RECONSTRUCTING THE ROMAN LAW
OF REAL SECURITY

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The essential idea of real security is that the debtor transfer
to the creditor a possessory interest in a specific item or aggregate
of property, chattel or realty, to serve as security for the loan.
There are four possible generic types: (1) the debtor vests both
ownership and possession of the property in the creditor, subject
to a personal obligation to reconvey on repayment; (2) the debtor
vests ownership in the creditor, but retains possession of the prop-
erty by leave of the creditor; (3) the debtor retains ownership
of the property, but grants possession irrevocably to the creditor
until repayment of the debt; and (4) the debtor retains both own-
ership and possession of the property, but transfers to the creditor
a possessory interest in the property.1 These four types represent
stages of increasingly sophisticated abstraction in the relationship
of legal interests denominated as real security.

Roman law knew all four of these modes under the names of
mancipatio cum fiducia or in iure cessio cum fiducia (commonly
known and hereafter designated simply as fiducia), pignus, and
hypotheca. The exact character of the real security encompassed
by each of these terms is difficult to ascertain and lately has oc-
casioned some dispute among Roman law scholars. As a pre-
liminary working definition it may be stated that fiducia indicated
the transfer of ownership to the creditor, who generally but not
always retained possession as well; pignus indicated the retention
of ownership by the debtor, but the transfer of possession to the
creditor; and hypotheca indicated the retention of both ownership
and possession by the debtor, but with the creation of a possessory
interest in the creditor.

The traditional standard view of the Roman law of real security
would define the Roman institutions as above, and present a his-
torical view basically as follows.2 The earliest such institution in

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from the Digest or Code are from Corpus Juris Civilis (Krueger-Mommsen
ed. 1882); those in English are from The Civil Law (Scott transl. & ed.
1932).

1Technically speaking, the first two forms are not total real security, as
the debtor has only a personal right to recover the res; however, the idea of
transferring the total property or some property interest in return for credit
is the essential concept herein to be considered.

2See, e.g., Buckland, Text-Book of Roman Law 473-81 (2d ed. 1932)
[hereinafter cited as Buckland, Text-Book]; Jörs-Kunkel-Wenger, Römisches
the republic was *fiducia*, in fact and in law a transfer of ownership to the creditor, conditioned upon repayment. Possession was also in the creditor, although he might grant it by leave or by lease, *in precario*, to the debtor, rarely in the early days but quite commonly by the late republic. *Fiducia* worked harshly from the debtor's point of view, for the creditor had the legal power to alienate the pledged property. True, the debtor had an *actio fiduciae* which penalized the creditor with *infamia* for a wrongful sale, but this personal remedy did not enable the debtor to recover his property.

Accordingly, at some point in the early republic *pignus* arose, which gave the creditor possession but left the debtor with ownership. The debtor now could protect his ownership against third parties by an *actio in rem*, while the creditor could utilize praetorian interdicts to protect his possession. But the debtor normally could no longer use the pledged property. To enable him to do so, the creditor increasingly, especially in landlord-tenant situations, allowed the debtor possession by lease or leave *in precario*. From this developed the *hypotheca*, sometime in the mid-empire, in which both ownership and possession were left in the debtor, but the creditor obtained a possessory interest entitling him to the ultimate legal right to possession. The *hypotheca*’s use was limited so long as the creditor could only exert his interest against the debtor, but when the Edict of Hadrian granted the creditor an *actio Serviana*, against all third parties, the *hypotheca* became predominant at least for real property. By the late empire the distinctions between *pignus* and *hypotheca* were blurred and the terms often used interchangeably, and they were so used in the *Corpus Juris Civilis*. Meanwhile, at some point in the mid-empire, *fiducia*, which had survived so long only because creditors found it a useful device, finally became extinct along with the institutions of *mancipatio* and *in iure cessio* themselves.

This interpretation of the history of Roman real security was everywhere prevalent until the end of the nineteenth century. Then an attack was launched on the basis of independent research by two scholars, Wigmore in a series of articles in the *Harvard Law Review* in 1897,\(^3\) and the Swedish romanist Martin Fehr in a dissertation published in 1910.\(^4\) Their view is that no such institution as the *hypotheca* has an initial separate genesis in the mid-empire. On the contrary, it was the old institution of *fiducia* which had

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\(^1\) Recht 152-62 (3d ed. 1949) [hereinafter cited as Jörs-Kunkel]; Schulz, Classical Roman Law 400-27 (1951) [hereinafter cited as Schulz].
\(^3\) Fehr, Beiträge zum römischen Pfandrecht in der klassischen Zeit (Upsala 1910). This work was not available to the author.
evolved into the complete antithesis of its original form: instead of ownership and possession in the creditor, both were left in the debtor. In the late empire it was the distinction between *pignus* and this new *fiducia* which blurred, resulting in interchangeable terminology. The term *hypotheica*, a Greek word, arises only because the compilers, familiar with a corresponding Greek institution, chose to use it to replace *fiducia* everywhere the latter appeared in the selections incorporated in the *Corpus Juris Civilis*.

This new thesis could hardly be said to have provoked a raging controversy, but there is some dispute among present writers as to its validity. The Wigmore-Fehr view has been largely adopted by Albertario, Sohm and Mitteis, while Cuq, Girard and Manigk have totally rejected it. Rabel, Kaser, Jörs and Kunkel have received it with respect and adopted it in part. Anglo-American writers, *e.g.*, Buckland, Schulz, Radin, Burdick, Lee and McNair, have largely ignored it. It is the purpose of this article to present an appraisal of the historical evolution of the Roman real securities and a neutral delineation of the substantive law underlying each possible mode—ownership and possession in the creditor, ownership in the creditor with possession in the debtor, possession in the creditor but ownership in the debtor, and ownership and possession in the debtor with a possessory interest in the creditor entitling him to eventual legal possession.

I. **Historical Evolution**

Attempting to reconstruct the classical law of Roman pledge by analysis of the *Corpus Juris Civilis* and the scattered independent texts available is difficult at best. To go further and try to determine the exact nature of the republican law leads us into the sphere of educated guesswork. Nonetheless the outlines of such law can be discerned with approximate accuracy.

The Twelve Tables, so far as they are extant, contain no reference to any type of real security. However, they do contain penal-

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5 A total of three articles in English and perhaps two or three times that in Europe scarcely qualifies as a raging controversy even by academic standards.


7 Buckland does reject the view that *hypotheica* has been interpolated throughout the *Corpus Juris Civilis*, but does not mention Wigmore or Fehr. Buckland, Text-Book 475 n.8. Jolowicz merely notes the dispute without drawing any conclusions of his own. Jolowicz *Historical Introduction to Roman Law* 319 n.1 (2d ed. 1952) [hereinafter cited as Jolowicz].

8 Unless Table VI.1 can be construed as referring to *fiducia cum creditore*, which is doubtful. See Jolowicz 299. Erbe declares there is not even a secure
ties for wrongdoing by persons to whom goods have been committed for safekeeping. This earliest form of bailment for safekeeping was called *fiducia cum amico*, and was close kin to the early transfer of title for pledge, the *fiducia cum creditore*. A reasonable hypothesis is that the existence of the *fiducia cum amico*, with its conditional transfer of property to a friend with legal protection for a future reconveyance, inspired creditors and debtors with the idea of the similar transfer *cum creditore*.

But the matter is by no means free from doubt, and indeed it is not even certain that *fiducia cum amico* preceded *fiducia cum creditore*.

Jolowicz speculates that originally both types of transfer in *fiducia* contained no legal sanction for retransfer. He argues that the informality of the arrangement and the use of the word *fiducia* (*fides*) "points to a time when it was unenforceable, and the transferor had to rely on the faith of his friend or creditor."
The theory gains weight when it is remembered that the Romans consistently preferred personal security to real security, a preference accounted for by the extraordinary character (in Schulz's phrase) of "Roman *fides*, Roman pedantic accuracy, honesty and reliability in business matters. . . ." But if such use of *fiducia* ever occurred, it was certainly extremely early and legal sanctions undoubtedly existed by the time of the Twelve Tables.

A much more probable nascent stage in Roman pledge law was one in which the object pledged was summarily forfeited to the creditor on non-payment at maturity—and this whether the ownership had been given to the creditor in *fiducia*, or only the possession in *pignus*. Direct support for this theory is found in Pompionius, D.20.5.9.1, and Scaevola, D.46.1.63, in which reference is made to the creditor who possess the right to sell the pledge under a special clause granting him the right to sue the debtor for any unrealized deficiency — the argument being that such a clause only arose because originally the creditor had but a bare forfeiture right to the pledge itself. Indirect evidence is found in the

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basis for the opinion that *fiducia* of any sort is as old as the Twelve Tables. Erbe, Die Fidusia in Römischen Recht 4 (1940).

9. Table III.1, The Civil Law 62 (vol. 1 Scott transl. 1932).

10. Wigmore, supra note 3, 11 Harv. L. Rev. 32 n.2.

11. Erbe, op. cit. supra note 8, at 9 & n.1.

12. Jolowicz 299. The *actio fiduciae* for *fiducia cum creditore* is, however, quite old and may date to the time of Q. Mucius. Ibid.


14. Jolowicz 318. But see Erbe, op. cit. supra note 8, at 2-4, wherein it is argued forcefully that the *pignus Verfallspfand*, or forfeiture pledge, is the oldest Roman pledge form, and the more technical *fiducia* or *Eigentumspfand*, transferring ownership, is, contrary to prevailing opinion, a later pledge form.


