

A Seizure for the Debtor to Third Parties

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In order to recover the rights of the creditor from the debtor, in case the debtor refused to pay, he/she first claims his/her rights to recover by the judiciary, through the seizure of the possessions of the debtor followed by resulting procedures after this seizure which are specified by law; but what is the case when the debtor has possessions and movables with the other? The law specified and clarified the possibility of the creditor of seizing the money and movables owed by his debtor with the other, according to specified procedures. This is what our research holds for discussion. We can realize the extent to which the debt relation that connects the creditor and debtor, and the other to be a third party. This party will be responsible for proving the comprehensiveness of his liability with the debtor's money and determining it is beyond doubt, in order not to be mixed with his own possessions, or if he denies that he has a relationship with his debtors, through a set of procedures that the legislator is keen to implement in comparative laws. The importance of this research lies in the fact that there is reporting, including other funds belonging to the seized, and the effects of inaction by the third party for not reporting; these are considered by some of the people a reporting by the other of possessing the money, in addition to the seizure occurrence, although it is not possible for this to occur because the legal nature of the money has not been clarified to decide whether or not the seizure is valid.

Key words: *Seizure, Debtor, Creditor, Third Parties*

Introduction

Third-party seizure or as it is called a seizure for the debtor to third parties, is one of the significant ways of seizure, as it includes several advantages which benefit one of the three parties (Holder, seized, and third party) or two of them. Also, it signifies the procedures taken by the holder which are different than any other kinds of seizure. One of the most important

procedures is the provision of a report by the third party, either positive or negative that clarifies within, the nature of the debt relation which connects him with the seized and the nature of the money that he/she holds if it exists, and precisely define them in order not to include the seizure on his/her owned movables. This is for the benefit of the other parties, which proves the right of the holder, who can through it regain the debt, the seized is obliged to pay off what he/she owes and freeing it from what he owes; this is in addition to facilitating the job of the executive party and providing specific information through which they can or cannot conduct the seizure directly. Despite the different terminologies related to the report, most of the laws in the countries already mentioned it with details.

Research Goals

The aim of this research is to demonstrate the importance of this type of seizure and the multiplicity of its applications, with the failure of the Iraqi legislator to include its details and procedures, and how we can provide some legal solutions by studying the relevant legal articles, whether they are general rules or comparative laws.

The Importance of the Research

The importance of this research lies in the fact that the acknowledgment, including the money owed by others to the seized, and the problems raised by the failure of others (the third person) to raise this report, may be considered by some as an acknowledgment by the other of their possession of money; this is in addition to the seizure occurrence despite the lack of the possibility of it occurring, because the legal nature of the money has not been clarified, whether it is valid for the seizure to occur or not.

Research Problem

The problem of the research emerges from the ambiguity in Iraqi law in its implementation law No. (45) for the year 1980, regarding the state of seizure of the debtor to others and the procedures resulting therefrom, the strength of the obligation for the seized to present this report and the methods for exemption from it; in addition to this is the emergence of the problem of fulfillment by others that the money may not be legally seized, and the corresponding legislation is different by proposing and dissolving it.

Conceptual Review

What is Third Party Seizure?

Seizure of the debtor with others is one of the distinguished methods of judicial execution. For the purpose of clarifying its concept and nature, we must address it through three requirements. We allocate the first requirement to clarify the concept of seizure of the debtor with others, allocate the second requirement to explain the parties to a seizure of the debtor with others and in the third and last requirement to clarify the nature and procedures for seizure of the debtor with others as follows:

Definition of the Seizure of the Debtor with Others

In order to define the “Seizure of the debtor to others” we decided to divide it into three sections as follows:

The Definition of the Seizure and its Kinds

Seizure in language: separation between the two things, seizure between them is seized i.e. seizure and custody. The Almighty said "He made a barrier between two seas" that is, a barrier (Surat el-Naml, verse 2017) between salty water and fresh water that does not mix and that the seizure is God's ability and his seizure holds him as seizure and stopped it (Jamal Al-Din Abi Al-Fadl Muhammad Bin Makram).

The seizure is defined as placing properties under judiciary control, permeably for selling them in order to bring back to the creditor his debt from the payments of selling. If the creditor (holder) takes the measures prescribed by the legislator, despite that the money remains in the hands of the debtor (seized), it is still considered under judiciary control, in other words, the seized abstains to dispose of it as this causes the damage for the creditor - holder; if the debtor (seized) disposes of this money, then the disposition is not carried out against the creditor, given that this disposition is as if it is not, and the creditor does not invoke it as it would harm him (Hindi, 2007).

There are two types of seizure; executive seizure and reservation seizure, and in both cases it is required to seize and put money under the judiciary control, but in addition to this, the executive seizure is characterized by the sale of the debtor's possessions so that the debt of the holder will be paid off from its price (Al-Wafa, 2007).

