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THE USAGE OF AUTHORIZATION OF PREVIOUS STATE (APS) IN JURISPRUDENCE AND LAW

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ABSTRACT

In order to explain the usage of APS in inferential cases of jurisprudential books and to use it as evidence in the mistakes of fact, we first explain APS and practical principles and then we will explain different types of APS: legal APS, subjective APS, existential APS, and non-existential APS. Problem will be occurred when there is non-existential APS in which the APS case is a non-existential or negative entity, so it is evident that the presumption of innocence will not be conducted. We solve this problem in such a way in which non-existential APS will be always brought up after an existential entity in cases which were negative entities before and then there is doubt about them, so this is one of the usages of innocence presumption. We will explain in detail ten usages of APS and non-existential APS.

Keywords: Practical principles, APS, non-existential APS, causal principle, caused principle, procedures

INTRODUCTION

According to Article 1 of *civil procedure in public and revolutionary courts in civil matters*, civil procedure is a set of principles and rules used in the trial and examination of probate matters and all commercial and civil actions in public courts, revolutionary courts, court of revision, supreme court and other institutes and authorities obliged to obey it (*Civil Procedure in Public and Revolutionary Courts in Civil Matters*, Khorshid Press, 2001, Article 1). Abdollah Shams believes that civil procedure is a set of procedures by which civil problems (in general concept) are submitted to judicial authority in order to get a juristic solution (in general concept) (Shams, Abdollah, Derak Publication, Vol. 1, P: 13).

In contrast to the definition of civil procedure in Article 1 in which the utterance is used for trial and investigation, Addollah Shams believes that civil procedure is a set of procedures by which civil problems are submitted to judicial authority in order to get a juristic solution. This is our goal in this article. What is practically mentioned in jurisprudential books as civil procedure is related to trial and juristic solution. In the book *Qaza*[1], jurists have discussed the courts rules including: recognition of plaintiff and denier; confession and denial; silence of defendant; promissory oath; examination of the evidence of witness and oath; and conflict of evidence. There is another specified book namely *Shahadat* [2] which is classified in the group of jurisprudential books, jurists have also mentioned the juristic solution to examine the actions and litigation concerning the contract, unilateral legal act and judgments in other topics of the books such as *Tejarah*[3], *Rahn*[4], *Hajr*[5], *Zeman*[6], *Solh*[7], *Sherkat*[8], *Mozarebeh*[9], *Mozara`ah*[10], *Mosaghat*[11], *Vadiah*[12], *Ariyah*[13], *Ejarah*[14], *Vekalat*[15], *Sokna*[16], *Habs*[17], *Talaq*[18],*Eqrar*[19], *Jealah*[20], *Qasb*[21], *Shof`ah*[22], *Ehyae-Mavat*[23], *Loqateh*[24], *Ers*[25], *Hodoud*[26], *Tazirat*[27], *Qesas*[28], *Diat*[29].

Since there is plenty of investigation in jurisprudential books about civil procedure, I decided to read relevant topics included in the book *Al-Romaneh Al-Bahiyeh fi Al-Shahre Al-Lo`meh Al-Dameshghiyeh* in order to understand close relationship between the initiatives of innovative architect of practical principles (Great Sheik Ansari), so that, I could investigate the juristic problem. Thus, I began to write this article.

Practical principles and APS

The obliged persons who are aware of secondary lawful rule include three types:

1. The obliged person who has finality towards the rule;
2. The obliged person who has conjecture towards the rule;

1. Adjudication
2. Testimony
3. Commerce
4. Mortgage
5. Incapacity
6. Liability
7. Peace
8. Company
9. Limited partnership
10. Share-Cropping
11. Agricultural Partnership
12. Deposit
13. Loan
14. Hire (rent)
15. Delegation
16. occupation (residence)
17. Detailer (Lien or Right to Withhold)
18. Divorce
19. Confession
20. Contract of Reward
21. Usurpation
22. Pre-emption
23. Cultivation of Waste Lands
24. Found Property
25. Inheritance
26. Fixed Punishment
27. Discretionary Punishment
28. Retaliation
29. Blood Money

3. The obliged person who has doubt towards the rule.

Whenever finality occurs, it is proof in essence and no fabrication of validity and correctness is needed for it. But conjecture is not essentially proof because it has hypothetical or presumptive discovery in contrast to reality but it is possible for conjecture to be considered valid by legislator in some cases, in other words, legislator orders us to have confidence, to have compulsory obedience and to be bound over some conjectures. To sum up, it is not completely fixed.