16. Id. at 318 n.1; Jörs-Kunkel 152 n.2.
prevalence of this forfeiture type of pledge among the Germans and Greeks, implying a similar stage of development among the Romans: "Wie im griechischen und deutschen, so scheint auch im römischen Recht das Verfallpfand die Urf orm des Pfandverhält-
nisses dargestellt zu haben." The fact that in later times the creditor clearly had to sell the pledge, returning any surplus to the debtor, "proves, not that Roman law was unlike cognate sys-
tems in its infancy, but that here, as in other cases, the legal genius of the Romans enabled them to develop in a peculiar way institutions which they originally shared with other peoples."18

The legal essence of the forfeiture pledge was that it substituted purely in rem for any in personam rights the creditor might other-
wise have. The creditor bore all the risks of loss of the pledge (periculum) and could not recover any deficiency should the pledge be worth less than the debt (reliquum); on the other hand, he need not return to the debtor any excess should the pledge be of greater value than the debt (superfluum or hyperocha). Since the credi-
tor could always guarantee in advance that the object pledged exceeded (perhaps considerably) in value the amount of the debt, the forfeiture pledge was quite advantageous from his viewpoint. The disadvantage to the debtor undoubtedly accounted for the demise of this pledge form. But when that occurred is disputed; for pignus, undoubtedly it occurred in the mid-republic. Thereafter the same end was achieved only by agreements permitting forfei-
ture to the creditor.10 Probably the same evolution to forfeiture by agreement only occurred in fiducia cum creditore also, although Jolowicz thinks the automatic forfeiture type prevailed at least to Cicero's time.20

There is general agreement that at least in the late republic and early empire there were two distinct types of pledge, that in which the creditor had ownership, called the fiducia cum creditore, and that in which he merely had possession, called pignus.21 Between these two there were some major differences in legal effect. In the fiducia cum creditore, the creditor or fiduciarius had full

17Sohm-Mitteis-Wenger, Institutionen des Römischen Rechts 342 (17th ed. 1949) [hereinafter cited as Sohm-Mitteis]. "As in Greek and German law, so also in Roman law the forfeiture pledge appears to have been the original form of the pledge relationship." (transl. supplied by author). Accord, Kaser § 111, at 393; Wigmore, supra note 3, 11 Harv. L. Rev. 25-27; Wigmore, supra note 6 at 378-79.
18Jolowicz 318.
19Cf. Rabel, supra note 6, at 36.
20Jolowicz 318.
21See, e.g., Kaser 385. "Die Klassiker halten sie (fiducia and pignus) im allgemeinen streng auseinander, obschon die Regelungen auch jetzt noch teil-
weise parallel laufen." (The classical writers usually strictly distinguished the two forms, although the applicable rules already at least in part were parallel.)
ownership of the pledge and could pass good title to third parties, had an actio rei vindicatio against all third parties, and a personal actio contraria against the debtor for any interference with the pledge.\textsuperscript{22} However, the creditor was under a positive duty to reconvey on payment, and the debtor had a personal actio fiduciae if the creditor mishandled the pledge, refused to return it, or transferred it to third parties.\textsuperscript{23} In subject matter, fiducia was limited to property transferred by mancipation (i.e., res mancipi) or in iure cessio, and hence was available only to Roman citizens who could transfer property in that manner.\textsuperscript{24} Transfer of bonitary ownership by traditio could not suffice because the actio fiduciae was not available in such a transfer.\textsuperscript{25}

In pignus, normally the creditor would have possession while the debtor retained ownership. The debtor now was the one who possessed actiones in rem to protect his interest, the actio rei vindicatio against third parties and the actio pigneratoria against the creditor to compel reconveyance on repayment.\textsuperscript{26} The creditor could protect his interest in the object pledged through praetorian possessorly interdicts against third parties, the interdicts uti possidetis, utrubi and unde vi according to Buckland.\textsuperscript{27}

Despite these legal differences, there were two major aspects in which fiducia and pignus were the same, and which brought them to increasingly close affinity: the possibility of possession in precario by the debtor, and the manner in which the creditor could realize the security value of the pledge in case of non-payment.

The critical factor for the creditor in fiducia was his receipt of ownership, not possession — “Besitzübertragung war dabei nicht notwendig.”\textsuperscript{28} The debtor might be allowed to retain the use of the pledge by lease or simple license, both of which were known as possession in precario. Today it is known that possession, though usual, was not required to be in the creditor by pignus either.\textsuperscript{29} Nor was such pignus without possession a late innovation: Cato (234-149 B.C.) contracted for the sale of olives on the tree, and the purchaser pledged everything he brought into the grove as security.\textsuperscript{30} Mitteis, following Fehr’s lead, would dis-

\textsuperscript{22}Buckland, Text-Book 471.
\textsuperscript{23}Ibid.; Jörß-Kunkel 154.
\textsuperscript{24}Erbe, op. cit. supra note 8, at 12; Kaser 385; Sohm-Mitteis 343.
\textsuperscript{25}Schulz 406.
\textsuperscript{26}Sohm-Mitteis 343.
\textsuperscript{27}Buckland, Text-Book 475.
\textsuperscript{28}Sohm-Mitteis 341. “There was no necessity for the transfer of possession.” (transl. supplied by author). Accord, Buckland, Text-Book 474.
\textsuperscript{29}Jolowicz 319; Jörß-Kunkel 156; Kaser § 38, at 126; Sohm-Mitteis 344-45; Rabel, supra note 6, at 38; Wigmore, supra note 3, 11 Harv. L. Rev. 22-25.
\textsuperscript{30}Jolowicz 320; Kaser § 110, at 389.
tungish pledges in pignus into pignore dare and pignori obligari according, respectively, to whether the creditor received possession or not. Further discussion of possessionless pignus may be reserved until the issue of the hypotheca is reached, but one observation is here timely. Clearly if the debtor retained possession, whether the pledge was fiducia or pignus was far less significant: the debtor had no need for an actio fiducia or an actio pigneraetica.

For both fiducia and pignus, the end of the old automatic forfeiture rule meant that there was no way of realizing the security of the pledge in case of non-payment save by agreement. Two types of agreements became common, the lex commissoria, which provided for the forfeiture of the pledge to the creditor, and the pactum de vendendo, or distrarahendo, which gave the creditor the right to sell. In case of sale, the creditor had a personal action against the debtor for any deficiency (reliquum) but was liable for any excess (superfluum or hyperocha). The lex commissoria always had to be an express clause, but the pactum de vendendo probably became implied in classical times, and was an absolute right even in the face of contrary agreement by Justinian’s day.

A powerful creditor could extort a valuable pledge from a debtor for a trifling loan and then acquire it by the lex commissoria; for such abuse Constantine finally abolished the clause, though there is evidence that it remained in use for some time after. Similarly to protect the debtor against an unwarranted sale, an involved system of notice and right of redemption was developed in late classical times and amplified by Justinian.

So much for the law of the pignus and fiducia, about which there is now general agreement; now for the hypotheca, about which there is very little. Not that there is any disagreement today about the growth of the institution itself — ownership and possession of the pledge left to the debtor, with only a possessory interest in the creditor; on the contrary. Originally such an institution, stamped with the name hypotheca, was thought to derive its physical as well as its verbal origin from the Greeks, and statements to such effect may still be found among less careful writers today.

31Sohn-Mitteis 344 n.5.
32Buckland, Text-Book 477; Jörs-Kunkel 154-55.
33Buckland, Text-Book 477; Kaser § 38, at 126; Wigmore, supra note 3, 11 Harv. L. Rev. 27-28 & n.2.
34For an excellent discussion of the latter operation of the rights to sell in post-classic times, see Levy, Weströmisches Vulgarrecht, Das Obligationrecht, 191-95 (1956).
35Buckland, Text-Book 477; Wigmore, supra note 3, 11 Harv. L. Rev. 28-29.
36E.g., Burdick, Principles of Roman Law and Their Relation to Modern Law 381 (1938). Even Buckland hedges in his Manual of Roman Private Law 355 (2d ed. 1939), as to whether the hypotheca was indigenous or borrowed. The older writers, even Sohm, all declared for a Greek origin. See, e.g., Muirhead, Historical Introduction to the Private Law of Rome 242 (3d ed. Grant
But it may now be regarded as confirmed that the institution developed from indigenous Roman roots, and only the name came from the Greek, though precisely when is hotly disputed.  

The pledge without possession first became of importance in agricultural estates. So far as the debtor was concerned the transfer of possession of the average chattel as pledge to the creditor worked no more than a temporary inconvenience. But if the debtor pledged his land to the creditor, or if he leased land from the creditor and pledged the goods with which he intended to live and work upon the land, it was essential that the debtor retain possession and use of the pledge. "Natürlich behielt der Pächter... den Besitz: wie hätte er sonst wirtschaften sollen!" If the res in question could be transferred as fiducia to the creditor (i.e., the debtor had quiritinary ownership and both creditor and debtor were Roman citizens), the creditor could still protect his interest by an actio rei vindicatio. But if the res were transferred as pignus, then the creditor had neither ownership to found an actio in rem, nor possession to qualify for a possessory interdict. As an initial aid to the creditor in this condition, at some point in the Republic the praetor granted him the interdict Salvianum, which enabled him at least to recover the pledged object from the tenant when the debt remained unpaid. It is uncertain but probable that this interdict became applicable before late classical times to protect the creditor’s interest against any third parties in possession of the pledge; in any event in the late Republic or early Empire the praetor created for his benefit an actio in rem, the actio Serviana, which was effective against both the debtor and third parties.

The utility of this actio Serviana naturally commended itself for wider application than the agricultural tenancy alone. Accord-

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Footnotes:
- 1916: "Imported from Greece, and very alien to Roman legal principles..."
- 37 Buckland, Text-Book 475 n.8; Jörs-Kunkel 156; Kaser § 110, at 389; Lee, Elements of Roman Law 177 (4th ed. 1958); Schulz 409; Sohm-Mittels 344-45; Rabel, supra note 6, at 38-39; Wignare, supra note 3, 11 Harv. L. Rev. 33 n.2.
- 38 Buckland, Text-Book 475; Jörs-Kunkel 156-57; Kaser § 38, at 127; Schulz 408; Sohm-Mittels 344-45; Rabel, supra note 6, at 38-39.

(transl. supplied by author).
- 40 Kaser § 111, at 394-95, sharply attacks this view. He believes that even in republican times the creditor in pignus was regarded as sufficiently possessing an owner’s interest to obtain the actio rei vindicatio. The interdict Salvianum, which he dates in the first century B.C., arose because of its advantage in the use of formulary procedure and the avoidance of exact technicalities.
- 41 Jolowicz states that if the interdictum Salvianum was available against third parties, the actio Serviana probably was a creation of classical times, but if the creditor had no relief against third parties otherwise the actio Serviana must have arisen during the Republic. Jolowicz 320.
ingly when Julianus prepared the Edict of Hadrian, he made the actio Serviana available (perhaps as an innovation, perhaps as a definitive statement of prior practice) to any creditor who lacked possession of the pledge: a development truly "die letzte Grosstat des jus honorarium." It should be noted that the use of the terms actio quasi Serviana or actio hypothecaria for this extended use of the actio Serviana is now believed to be post-classical interpolation. The pledge with possession in the debtor was now thoroughly established as a functional device in all areas of life. Specifically, the advantages it afforded in enabling multiple pledges of the same property, as well as its utility to tenants in rural or urban occupancy, made it indubitably the most popular mode of pledging realty.

In this picture of the evolution of the pledge with possession in the debtor, all commentators concur. Where they diverge is over the continued existence of fiducia as a distinct entity, the relationship of fiducia and pignus to this evolving institution and inter se, and the manner in which the name hypotheca became peculiarly attached to pledge with possession in the debtor. The definitions found in the Digest only complicate the matter. Ulpianus: "Proprie pignus dicimus, quod ad creditorem transit, hypothecam, cum non transit nec possessio ad creditorem." D.13.7.9.2. Pignus is when possession is transferred to the creditor, hypotheca when it is retained by the debtor. Simple enough. But then contrast Florentinus: "Pignus manente proprietate debitoris solam possessionem transfert ad creditorem; potest tamen et precario et pro conducto debitor re sua uti." D.13.7.35.1. This clearly indicates that pignus might or might not exist with possession in the creditor. Finally there is the famous maxim of Marcianus: "Inter pignus autem et hypothecam tantum nominis sonitus differt." D.20.1.5.1. So now we are assured that the only difference between pignus and hypotheca is one of words!