Literature Review

The aim behind the seizure is to achieve two things: the first is to determine what funds are to be executed and the second is the implementation of the holder's powers that the debtor cannot dispose of it until the creditor has fulfilled his right; the seizure is the beginning of the execution of expropriation of the debtor's real estate or transferred property (Foda et al., 2008).

The executive seizures are four kinds and are different according to the nature of money that has to be seized, and differs from being possessed by the debtor if possessed by others and they are:

- 1-Reservation of transferred with the debtor
- 2-Seizure of the debtor with others
- 3-Seizure of the revenues, stocks, bonds and shares
- 4-Execution on the real estate

Mohamed Ashmore (1927, 1923, 1988) defined jurisprudence (fiqh in Islam) "as a declaration of a special form that the creditor assigns a person to hold in his hands what is required for the creditor's possessions with this person from the rights and movables, and the result of this seizure is the secured obtaining of creditor's rights and funds seized equivalent to his debt. ". The purpose of this type of seizure is to prevent the creditor from obliging the custodian to pay what he is entitled to pay off of the debt.

It was also defined as "the procedure whereby according to it the creditor can, based on public guarantee. (The general guarantee means "financial liability, which is the sum of the person's rights that exist or may exist and obligations arising or may arise,") (Zaaloul, 1996). For his money was possessed by the debtor, to put any money or movables for his debtor with the other or with him under the judiciary system control in the country, and prevent this third party from paying the seized debtor or transfer the movables for him, until the reserving creditor takes the (Al-Tahyaw, 2011) measures that are entitled to him to claim his right from the seized money or from the price collected after its sale.

It is noted that the abovementioned definitions are different in pronunciation but they include the same meaning and content. Some considered the seizure of the debtor with the other as an announcement that the creditor calls on, and others consider it as a procedure signed by the creditor. However, the difference is not fundamental. All the definitions aim at the inability of the other – third party - the debtor - to dispose of the debts and movables of his creditor which he holds until the creditor receives his rights of them or their price after selling.

In terms of legislation, the Iraqi legislator has organised the “seizure for the debtor with others” in the effective executive Iraqi law within the fourth chapter of the provisions of this law. The legislator began regulating this issue in terms of procedures (Iraqi Implementation Law No. 45 of 1980 and its amendments), but it did not address a specific and direct definition of it.

(Saif 2017) Seizure of what the debtor has with others is the seizure that the custodian signs on what his debtor has of the rights of others or moral movables in the possession of this third party. The jurist, Ahmed Abu Al-Wafa, described it as a reservation signed by creditors on the rights of a debtor or its movables that are in the possession of others, who owe the debtor or its possession with the intention of preventing this defect from fulfilling the debtor or handing over the movable possession (Al-Wafa, Implementation Procedures in Civil and Commercial Articles, 2007).

The Jurist Ahmad Hindi said that the creditor's right to seize a debtor's debtor with others is a stand-alone right independent of the right to use the debtor's rights, as it is in its nature a dual reservation that responds to two financial charges and against debtors and under two rights, one of which is the right of the seizure before the seized and the second the right of the seized before the seized has. According to these two deductions, the seizure takes place, and with the absence of one of them, the seizure is denied (Hindi A. , 2019).

It was presented by Mr. Saeed Mubarak as the seizure that the creditor signs on the rights and movables his debtor has in the custody of others or in its possession, and for this it assumes that there are three persons: the creditor, the debtor and the third person (Mubarak, 2007). In our view, the correct definition is the seizure of what is for the debtor with others is a procedure by the creditor to seize movables and debts held by others, even if they are postponed or suspended on condition.

Matter of Seizure of the Debtor with Others

The matter of the seizure of the debtor with others is the things and rights which are for the debtor with the custodian – debtor of the debtor- (Hindi A. , 2019) and such things and rights are debt rights (“debts”) or movables.

Importance and Nature of the Seizure of the Debtor with the other

The importance of this distinguished (El-Soufi, 2011) way of seizure starts from including several advantages, divided between the holder's interest conservation from one side and the custodian interest conservation from the other side.

1-Holder's interest conservation: for the interest of the holder to start with a direct execution towards the other – custodian - not towards the debtor - seized in order to achieve the element of surprise for the debtor regarding the seizure of what he has with the other so he cannot smuggle or recover it because this seizure is seized.

2-Interest conservation of the custodian: because the custodian's interest is to start this seizure with an announcement for him and not to start with the attendance of the court agent like the executions of the seizure of the movables to the place of the things decided to be seized; this is supposed to be with the other which offends his reputation and he may be exposed to include the seizure of his possessions which are not possessed by the debtor (seized).