Since doubt is equal in two sides and it cannot have any opinion on the one hand and there is no tradition and discovery of reality, it is not reasonable to consider it valid in this case. So, whenever a rule is legislated in the case of "doubt about real rules", it is the same as legislator says: "the event of doubtful rule has this kind of rule". This rule is a rule other than a real rule and is considered as doubtful for us. Whatever doubtful are in fact real rules and a rule which is considered for the event of doubtful rule is the prima facie rule and is opposed to doubtful real rule.

The evidence bespeaking this prima facie rule is called as principle. Whenever there is no evidence on real rule and we have doubt about the rule, principle is considered as valid.

Theoreticians in law divide the practical principles into four divisions. They believe that practical principles are confined to these four principles based on rational restriction and induction, because in the event of doubtful rule (doubtful event), when the state of record is considered (it is valid in the viewpoint of legislator), it will be a conduit for APS; when the state of record is not considered, it includes two parts: In the first part, doubt is about obligation. It is considered as a conduit for innocence. In the second part, doubt is not about obligation. It has two subdivisions. Precaution is possible or impossible in it. When precaution is possible, principle of precaution is as a conduit. When precaution is impossible, principle of option is as conduit. These four principles are conducted in all cases of jurisprudence (Feiz, Alireza, *Fundamentals of Jurisprudence and Principles*, Tehran University Publication, 2012, P: 176-177). Then we will deal with the presumption of innocence using the words of Feiz.

Authorization of previous state (APS)

APS means to obtain an object. In relation to the idiomatic meaning of APS, we should say that theoreticians in law have presented different definitions for APS. The most explicit and shortest definition is offered by Sheik Ansari: APS means to maintain what has been before

(Muhammadi Khorasani, Ali, *Description on jurisprudence principles*, Dar Al- Fekr Publication, 1994, Vol 4, P: 197-198). In other words, APS means to continue what has been before. Jafari Langerudi says that the idiomatic meaning of APS is to comply with previous certain status in which there will be doubt about its continuance. For example, suppose a person with unknown whereabouts whom life was certain and perceptible before his absence; but when his life is doubtful because of his absence, APS will be conducted on him until presumptive death is issue.

Article 198 of civil procedure and Articles 873 and 1333 of civil code have dealt with APS. When there is a need for APS and the mentioned Articles seem vague, the meaning and scope of APS will be developed using the criterion of these Articles. Courts act based on this rule. Development of APS principle (principle of continuity) in the courts is less than jurisprudence because of the existence of complexityin the texts of methodology and knowledge of the principles of jurisprudence and inexperienced problems and issues concerning the APS.There is no APS in European law (Jafari Langerudi, Muhammad Jafar, *law terminology*, Ganje Danesh Publication, 25th impression, 2013, P: 36).

Muzaffar states that we should describe APS as a presumption. If this is the case, there will be no difference between APS and other practical principles and jurisprudential rules. In reply to his comment, Sheik Ansari declares that if the tradition is validity basis for APS, we should consider APS as *prima facie* (secondary) rules and if the rational judgment is validity basis for APS, we should consider it as presumptive evidence of inference such as syllogism and induction.

Muzaffar states that although this opinion is considered as axiom in the viewpoint of persons came after Sheuk Ansari, the ancients also considered APS as presumption, because their document was rational judgment. But this conjecture is a document for APS. In fact, it is not APS itself. As tradition is a presumption for validity of APS, the rational rule is considered as presumption for validity of APS (Muzaffar, Muhammad Reza, *Principles of Jurisprudence*, Dar Al-Fekr Publication, 7th impression, Vol. 2, P: 493-494).

