

Civilian Protection for Partners from The Partner's Material Actions in Common Property, A Comparative Study

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Abstract

The material actions carried out by a partner on the common property, such as building and planting without the permission of the partners, are considered a violation of the rights of the other partners with him in the common property, and these violations that occur due to the construction of new properties established by the partner require the provision of urgent civil protection, both procedural and civil, because there is a type of Integration between the two, and this integration, when achieved, undoubtedly provides sufficient guarantee for the rights of the partners and protection for them at the same time, given that the judiciary is an arena for justice and the realization of rights, and resorting to the judiciary is a right guaranteed to everyone with the aim of protecting a specific legal right or position, because these violations would cause disruption. Utilization of common property, because common ownership is complex: property and partners' shares overlap with each other. This overlap in shares and powers stands as an obstacle to the use and exploitation of common property, which prompts some partners to exploit and benefit from it by constructing buildings, facilities, and plants without obtaining the approval of the other partners. This Exclusivity in exploitation undoubtedly arouses the ire of partners, which requires urgent protection of the rights of partners from attacks that occur from their partner.

Keywords: Common, Money, Partners, Procedural Protection, Innovations, Judicial Receivership

INTRODUCTION

The legal protection of partners in common property from the transgressions that occur due to the establishment of new facilities established by the partner can only be achieved by providing protection in both its procedural and civil aspects, because there is a kind of integration between the two, and this integration, when achieved, undoubtedly provides sufficient guarantee for the rights of the partners and protection for them at the same time. Considering that the judiciary is an arena for justice and the realization of rights, and resorting to the judiciary is a right guaranteed to everyone with the aim of protecting a specific legal right or position. There is no doubt that physical behavior through construction or planting in common property exposes the rights of other partners to danger and threatens their interests, because these transgressions would It causes disruption to the use of common property, because common ownership is complex ownership and is mixed and the partners' shares overlap with each other. This overlap in shares and powers stands as an obstacle to the use and exploitation of common property, which prompts some partners to exploit and benefit from it by constructing buildings, facilities and plants without obtaining the approval of the partners. Others, and this uniqueness in exploitation undoubtedly raises the ire of partners, which requires urgent protection of the rights of partners from attacks that occur from their partner.

Research Questions

The questions raised by the research topic are many, which require consideration, the most important of which are:

Do the partners have the right to oppose the partner who established the innovations in bad faith, i.e. the one who infringed on the rights of the partners in the common property? Or is the building or plantation that the partner erects in the common property included in the means of benefiting from it?

Is it possible to demand the removal of the bypass or wait for the result of the division?

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On whom does the burden of proof fall on the establishment of hadiths, and who are the parties to the lawsuit if it is filed with the court competent to hear the dispute?

Is it possible to file a lawsuit to stop the transgression committed by the building or planting partner and appoint a judicial receiver to manage the common property?

Is it possible to file possession lawsuits to stop the attacks committed by the partner in the common property?

Research Problem

The problem of the research is that the Iraqi and comparative legislators did not provide legal protection to the partners in the common property within the provisions related to common property in the civil law, and the esteemed judiciary considers the establishment of buildings, plants, and facilities in the common property among the uses that the partner has the right to do, and this undoubtedly conflicts with The nature of common ownership is characterized by being thorny and complicated because the partners' shares overlap with each other and it is difficult to benefit from it alone in isolation from the rest of the partners. This is because there is no physical space for the partners before the division, but only an undivided moral share, meaning that the place is one and the shares are multiple.

RESEARCH METHODOLOGY

In our study, we will rely on the comparative approach, by comparing the position of the Iraqi legislator in the Iraqi Civil Code and the laws related to the subject of the study with the laws under study, with the aim of identifying the weaknesses and strengths, diagnosing them, and coming up with a legal treatment that will help us find solutions to the problem of the study.

Research Structure

The research plan will be divided into three sections. In the first section, we will talk about the parties to the lawsuit and the burden of proving the establishment of female infidels. In the second section, we will talk about: judicial custody, and in the third section, we will talk about: possession lawsuits. Then we will end our study with a conclusion that includes the most important results and recommendations that we have reached. Suggested.