Based on that and in order to reach to the nature of seizure of the debtor with the other, is it reservation seizure? Or an executive seizure? Or is it considered a mixed nature? This will be done through presenting the jurists' opinions and theories and through explaining the positions of comparative legislations, and so the chapter was divided into three points: the first discusses the non-executive reservation seizure of the debtor with the other, the other chapter will clarify the executive seizure of the debtor with the other and the last point will discuss the mixed nature of the seizure of the debtor with the other.

First: non-executive seized seizure of the debtor with the other,

Second: the executive seizure of the debtor with the other

Third: the mixed nature of the seizure of the debtor with the other.

Parties of the Seizure of the Debtor with the Other

Our concern in this study is the other (custodian) and so we will study this topic in detail after defining the holder (creditor) and the seized (debtor) as follows:

Holder "Creditor"

It is a condition that the holder has to be a personal creditor for the seized – debtor; there is no difference (Heif, 2017) of being an excellent creditor, mortgager, a right holder or an ordinary creditor. It is necessary to fulfill specific conditions for the right of the holder for the seized, which means the right that is seized for, as it must be "Inquisitive and performance state" as explicitly stated in the article (325) of the civil and commercial procedures law (Hindi A. , 2007).

Seized “Debtor”

The debtor is the negative side of the debt relation that connects him with the holder – the creditor and the debtor is the debtor of the holder; he could be a normal or a moral person. The seizure can occur on each debtor in condition of being debtor for the custodian or owner of his movables that the other possesses, and it is conditioned of possessing those money and movables in the time of the seizure occurrence, and if they were not included in his possessions in the moment of seizure or were taken out of his possessions before that, the seizure is not considered truthful (Khalil, 2006).

The Custodian “the other”

Perhaps; most of what brings the debate between the researchers and thinkers is the term “other”, who is the seizure occurring to under his/her hands. Many terms were used to define it; the third party, the custodian, and all of them denote the person who does not have an affiliation with the debtor who is seized, so that the seized lacks the direct (Ahmed Al-Sayed Sawi, 2005) control over what he has under his hand of movables.

As he is also defined as an independent person from the debtor and enjoys according to the law or a contract between him/her and the debtor (Hindi A. , Forced Implementation in the Light of the Pleadings Law and its Amendments to Law No. 76 of 2007, 2009) “seized” – is special independent authority for what he possesses. According to that it is not enough to consider him an independent personality from the debtor, but also he controls on the thing and this prohibits that debtor to control, and such debts or movables must be valid to be seized (Al-Qassas et al., 2006).

Procedures of Seizing from the Debtor with the Other

The parties of the seizure of the debtor with the others are three: the holder, the debtor (seized) and the other (custodian), and the main element of any seizure is the executive duty seen from the side of who is assigned to do and what is the aim behind it. We will divide the procedures of seizure of the debtor with the other according to the procedures that are taken by the debtor (holder) for the interest of the other (custodian) and the seized (debtor), and the procedures that taken by the custodian for the interest of the holder and the debtor. The legislator did not delegate the debtor (seized) to take any action and this is a natural issue related to the nature if this seizure and the aim behind it (Dowidar, 2014).

The Permission for the Seizure

Because the seizure of the debtor with the other starts with a reservation seizure (that seizure that does not aim to selling the seized possessions, does not condition the (Hindi A. , Forced Execution, 2016) creditor to hold an executive bond, and does not have to be preceded with execution introductions, so it is possible to implement it without having an executive bond between the hands of the creditor; but in this case it is conditioned to have a permission from the judge to execute this seizure, according the what was decided in the article (327) of the in force Egyptian Commercial and Civil law, and the article (231/1,2) of the in force Iraqi law of civil procedures. According to this, it is not conditioned in the right of the creditor to decide the amount, in the Egyptian law as it was stated that this right needs the estimation of the seized debt by the (Hindi A. , Forced Implementation in the Light of the Pleadings Law and its Amendments to Law No. 76 of 2007, 2009) judge and this estimation is temporary; this what was decided in the article (327) of the Egyptian law contrary to the Iraqi law through which the legislator conditioned in the article (231/1) (the decision of the / Al-Rusafa Federal Court in its discriminatory capacity) that the debt has to be known, payable and not conditioned.

Notify the Other (Custodian)

For this kind of seizure, the law stipulated different procedures than those related to the seizure of the movables possessed by the debtor. This seizure occurs through notifying the other of the seizure decision, and it is understood not to hand over the money of the debtor to anyone. (He/she is the person who manages the implementation directorate and he/she is required to have a bachelor's degree in law, provided that he has a judicial or legal practice after graduating from college for a period of no less than three years); he/she is responsible for them and he/she has no right to dispose of them except by a decision from the executive judge, and he/she has the right to show whatever data or objections, and the agent who notified him/her has to prepare minutes (Erbil District Court of Appeal, 2006) for that (Article (75) of the Iraqi Implementation Law No. 45 of 1980 in force, 1980).