Legal APS and subjective APS

Whenever doubt is occurred about continuance of the previous judgment which had been already ascertained for a subject, legal APS will be conducted. For example, Article 803 of civil code permits

the donor to evocate to it by continuance of gift; but there is no Article in law by which we can explain the judgment for a subject in which part of a gift is destroyed. Thus, given the destructed part of gift, there is doubt whether the gift of revocation is still remained for donor or it is abolished. In this case, previous revocation permission will be subjected to APS because of doubt about revocation permission after destroying part of the gift. Therefore, the donors can evocate to donation in relation to the partial destruction and continuance.

Whenever doubt about judgment is validated by doubt about continuance of the subject, the subjective APS will be conducted; in other words, whenever the subject is ascertained, there will be no doubt about its judgment. For example, suppose a person who has just travelled to a city. Then, after some days, planes bombed the city; city is conquered by enemy. His relatives receive no news from him and they don't know whether he is alive or dead. They don't know whether he is captured by enemy or not, because there is no connection between the city and other cities and he cannot come back to his city or he cannot announce to his relatives. In this case, his previous life will be subjected to APS. According to Article 1019 of civil code, "since anybody has been heard no news from him and his life yet and nobody knows whether he is alive or dead. So, his presumptive death judgment will be rendered.

In this example, we can see that life or death of that man is not considered directly by law but is considered by validity of legal judgments conducted on it such as matrimony or divorce and so on. In this regard, life of that man will be subjected to APS and judgment on continuance is issued (Imami, Seyyed Hassan, *Civil Law*, Islamiyeh publication, 12th impression, 2008, Vol. 6, P: 275-277).

It is mentioned in the book *Izah Al-Kefayah* that APS is conducted in both religious instructions and questions of fact such as zaid life. The meaning of order of certain affects in religious instructions is that we are bound over the judgment we had already been certain about. In the case of questions of fact, we are bound over the equivalent judgment of the subject which is ascertained by us (Fazel Lankarani, *Izah Al-Kefayah*, Nouhe Bahar Publication, 1996, Vol. 5, P:261). If *Mostas`hab*[1] is one of the secondary rules or *Serfehsubjects*[2] or lexical subjects, there will be no problem in conducting its APS (Lanarani, Fazel, Vol. 6, P: 39-40).

[1]. It is a subject which has religious law and instruction. It was already existed certainly but there is doubt about its existence now and APS should be conducted for it (judgment on its previous certain continuance).

[2]. Subjects in which the legislator has never possessed.

Existential APS and non-existential APS

Existential APS is conducted if there is existential entity for APS; in other words, there must be an entity which has already been existed but now, we have doubt about its existence and we don't know whether it is still remained or lost.

Article 198 of civil procedure proves the correctness of existential APS about religious law. It declares that ifsomebody is obliged to a debt or right and if it has been proved, we can consider it as a principle of continuance for it unless the contrary is proved. Although this Article is about APS and APS of the right, they don't have any characteristic by which APS could be as proof for both of them; but also deductive inference of this Article is APS principle. Therefore, APS could be conducted on all cases which have conditions for existential APS.

Non-existential APS will be conducted if there is non-existential entity for APS; in other words, there must be an entity which has not already been existed but now, we have doubt about its existence and we don't know whether it is appeared or lost; so, APS will be conducted on non-existence of that entity. In other words, that entity is recognized as a lost entity by APS.

Example: whenever insolvency and inability of debtor to pay the creditor is proved and whenever there is doubt about removal of insolvency, his insolvency will be subjected to APS as long as his solvency is confirmed.

Words of Imami could be challenged. As great Sheik has said in his book *Rasael*, non-existence is classified into two divisions. So, we should notice which of them is discussed in negative (non-existential) entity. Therefore, we first deal with the words of great Sheik about classifications of APS by validation *of Mostas`hab*.