The First Topic

The Parties to The Case and The Burden of Proving The Residency of The Newly-Invented Women

The Iraqi legislator, through Article 1061/2 of the Civil Code, stipulates that “every joint partner fully owns his common share, and has the right to benefit from it and exploit it in a way that does not harm his partners.” Likewise, Article 826/1 of the Egyptian Civil Code stipulates that “every A joint partner has full ownership of his share, and he has the right to dispose of it, seize its fruits, and use them in a way that does not harm the rights of the other partners. This means that the legislator has allowed the partner to benefit from his share in various ways, but by his disposal he has taken control of the rights of the other partners in the share. The common property, because it is not possible to benefit from his share without prejudice to the rights of others by virtue of the nature of the common property, and therefore, when a partner establishes innovations in the common property, he will have harmed the rights of the other partners. Therefore, the others have the right to resort to the judiciary with the aim of providing urgent protection for their rights from assault, but the question is that What is being raised here is who has the right to file the lawsuit, against whom it is filed, and on whom falls the burden of proof that the new incidents have been established. Is it permissible to file a lawsuit to remove the violation before demanding the division of the common property? We will try to answer all these questions in more detail as follows:

The parties to the lawsuit are both the plaintiff and the defendant. The plaintiff or (plaintiffs) are represented by the partners in the common property on whose shares the innovations were established, or their public and private successors and the ordinary creditor. The plaintiff may be one partner who owns at least the largest amount of shares in the common property or A group of partners, and if one of the partners is a minor, absent,

or missing, then the guardian, custodian, or trustee will act on his behalf. This means those who have the status of a partner in the common property, that is, in other words, to be a partner in the common property before the establishment of the new innovations and not after it, so it is not fair. Or is it fair for a partner to complain about the establishment of new establishments that were established at a date prior to his acquisition of the status of a partner, that is, before he became a partner in the common property, and in application of this, the Federal Court of Cassation ruled in one of its decisions that "...it is necessary to hear the personal evidence of both parties on site to prove the date of residence." The building, and whether it was before the plaintiff owned his shares in the plot or after it, since the judiciary of this court has settled that the lawsuit to raise the trespass filed by the new partner is not heard regarding the erection of his partners from buildings before he owned his shares in the plot because he was not a partner at that time so that his approval of the building was taken and because it was He was satisfied with reality as it was when he decided to take possession.

As for the defendant, it is limited to the partner who established the new developments in the common property without the permission of the rest of the partners, regardless of the scope of the new developments, which may be a building, plants, or facilities, as detailed previously.

As for the burden of proving the establishment of new items in the common property, without the slightest doubt it falls on the other partners and not on the partner who established the new items. On their shoulders lies the burden of proving that through various methods of proof, and the partner who established the new items can refute this by proving that what he established Of new developments that do not fit the description of new developments, or merely improvements or facilities that are mobile and not fixed, and that the purpose of establishing them is for a temporary period and not permanently, and in implementation of this, the Presidency of the Nineveh Federal Court of Appeal has removed its discriminatory capacity in one of its decisions. "This is because the word real estate mentioned in Clause (First/B) (From the dissolved Revolutionary Command Council Resolution No. 1198 of 1977, it was absolute and did not contain anything restricting it to a specific type of real estate, such as residential real estate, which required the court of first instance to assign the plaintiff to explain the nature of the innovations that he claimed to have carried out in a detailed list and to listen to the defendants' answer regarding it. Then the elected judicial expert was assigned to state whether or not these innovations fit the description of buildings and facilities, the date of their creation, and whether or not it follows the date of the pledge to transfer ownership, and then issue the ruling in light of that, and since the court of first instance did not adhere to the above legal point of view. In its distinguished ruling, it was therefore decided to overturn it and return the case file to its court to proceed with it according to the previous approach.

We note that what the esteemed court reached in its decision above is justified, because the term new constructions expands to include all of the buildings, plants, and facilities. Therefore, the plaintiff must determine the nature of the new constructions through the court seeking the judicial expert's report, and in the light of the latter's report, it is clarified whether what was constructed is One of the partners meets the description of new women or not.

In the same regard, the partner who established the new developments can claim that the building, facilities, or plants he erected were done with the explicit or implicit permission and approval of the other partners, and he must prove that with various evidence and evidence. The other partners can also deny this and prove that what the partner erected was Updates that were not done with their consent or permission.