There are almost as many explications as there are romanists. Perhaps the closest to the standard older analysis is that preferred by Buckland. In his view, the pledge with possession in the debtor grew out of pignus in the manner described above. Hypotheca was only the Greek name for such a relationship, used in dealings with Greeks until the days of the Severi, when it began to come into general use to distinguish the institution from the standard pignus with possession in the creditor. Fiducia on the other hand continued as a totally independent institution, so that in the empire

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44Sohm-Mitteis 345.
45Jolowicz 319 n.4; Kaser § 111 n.32; Schulz 408.
46Jolowicz 319.
47Buckland, Text-Book 475 n.8.
there were three entirely different modes of pledge—*fiducia*, *pignus* and *hypotheca*. The reason for *fiducia's* continued survival despite the formalistic manner of its creation lay in its advantages for the creditor. Indeed it is “possible that *mancipatio* and *cessio in iure* were kept in existence for some time because they could be used for *fiducia*.” Presumably Buckland would argue that *fiducia* went its separate path until it became so archaic as to perish, while *pignus* and *hypotheca* remained distinct only insofar as the special characteristics of possession in the debtor (tacit hypothecation and multiple hypothecation) required. The thesis is not improbable and cannot be demonstrated as wrong, though there does seem to be no good reason why *fiducia* with possession in the debtor might not also have been a precursor of *hypotheca* and, especially after the *actio Serviana*, have tended to merge with both *pignus* and *hypotheca*.

For Sohm-Mitteis, the significant feature of Roman real security is the development of a freely alienable pledge without possession, an abstract creditor's interest based on agreement between the parties, the *besitzloses Vertragspfand*. In this analysis, the two original forms of republican real security were the *Verfallpfand* or forfeiture pledge and the *Besitzpfand* or possession pledge. The primary form of *fiducia*, with transfer of ownership but not necessarily possession to the creditor, was the *Verfallpfand*. *Pignus* in the form of *pignore dare* was the *Besitzpfand*. The creditor here had bare possession, with no inherent right to foreclose or sell.

By the empire both forms had evolved into alienable pledges, the *Verkaufs pfand*. *Fiducia* now tended to replace the forfeiture agreement, the *lex com missaria*, with the agreement for sale, the *pactum vendendo*. Nonetheless it was less viable than *pignus*, because it labored under two handicaps: the debtor had no right in rem against third parties, and its use was limited to Roman citizens because it could only be created by the rather old-fashioned methods of *mancipatio* and *in iure cessio*. *Pignus* in the form of *pignore dare* was more practical and satisfactory to both parties. The debtor had an *actio rei vindicatio* against anyone in possession, while the creditor had the protection of possessor interdicts.

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48 Buckland & McNair, Roman Law and Common Law 314 (1952).
49 Buckland, Text-Book 474.
50 In the West in post-classic times, this appears to be what happened. See Levy, West Roman Vulgar Law 60 & n.251 (1951), and especially Levy, op. cit. supra note 34, at 181-82.
51 Sohm-Mitteis 342: "dem pactum fiduciae die Verfallklausel (*lex com missoria*) innahmehnte . . . ."
52 Sohm-Mitteis 343: "Das pignus als solches war ein blosses Beschlagspfand (Arrestpfand) . . . ."
53 Id. at 342-43.
and as a matter of practice obtained agreements permitting him to sell.

But as the emphasis from the creditor’s point of view fell increasingly upon the pactum vendendo, the requirement of possession became subordinate: the Besitzpfand turned into a Verkaufspfand, or pledge with right of sale. This form, which Sohm-Mitteis terms pignori obligari, spread in utility through the actio Serviana, until eventually a truly abstract interest in the res came to be the sole basis of the pledge, the besitzloses Vertragspfand, the pure contractual pledge without possession.

“Unter dem Einfluss des steigenden Verkehrs war die Römische Entwicklung vom Eigentumspfand (Manzipationspfand, Verfallspfand) und Besitzpfand (Traditions-pfand, Beschlagspfand) zu dem Verkaufspfand (dem Vertragspfand, welches die Sache als Träger von Geldwert behandelt) übergegangen.”

It is not clear in this presentation whether fiducia as Verfallspfand should be deemed to have died out or merged with pignore dare as the latter gave rise to the Vertragspfand. It is clear that Sohm-Mitteis regards both possession in the creditor, pignore dare, and possession in the debtor, pignori obligari, as equally available alternative forms of pignus, presumably with the term hypotheca as a total interpolation in the Corpus Juris Civilis.

Wigmore’s approach is similar, but more detailed. In his theory, the two original forms of real security were a pledge-mortgage with possession in the creditor (pignus) and a sale to the creditor for repurchase by the debtor (fiducia). The pledge-mortgage with possession in the creditor was primordially a forfeiture pledge; but by the time of our earliest sources it had developed into the standard pignus with agreements to forfeit (lex commissoria) or, perhaps implied, to sell (pactum de vendendo). Even at this time possession need no longer be in the creditor: “The pledge with pledgor’s possession was in existence as far back as we find pignus at all.” Pledge-mortgage with possession in the

54Sohm-Mitteis 346. “Under the influence of increasing commerce, the Roman law developed from the Eigentumspfand, or pledge in which title is transferred (the mancipatio or forfeiture pledge), and Besitzpfand, or pledge in which possession is transferred (the traditio or pledge with distraint), to the Verkaufspfand, or pledge with right of sale (the Vertragspfand, or purely contractual pledge, which regarded the res solely as the basis of a monetary interest).” (transl. supplied by author).
55Id. at 344 n.5.
56Kaser § 33 expresses the same idea: fiducia was a “Kauf mit Ruckkaufs- vorbehalt . . . wobei der Kaufpreis die Funktion einer Darlehensauzahlung hatte.”
58Id. at 30 n.2.
debtor was desirable both for contingent liability situations (e.g., in favor of the wife’s interest in her dos, or the ward’s interest in the property subject to the care of his guardian), and agricultural loans and leases. Later custom, exemplified by the actio Serviana, brought the pledge-mortgage into wider vogue. By classical times Wigmore’s thesis is that:

“Pignus was the generic word, used with two different verbs,— deponere for creditor’s possession, and opponere for debtor’s possession; when the debtor was left in possession, he was said to possess precario, i.e., on a lease at will of the creditor. And pignus was applicable to land as well as to personalty. In post-classic times, pignus did indeed become ordinarily applied to personalty, and specifically to personalty handed into the creditor’s possession (like the English “pledge”). For reality retained by the debtor, the more common word, apparently became hypotheca . . . .”

Sale for repurchase (fiducia) Wigmore views in its origin as essentially a conditional sale, “almost identical, in form and spirit, with the original English ‘trust’.” The creditor usually had possession of the res with title thereto, but only on condition of re-conveyance; meanwhile he bore the risk of loss, but could retain the full res (at least, in later days, via a lex commissoria) on non-payment. This power of forfeiture, intrinsic to the fiducia, constituted its advantage to the creditor. For the debtor its advantage lay in its greater privacy than the more forthright pignus, and in the commonly longer term of his right to recover by repurchase. But for reasons Wigmore never fully explains fiducia tended to blend into pignus (presumably pignore opponere):

“By the end of the classical period the fiducia seems to have been brought under all the rules of pledge, so far as they prevented the pledgee from getting any special benefit from using that form . . . and the phrase ‘pignus vel fiducia,’ as including the two typical forms, is common.”

What happened to the term fiducia? Well, fiducia had always been the preferred usage for reality security. Once it had been denatured into a pure security interest of the creditor, its status

60Id. at 379.
61Id. at 380. The analogy is also discussed by Erbe, Die Fiduzia in Römischem Recht 3-4 (1949).
62Wigmore, supra note 59, at 377.
63Wigmore, supra note 57, at 32 n.2.
was the same as the Greek institution of *hypotheca*.

This is the basis of Wigmore's interpolation theory:

"The Greek Constantinopolitan Compilers, accustomed to the Greek term *hypotheteke*, and finding that the *fiducia* corresponded to it in legal effect, saw fit to substitute the word 'hypotheca' for the word 'fiducia' in every passage of the classical jurists selected for the Digest."

His chief substantiation is the fact that independent manuscripts and fragments in the West, especially those surviving of Gaius and Paulus, seem to know *fiducia*, but not *hypotheca*, and subsume all real security forms under *pignus vel fiducia* instead of the Digest phrase of *pignus vel hypotheca*.

Both Wigmore and Sohm-Mitteis make a valuable contribution with their insistence that possession in the creditor and possession in the debtor were always equally valid types of *pignus*. This theory of the generic nature of *pignus* has been adopted by the other major authorities today.

But Wigmore's theory of the absorption of *fiducia* by *pignus* and the subsequent wholesale interpolation of *hypotheca* for *pignus* is quite subject to question. True, *fiducia* with possession in the debtor, just as well as *pignus* with possession in the debtor, could have been the form of agricultural tenure which prompted the interdictum Salvianum and actio Serviana, and hence the institution later known as *hypotheca*. But why should this require that *fiducia* be deemed to have first abandoned its peculiar nature for absorption into the different one of *pignus*, yet continued as a functional synonym applied to *pignus* of realty until suddenly a wholesale one-for-one replacement of the word by *hypotheca* took place?

*Fiducia* in its original form gave total ownership rights to the creditor, only a personal *actio fiduciae* to the debtor. This ownership was absolute, not conditional: the idea of a condition was inimical to the Roman conception of the transfer which occurred by means of *mancipatio* or *in iure cessio*. If Wigmore is right, then in classical times, even among the great and extremely careful commentators, the name *fiducia* (as synonymous with *pignus*) was applied to an institution the very antithesis of its original sense —

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64 Wigmore, supra note 59, at 385.
65 Id. at 381.
66 Id. at 382-83. That much is certainly correct. Levy, op. cit. supra note 34 at 181-82, observes that in the West the generic term "*obligare rem*" was preferred, and *fiducia* degenerated into a casual reference to any pledge.
68 Rabel, supra note 67, at 40.
with ownership left in the debtor, no actio fiduciae, and the creditor the possessor merely of an abstract interest. This is not impossible, but has certain elements of improbability about it.

Another question: what happened to the requirement of transfer by mancipatio or cessio in iure? Wigmore suggests that simple traditio eventually sufficed, but as Rabel notes, even the latest references to fiducia indicate the continuing utilization of mancipatio and cessio in iure. Of course, this may have only been a legal fiction, with the statement in writing of the occurrence of a mancipatio or cessio in iure creating an irrebuttable presumption that such in fact occurred, even though really non-existent. But this is rather an awkward way of preserving the forms of fiducia if, as is admitted, the form of pignus with possession in the debtor would have done as well.