Sometimes, *Mostas`hab* is a negative entity which is divided into two parts. First, absence of indebtedness to religious and law duties which is called by some jurists as "*principal innocence* or *acquittal* or *release from judgment*". Second part, which is differentfrom the first part. For example, unchanging the original meaning of the words and utterance; lack of evidence, lack of Zaid death, lack of cloth humidity, lack of contingency for causes and factors of prayer or ablution and so on (Sheikh Ansari, Morteza, *Faraed Al-O`sol*, Moasseseye Alami Publication, Vol. 2, P: 182, 1991).

Principle of correctness has priority over all non-existential APSs. Whenever the principle of correctness is conducted on a subject, non-existential APS will be conducted too for that subject which is contrary to the principle of correctness

(Farahi, Seyyed Ali, *Al-Qavaed Al-Feqhiyah*, Moasseseye Nashre Islami Publication, 1st impression, 2006, P: 100). In this regard, Sheik Farahi says that: "when the principle of correctness is conducted on a subject, non-existential APS will be conducted too contrary to the principle of correctness". He describes it by providing an example. In this example, he says that whenever doubt about validity of the sale is due to the doubt whether sale is occurred based on its conditions (correct sale) or not (incorrect sale); although, non-existential APS is naturally conducted and attributes to incorrectness of the sale with non-ascertainment of its conditions, but the principle of correctness in sale has priority over non-existential APS (Farahi, P: 100). We should refer to the words of Ayatollah Sobhani to solve this problem and to better understand the usage of non-existential APS.

Sometimes we have doubt in errors in fact and the source of doubt is not the availability of part or condition but the source of condition is the concurrence of the act with impediment and removal. For example, it is guessed that a person has said his prayers with impurity or polluted cloth (Darse Kharej, Ayatollah Sobhani). Since this article discusses the usage of APS in jurisprudence and law, this topic will be dealt with in applied discussions.

Priority of caused principle over caused principle

The causal APS has priority over caused APS because when there is causal APS, no subject will be existed to conduct the caused APS. For instance, suppose a person who has given his attorney, power o attorney to sell his house; after concluding the transaction, he claimed that he has dismissed his attorney before concluding the transaction and he has informed the buyer. Then, he presented some documents to the court and finally, he requested the court to the transaction. Since the lexical and verbal evidences of plaintiff don't prove the reception of news by attorney about dismissal, the judge will sentence him to failure of evidence.

As it is shown below, failure of evidence by plaintiff is based analytically on caused APS and caused APS in which caused APS has priority over caused APS because of the conflict between them.

Subject matter of plaintiff annulment of selling a house which is sold by attorney. The plaintiff believes that lack of power of attorney by his attorney during concluding the contract of sale is considered as source for annulment of sale, because he invokes that he has already dismissed his attorney and he has informed the buyer. In this regard, there are two doubts: one is about the ownership of the client after conclusion

of the contract of sale and the other doubt is about the power of attorney during concluding the contract of sale. We can see the conditions of APS in both of them; but these two APSs are in conflict, because correctness or validity of sale is the result of APS in the power of attorney during concluding the contract and annulment of the sale is the result of APS in the ownership of client after conclusion of the sale contract. Since the doubt about the correctness of sale is due to the doubt about the power of attorney, no power of attorney will be remained using continuance APS during selling an object for ownership APS in relation to the house after sale; because doubt will not be removed in transferring. In other words, APS is conducted in causal power of attorney and caused ownership. Causal APS has priority over caused APS in relation to the conflict between them (Imami, Vol. 6, P: 281-282).

We discuss ten usages of APS and non-existential APS in the book *Al-Rowzah Al-Bahiyah fi Al-Sharh Al-Lo`mah Al-Dameshqiah* concerning the sale in the cases of dispute between vendor and customer:

1. Observing the goods is sufficient for describing it, though it is not observable during transaction. Whenever the seller and the buyer have dispute in the case of the goods, there will be three states:

A)They have dispute in the case of change of the goods.

B)They agree in change but they have dispute in priority and non-priority of the sale.

C)Goods is destroyed (Shahid Sani, Zein Al-Din Al-Hiei Al-Alemi, *Al-Rowzah Al-Bahiyah fi Sharh Al-Lo`mah Al-Dameshqiyah*, Dar Al-Ta`arof Publication, Vol. 3, P: 208-212).