In application of this, the Federal Court of Cassation ruled in one of its decisions that "the discriminator had argued that he was four years old when the discriminator constructed the property, which makes the discriminator's evidence that was received regarding the permission to build by the partners being granted incorrect, and the court had to decide It verifies the age of the distinguished person and then decides whether or not permission to build is valid. On the other hand, it was found that the Court of First Instance, in its ruling, which was upheld by the Court of Appeal, obligated the defendants to value the construction of the property, which is an incorrect approach, as the court should have ruled on the ownership of building the property, according to Its value shall be disbursed from the sale price in the lawsuit to remove the joint property related to the property on which the subject of the lawsuit was established.. This means that the court had to investigate

the age of the partner who granted permission to establish the new lands at the time, because that affects the legal position of the partner who built or planted in terms of considering him to have built or planted with or without the permission of the partners, because the ruling differs in the two cases, and based on what the court decided. It is considered a proper application of the law, based on the protection that the judiciary is trying to grant to the partner who established the new property, in line with the judiciary's tendency and its recent orientation that establishing new property in common money is one of the ways of benefiting from it.

But the question remains: Do the partners have the right to oppose the partner who established the new property, and do they have the right to file a lawsuit before the property is removed?

Of course, the partner in the common property has a real ownership right and the powers of the owner that this right confers on him. Every partner in the common property owns his common share completely and has the right to benefit from it and exploit it in a way that does not harm the other partners. This is what the Iraqi legislator stipulates in Articles 1061 and 1062 of the Iraqi Civil Code. Therefore, since he is the partner who established the new properties, he has the right to benefit from his share in the common property, but he cannot do so except by trespassing on the shares of others. In other words, he cannot benefit from his share in isolation from the shares of others, because the rights of the other partners are concentrated in this part as well, by virtue of The nature of common ownership means that there is a fateful interconnection between the rights of the partners, and therefore, if he erects new buildings, plants, or facilities without the permission of the other partners, they have the right to oppose that because by doing so, he has taken control of his share and the shares of others.

In application of this, the Federal Court of Cassation said in one of its decisions, "The distinguished ruling is invalid, because what is established from the real estate registration document is that the house is a common property between the two litigating parties and others. And since the partner, if he builds in the joint property, does not have the right to demand the prevention of opposition from his partners in the building he built." On the joint property to transfer it to the partners (Article 1068) Civilian, which requires rejecting his lawsuit filed with a request to prevent opposition, as it is not permissible to change from the prohibition of opposition contained in the lawsuit petition to a request for value, and since the court ruled in its distinguished ruling contrary to the above, which violated its validity, so it decided to overturn it for this reason.

We note that the esteemed Federal Court of Cassation, in its decision above, is consistent with the provisions relating to the protection of property rights from infringement, because allowing one of the partners to unilaterally build or plant in the common property in isolation from the rest of the partners gives him the right to decide on his share and the shares of others in it, and his behavior constitutes an infringement on the most sacred rights. Which is ownership, especially in light of the absence of legislative texts and legislative shortcomings in this aspect. The role of the judiciary comes as a complement to fill that deficiency and protect the rights of other partners. This decision was for the Federal Court of Cassation in light of its previous approach, which considers the construction, planting, and establishment of facilities carried out by the partner to be in the money. Sharing without the permission of his partners constitutes transgression and requires the transgression to be lifted.

The Federal Court of Cassation ruled in one of its decisions in light of its new approach that "what is established from the investigations conducted by the court and the copy of the property registration is that the two parties are partners in the property that is the subject of the lawsuit, and since the partner does not have the right to demand the removal of the structures built by his other partner, but rather he has the right to demand the equivalent wage." If its conditions are met by an independent lawsuit, and this is what the judiciary of this court settled upon in its decision No. 404/General Authority/2011 on 11/28/2012" It also ruled in another decision that "upon examination and deliberation, it was found that the cassation appeal was submitted within the legal period, it was decided to accept it in form, and upon reviewing the distinguished ruling, it was found to be incorrect and in violation of the law. This is because, even if the court followed the cassation decision No. 307/Aqar Appeal/2013, it did not It reached an incorrect conclusion, as the aforementioned discriminatory cassation decision indicated that the plaintiff's claim was based on the law and that the principle addressed by the decision of the General Authority of the Court of Cassation No. 404/General Authority/2011 on

2/28/2011 regarding the status of the request to lift the infringement Between partners in the common land and it is not related to the request to prevent opposition, because all partners have the right to benefit from the common property in application of the provisions of Article (1063/1) of the Civil Code and none of them opposes his other partner to benefit from his share”.

