Region Court of Appeal in its discriminatory capacity on 17/8/1992, published in the book Judicial Applications in the Judiciary of the Baghdad Region Court of Appeal in its discriminatory capacity, Undertaking to Transfer the Ownership of the Real Estate, by lawyer Hadi Aziz, Baghdad, Arabian Gulf Press, 1998, p. 93, paragraph 293.

⁴⁰ - See the decision of the Baghdad Rusafa Court of Appeal in its discriminatory capacity No.: 1197 / Civil / 2011, dated 12/9/2014, published by the **gesture of Hamel Al-Ajili**, chosen from the judiciary of the Baghdad Court of Appeal - Rusafa Federal Court in its discriminatory capacity, applications of Resolution 1198 of 1977, Pledge to transfer ownership, 1st Edition, Sabah Library, Baghdad, 2015, p. 7.

the estate of their testator, and after the issuance of the judgment difference allowances are implemented on The property of the deceased as a debt of the estate because there is no estate until after the debt has been paid, and if there is no property for the deceased, the debt has expired because the death of the debtor without an estate is considered one of the reasons for the expiry of the debt within the meaning of article 37, paragraph III, of the Iraqi Execution Law in force ⁽⁴¹⁾.

On the other hand, there are decisions of several courts requiring the seller's heirs (in their personal capacity) to be sued. It explains that it is these heirs who renounce the registration of the property in the name of the buyer after the buyer gives them a warning to do so ⁽⁴²⁾.

Some commentators argue that it is necessary to differentiate between two cases: the first if the deceased has renounced registration when he was alive, and here the lawsuit must be filed against the heirs (in addition to the estate), and the second if the seller did not relinquish before his death, but rather his heirs from registration after that, and here the lawsuit must be filed against them (in their personal capacity). We believe that it is more correct to file a lawsuit against the heirs of the seller in addition to the estate of Their testator because the

A. ⁴¹ - The decision of the Federal Court of Appeal of Al-Qadisiyah in its discriminatory capacity on 4 Jumada Al-Awwal 1433 AH corresponding to 27/3/2012 No. 82/83 / T / H / 2012. Which included (dated 27/12/2011 In the presence of the defendants (privileges), it was found that it is valid and in accordance with the provisions of the law for the detailed reasons and circumstances contained therein, because the defendants in the lawsuit No. 793/B/2010 were previously approved by the external undertaking concluded on 6/1/2001 between their vendor and the seller..... The buyer is distinguished by the plaintiff..... And we renounce them from this undertaking, so the estate of their heirs is responsible for compensating the privileged (plaintiff) the difference of the two allowances according to the pledge and the rejection of the denial based on the frankness of paragraph (I/A) of the decision of the dissolved Revolutionary Command Council No. 1198 of 1977 as amended. As for the defenses stated by the defendants' agent (privileges), which focused on the non-orientation of the litigants and the appeal of the report of the three judicial experts who estimated the amount of compensation with regard to the plea of non-litigation against the defendants in their personal capacity, this payment is legally payable. Because the prominent legal division refers to the death of his heir, the defendants who are the sellers..... Its estate is the legal opponent in the lawsuit to request the ownership of the property belonging to it because the reason for the obligation and the relationship of the creditor and indebtedness were linked and related between the plaintiff, the buyer and the seller, the heirs of the defendants, and there is no estate for the heirs of the seller until after paying the debts on the estate resulting from the legal actions issued by the heirs of the defendants, and the estate is responsible for paying the debts related to the actions of the testator, whether those debts or compensation arise and are fixed before or after death, and the text of Article (1106) of The Civil Code and Article 189 of the Real Estate Registration Law If the correct and fair expression of these two texts is not to transfer the estate to the heirs until after trimming it from the debts stuck in it and the ongoing dispositions on those funds by the testator before his death remain taken into account of his estate and to say otherwise intersects with Article (87-2) of the Personal Status Law, which prohibited the disposal of the estate until after paying the debts it owes in accordance with the stipulated order and imposing that the estate may not be disposed of until after the debts are paid This text is considered a public order that cannot be bypassed, as it is considered a special text that restricts the text of Article 1106 Civil and 189 of the Real Estate Registration Law, and we summarize from all of the above that the defense of litigation is not productive)