A) The seller and the buyer have dispute in the case of goods change. The buyer claims deficiency ingoods but the seller claims surplus in goods. In this regard, there will be two states:

First state: the buyer claims the deficiency in goods but the seller denies his claim. The buyer says that the seller has already known it. In this case, there will be two promises:

a) The buyer gives the right of option for cancelation and annulment by his oath.

Evidence: although the seller claims that the buyer has already known it, the buyer denies it. As a result, principle of non-collection APS ordains that the buyer has not collected his right. So, he is considered as a denier, because the seller claims that the seller has collected his right but the buyer denies it. According to the rule "*burden of proof rests upon claimant and the oath upon one who denies*", the denier swears and his claim has priority. The other

evidence is that the principle of continuance for possession of the buyer is based on the purchase money. The principle here means APS. So, the non-existential APS is used in relation to the goods in which there is doubt about delivery of the goods and non-delivery of the goods, so that, non-existential APS will be conducted on non-delivery of the goods. After exclusion of evidence, Sheik Ansari says that contract is not considered for available goods (Sheik Ansari, Morteza, *Al-Makaseb*, Moasseseye Elmi Publication, 1st impression, 1995, Vol. 1, P: 528-530). In other words, when there is doubt about fundamentals of contract, the principle of correctness is no longer conducted. The result of correctness principle is in fact, "the presumption of irrevocablability of the sale contract" or "the principle of bindingness of the sale contract".

b) Promise: the seller has priority by his oath and judgment is pronounced in favor of the seller and as a result, the seller has no right for cancelation and annulment.

Evidence: one is that the buyer knew that there is sale permission and he didn't know much about the goods. The other evidence is non-existential principle. In other words, when there is doubt about the change of goods, we should refer to the previous state.

Second state: the seller and the buyer have dispute in the change of the goods. In this case, the seller claims surplus in goods, but the buyer denies it. Thus, there are two promises:

a) Promise of the buyer has priority. The right of the seller for cancelation or annulment will be removed.

Evidence: the first evidence is the principle of non-change. The second evidence is that sale is necessary here and the meaning of principle is APS; whenthere is doubt about the change of the goods, the previous state will be considered and APS will be conducted on the principle of non-change.

b) Promise of the seller has priority, as it is in the section "a".

Question: what problem will be occurred when the promise of the buyer has priority in both first and second promises? It should be said that plaintiff and evidence are both considered and summed up; because in the first state, the buyer denies the claim of the seller for informing and in the second state, the buyer denies the claim of the seller; so, how can we accept his claim in both promises.

B) The seller and the buyer agree in change, but they have dispute in priority and non-priority of the sale. In other words, the buyer claims that the change was occurred before the sale and he requests the court to cancel and annul the sale contract;

and the seller claims that the change was occurred after the sale and he requests the court to receive his right or the purchase money. In this regard, there are two promises:

a) Whenever the indications are presented in favor of one of them, he will have the priority.

b)If both states are possible, there will be two aspects:

First aspect:principle of non-collection is the right of buyer. So, promise of the buyer has priority.

Second aspect: principle of non-priority is in fact, change in the sale. So, promise of the seller has priority.

Aspect of taking priority: since the principle of non-priority is change in causal principle, it removes the evidence of the first aspect (caused principle).

It is evident that non-existential APS is used in both aspects and when there is a certain existential entity, we can use non-existential APS; in other words, the principle of non-existential APS is only conducted in the collection of the whole right or in the non-priority of the occurred entity.

C) The goods is destroyed. Discharge of this kind of goods is sufficient for its delivery. In this case, two possible states will be occurred.

First state: they have dispute in priority and non-priority of the destroyed goods in the sale contract. The buyer claims that the goods is destroyed before the sale contract and he requests the court to cancel and annul the sale contract. So, he wants to receive his purchase money. The seller claims that destruction of the sold goods is occurred after the sale contract and he requests the court to approve the sale contract and then he says that the transaction is correct.

Judgment: since non-priority principle of the destroyed goods is a caused principle, the buyer has priority in the non-collection principle and as a result, it removes the caused principle.