We note from what was stated in the court’s decision above that requests to oppose and prevent opposition that are related to the use of the common property in building and planting are not permissible between partners in the common property, because each partner has the right to benefit from the common property in accordance with the provisions related to the common property and the text of Article 1063/1 of the Civil Code, because Every partner shares in the ownership of every part of the common property. However, the court’s decision above is flawed, as the court should have stated in its decision the cases in which it requires opposition to the common property, because the ruling differs in the stage that precedes the division of the common property from What follows when each partner is allocated a separate portion of the common property equivalent to his share, and in application of this, the Federal Court of Cassation ruled in its decision that “the court of first instance ruled by its ruling to dismiss the lawsuit without following what was stated in the court of cassation’s decision for reasons that are not legally acceptable, which is that common ownership defies a ruling to prevent it.” A partner’s opposition to his partner, and the ruling issued prohibiting opposition cannot be implemented without noticing that a partner does not have the right to monopolize a part of the joint property for himself, because each joint partner fully owns his share in that part and has the right to exploit and benefit from it in a way that does not harm his partners and that each of the partners A foreigner in the share of the other, and therefore it is valid to demand the prevention of opposition between the partners, but without the overriding part being delivered, and since the plaintiff had requested in his petition for extradition, the court had to follow what was stated in the cassation decision and issue a ruling on the lawsuit according to the claim, and since it issued its ruling without noticing What was presented was decided to be annulled.”

Whereas it is established and beyond doubt that the requests for opposition and the lifting of the encroachment are exclusively specific to the owner of the parceled property without extending to anyone else. This is because the parceled property is precisely defined, avoiding ignorance in terms of area and location, and thus the owner can enjoy the benefits of his property, monopolize it, and exercise all his powers over it. In contrast to common ownership, in which there are multiple owners and everyone participates in the management, exploitation, and benefit of it, the share of each partner before the division of the common property is difficult to determine financially. Rather, each of the partners has an intangible share that spreads throughout every part of the common property, meaning that the share of each A partner is not specified and specified in a way that negates ignorance, as is the case in separate ownership, and this ignorance leads us to an important conclusion that if one of the partners builds or plants on part of the common property, it is difficult to consider that these new developments have been established on the property of others or are considered an encroachment on shares. The rest of the partners, which are not originally designated or separated before dividing the common property, because the requests of the opposition and preventing the opposition from benefiting from the common property and lifting the encroachment are exclusively for the owner, and here everyone shares in this ownership on the one hand, and on the other hand the area that has been encroached upon must be determined, and in application. Therefore, the Federal Court of Cassation ruled in one of its decisions that “the ruling to lift the trespass requires specifying the location and area of the constructed building, and it cannot be ruled arbitrarily due to ignorance in the ruling upon implementation”

As a conclusion to the above, we, for our part, see that the requests for opposition and the lifting of the encroachment shall be made after the division of the common property, such that each partner is entitled to a separate part equal to his share. If the building falls into the share of its builder, he owns it, and if it falls into the share of someone else, he may assign the partner who erected it to remove it and lift the encroachment in accordance with the provisions of Article 1123 of the Iraqi Civil Code, because each partner is considered the owner of his share that devolved upon him from the beginning according to the retroactive effect of the division, and this is what is stipulated in Article 1075 of the Iraqi Civil Code, because the partner who established the newly-created property without the permission of the other partners, and the division was completed and

the new property occurred in the place of someone else, In this case, he is a transgressor and is tasked with demolishing and removing the new things he has erected.

The Second Topic

Judicial Receivership

If the common property or the interest of the partners is exposed to danger in the event of the establishment of new property by the partner who established it without the explicit or implicit permission and approval of the partners, causing it to exceed their shares and disrupt their interests in the benefit, do the partners have the right to file a lawsuit before the urgent court to rule on judicial receivership? Based on the provisions of Article 147/1 of the amended Iraqi Civil Procedure Code, which stipulates that “every person with an interest in a movable or immovable property may, if he has reasonable grounds for fearing an immediate danger that the property will remain in the hands of its possessor, request the urgent judiciary to place This money is under guard, managed, and returned with its seized revenue to whoever is proven to have the right to it.”

We note that the text of the above article allows every owner with an interest in a movable or immovable property, if there is an urgent danger that requires the intervention of the judiciary, then the aggrieved person has the right to resort to the judiciary and file a lawsuit before the urgent judiciary to order him into judicial custody, regardless of who the right will ultimately be transferred to, as the role of the judiciary is The hasty person does not touch the origin of the truth because this deviates from his basic function.