As sale for repurchase, fiducia, had practical advantages for the creditor: an ownership interest easily protected, and forfeiture rights. When these disappeared, why should the creditors, in the classical period, have bothered to retain the old name and principles of fiducia when the functional form had been effectually merged with pignori opponeri? All in all, Buckland's view, discussed above, that fiducia retained its inherent attributes down through classical times precisely because of the advantages for the creditor seem at least as probable.

What happened in post-classic times, at least in the vulgar law of the West, is easier to discern. Fiducia as a distinct institution, with transfer of ownership through mancipatio or in iure cessio, cannot at the very latest have survived longer than the 4th or early 5th centuries, disappearing along with the mancipatio and in iure cessio themselves. Later than that any use of the word fiducia is sound without substance. Levy's careful culling of recent research establishes that the more careless Western writers, unlike their more academic brethren in Beirut and Byzantium, commonly and casually used fiducia as a term for pledge regardless of any transfer of ownership or possession. The term had degenerated into a generic one for pledge, to be teamed with pignus, without any particular distinction being drawn between them. In any event, the popular term was neither fiducia nor pignus, but obligare rem.”

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69 Levy, op. cit. supra note 34, at 184, may also be cited as doubtful that traditio ever substituted for mancipatio or in iure cessio in any form of fiducia. In his opinion, when these died out, there was no form of true fiducia as a “Sicherrungsübereignung.”
70 Id. at 41-43.
71 Erbe, op. cit. supra note 61, at 204.
72 Id. at 204-06.
73 Levy, op. cit. supra note 34, at 181-84.
This freehanded use of the *fiducia* in the West in post-classic times is not surprising in view of the rather low ebb of legal scholarship. But such usage in post-classic times affords no aid in any attempted demonstration that *fiducia* as a transfer of ownership disappeared in the classic period and that the term instead was applied to the pledge without possession, as Wigmore would have it. Still less does it offer any clue as to how the term *hypotheca* arose, and the extent to which it was interpolated for either *fiducia* or *pignus*.

Indeed, the theory of wholesale interpolation that Fehr and Wigmore propound is even more vulnerable. If *fiducia* tended to be amalgamated with *pignus*, as Wigmore argues, why should not *pignus* also have been interpolated for *fiducia*? The work of Lenel and other scholarly interpolation studies point to precisely such interpolation of *pignus* for *fiducia* in some areas.\(^{74}\) Further, granted that in other passages *hypotheca* was often interpolated for *fiducia*, there is no compelling cause to believe in a wholesale transposition by the Tribonian commission in preparing the *Corpus Juris Civilis*, instead of a gradual replacement over the fourth and fifth centuries by the professors at Beirut and Byzantium. Finally, it appears quite probable that *hypotheca* as a term for pledge with possession in the debtor had gained currency in classical times, drawn from Greek sources\(^{75}\) or from usage in Greek-influenced south Italy,\(^{76}\) and was so used by classical authors.\(^{77}\) With all these alternatives, in our present state of knowledge, as Rabel concludes, "there is no way of knowing, when we read either *pignus* or *hypotheca* in the Digest, what the original object of the passage was, unless we begin an exegesis with a more or less questionable principle as basis."\(^{78}\)

In any event, we can at least intelligibly appreciate the import of the definitions of Ulpianus, Florentinus and Marcianus cited above. Ulpianus indicates the preference in usage for *hypotheca* to cover pledge with possession in the debtor and *pignus* for pledge with possession in the creditor; Florentinus demonstrates that *pignus* as well as *hypotheca* could in fact be used to designate possession left in the debtor; and Marcianus rightly avers accordingly

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\(^{75}\) Buckland, Text-Book 475 n.8 and Kaser § 110, at 389, suggest the word *hypotheca* was first used in the provinces, then adopted in a monograph by Gaius on provincial edicts or by a later writer in a new edition of such a monograph. Other than this suggestion, Kaser believes the issue to be "ein ungelöstes Rätsel."

\(^{76}\) Rabel, *supra* note 67, at 39.

\(^{77}\) Jörs-Kunkel 156 n.3. This footnote cites the major continental criticisms of Fehr's Justinian interpolation thesis.

\(^{78}\) Rabel, *supra* note 67, at 45.
that there was only one pledge type in classical times, indifferently known as *pignus* or *hypotheca*. Altogether, perhaps the best critical summary of the evolution in Roman terminology is that of Jörs-Kunkel:

"[*Pignus*] ist zweifellos die ursprüngliche Terminologie; sie beweist, dass die Römer beide Pfandarten trotz der verschieden denen Besitzlage nicht als wesensverschieden behandelten. Erst späterhin, immerhin wohl noch in klassischer Zeit, begann man das besitzlose Pfand in äusserlicher Anlehnung an den griechischen Sprachgebrauch hypotheca zu nennen und dem Faustpfand [i.e., pledge with possession] gelegentlich gegenüberzustellen. Die nach klassische Zeit zeigt dann eine entschiedene Vorliebe für den griechischen Ausdruck: an vielen Stellen der justinianischen Gesetzgebung ist das Wort hypotheca nachklassische Zutat, zumeist als Sondername für das besitzlose Pfand, gelegentlich aber auch als Bezeichnung für beide Pfandarten."

II. A NEUTRAL PRESENTATION
OF THE LAW OF ROMAN REAL SECURITY

One major conclusion can be drawn from the historical analysis above: that Roman law in both its classical and post-classical eras knew only one basic form of real security. Whether this form was known as *pignus* or *hypotheca* or both, or whether preferred usage required *pignus* to indicate possession in the creditor and *hypotheca* (fiducia?) to indicate possession in the debtor, is a topic really of fairly minor importance. Substance, not nomenclature, is the only matter of significance. Admittedly, there were special legal doctrines occasioned by the fact of possession in the creditor (e.g., duty of care of the pledge) or in the debtor (e.g., the possibility of tacit and multiple pledges). But these individual legal rules were fact-incited and fact-oriented, not the result of theoretical distinctions between disparate legal institutions.

Accordingly, it is quite inappropriate to speak of the legal rules of *pignus* or the legal rules of *hypotheca* as such. It is preferable

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79 Jörs-Kunkel 156, "[*Pignus*] is undoubtedly the original terminology; it indicates that the Romans did not regard the two forms of pledge as essentially different even despite the different modes of possession. Only later, although still in the classic period, did they begin to call the pledge without possession *hypotheca*, following the Greek terminology, and to use it on occasion in contrast to the pledge with possession. The post-classic age manifests a definite preference for the Greek expression: in many passages of the Justinian legislation the word *hypotheca* is an interpolation, most often for the possessionless pledge, but occasionally also as the description for both types of pledge." (transl. supplied by the author).

80 The most neutral and comprehensive treatments are to be found in Jörs-Kunkel, Kaser and Schulz.

81 In subsequent presentation, the term hypothecation will be used to de-
to adopt a neutral terminology and present the doctrines applicable to pledge as a whole, organized in categories strictly according to the basic factual situations which engender these doctrines. The second part of this article shall strive to present such a neutral analysis of Roman real security as manifested basically in its classical period. The topics presented in order are: mode of creation and subject matter of pledge; respective rights and duties when the creditor has possession; the creditor's right to foreclose, buy, or sell; the creditor's rights against third parties; the debtor's rights against the creditor or third parties; general and tacit pledges; rights of multiple creditors inter se; priorities among multiple pledges; modes of extinction of pledges.

Whether *fiducia* in classical times had merged with the generic pledge type, or remained independent, undoubtedly in republican Rome it existed as a distinct mode of real security whose essence centered on the transfer of ownership to the creditor. But reconstruction of the legal doctrines that governed *fiducia* at this time, aside from the basic features described above in the historical analysis, is a problematical undertaking at best and far beyond the capacities of a neophyte. Therefore, only casual reference will be made to probable rules of *fiducia* where such would be germane in the consideration of the general Roman pledge type.

A. Mode of Creation and Subject Matter

*Creation.* — *Fiducia* of course required transfer of the property under the full formalities of *mancipatio* and *cessio in iure*. But in the creation of the normal pledge no formalities whatsoever were required. As Gaius states, a pledge was constituted by any informal agreement, "*contrahitur hypotheca per pactum conventum,*" and a writing was of utility only in proof. D.20.1.4. Ulpianus declares that mere agreement sufficed, and delivery was unnecessary: "*Pignus contrahitur non sola traditione, sed etiam nuda conventione, etsi non traditum est.*" D.13.7.1. However, some agreement on the part of the debtor was necessary. Papinianus posits the case of a friend of an absent debtor who pays the creditor (not at a purchase sale, which would give the friend title). The pledge was deemed released, not transferred to the friend — although if he took possession, he could defend with an *exceptio* any action brought for its recovery by the debtor until the debt was paid. D.20.6.1.pr.

scribe the process of creating a pledge, especially if without possession (as in multiple pledges), since such is the common usage today. Purely as shorthand reference, the word *pignus* may occasionally be used to indicate possession in the creditor, and *hypotheca* possession in the debtor.

82The most thorough-going treatment of *fiducia*, though by no means free of polemic, is Erbe, *op. cit. supra* note 61, at 12-121.
Conditional creation of a pledge subject to a specified event was quite possible. No liability occurred until the event happened. D.20.1.13.5. An *inter vivos* creation was not essential — the praetor would honor any hypothecation by will. D.13.7.26. The limited Roman conception of agency resulted in an interesting fiction. A debtor could obligate himself via a slave or a *filius familiae*, but not via a freeman even if he were a managing agent or guardian. D.13.7.11.6. But a freeman, in fact an agent, could give the pledge as for himself, and thereafter could sue as though owner if necessary to recover it. D.13.7.11.7. All in all, just about any *causa* for a pledge or mode of creation was possible. As Marcianus summarizes:

"...property can be hypothecated for any kind of an obligation whatsoever where money is lent, a dowry bestowed, a purchase or sale made, a leasing and hiring concluded, or a mandate given; also where the obligation is absolute, or where it is for a certain time, or under some condition, or where it is assumed in pursuance of an agreement, or to secure a present indebtedness, or one previously contract-ed." D.20.1.5.pr.

**Physical subject matter.** — For pledge, praetorian or bonitary ownership — that protected by an *actio Publiciana* — sufficed. D.20.1.18. Indeed, the debtor need not be owner at all. Property of a third party could be pledged if the latter consented. D.13.7.20. Absent consent of course no pledge could result. D.20.1.16.2. But a general obligation (*obligatio generalis rerum*) covering all property which the debtor now has or may hereafter have does not include such things which one normally would not give in pledge, as clothing, household goods, and essential domestic slaves, D.20.1.6, or articles in daily use, D.20.1.7, or a laborer's tools necessary to earning his livelihood in cultivating land, C.8.16(17).8, or a concubine, natural children and apprentices.