Second state: they have no dispute in destruction of the goods. In fact, they agree in destruction of the goods. They have dispute in priority and non-priority of destruction, because they both say that they don't know when the destruction of the sold goods is occurred. Thus, two principles are in conflict: principle of accused non-priority and principle of non-priority of contract over destruction. Since these two principles are the same in ranking, both are abolished. Therefore, promise of the buyer has priority because continuance principle of his possession is on the purchase money and his ownership is based on this case. The other reason is

doubt about the effect of the contract with transfer nature. Whenever there is doubt in the existence of a contract, it is principle of non-contract. Principle of non- APS and principle of non-contract are used for two times and one time respectively.

2. According to the option for delayed payment of the price, if the buyer doesn't pay the price of the sold goods within 3 days, the seller will have the option right of cancelation by following three conditions: not receiving the purchase money; not delivering the goods; and not conditioning the delay. This question is asked: if the buyer pays the price of the sold goods after 3 days, will the right of option be abolished or not? In this regard, there are two aspects:

First aspect: APS of cancelation attributes to the ascertainment of cancelation right.

Second aspect: decline of the loss attributes to renouncing a right of option (Shahid Sani, Vol. 3, P: 347-349). To sum up, if the seller consents to receive the purchase money, it is his new engagement to the right of option; otherwise, he has the right of cancelation.

3. Selling and renouncing: e can see in the discussion of lesion option that if the deceiver pays the lesion difference, the right of option will not be renounced, though it leads to the removal of the option; because APS is considered on the right of cancelation approved before (Shahid Sani, Vol. 3, P: 352-353). In this case, if the deceived party in the transaction consents to receive this lesion difference, option of lesion will be removed. Otherwise, APS will be conducted on the right of option.

4.According to the option of defect, whenever possession is occurred, the option of defect will be renounced whether the possession is occurred by transferring of the ownership or not; whether the goods is changed or not. Now, this question is asked: if the ownership of the goods returned to the buyer, will the right of option be returned to him again or not? In this regard, there are two aspects:

First aspect: maybe, the permission for option of defect is returned, because there is a defect and it is possible to remove it.

Second aspect: when the possession of the goods is removed from the buyer, it means that the right of option is renounced and APS is conducted on it; thus, returning the permission needs new evidence (Shahid Sani, Vol. 3, P: 374-375).

5.According to the option of conditions, a person who is responsible to perform a condition is no longer obliged to perform that condition due to non-existential principle (Shahid Sani, Vol. 3, P: 383). There is difference between affirmative condition and corollary condition and when the affirmative condition is depended on an irrevocable contract (binding contract), the

person who has determined the condition is given the right of cancelation for option of conditions.

6.When the buyer claims that the goods is defective, he can file a claim in two ways:

a) He claims that the goods is defective; in this case, there will be two states:

First state: the buyer was absent whileweighing and measuring the goods. So, the evidence of the parties to the dispute will be presented. The seller claims that he has delivered the goods and is cleared from obligation. The buyer claims that the goods is defective.

Judgment: it is in favor of the buyer by his oath.

Evidence: right of the buyer is not collected. The principle of non-collection is the same as non-existential APS which is used in doubt created after an existential entity.

Second state: the buyer was present while weighing and measuring the goods. The evidence of both parties is the same as the first state.

Judgment: it is in favor of the seller by his oath.

Evidence: there is apparent judgment here. The owner of the right (right holder) was present while delivering the goods and received it completely. Apparent principle has priority here. The author says that agreement of the principle will be possible apparently.

When the buyer receives his right, this reception is his confession to receive his complete right and if he claims deficiency after this confession, his claim will be contrary to the principle. This argument will not occur in the first state, because since he was absent while weighing and measuring, he don't confess to receive his right.

b)Whenthe claim of buyer about deficiency of the goods is not accepted, the buyer changes his claim and says that he has not received the goods without considering his presence or absence, because presence and absence have no effect on this dispute. The buyer and the seller present their evidences. The seller claims that he has not received the whole goods.