What can be learned from the aforementioned text is that it is a condition for partners or a partner to be able to resort to urgent justice that there be a personal and direct interest recognized by the law, even if the interest is potential if its purpose is to guard against imminent harm. Basically, the role of the courts is to look into lawsuits to decide on the matter. Judicial disputes brought before it by issuing decisive judicial rulings. However, in addition to that, it has the right to provide judicial protection for rights from an imminent and potentially occurring danger, by taking precautionary measures to protect the interests of the opponents and ward off the imminent danger. These urgent decisions are not considered decisive judicial rulings in the dispute, but rather decisions. Temporary and cannot be delayed, aiming to provide urgent judicial protection.

In this context, in addition to the above, it is necessary to determine the conditions for urgent judgment and determine the extent of their application to the incidents that a partner establishes in the common property without the permission of the other partners, so that we can clarify the extent of the right of the partners to request judicial receivership or not, as stipulated in Article 141/1 of the Civil Procedure Code. The effective Iraqi amendment stipulates that “the court of first instance has jurisdiction to hear urgent matters for which there is a fear of running out of time, provided that the original right is not prejudiced”.

Article 45 of the Egyptian Civil and Commercial Procedures Law also stipulates that “a judge from the court of first instance shall be assigned to the headquarters of the court of first instance to rule temporarily, without prejudice to the right, in urgent matters for which there is a fear that time will be lost”.

The French legislator also defined urgent judiciary in the French Code of Civil Procedure as: “a temporary decision that came as a result of a request by one of the parties for the presence of the other or for the opponents to be summoned in cases where the law gives the judge the authority to take necessary measures in an urgent manner”.

As an explanation for this, the scope of the urgent matters judge’s jurisdiction is limited to looking into urgent matters for which there is a fear of running out of time and ruling temporarily without prejudice to the origin of the right. This means that three conditions must be present to determine the jurisdiction of the urgent matters judge to consider urgent cases, which are: urgency, temporary action, and not prejudice to the origin of the right.

First: urgency

Urgent means the danger imminent to the right, which requires the judge of urgent matters to remove it by taking a temporary measure that cannot be postponed or waited. This imminent danger, or in other words

imminent, cannot be helped by ordinary litigation procedures, which are often characterized by procedural slowness, until the origin of the dispute is presented to the judiciary of the trial court to decide on it.

The condition of urgency is derived from the nature of the disputed right and not from what the opponents add to the dispute presented before the urgent matters judge, as the judge has discretionary authority to adapt the dispute before him as to whether it meets the description of urgency or not.

Despite the broad scope of the term “urgency” to include everything that threatens the right to be protected, this means that partners in the common property, if their interests are threatened by one of the partners who established the new property without their consent, thus disrupting the use of the common property, can resort to urgent litigation before the court. Judge of urgent matters to request judicial custody.

Second: Do not prejudice the origin of the right

What can be learned from the text of Article 141/1 of the Iraqi Civil Procedure Code and Article 45 of the aforementioned Egyptian Civil and Commercial Procedure Code is that the jurisdiction of the urgent matters judge is not to prejudice the origin of the right, as he is not competent to consider the dispute and enter into the origin of the disputed right, and the intent of the phrase without Prejudicing the origin of the right, that is, without examining the dispute by addressing the origin of the right that created the event to be protected, and the role of the judge is limited to examining the surface of the documents in order to support the right for which temporary protection is required.

Third: The procedure is temporary

In addition to the above, the intention of resorting to urgent justice is to confront an imminent danger, that is, characterized by a nature of urgency that does not tolerate delay. Delay makes judicial protection of rights useless, due to the possibility of losing the features of the thing or destroying it. Therefore, it is confronted with a temporary measure that does not affect the essence of the right in order to quickly protect the right, unlike the trial court through which rulings are issued that settle the dispute, that is, the dispute is settled. The intention of the temporary procedure is to arrange a temporary situation until the dispute is presented before the trial court to decide on it and decide on the basis of the right.

If one of the above conditions is not met, the urgent matters judge rules that he does not have jurisdiction to hear the case, because the aforementioned conditions determine the judge's jurisdiction.

What concerns us in this aspect is judicial receivership as a temporary, precautionary measure to which the judge resorts at the request of the disputing partners, until the dispute between the partners is resolved.

Legal jurisprudence defined custody It is “the placement of property over which there is a dispute or the right to which is not established, and which is threatened by an immediate danger, in the hands of a trustee who is responsible for its preservation, management and return, while submitting an account thereof to the person who has the right to it proven.”