⁴² - See the decision of the Baghdad Rusafa Court of Appeal in its discriminatory capacity No. 331/civil/2014 dated 13/4/2014, which included "Since it is stated in the lawsuit petition that the defendants refrained from registering the shares of their testator in the name of the plaintiff, and their refusal to attend the Directorate of Real Estate Registration, the right to compensation in this case has arisen from the heir, because it came by his act (the nakul), and as long as the obligation to compensate for the heir himself came from the heir's own rejection, he is a guarantor to compensate those who suffered damage for his act in all His property, even if the amount of compensation exceeds what has accrued to him from the deceased, as if he inherited a car and hit another car with it and caused damage to it, the obligation to compensate the damage caused to the other car arose by him because of his act, even if it was by the car he inherited from the deceased, and this means that the heir is responsible for compensation in his personal capacity and not in addition to the estate, and for the full amount of damage he caused to others, even if the amount of compensation exceeds the value of the property he inherited and caused damage to others by means of it." **Rahim Hassan Al-Uqaili**, Lessons in the Applications of Laws, Legal Library, Baghdad, 1st Edition, 2011, p. 18.

compensation is from debts, and they do not move to the general successor but remain in the estate of the deceased in accordance with the general rules of obligation ⁽⁴³⁾.

After we touched on the case of the death of the seller before the establishment of a lawsuit for the difference of allowances, we find that the reality may impose another case, which is the case of the death of the buyer before the establishment of a lawsuit for the difference of allowances, in this case the law allowed his heirs to file a lawsuit against the seller before the expiry of the limitation period, and some courts go that the heirs must file the lawsuit (in addition to the estate of their testator) and not in their personal capacity, and some commentators differentiate between: If the seller has entrusted, the buyer's heirs must file the lawsuit (in addition to the estate), but if the seller has committed after the death of the buyer, they must file the lawsuit (in their personal capacity) because the sale occurred against them personally.

Conclusion:

Through the study and research of the issue of the suit of the difference of the two suits and their treatments according to the modern trends of the courts of appeal in their discriminatory capacity, we found out the importance of the lawsuit of the difference of the two suits, so we decided to explain some of the most important conclusions and recommendations that we reached and according to the following detail:

1- The Iraqi legislator considered formality an important element for the conclusion of the contract for the sale of real estate, so that the failure of the contract to fulfill this formality resulted in its invalidity. Also, the Iraqi legislator has made the necessary procedures for the disposal of real estate related to public order so that it is not permissible to agree on what is contrary to them.

2- The provisions of the Iraqi Civil Code did not give a specific definition of the undertaking to transfer the ownership of the property or the real estate right but referred to provisions related to the organization of this undertaking.

3- The Revolutionary Command Council Decree No. 1198 of 1977, as amended by Resolution 1426 of 1983, amended the provisions of Articles 169 and 170 of the Civil Code, by raising the amount of compensation to a percentage that is not less than the difference between the two allowances (the real estate allowance at the time of the pledge and its allowance at the time of the contract), and this trend was in a locality, especially since it keeps pace with the economic situation and real estate prices, and achieves justice, which is the goal of the legislator.

⁴³ Article 142 of the Iraqi Civil Code stipulates: " 1. The effect of the contract shall go to the contracting parties and the general successor without prejudice to the rules relating to inheritance, unless it appears from the contract, from the nature of the transaction or from the text of the law that this effect does not go to the general successor. 2. If the contract creates personal obligations and rights relating to a thing that is then transferred to a special successor, these obligations and rights shall be transferred to that successor at the time when the thing is transferred if they are its requirements and the special successor was aware of them at the time of the transfer of the thing to him." See **Mohamed Ali Skiker and Moataz Kamel Morsi**, Explanation of Civil Law, Obligations, Part 1, Knowledge Foundation, Alexandria, 2005, p. 631.