Judgment: it is in favor of the buyer by his oath.

Evidence: the principle of non-collection gives the right to the buyer. This principle of non-existence is the same as non-existential APS which is used in doubt created after an existential entity.

Question: this dispute will be accepted if the buyer has not claimed for deficiency of the goods. This is one of the evidences on which religious law is conducted. For example, the defendant claims his clearing from obligation when he has paid

something to the plaintiff without any witness. If he confesses to the reality, he is obliged to pay it (Shahid Sani, Vol. 3, P: 400).

7. The buyer and the seller have dispute in amount of the goods. In this regard, the seller claims the surplus of the goods and the buyer claims the non-surplus of the goods. This case is investigated in the following four states:

a) The original goods is available or not.

b) The original goods is available but it is transferred to another person by necessary sale.

c) Part of the goods is destroyed.

d) The original goods is mixed with another thing.

a)The original goods is available or not. In this case, there are three promises:

First promise: when the original goods is available, the claim of the seller is accepted by his oath and when the goods is destroyed, the claim of the buyer is accepted by his oath. This is a well-known promise namely "consensus promise". The writer says that it is impossible to claim the consensus.

Evidence: the existence of consigned tradition which is included in the book *Wasayel Al-Shiah*.

Second promise: the promise of the buyer has priority and is accepted by his oath whether the original goods is available or is destroyed.

Evidence: because the buyer denies the surplus amount. This is the principle of non-surplus. This principle is the same as non-existential APS. In this regard, there is an existential APS. So, existential APS is conducted in relation to its surplus.

The writer says that: this is a strong promise if the consensus is not proved contrary to it. Allameh has used this promise in his book,*Tazkareh*. It is evident that no consensus is used in the well-known promise.

Third promise: the buyer and the seller swear. As a result, sale contract is canceled.

Evidence: they both are either denier or plaintiff, because each of them claims a contract with a defined goods and the other one denies that claim. Thus, the rule "*burden of proof rests upon claimant and the oath upon one who denies*" is conducted on both claims.

This selected promise is included in the book of Shahid Avval *the rules* and the book of Fakhreddin, *description on the rules.*

The second promise and third promise are known as "rare promise" in the book *Doroos.*

b) The original goods is available but it is transferred to another person by necessary transfer. Should this necessary transfer be

considered as destruction? In this regard, there are two promises:

First promise: this transfer attributes to destruction.

Evidence: since we don't access to the goods, it is considered as destruction though the goods is available in real world.

Second promise:this transfer is considered as non-destruction, so that, if the original goods is not destroyed, the promise of the seller will have priority. In this regard, a substitute of equal value for damaged goods will be provided instead of fungible and non-fungible goods.

Evidence: because the goods is remained and we cannot consider its transfer equal to real destruction as evidence; so, the promise of the buyer has priority due to the real destruction.

c) If part of the goods is destroyed, three promises will occur:

First promise: destruction of part of the goods attributes to the destruction of the whole goods.

Evidence: since the existence of the goods is considered as criterion for the priority of the seller`s promise and since the whole goods is not available here, the promise of the seller has not priority and thereby the whole possession is annihilated by annihilation of part of the goods.

Second promise:we ignore the destruction of part of the goods and we assume that the whole goods is available or remained.

Evidence:people custom says that when part of the goods is remained, we can call it as goods.

Third promise: the destructed part is considered as destructed goods and the remained part is considered as available goods.

Evidence: when part of the goods is destroyed in real words, it attributes to the destruction and when part of the goods is remained, it attributes to the availability of the goods.

d)When the goods is mixed with another thing, two states will occur:

First state: it is difficult to separate them

Judgment: it is judged that the goods is remained and the famous promise of the first state is conducted. In other words, the promise of the seller will have priority by his oath.

Evidence: the narration mentioned in the section (a).

Second state: it is impossible to separate them. For example, when the water is mixed with the sugar or when the milk is mixed with oil. In this case, two aspects will occur.

First state:we consider the goods as destroyed goods. According to the

mentioned tradition, the promise of the buyer has priority.