What is learned from this is that in order to request a receivership, there must be money, and this money may be real estate or movable property, and this money must be disputed, which requires the appointment of a guard who will be responsible for its management and preservation, and the latter is appointed by agreement or by court.

The Iraqi legislator addressed the provisions of guarding within the provisions of the Civil Procedure Code in Articles (147 and 148), where Article 147/2 stipulates, “The appointment of the guard shall be by agreement of all concerned parties. If they do not agree, the judge shall appoint him, and the guard shall receive a wage determined by the court.” Article 148/1 also stipulates: “The court determines in its decision the task of the guard, his obligations, and the rights and authority he has...”, while the Egyptian legislator regulated the provisions of guarding within the provisions of the Civil Code through Articles (729-738), it would have been better for the Iraqi legislator to follow the example of the Egyptian legislator when he I am concerned with regulating the provisions of receivership within civil law due to their importance and close connection to the right of property.

Article 1961 of the French Civil Code also stipulates that “the judiciary may order the custody of: 2- An immovable property or a movable thing whose ownership or possession is disputed by two or more people.” Likewise, Article 1959 of the same law stipulates that “it may be Not only movable property but also immovable property are subject to guarding.

We note that Article 733 of the Egyptian Civil Code stipulates that “the agreement or ruling ruling on custody determines the obligations of the receiver and his rights and authority. Otherwise, the provisions of the deposit and the provisions of the agency shall apply...” This means that the common property that is placed under guard according to an agreement or pursuant to a judicial ruling while it is in the possession of the guard is considered a deposit with him, or the guard is considered an agent for the rest of the partners between whom a dispute occurred due to the establishment of new matters before the division of the common property. Therefore, the guard is obligated to preserve the money that Under his control and management, providing an account of its yield, and then returning it to whoever has the right to it after deciding the dispute.

The rights of the partners in managing the common property are not affected once the lawsuit for judicial receivership is filed, but rather remain until the ruling is issued imposing the receivership. This is what the Court of Cassation stated in one of its decisions, “The rights of the partners in managing the common property are not affected once the lawsuit is filed requesting judicial receivership over it, but rather remain subject to the rules.” The legal system that regulates it until the day the ruling is issued imposing guarding, and its capacity is confirmed to the guard pursuant to this ruling”.

It behooves us to address another issue that is no less important than the previous one with regard to the existing dispute between the partners regarding the management of common property. The issue of managing common property has been regulated by explicit legal texts within the provisions relating to common ownership, as Article 1064 of the Iraqi Civil Code stipulates that “1 - The management of the common property shall be the right of the partners together, unless there is an agreement to the contrary. 2- ...If there is no majority, the court may, upon the request of one of the partners, take such measures as necessary, and it may appoint, when necessary, someone to manage the common property, and the majority shall have the right to manage the common property. It is also to choose a manager and determine the extent of his authority in management,” as Article 828 of the Egyptian Civil Code stipulates, “...if there is no majority, the court, upon the request of one of the partners, may take such measures as are necessary, and it may appoint when necessary.” Who manages the common money? 2- The majority also has the right to choose a manager.”

What can be learned from the text of the previous two articles is that appointing a manager for common property differs from a judicial receiver, because the procedures for appointing a manager for common property are before the subject court, while the procedures for appointing a judicial receiver are before the court of summary judgment on the one hand, and the appointment of a manager for common money who is responsible for managing it. Its exploitation will be permanent until the common property is divided so that each partner is entitled to a separate portion of the common money and the state of common property ends, with the exception of cases in which the manager who was appointed is removed for his mismanagement and betrayal or for exploiting the rights of the partners, unlike the appointment of a judicial receiver who is temporary to ward off danger. Urgent, characterized by urgency, as we stated previously regarding the conditions for imposing judicial receivership.

In addition, Article 150 of the Iraqi Civil Procedure Law stated in its last section regarding urgent judiciary that “...and the litigation procedures stipulated in this law shall apply to it, taking into account the provisions related to urgent matters.” This means that urgent judiciary is one of the branches of judiciary. Therefore, the civil judiciary applies to it in terms of procedures related to litigation)Accordingly, the partners who are harmed by the establishment of new property in common property without their explicit or implicit consent are required to meet the conditions for accepting the lawsuit, including eligibility, litigation, and interest, in order for them to have the right to resort to the urgent judiciary to file their lawsuit and request provision of temporary protection without prejudice to the origin of the right, as is the case in a civil lawsuit, in application of that. The Karbala Court of Appeal / Cassation Commission ruled in one of its decisions, “...that the urgent request shall be subject to the litigation procedures stipulated in the amended Civil Procedure Code based on the last part

of Article (150) thereof, and that the necessary conditions for accepting the urgent request submitted to the urgent judiciary are These are the same conditions required for accepting a lawsuit, including the dispute...”.