4- The Iraqi legislator did not stipulate, neither in article 1127 of its Civil Code, nor in Resolution No. 1198 of 1977, as amended by Resolution 1246 of 1983, that the contract be concluded in writing, but may be oral.

5- The decisions of the courts of appeal, as discriminatory, differed in their decisions from the direction of the Federal Court of Cassation on the issue of the pledge to transfer ownership, as the courts of appeal stipulated that the pledge to transfer ownership must be issued by the owner of the property at the time of concluding the undertaking, while the Court of Cassation did not.

6- The courts in Iraq differed regarding the (penalty clause) if it is mentioned in the pledge and ruled that if the pledge includes a penalty clause and the value of this condition is less than the difference between the two values mentioned in Resolution 1198, the court must raise the compensation until it reaches the amount of this difference ⁽⁴⁴⁾. If the value of the penalty clause is greater than the difference, we found that the practical application gave the court discretion according to the gravity of the damage, if it may rule on the value of the condition in full or lacking Provided that the compensation shall not be less than the amount of the difference between the two values mentioned in all cases.

7- The courts differed in the capacity in which the lawsuit should be filed in the event that the seller is dead, some of them argued that the lawsuit should be filed against the seller's heirs (in addition to the estate of their testator) and not in their personal capacity, and on the other hand, there are decisions issued by several courts that require the lawsuit to be filed against the seller's heirs (in their personal capacity).

8- The legislator gave the buyer the right to recover the price of the property he paid to the seller in addition to compensation for the compensation through a lawsuit for the difference of the two allowances, but the Iraqi legislator prevented the combination of the two claims in one lawsuit because the methods of appeal in each of these two lawsuits are different.

9- The legislator does not allow the buyer to claim with the price interest because the interest is due in the event of a valid contract and the legislator considered the contract for the sale of the property outside the real estate registration department invalid.

II. Recommendations

1- We call on the Iraqi legislator to address the problem of difference and contradiction in the judicial decisions issued by the courts of appeal in their discriminatory capacity regarding the application of the provisions of Resolution No. 1198 of 1977, and this difference generates prejudice to the rights of some, so we recommend to the Supreme Judicial Council that cases related to the application of Resolution 1198 of 1977 be subject to the judiciary of

⁴⁴ Article 170 stipulates that (1. The contracting parties may determine in advance the value of compensation by stipulating it in the contract or in a subsequent agreement, taking into account in this case the provisions of Articles 168, 256, 257 and 258. 2. The contractual compensation shall not be due if the debtor proves that the creditor has not suffered any damage and may be reduced if the debtor proves that the assessment was gross or that the original obligation has been partially performed and any agreement contrary to the provisions of this paragraph shall be null and void. 3. If the damage exceeds the value of the contractual compensation, the creditor may not claim more than this value unless he proves that the debtor has committed fraud or gross error.

the Federal Court of Cassation and not to the judiciary of the courts of appeal, and that the decisions issued in this regard are issued in the first place.

2- We call on the Iraqi legislator to address the text of Article 1127 of the Civil Code, which we find that it came in a formulation that is inconsistent with the challenges and reality in Iraq, and is considered a departure from the general rules of the principle of forced specific execution contained in the text of Article 426 of the Civil Code, in terms of not leaving a means for the buyer in the event that the seller refuses to perform his obligation to register except by means of claiming compensation from him, in addition to not specifying the amount of compensation.

3- Resolution No. 1198 of 1977, as well as Article 1127 of the Iraqi Civil Code, did not include the transfer of other real estate rights, but was limited to the transfer of ownership, so we recommend amending the text of Article 1127 and the decision in a way that includes all other real estate rights.

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