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83 The Digest fragment, visibly interpolated, evidences some hesitation in reaching this conclusion in view of the admitted ability of a freeman to acquire possession of a *res* as agent for another.

84 *Quiritinaria* ownership was of course essential for *fiducia*.

85 Pomponius indicates that technical rules as to when title passes may be decisive here. *D* pledges property to *A*, then sells it to *B*, borrowing the money from *C* to pay *A* and release the initial pledge. Even though *D* promised to repledge to *C*, the property is deemed to have already passed to *B*. Digest 13.7.2 [hereinafter cited as D.].

86 *Cf.* the illustration given by Paulus in D.20.1.29.2: A house given in pledge burns. The bona fide purchaser of the land builds a new house. The creditor's pledge remains on the new house (1), although the creditor must pay the cost of the materials.
D.20.1.8. The creditor has the burden of proof if there is an issue as to whether a specific item was intended to be among the articles pledged. D.20.1.15.1.

Intangible subject matter. — The utilization of intangible interests as subject matter argues a certain sophistication of the concept of pledge. The Romans arrived at such a stage, probably in early classic times, by the application of the principle that any interest that could be the subject of a sale could also be the subject of a pledge — in Gaius’ phrase (quite possibly originally referring to fiducia), “Quod emptionem venditionemque recipit, etiam pignerationem recipere potest.” D.20.1.9. Probably the initial intangible subject was a future expectation of physical property, as an increase of flocks, crops or fruit. D.20.1.15.pr. (Gaius). Paulus indicates a progress in the concept occurring under praetorian auspices. Thus a debt could be pledged, but only if the praetor will honor the agreement, D.13.7.18.pr., and land subject to a vectigalis (perpetual lease) or to a superficies could be pledged “quia hodie utiles actiones superficariis dantur.” D.13.7.16.2.

A usufructus could be pledged, D.20.1.11.2, but the Roman incapability of conceiving of a servitude in gross resulted in a peculiar distinction: a rural servitude could be pledged, but only to a neighboring landowner who could make use of it (presumably under a lex commissoria), D.20.1.12, but an urban servitude could not. D.20.1.11.3. But the Romans were willing to recognize a pledge on the continuously changing inventory of a store, a so-called pledge on floating stock in trade, D.20.1.34.pr., which even today is recognized by the common law but not usually by the civil law. A pledge of a pledge, or subpledge, was also possible. But unlike our law, which regards such a subpledge as purely one of the creditor’s intangible interest, the Romans tended to treat it as a second pledge on the res itself.87 Thus, if the debtor paid the initial creditor, the secondary creditor lost all his rights in rem, D.13.7.40.2; D.20.1.13.2. But if (at least in the empire after Gordian) the secondary creditor exercised his right of sale, the debtor’s interest in rem as well as that of the initial creditor was extinguished. C.8.23 (24) .1.

Matter not subject to pledge. — Property which the debtor has already sold cannot be pledged by him, even if the sale occurs between the agreement for a pledge and the receipt of the loan from the creditor.88 D.20.3.4. Obviously a res extra commercium could

87Buckland & McNair, Roman Law and Common Law 319 (1952).
88But an after-acquired title rule was known. If the debtor pledged land not his own, and later became owner, although an action in pledge was not available, a praetorian action in analogy to pledge could bring relief. Code 8.15(16).5 [hereinafter cited as C.].
not be pledged, D.20.3.1.2; C.8.16(17).3 (private tomb); C.8.16(17).5 (prizes in an athletic contest); nor could a freeman. C.8.16(17).6. A ward could not pledge his property without the consent of his guardian, D.20.3.1.pr., nor could a filius familias or a slave pledge his peculium without consent (even if the son was over 25, if he was not yet emancipated). D.20.3.1.1; C.8.15(16).4.

B. Mutual Rights and Duties When Possession is in the Creditor

It should be noted initially that the law applicable to the status of a creditor in possession was not strictly limited to those situations in which possession was deliberately transferred to the creditor as part of the agreement (standard pignus). It applied indifferently as well to situations where the creditor later by any means or for any limited period of time came into possession, even if initially it had been agreed that possession should be in the debtor (standard hypotheca).89 No label, only the fact of possession determined most of these rights and duties.

Duty of care. — Whatever may have been the benefits he obtained otherwise, the creditor in possession was held to quite a strict standard of care. Essentially he was liable for dolus or culpa, but not for injury resulting from vis major. D.13.7.13.1. He was required to exercise great care, exacta diligentia, Inst.3.14.4,90 and was liable even for the slightest negligence, culpa levis, D.13.6.5.2. Paulus presents the standard of care as that of the prudent pater familias, "Exigitur, quae diligens pater familias in suis rebus praestare solet, a creditore exiguntur," D.13.7.14, a formula with quite a modern ring to it. Conversely, the debtor was obliged not to do anything which diminished the security of the creditor, e.g., the debtor could not wantonly injure a slave pledged to the creditor. D.20.1.27.

Expenses and profits. — Here clearly the benefits tend to lie all with the creditor. Any significant natural increase in value of the res is deemed to accrue to the res and remain subject to the pledge, e.g., increase of flocks when the flocks are pledged, D.20.1.13.pr., alluvia when the adjacent land is pledged, D.20.1.16.pr., and the later acquired usufruct when the basic ownership (nuda proprietas) of land is pledged, D.13.7.18.1. But any incidental advantages or disadvantages will accrue to the debtor, D.20.1.21.2, who will either enjoy them on return of the object, or in the event of a sale at least benefit from an increased hyperocha or a decreased relicum. Thus where there is a loss to the value of the pledge due to its temporary taking by the state for public use, on redemption

89 Cf. Jörs-Kunkel 158.
90 Citations to the Institutes of Justinian are to Institutes of Justinian (7th ed. Sandars transl. 1922).
the creditor is not liable, and the debtor must bear the loss. D.13.7.43.1; C.8.13(13.6) (highway repairs). Where the creditor has made any improvements in the res, he can recover the expense for such improvements from the debtor. P.2.13.7.91 The canny Roman sense of equity, however, intervened to modify this rule where major improvements were made by the creditor with an eye to thwarting the debtor from recovering the res by making the repayment price prohibitive. In such a case the debtor need not pay the costs of the improvements. D.13.7.25.

**Creditor's possessory rights.** — A creditor in possession could always bring an action for theft (furtum) against anyone who stole the property, even if it were the debtor-owner. G.3.200, 204.92 This rule probably originated when the creditor was owner, in fiducia, but it was later clearly recognized that any person having a possessory interest in the object could bring an action of furtum. G.3.203. The creditor could lease the object pledged to third parties, D.20.1.23, or back to the debtor, D.13.7.37. He could also pledge it to his own creditor. D.13.7.40.2.

Two somewhat unusual rules gave the creditor a right to retain the pledge until the total debt was paid, or a totally unconnected debt was paid. The first rule was that of pignoris causa indivisa est. Should the debtor have pledged several articles, he has no right to return of some of them on part payment; should co-owners pledge property, payment of his share of the debt by one leaves the interest he has in the full estate still encumbered; when heirs divide an estate pledged, the total encumbrance of the pledge falls on each share.94 C.8.30(31).1; C.8.31(32).1, 2. At least after the emperor Gordian, and probably earlier in classical times,95 the curious rule prevailed that even after the debtor paid the debt secured by the pledge, the creditor had a jus retentionis to hold the object until a totally unrelated debt was paid. C.8.26(27).1.2. This

91Citations to Paulus, Sententiae, are to 1 Scott, The Civil Law (1932). Section 2.13 of the Sententiae, De Lex Commissoria, is believed originally to have concerned fiducia. Cf. Buckland, Text-Book 474 n.6.

92Citations to the Institutes of Gaius are to Poste, Gai Institutiones Juris Civilis 4th ed. Whittuck 1904).

93Not only could an owner steal his own property from the creditor, he could regain full bonitary title by usucapio for a year. Gaius Inst.2.59 [hereinafter cited as G.]. Obviously, usucapio was not possible if the debtor was in possession by precario or lease, but if the debtor's possession was not with the consent of the creditor, usucapio could be achieved. In such a case the usucapio was not bona fide, i.e., was lucrativa usucapio, but nonetheless effectual. G.2.60.

94See Schulz 421-23, for an excellent series of illustrations of the causa indivisa rule. Whether the causa indivisa idea existed in classic times is, however, not free from doubt. See Kaser § 110, at 390 n.17.

95Buckland, Main Institutions of Roman Private Law 322 (1931). Weiss, Pfandrechtliche Untersuchungen 51-52 (1909), sees this rule as a consequence of influence from similar Greek institutions.
jus retentionis was not however a continued pledge interest in rem. Though the creditor could defend an actio brought for its possession by the debtor with an exceptio, he could not prevent further hypothecation of the res to other creditors\(^6\) nor did he enjoy the right to sell the res to satisfy the unsecured debt.\(^7\)

**Actions and interdicts.** — The basic remedy of the debtor not in possession against the creditor was the actio pigneraticia directa, to recover the pledge on repayment or to recover damages for injury to the pledge or misconduct with it. This actio was available even if the debt was not paid, so long as the money for payment was tendered at the time of the preparation of the formula before the praetor, D.18.7.9.5, and it was available on full payment of the debt even if the pledge had originally been given on an agreement of antichresis (see infra). D.13.7.33. On the other hand, the creditor had a reciprocal actio pigneraticia contraria which was available to recover necessary expenses occurring on account of the pledge, D.13.7.8, or to recover damages should the debtor have deceitfully pledged property belonging to another, or otherwise acted in bad faith with regard to the pledge, D.18.7.9.

The creditor had the benefit of possessor interdicts against wrongful disturbance of his possession by third parties: unde vi, where he has been forcibly deprived of the pledge, D.43.16.1.9; utrubi, to protect against the loss of, or to recover, moveables, D.43.3.1.1; and uti possidentis, to protect against interference or loss of immovables, D.43.17.2 (not available if the debtor in fact remains in possession, while the creditor has only technical possession, as under a lease, D.43.17.3.8).

**Antichresis.** — Generally a creditor had no right to use, exploit, or take any profit from the res. So strongly was this principle felt that in the case of chattels, for a creditor to make use of the res was theft. D.47.2.55 (54).pr. But especially in the case of a pledge of land, it was not uncommon to agree that the creditor should take the fruits of the land in lieu of interest until the principal sum was repaid. D.20.1.11.1; C.4.32.17. Even in the absence of express agreement some retention of profits to be applied pro tanto could be implied, e.g., if a pledge was made of a slave over whom the creditor took possession, Paulus states that anything acquired through the industry of the slave should go to offset the principal. P.2.13.2. Indeed, if there was no agreement whatsoever regarding the payment of interest by the debtor, the creditor enjoyed a tacit

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\(^6\)Buckland, *op. cit. supra* note 95.