In this regard, it was stated in a decision of the Iraqi Court of Cassation “ the presidency of execution seize an amount of the third person's money equal to the seized amount that he delivered to the other without the presidency's permission and the executive transactions are applied on the seized money” (Iraqi Court of Cassation Decision \ Cassation \ on The Judicial Provisions Group - - - Seventh Year , 1976).

Notifying the Debtor (Seized) About the Seizure

The seizure of the debtor with the other was done, and produces its impacts from the moment of notifying the custodian with the seizure document, but it is needed to notify the seized about the seizure according to the article (332) of the law (The Egyptian Civil and Commercial Procedures Law No. as Article (332), 2007). Because he is the debtor and the seizure is directed towards him, the notification is considered to be done after the seizure is done, but it is needed to complete the seizure. So if the holder did not do it within the specified time for it, it is considered as if it was not done; this means that even if the seizure was valid, fails or its effects fade out because it was not followed by a job, one should follow it according to the law, and this failure is retroactive, as the seized has to pay his money for the (Saeed Ahmed Shu'la, 2003) custodian and the custodian has to fulfil for the seized, considering that the seizure that took place has no effect (Hindi A. , Forced Implementation in the Light of the Pleadings Law and its Amendments to Law No. 76 of 2007, 2009).

So the holder has to inform the custodian after the seizure to notify the debtor about the occurrence of the seizure, which means that his money which is possessed by his debtor (custodian) was seized, so in order to pay off the debt he/she is entitled to for the holder if he wants to end the seizure. Or one may stick to the invalidity of the seizure procedures if they are invalid and also to know the real reason behind the failure of the custodian to fulfil his right not to claim to fulfil without a benefit (Tolba, 2012).

Research Methodology

The study adopted the scientific analytical method for the legal articles adopted in the study, in addition to the comparative approach to legal models, the most important of which is Egyptian law, given the importance to the “seizure of the debtor with the other”; this is the main reference to Iraqi law, and the use of the laws of some other countries whenever the need arises, as well. On relying on inductive style by matching legal texts with practices in practise.

Research Community: Mainly the Iraqi legal literature and the Iraqi intellectuals.

Research Sample: Most of the popular Iraqi legal intellectuals and scientists.

Research Tool: This research was a desk review for the different books, legal articles and researches relevant to the topic.

Conclusion

To conclude this research, we reached an important number of results and recommendations, as follows:

First: Results

1-seizure the debtor with others is a procedure taken by the creditor on the possessed movables of the debtor with the other, to prevent him from disposing of it permeably and selling it, paying off its debt from its price, or to gain his rights of it.

2-The procedures and conditions decided in the seizure of the debtor with the other according to the nature if money and if they can be seized legally or not.

3-This kind of seizure starts with reservation taking into account the interest of the holder, and it starts with a direct procedure towards the custodian (other) not with the debtor in order to ensure the surprise element; this is so the debtor will not be able to smuggle or recover it, even if the Egyptian legislator ensured that it is important to notify the debtor at the same time, to give him time to repay before the occurrence of the seizure.

4-The seizure of the debtor with the other is considered with a mixed nature and this is to reveal the combination feature between the reservation seizure as a primary procedure according to the seized money or debt, in order to stop the custodian handing it over or using it; it then moves to the executive role during the time taken for the procedures to take back his money which are seized executively.

5-The Iraqi law did not decide the duration that obliges the other to review or inform the executive department of that, or if the debtor possesses the money under his possession; but this was mentioned in the Amendment of the Implementation Law No. (45) in (2007) with the text of Article (76) through which rectified this deficit and decided a duration of seven days for revision from the date of notification of the seizure.

Second: Recommendations

1-We call upon the Iraqi legislator to address the details if the seizure of the debtor with the other with mentioning its nature and procedures. This will be through using the comparative approach related to the mechanism of the submission of the report by the other and revealing its importance. This will also be done by tackling the term “disclosure of possession” in a precise way without leaving it for jurisprudence through setting general rules only as it was mentioned in the articles (81-75) of the Iraqi execution law.

2- We call upon the Iraqi legislator to use the term “third parties” instead of the “third person”, as is the case in all of the implementation laws in Egypt, Jordan and Lebanon when it comes to the topic of seizure of the debtor with the other, and this is because the term “other” is more precise than the “third person” as we discussed.



3-We hope that the Iraqi Legislator follows the comparative legal approach regarding the mechanism of notifying the seized (debtor), and this is through adding a paragraph to the article (75) in addition to the other paragraphs provided. This paragraph has to include the possibility of informing the debtor about that procedure, and the reason for this is achieving justice and fairness and the possibility that the debtor can get enough to pay the debt after informing him of the seizure decision.

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