Evidence: customarily, it is not correct to say that the goods is remained.

Second aspect: we consider the goods as remained or available goods.

Evidence: the goods is not destroyed by real destruction and some signs indications of the goods are remained in real world (Shahid Sani, Vol. 3, P: 405-406).

8.The seller and the buyer have concord about the payable at maturity time, but they have dispute in acceleration, provisions and guarantee by the seller. In this regard, two states will occur:

First state: the seller claims that maturity is imminent or the buyer says that the seller should give him guarantee for belonging to another person.

Judgment: the seller swears and judgment becomes in favor of the seller.

Evidence: since the principle of non-existence attributes to all of these cases, the meaning of non-existence principle is the same as the meaning of the non-existential APS which is considered after the existence of an existential entity.

Second state:in contrast to the dominant state in which the seller claims the maturity is imminent, the seller claims that the maturity is not imminent due to some intentions. In this case, the buyer denies it.

Judgment:the promise of the buyer has priority.

Evidence: the principle of non-existence attributes to all of these cases. The meaning of the non-existence principleis the same as the meaning of the non-existential APS which is conducted after the existence of an existential entity (Shahid Sani, Vol. 3, P: 407).

9.The seller and the buyer have dispute in the magnitude and amount of the goods. The promise of the seller has priority due to the non-existence principle. Again, the non-existential APS is conducted after the existence of an existential entity.

Question: this judgment is mentioned in the sections 8 and 9 in relation to the amount of the goods based on the principle of the non-existence. Why didn't the author mention this in the section 7 in relation to the difference in the amount of the goods?

Answer: the author replies that we had narration in the sections 8 and 9 and that narration was based on the principle of non-existence (Shahid Sani, Vol. 3, P: 408).

10. In the sections 8 and 9, they had dispute in the maturity and amount of the goods or provisions or guarantee. It does not make any difference whether the goods is complete or specified. Sometimes, the dispute leads to the difference in the goods; for example, the seller says that he has sold this cloth for 1000 dirham and the buyer

claims that the seller has sold that cloth and another cloth for 1000 dirham.

Judgment:the seller and the buyer swear. So, the sale contract will be canceled.

Evidence: there is no common thing between them. One party claims a thing that the other party denies it. So, both are either plaintiff or denier. Since both of them swear, the sale contract will be canceled (Shahid Sani, Vol. 3, P: 407).

CONCLUSION

We can see that APS and non-existential APS (principle of non-existence) are used in nine sections of all sections. In the section 1, there were several promises for this usage. In the section 2 in relation to the option of delay, the price or the purchase money is paid after 3 days in which we had doubt about the renouncing a right of option. In this regard, APS attributes to the ascertainment of the right of option, as it is ordained in the Article 402 of civil code which denotes the option for delay of the purchase money. It is also evident in the article "the usage of APS in civil codes in Iran" (Hamid Abadi, Ali Akbar Izadiford, Hossein Tafi, *Islamic Law and Jurisprudence press*, No. 4, Summer 2011, P: 1-19, Articles 1-2). In the section 3, the deceiver paid the difference and then APS was conducted on it by doubt about the renouncing a right of option. It is explicitly evident in the Article 421 and this essay. There are evident examples here. So, why should we consider the usage of APS as Article 497 of civil code in which the lease will not be canceled due to the death of lessor or lessee?

Since the lease was certain in previous state but now, doubt will be occurred by the death of one party. In this case, the lease will be continued by referring to the previous state (Lotfi, Asadollah, *Principle of Continuance in statue and jurisprudence*, Law Quarterly of Political Sciences and Law College, No. 101, P: 261). Since the lease is a binding contract and benefit is completely transferred to another person; when he dies, there will be no doubt about the binding contract. Is the primary principle based on the cancelation of the contract due to the death of one party or based on being representative of the lessor or lessee? Certainly, the primary principle and the nature of the binding contract is based on the continuance of the lease until the discontinuity of the contract duration; even in the case of maturity of the deceased debt, we have a tradition in contrary to the primary principle on which we can rely. Therefore, this Article is derived from the primary principle.

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