\(^7\)Jörs-Kunkel 155: “Hierin lag aber nur ein Zurückbehaltungsrecht, kein eigentliches Pfandrecht.”
antichresis to all profits from the pledge up to the legal rate of interest. P.2.5.2; D.20.2.8.

C. Creditor's Right to Foreclose, Buy or Sell

Right to foreclose or buy. — Whether or not there ever was a period in which the creditor could simply declare the pledge forfeit on failure of repayment,\(^8\) Roman law in the republican and classical period did recognize a right to contract for forfeiture, the lex commissoria. D.20.1.16.9. Employment of such a clause when the res considerably exceeded the value of the debt gave rise to serious abuse. The use of the lex commissoria was accordingly finally abolished by Constantine. C.8.34(35).3. Thereafter the only way in which the pledge could be forfeited to the creditor was upon petition to the governor, the impetratio dominii. This was allowed when the creditor found himself unable to sell the pledge, and the debtor upon repeated notice did not avail himself of the opportunity to repay. The governor would then permit the creditor to take title, but even then, under Justinian's elaborate scheme, the debtor had two years in which to redeem before the creditor's title should become indefeasible. C.8.33(34).3.3.

The issue whether the creditor should be able to buy from the debtor is closely related to that of forfeiture. Obviously, if the creditor could buy from the debtor at the time the debt fell due, exerting the weight of his superior position, something akin to forfeiture might result, even though there had been no lex commissoria initially in the agreement. It is not surprising, therefore, to find the rule strictly laid down by Paulus that the creditor could not himself buy the pledge from the debtor, P.2.13.3, nor could he do so via an agent or straw man, per interpositam personam. P.2.13.4. However, later we find Marcellus citing a case in which the creditor's purchase was upheld, apparently on estoppel grounds, indicating a weakening of the rule.\(^9\) Finally there is a blunt statement by Tryphonius, citing a rescript of Papinianus to the effect that the creditor can purchase the pledge from the debtor because the debtor is the owner. D.20.5.12.pr. Whether this indicates a new rule in favor of alienability to the creditor, or the reference was to a special case (perhaps with prior agreement), or a power of purchase upon application to state authority analogous to impetratio dominii is uncertain.

Evolution of right of sale. — The law as to the creditor's right

\(^{8}\)See text accompanying notes 19-20 supra.

\(^{9}\)The illustration given by Marcellus is one in which the creditor is about to sell the pledge for non-payment. The debtor requests the creditor to purchase it himself, and after the agreement of purchase writes a letter intimating that he has sold it to the creditor. The debtor cannot later revoke this sale by tendering the principal and interest. D.13.7.34.
to sell passed through three stages: first, the creditor could only sell if an express agreement permitted; then, an agreement to sell was always implied unless contradicted; and finally, the right to sell became absolute, notwithstanding contrary agreements. It is probable that the creditor had no right to sell in republican and early classical times absent agreement, for we have a statement by Labeo implying sale was by agreement only, D.20.1.35, and one by Javolenus holding a creditor who sold without agreement or before maturity a thief. D.47.2.74(75).100 In this early period even the notice of an intended sale by the creditor, done for the purpose of injuring the debtor's credit, was a tort. D.47.10.15.32.

By mid-classical times, however, the right of sale had clearly become an implied one, effective in absence of contrary agreement. D.13.7.4 (Ulpianus); P.2.5.1.101 Quite possibly this implied power of sale, which Buckland describes as "obviously desirable, but quite anomalous," especially where the creditor was not in possession, came from fiducia, where it fitted in perfectly with the idea of ownership in the creditor.102 In any event, it became the accepted way in which the creditor should realize his security interest, especially after the abolition of the lex commissoria. C.8.27(28).9; C.8.27(28).14. Ultimately, the power of sale was so well founded that even in the face of agreement to the contrary, the creditor could give notice to the debtor, and on his failure to redeem, sell. P.2.13.5. The whole evolution may be noted in brief in a passage by Ulpianus, declaring that a pledge can be sold (a) if the debtor expressly agrees (original idea), (b) provided no agreement was entered into preventing it (basic second stage), (c) but even if there exists an agreement against sale, the creditor may sell without liability for theft upon giving the debtor the three notices required by law (final absolute right, quite possibly interpolated). D.18.7.4.

Incidents of the right to sell. — The right of sale was always contingent upon the giving of notice to the debtor, that he might redeem in time if he could. This was set at a threefold notification to the debtor, P.2.5.1, probably in the early post-classic period.103 The notice system was periodically modified by imperial order through the years, until it culminated in Justinian's elaborate system. According to this, upon maturity of the debt, the creditor should give notice to the debtor of his intention to sell. Two years must then pass before the creditor could sell; if he could find no

100In addition, references to agreements of sale by Gaius in the Institutes probably originally referred to express and not implied agreements. G.2.64; Inst.2.5.1.
101See Kaser § 111, at 394 & n.9.
102Buckland, op. cit. supra note 95, at 323.
103See Kaser § 111, at 394 n.9.
buyers, he must give further notice to the debtor and wait an additional two years before it would be possible to declare the res forfeited, and even then the debtor would have two final years to redeem. C.8.33(34).3.

The requirement of notice, however, was virtually the only limit on the creditor's right of sale. True, if the agreement called for time payments by the debtor, the creditor could not sell immediately upon delinquency in one of the payments, but even this could be evaded by an agreement permitting such sale in writing. D.13.7.8.3. The creditor could sell on maturity even if a substantial portion of the debt had been paid, C.8.27(28).6, and he could sell for failure to pay interest or the cost of improvements as well as for principal. D.13.7.8.5. A purchaser from the creditor of the pledge prior to maturity had the same right of sale as the creditor. C.4.10.7. When a subsequent creditor purchased the interest of the first creditor, he could sell and keep the proceeds not only for his own debt, but also for that of the first creditor. D.20.5.5.pr.

There seems to have been some dispute over whether the debtor could compel the creditor to sell. The question becomes of some urgency to the debtor if he is unable to pay, yet the res is worth considerably more than the debt. If the creditor could remain in possession indefinitely, he might be able to compel the debtor to accept forfeiture on disadvantageous terms. An early opinion by Atilicinus was to the effect that the creditor must sell if the debtor was insolvent. Pomponius cites and rejects this view in favor of one that noted a power in the debtor himself to sell, tendering the amount of the debt to the creditor out of the proceeds, thus forcing the creditor to release the pledge. D.13.7.6.

One other item worthy of note is the rule that if the sale is rescinded, the ownership of the debtor revives. D.20.6.10.pr. This common-sense doctrine of course prevents fraudulent dummy sales. Similarly, to prevent fraud upon the creditor, the debtor could not buy the res, and if he did so (presumably through a straw man) for less than the full value of the debt, the creditor could reclaim possession until the full debt was paid. D.13.7.40.pr.

Proceeds of the sale.—It goes almost without saying that if the sale does not realize the full amount of the debt, plus interest and expenses, the creditor had a personal action against the debtor for the deficiency. C.8.27(28).3. In the event of such deficiency, the proceeds were first to be applied to the interest and the expenses, and only thereafter to the principal, regardless of the debtor's wishes in the matter. D.13.7.35.pr.

If there were any surplus from the sale, probably originally
the creditor could retain it, on analogy to the forfeiture pledge. But
during the classical period, there is no doubt of the absolute right
of the debtor to any excess over the debt. D.13.7.24.2. The debtor
had an action to recover the surplus, P.2.13.1, and the creditor's
liability to pay was a personal one, not transferable to the pur-
chaser of the res. D.13.7.42. Of course, if there were other credi-
tors on the same pledge, the first creditor selling would pay the
excess first over to such creditors, and then the surplus if any to
the debtor. C.8.33(34).3.4. It appears that the debtor could agree
in advance to yield his right to the surplus. C.8.27(28).20. Such
an agreement was open to the same objections as the lex commis-
soria, and was certainly not possible under Justinian's sale legisla-
tion, if not before. C.8.33(34).3.4.5.

D. Creditor's Rights against Third Parties

*Actio Serviana.*—That the *interdictum Salvianum* eventually
afforded a creditor (at least in agricultural tenure situations)
protection against third parties is undoubted, D.43.33.1 (Julianus),
but the time of this extension of application is unknown. In any
event, it was to the more satisfactory action in rem of the *actio
Serviana* that creditors commonly resorted when not in possession
(if in possession, the possessor interdicts would suffice). Inst.
4.6.7; C.8.9.1. It should be noted that the action was available
whenever the creditor was out of possession: it was immaterial
whether this was by the initial agreement (*hypothesca*), or occurred
after possession was first reposed in the creditor (*pignus*).
Inst.4.6.7.

The *actio Serviana* was available whenever the *actio Publiciana*
would protect the basic ownership involved, i.e., even for bonitary
ownership. D.20.1.18. Although an *actio in rem*, it did not guar-
antee the return of the specific res from the third party, who had
the right to pay the creditor the amount of the debt and retain the
res. D.20.6.12.1. When the pledge was made simultaneously to
several creditors, each could use the *actio Serviana* against third
parties. D.20.1.10. If the pledge was given to successive creditors,
a subsequent one might employ the *actio* against third parties, but

104 For the probable historical background of the *actio Serviana*, see text
accompanying note 43 supra.
105 Jörns-Kunkel 157, declares that the extension occurred only in Justinian
times, but Jolowicz 320, is less certain and suggests the extension may have
been as early as republican times. A rescript of Gordian, C.8.9.1, appears to
indicate that under that emperor the *Salvianum* was limited to proceedings
by the creditor against the debtor or lessees. Note should again be made of
Kaser's view that the creditor had the *actio rei vindicatio* even before the
interdict *Salvianum*. Kaser § 111, at 394-95.
106 Jörns-Kunkel 158.
must yield possession in turn to the prior creditor if requested. D.20.4.12.pr.

A sensible solution was found to the res judicata effect of prior suits by the debtor against the third party. If the debtor sues for property already the subject of a pledge and loses, the creditor is not barred from bringing the actio Serviana, provided he proves the res was in the hands of the debtor at the time the agreement of pledge was made. D.20.1.3.pr. (Papinianus). But if the debtor sues to recover property and loses, and only thereafter pledges that property to the creditor, the creditor is barred from further suit—"non plus habere creditor potest, quam habet qui pignus dedit." D.20.1.3.1.

The creditor was also held to an election of remedies. When he chose to proceed with an actio Serviana against the third party, and recovered damages, he was thereafter barred from proceeding in personam against the debtor. D.20.6.8.19. Justinian effectively eliminated this election by compelling the creditor to resort to his personal action against the debtor first, and only if he failed to recover all that was due him there, to proceed against third parties. Nov.4.2.107

Even if the third party acquired possession via a sale by the debtor (without the creditor’s consent), the creditor’s pledge remains, D.13.7.18.2, and he can assert his actio Serviana. C.8.13(14).15.108

E. Debtor’s Rights against Creditor or Third Parties

Naturally, since the debtor is the obligated party in the debtor-creditor relationship there is normally less occasion for concern about the attainment of his rights than there is for the protection of the creditor’s security. Most of the rights the debtor enjoys have already been enumerated, but an organized summary should make his position clearer.