The Third Topic

Possession Claims

Before entering into possession claims, the concept of possession must be clarified. The Iraqi legislator defined it under Article 1145 of the Iraqi Civil Code as “1- Possession is a physical situation in which a person, personally or through an intermediary, has actual control over something that may be dealt with or that he actually uses as a right.” The Egyptian legislator did not define possession as the Iraqi legislator did, but the preliminary draft for Egyptian civil codification included a text defining possession, according to the text of Article 1398 of the draft, where he defined it as “a physical situation in which a person has effective control over something that may be dealt with, or actually used.” A right.” This article has been deleted in the current civil code, because this definition has a predominantly jurisprudential nature.

Article 2228 of the French Civil Code also defines possession as “taking possession of something or enjoying it or a right...either personally or through another person in whose possession they are or who exercises the rights related to them on our behalf.” What is learned from this text is that possession in French Law It is the use of the right of ownership in addition to the use of other real rights deriving from the right of ownership, such as easement rights, usufruct, or mortgage rights.

Originally, the law surrounded the original and accessory property rights with special lawsuits that enable the possessor and owner to defend his right or prove his ownership through possession lawsuits or ownership lawsuits. Possession lawsuits are summarized in three lawsuits: 1- A lawsuit for raising hands 2- A lawsuit for preventing infringement 3- A lawsuit for stopping. New business.

There is no doubt that possession is a presumption of ownership. Whoever possesses something is usually the owner. There is rarely an owner who does not possess what he owns in person or through someone other than him. However, this presumption between possession and ownership is subject to proof of the opposite and is not conclusive. Therefore, in cases where the owner does not possess the money himself Or through someone else, the law allows him to recover his ownership when he establishes evidence of his ownership of the money through these lawsuits, and this protection it provides is temporary and not permanent, coupled with proof of ownership, so whoever is unable to prove this cannot benefit from these lawsuits. This is the difference between possession lawsuits and ownership lawsuits, because the purpose of the possession lawsuit is to prove a fact and not to prove a right. It does not aim to prove ownership. This means that whoever claims physical possession can prove it by various means and does not require the plaintiff to present his documents and does not base his ruling on proving a right. Ownership, whether owned by the plaintiff or the defendant.

The joint holder has two elements of possession: the physical element, which is represented by the actual and material control shared over the common property with other partners, as well as the moral element, which is represented by the intention of using the common property with other partners

This means that each partner's possession of the common property is protected by possession lawsuits, but the question that can be raised here is: Do the partners have the right to resort to possession lawsuits in the event that one of the partners establishes innovations on the common property, such as buildings, plants, or facilities, without obtaining the approval of his other partners, so that Do the partners file a lawsuit to prevent exposure to their shares in the common property, stop new business, or raise hands?

First of all, before answering this question, it is necessary to clarify the position of the Iraqi legislator and the comparative laws under study on the subject.

Article 1151 of the Iraqi Civil Code stipulates that “If the possessor files a lawsuit to recover his possession, he may ask the plaintiff to construct buildings or plant trees on the disputed property while the lawsuit is pending...” Article 1152/1 also stipulates that “If the defendant had built buildings or planted trees on the disputed property before he was prevented from doing so, he may request that the buildings and trees remain

with the property in his possession until the ownership claim is decided...and if the building or planting is located in the property section.” The disputed matter, these provisions shall only apply to this section, and the plaintiff shall regain control of the remainder of the property.”

As an explanation for this, in addition to our main topic regarding innovations in the common property, if one of the partners in the common property erects buildings or plants in the common property, violating the rights of the other partners and without obtaining their explicit or implicit approval, the other partners can prevent the partner who established the innovations from continuing to construct the buildings. Or planting in the common property that is disputed between the partners, and temporarily stopping him from continuing to establish it until the case is decided and waiting for the result of the division and considering who the new items will go to in the end. However, the builder or planting partner is not responsible for removing what he created until the lawsuit is decided and the fate of the established new items is known, because the lawsuits Possession is intended to provide temporary protection and is not intended to prove ownership. If it falls on the behalf of the partner who created it, then it is considered as if he placed it in his possession from the beginning in accordance with the retroactive effect of the division. If it falls on the share of another partner, then the solution lies in applying the general rules by attaching it to it. Additional supplementary rules that are used in the absence of text.