The most basic right he has is to recovery of possession, or elimination of the creditor’s interest, upon repayment. For failure to recover, or for any other misfeasance regarding the pledge upon the part of a creditor, the debtor had the actio Pigneraticia. D.18.7.9.3.4. If fiducia were involved, in similar circumstances the debtor had the personal actio fiduciae, which did not bring

108 The pledge persisted despite any type of unconsented transfer by the debtor. "It is certain that a debtor cannot prejudice the rights of a creditor by either selling, donating, bequeathing, or leaving under a trust the property pledged..." C.8.13(14).15.
reconveyance but did carry the greatly feared penalty of *infamia*. Against third parties engaged in some misfeasance regarding the pledge, the debtor had all the remedies of an owner, especially the *actio rei vindicatio*.

The rights of the debtor to tender the debt and demand reconveyance generally ended when the creditor exercised his power of sale. The debtor could still tender to the third party purchaser and demand reconveyance if the contract of sale granted him that right, or if there were some equitable cause, as the debtor was a ward, or under 25, etc. D.20.5.7.1. When a subsequent creditor without possession purchased the rights of a prior creditor in possession, and took the pledges, the debtor had the right to tender the amount paid and retake the pledges (leaving of course the subsequent creditor's own interest unaffected). D.20.5.5.1. If the creditor's interest has passed to his heirs, of course the debtor may still tender and compel reconveyance from them. P.2.13.6. Even if the creditor has made a subpledge of the debt to his creditor, the initial debtor can pay the debt and demand reconveyance. The second creditor then loses his interest in rem and is relegated to his personal remedies against the initial creditor. D.20.1.13.2.

Once the debt has matured, the debtor has no right to prevent the creditor from selling if there is an express agreement permitting sale, or in later times if the sale agreement is implied or made an absolute right. But the debtor does have a right to the notices imposed by law. And his right to demand any excess in the sale over the value of the debt (*superfluum, hyperocha*) is a personal right against the creditor, who cannot shift liability for it to the purchaser. D.18.7.42.

If the debtor is unable to repay the creditor on the due date, he may himself sell the *res*. This would obviously be more desirable for the debtor than sale by the creditor, as the latter's interest in attaining the highest possible value for the *res* (above the amount of the debt) would be slight. The debtor's right to sell was clearly recognized for the general type of pledge, D.13.7.6.pr.; 20.5.7.2; P.2.13.3. Since a sale by the debtor to which the creditor does not consent does not extinguish the creditor's in rem interest, D.18.7.18.2, the debtor must immediately take the requisite amount from the purchase price and tender it to the creditor to pay the debt and release the pledge. P.2.13.3. This right of

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100 *Infamia* meant the exclusion from all offices of the state, inability to act as an attorney and other civil disabilities. Even more important because of the premium the Romans placed on fidelity and honor was the stigma attached to *infamia*. Hunter, Systematic and Historical Exposition of Roman Law 431-32 n.1 (4th ed. 1903). *Cf.* Greenidge, Infamia 28-25, 131-34, 164-70 (1894).
sale by the debtor was the proper solution to the problem of what to do should the creditor, especially if in possession, refuse to sell post maturity. D.13.7.6.pr. However, the debtor might agree to waive his right of sale, and any sale in violation thereof would be void. D.20.5.7.2.

F. General and Tacit Pledges

A general pledge is one which covers all the property of the debtor, or all the property which he has in one locale or involved in one enterprise. A tacit pledge is one which arises at once by operation of law instead of by personal agreement between the parties, in virtue of some special relationship between the parties. Since in neither case was possession in the creditor customary, or in some instances even possible, the term hypotheca may (with the reservations noted before) be used, and is indeed more appropriate here because of the proliferation of this type of pledge by operation of law in post-classical times.

General pledge (hypotheca).— The use of the general hypotheca probably arose in conjunction with leases of agricultural land and urban tenements, when all of the movable assets of the tenants were pledged in payment of the rent and to cover possible injuries to the leasehold. D.20.6.14 (Labeo); D.20.2.2. In classical times the device became quite popular, and is cited by Gaius as a frequent type of agreement in which the debtor pledged all the property he now had or might subsequently acquire, "Quae nunc habet et quae postea adquiserit." D.20.1.15.1. In Justinian's time rules of construction were applied which permitted the use of different phraseology to create the liability of a general pledge, a sure sign that no need was felt to hem in the general pledge in favor of special pledges. C.8.16(17).9.

The possibilities of abuse inherent in the general pledge apparently rather early produced modifying constructions which exempted necessities or items considered essential to the debtor's well-being, e.g., clothing, household goods and essential slaves, D.20.1.6; articles in daily use, D.20.1.7; a concubine, natural children, apprentices, D.20.1.8; C.8.16(17).1. The decline of small agricultural holdings in the late empire prompted several imperial decrees exempting the slaves, oxen, and tools of agricultural laborers from seizure by creditors. C.8.16(17).7; C.8.16(17).8.

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110The passage cited may be a post-classical interpolation, inasmuch as it is stated in the form of an exception to the general rule that the creditor must prove that a specific article was intended to be among the aggregate pledged — the rule may be from Gaius, and the exception post-classical. But in any event there are sufficient references from other jurists to establish the classic use of the general hypotheca: D.20.1.6; D.20.1.7; D.20.1.8.
Tacit pledges.—The tacit pledge is one created by operation of law to protect persons in whose welfare the state has a peculiar interest, or to safeguard persons whose loans are entitled to greater commercial consideration. In classical times, the tacit pledge was relatively rare, probably extending only to that of the ward on purchases made by his guardian with the ward’s money, that of the fisc on the property of a delinquent taxpayer, that given to one who lends money for essential repairs on a house, and perhaps that of the landlord on the property of his tenant for rent. In post-classical times, the tacit pledge proliferated, and was a substantial ingredient in creating what Mitteis calls a most unsecure security (außerst unsicher Sicherheit): “There were numerous [tacit] pledges, very often in the nature of a general hypothec. . . . No creditor could ascertain how many prior pledges already burdened the res newly pledged to him.” Since many tacit pledges also enjoyed special priorities over regular pledges, the problem was intensified.

The original tacit hypotheca for the protection of special persons was that created for the ward. Because of the Roman rule of agency that precluded the guardian from acting in the name of the ward, any purchase or sale of property on behalf of the ward was done in the guardian’s name, and all proceeds continued in the guardian’s name. Hence it was essential to create a hypotheca over this and other property of the guardian on behalf of the ward. D.20.2.10; D.20.4.7.pr. Similar protection was later granted on the property of the curator of one insane. C.5.70.7.5. Justinian granted wives a tacit hypotheca on the property of their husbands to guarantee their dos, C.5.12.30; and he likewise granted one to legatees on the total estate held by the heirs to secure the legacy. C.6.43.1.

The preeminent tacit pledge arising out of a commercial relationship was always that given to the state on behalf of unpaid taxes on all of the delinquent taxpayer’s property, D.49.14.28; C.8.14(15).1. The earliest commercial tacit pledge as such was probably that cited by Pomponius as given to the landlord of an agricultural estate leased to a tenant over the crops as security for the rent. D.20.2.7. Similar tacit hypothecas to secure rent and payment for negligence by a tenant during occupancy were those granted to the landlord of a house over everything brought

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111In determining whether this was a true pledge interest, or only a privilegium exigendi, see Kaser § 110, at 390 & n.24.
112Schulz 410-11. See also Levy, West Roman Vulgar Law 120 (1951).
into the house by the lessee, D.20.2.2; D.20.2.4; C.8.14(15).7, (unless the property is intended to be only temporarily there, D.20.2.7.1), and to the landlord of a warehouse over everything stored in the warehouse. D.20.2.3. Finally a tacit pledge is given to anyone who lends money for necessary repairs to a building, or who lends money to pay the workmen employed in making such repairs. D.20.2.1. One interesting distinction drawn between urban and rural estates, probably related in purpose to the protection of agricultural laborers created by Justinian, was that although all the property of the tenant brought on the urban tenement was tacitly pledged, that brought on a rural tenement was not. D.20.2.4.

G. Multiple Pledges: Rights of Subsequent Creditors and Priorities

The use of the same res for several pledges was forbidden in early German, Scandanavian and Greek law, for in each system the pledge was of the forfeiture type, with the full value of the res deemed given in the first pledge. The same was undoubtedly true in early Roman law when the pledge was forfeited to the creditor on nonpayment. But as the Roman pledge developed into the basic security interest of the later republican and classical times, multiple hypothecation became quite common, and in post-classical times so prevalent as to require special and elaborate regulation. It should be noted that although among several pledges only one could be possessory, it made no difference in the application of the rules that developed whether possession was given to the first creditor, a subsequent creditor, or to no creditor.

Types of multiple pledges.—A multiple pledge could arise in three ways. First, as has been noted, the initial creditor might make a sub-pledge of the res. The second creditor, aside from his possible contractual rights against the first creditor, was in the same status as a second creditor of the res, and could be relegated to his personal remedies against the first creditor should the debtor pay or sell the res. D.13.7.40.2; D.20.1.18.2. Second, the debtor might pledge the res simultaneously to several creditors. Absent special agreement, each of the simultaneous creditors had a full lien on the res, D.20.1.16.8, and each had an equal right against the debtor. D.13.7.20.1. Each creditor could use the actio Serviana against third parties, but not against each other. D.20.1.10. But simultaneous creditors were obviously comparatively rare. The most common type of multiple pledge was that in which the credi-

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115 Id. at 32; cf. Jörs-Kunkel 160 n.1; Sohm-Mitteis 350 n.13.
tors were successive in time and unrelated by agreement to each other.

Rights of subsequent creditors.—As compared with the first creditor, the rights of subsequent creditors were quite limited. For that reason, for a debtor to pledge the same subject matter twice without disclosing the original pledge was grounds for the extra ordinaria praetorian penalty of stellionatus (swindling), unless the value of the pledge easily exceeded the amount of both debts. D.13.7.36.1. The essential weakness of the subsequent creditor's position was that he had no direct way of realizing his security. He had no right of sale, and if he tried to foreclose, the prior creditor could bar his action with an exception based on his prior right. D.20.4.12.pr. Even worse, the sale by the prior creditor absolutely cut off the later creditor's right in rem, D.20.4.12.7; C.4.10.6; C.8.18(19).3, except if the subsequent pledge agreement was construed as subjecting to the second debt only the extent in value by which the res exceeded the prior debt. D.20.1.15.2.