In application of this, the Egyptian Court of Cassation ruled in one of its decisions that “what is established in the jurisprudence of this court is that the law allows everyone who has possession of a property to protect his hand against claims of seizure, and since seizure in its legal sense is as it applies to the separated property, it falls on the common share, and since There was no distinction in the law in terms of protection between joint seizure and pure seizure due to the absence of any requirement. Thus, every pure squatter or joint squatter has the right to seek the help of seizure lawsuits to protect his possession, and it is acceptable to file these lawsuits from the partner in the common property to ward off the actual infringement. Whatever the infringement may be, if one of the partners in the shared property commits an act of infringement, it is permissible for these partners to seek the help of a lawsuit to prevent the infringement.

Possession lawsuits are filed between partners in the common property, in order to provide a kind of temporary protection for the partners from the attacks and transgressions that occur from one of them against the other, without prejudice to the original right. A partner may seize the common property alone and alone, to the exclusion of the others, as is the case with separate property, from While carrying out material actions or other actions, and through this action, he is considered to have infringed on the rights of other partners in the common property. Here, the partners have the right to file a lawsuit to prevent the infringement issued by one of the partners on his share in the common property, or to file a lawsuit to stop new business if this would lead to The actions pose a threat to his possession.

CONCLUSION

At the conclusion of this study, in which we addressed the civil protection of partners from the material transactions carried out by the partner in common property, we present the most important findings that we have reached, as well as recommendations that relate to the subject of the study.

First: The Results

The purpose of procedural and civil protection is to provide temporary protection for partners from the material actions made by the partner with common property, such as building, planting, and establishing facilities.

When a partner establishes new matters in the common property, he has harmed the rights of the other partners. Therefore, the others have the right to resort to the judiciary with the aim of providing urgent protection of their rights from assault.

The legislator has allowed the partner to benefit from his share in various forms of benefit, but by doing so he has taken control of the rights of the other partners in the common property, because it is not possible to

benefit from his share without prejudice to the rights of others due to the thorny and complex nature of the common property.

The defendant is limited to the partner who established the new developments in the common property without the permission of the rest of the partners, regardless of the scope of the new developments. It may be a building, plants, or facilities. As for the burden of proving the establishment of the new projects in the common property, without the slightest doubt, it falls on the other partners and not on the partner. Who established the innovations.

If he erects new buildings, plants, or facilities without the permission of the rest of the partners, they have the right to object to that, because by doing so, he has taken control of his share and the shares of others.

In order for partners or a partner to be able to resort to urgent justice, there must be a personal and direct interest recognized by law, even if the interest is potential if its purpose is to prevent imminent harm.

To request judicial receivership, the common property must be real estate or movable property, and this property must be disputed, which requires the appointment of a receiver to ensure its management and preservation. The latter is appointed by agreement or by court.

The rights of the partners to manage the common property are not affected once the judicial receivership lawsuit is filed, but rather remain until the ruling is issued imposing the receivership.

Each partner's possession of the common property is protected by possession lawsuits. Therefore, the partners have the right to resort to possession lawsuits in the event that one of the partners establishes new developments on the common property, such as buildings, plants, or facilities, without obtaining the approval of his other partners, so that the partners file a lawsuit to prevent exposure to their shares in the common property. Or stop new business or raise your hand.

Possession lawsuits are filed between partners in common property, in order to provide a kind of temporary protection for the partners from attacks and transgressions that occur from one of them towards the other without prejudice to the original right.

Possession lawsuits are intended to provide temporary protection and are not intended to prove ownership. This means that the building or planting partner is not responsible for removing what he has created, but rather to stop building or planting temporarily until the merits of the lawsuit are decided and wait for what will become of him as a result of the division.

Second: Recommendations

We recommend that the Iraqi legislator activate procedural and civil protection for partners in common property from the material actions of the partner by stipulating it within the provisions of common property, as a precautionary measure to be resorted to when encroaching on common property.

The new constructions and plants erected by the partner in the common property constitute a threat and infringement on the rights of the other partners if they are erected without the partners' permission, which requires that temporary protection for them be considered within the jurisdiction of the urgent judiciary without prejudice to the origin of the right.

We call on our esteemed judiciary to consider building and planting in common property as transgressions if they are built without the permission of the partners, because a partner in common property cannot benefit from his property independently of transgressing the shares of other partners.

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