However, the subsequent creditor did have an actio Serviana against all third parties improperly in possession, though even here if he recovered, it was only subject to the prior interest of the earlier creditor. D.20.4.12.pr. On sale by the prior creditor, the later creditors were entitled to any excess of the sale price over the initial debt to satisfy their own debts, before any remnant might go to the debtor. D.20.4.12.5; C.8.33(34).3.4. If the debtor should sell to the initial creditor, or give the pledge to him in satisfaction of the debt, however, the rights of the subsequent creditor were not cut off any more than by a sale of the debtor without the consent of the prior creditor. C.8.19(20). Further, if the debtor sold, and used the proceeds to pay the initial creditor, the subsequent creditor had the right to pay the purchase price to the buyer and take possession of the res from him. D.20.5.3.1. It would appear, however, at least after a post-classical imperial rescript, that if the initial creditor sold, the subsequent creditor could not tender the purchase price to the buyer and recover the object. C.8.19(20).3.

The right undoubtedly of the most practical significance to the subsequent creditor was that of jus offerendi or succeedendi, for by it he stepped into the shoes of the prior creditor. In the

116 Jörs-Kunkel 160; Schulz 423.
117 Kaser § 110, at 390-92 & n.22.
118 It would appear that in early classic times the excess went entirely to the debtor, with subsidiary creditors limited then to personal rights against the debtor. Schulz 424.
119 If there was an intervening creditor, the subsequent creditor exercising his jus offerendi took priority only as to the amount of the initial creditor's pledge, not as to the amount of his own original debt as well. So far as his
jus offerendi, of his own volition he paid the prior creditor; in the
jus succedendi he paid on behalf of the debtor when the prior
creditor threatened to sell or foreclose. By this right he not only
protected his own subsequent in rem rights, but perhaps more
important could acquire a clear title for sale himself (especially
necessary for land). By exercise of the jus offerendi, the sub-
sequent creditor acquired the exclusive position of creditor.
C.8.13(14).22; C.8.17(18).5. He could then sell not only for the
amount of his debt, but also for the amount of all prior debts
purchased. D.20.5.5.pr. If the prior creditor refused to accept
the money tendered, he automatically lost his in rem rights against
the debtor and superiority over the offering subsequent creditor,
D.20.4.11.4; however, the subsequent creditor must pay the money
tendered into deposit, and could not thereafter use it as his own,
C.8.17(18).1. The jus offerendi was available to a subsequent
creditor even if the prior creditor was the state itself. C.8.18(19).4.

General priority rules.—The most basic rule as to the rights
of multiple creditors inter se was that of first in time, first in
applying it, there was no preference for special creditors over gen-
eral creditors as to the specific thing pledged. If the pledge of
the general creditor was prior, and required all of the property
of the debtor to satisfy the debt, the special creditor was totally sub-
ordinated. D.20.4.2.; C.8.17(18).6. If the state’s pledge were later
in time (and not privileged, as for taxes), it likewise would be
subordinated to a prior private lien. C.8.17(18).3. Determina-
tion of time was based upon the date of the act of pledging, not the date
of an agreement to pledge. D.20.4.11.pr. But if there was a pledge
to C1 on a certain condition, followed by a pledge to C2 absolutely,
and then the required condition happened, C1’s pledge acquired
retroactively priority in time. D.20.4.11.1.

Some apparent exceptions resulted from unusual circumstances.
Thus, if the same res was pledged to C1, then to C2, and then again
for another sum to C1, C2 had priority over the debt resulting
from the second pledge to C1. D.20.4.12.3. Likewise if C1 has a
general hypotheca over all the property the debtor shall bring
upon leased land, and C2 subsequently lends the debtor money on
a specific res not upon the land, when the debtor later brings it
upon the land, C2’s lien is regarded as prior, as to that specific
own original pledge was concerned, the subsequent creditor was still subordi-
nate to the intervening creditor. See Schulz 424-25.

This may require some clarification. If the debtor agreed with C2 that
C2 should have the pledge if he ever borrowed from him, this agreement was
of no force against a subsequent pledge to C1, even though the debtor in fact
later borrowed from C2. D.20.4.11.pr.
res. D.20.4.11.2. And if C1 lends the debtor money without security, then the debtor pledges a res to C2, and only later gives the res as security to C1, also, C2 is deemed prior. D.20.4.12.2.

In all the above situations, the pledge to C2 was in some significant way considered prior in time, and therefore could be prior in right. In one case it could be subsequent in time and still prior in right: if C1 specifically consented to the debtor’s second encumbrance of the pledge. Then the only issue was as to C1’s condition: was he deemed to have relinquished his pledge altogether, or merely to have agreed to subordination to C2? This was treated as an issue of fact. D.20.4.12.4.

Finally, it should be noted that in suits among multiple creditors, the Romans soundly limited the doctrine of res judicata to the actual parties involved. Thus if in a suit between C3 and C1, C3 prevailed, this did not give him priority over C2. C2 had not been involved in the suit, and his priority could not be indirectly cut off. D.20.4.16.

Special priorities. — The rule of prior tempore, potior iure, was steadily eroded by the granting of special priorities by law to protect certain weaker parties, or to encourage some desirable relation. Looking to its own interests first, the state created a privileged position for any pledge to the fisc (tacit or contractual) for unpaid taxes. D.49.14.28; C.4.46.1. A purchaser from the treasury of this pledge enjoyed the same priority. C.8.18(19).2. Justinian, in creating the tacit hypotheca for the wife’s dos, gave it priority over subsequent pledges as well. C.5.12.30; C.8.17(18).12.1.

Certain commercial acts also gave rise to priorities. Thus, the creditor who lent the money for the purchase of the pledge itself (usually land) had priority as to that pledge over any other creditors, C.8.17(18).7, a rule not unlike the priority we accord to our purchase price mortgages. To insure greater commercial flow, two rules were adopted to give priority to those who enhanced commerce significantly. A subsequent creditor had priority where his loan was for the preservation of the property itself, as one who loaned money to repair a ship, D.20.4.5, and in general a subsequent creditor was preferred who loaned money for the preservation or transportation of merchandise, D.20.4.6.1,2.

The possibility of creating informal multiple hypothecas on the same pledge with no indication of the existence of any at all (especially in land, where transfer of possession to the creditor was unlikely) gave rise to a considerable lack of certainty in
secured transactions. Although a system of title registration existed in Egypt and to some extent in Greece,\textsuperscript{122} this excellent device was never adopted by Roman law. The emperor Leo did adopt a system giving priorities to registered hypothecas, but it was largely ineffectual on two counts. It was really only a system of proving execution of a hypotheca: if the hypotheca were drawn up by a public official as a notary, or if it were subscribed by three honorable and upright witnesses, it was entitled to priority over hypothecas not so created. C.8.17(18).11. It is readily apparent that there is no real certainty when the document signed by three witnesses could still be totally secret, and secondly, there would in no case be more than temporary or local publicity since there was no permanent registry system.

\textit{Effect of priorities.} — It is noteworthy that although a considerable variety of special preferences for different types of pledges, especially in late and post-classical times, came into existence, there was never developed any systematic method of handling them. We are not even sure of the priority where several of these privileged pledges came into conflict. Pledges for the payment of taxes to the fisc were probably first, and then the wife's hypotheca for her dos,\textsuperscript{123} but what was the order, if any, among the other privileged pledges is quite uncertain. Quite possibly, it was once again an order based on time among the privileged pledges themselves.\textsuperscript{124} In any event, this proliferation of privileged as well as that of tacit hypothecas may be regarded as a fundamental defect in the Roman law of real security. Both might have been overcome in part by a sound system of recordation and registration, but this device was never used by the Romans. The creditor, especially in later history, was in a most precarious condition. Not only had he never a clear assurance that there existed no earlier pledges upon the subject matter (for the creation of pledges by agreement was always an informal matter, and in any event a tacit hypotheca might also be a hidden encumbrance), he could not rest assured that his temporal priority might not be disturbed suddenly by a privileged pledge. Sohm-Mitteis puts it quite nicely by noting that any security remaining after considering the possibility of tacit pledges "is destroyed by the privileged pledges. Who today is the prior creditor may find himself tomorrow transformed into a subsequent one."\textsuperscript{125} It is no wonder that Roman creditors

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\item \textsuperscript{122}Radin, Roman Law 207 (1927).
\item \textsuperscript{123}Cf. Buckland, Text-Book 480; Jörs-Kunkel 160.
\item \textsuperscript{124}Cf. Hunter, op. cit. supra note 109, at 442-43.
\item \textsuperscript{125}Author's translation in text. "wird durch die Pfandprivilegien zerstört. Wer heute noch vorgehender Pfandgläubiger ist, kann sich morgen in einen nachstehenden verwandeln." Sohm-Mitteis 352.
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appear to have preferred personal security to such a tenuous real security.\textsuperscript{126}

H. Extinction of the Pledge

The most obvious method of extinguishing a pledge is payment of the debt, or satisfaction in the manner prescribed by the initial agreement. D.20.6.6.pr. Payment by a third party, even if unknown to the debtor, will also end the pledge if the payment is intended on the debtor's behalf. D.20.6.1.pr. If the creditor should refuse the due payment by the debtor, then the debtor may seal the money in deposit, and bring suit for the release of the pledge. C.8.13(14).20. If the initial agreement contained a condition permitting rescission, the debtor may avail himself of such clause and rescind. D.20.6.3. If this release was not formal—for example, when the creditor simply remained silent while the debtor sold the res to a third party—then it did not totally extinguish the pledge, but did give rise to an effective exceptio pacti or doli. D.20.6.7.2.\textsuperscript{127}

The pledge may also be eliminated by a renunciation or release by the creditor. D.13.7.9.3; D.20.6.5.pr. A renunciation of the right to demand payment may be made for a specific time, and the pledge is protected within that time. D.20.6.5.1. There is no release, though, if a creditor in possession of the res is induced to return it to the debtor through fraud. D.13.7.3. A novation of the debt acts as a release unless the pledge is expressly retained in the new contract. D.13.7.11.1.

A release also occurs where the creditor consents to the sale by the debtor. D.20.6.4.1; D.50.17.158; C.8.25(26).4. Consent to the sale will be implied when the creditor is notified of it, and takes no action to prevent it although he has opportunity to do so. C.8.25(26).6. But where the creditor is a ward, he cannot consent to the sale without the concurrence of his guardian, D.20.6.7.pr, and a general agent or managing slave cannot consent for the creditor unless expressly authorized. D.20.6.7.1. A filius familias or a slave who has given the loan for the pledge out of his peculium can consent to release the debt provided he receives some consideration for doing so. D.20.6.8.5.

Unusual circumstances can vitiate the creditor's consent to sale or other disposition by the debtor. Thus, if the creditor consents to a sale within a specified time, a later sale does not cut off the pledge. D.20.6.8.18. But if the creditor gives the debtor the right

\textsuperscript{126}Buckland, op. cit. supra note 95, at 320.
\textsuperscript{127}Kaser § 110, at 392.
to sell, and on the latter's decease the pledge passes into the hands of the heir who sells, the latter sale is deemed authorized, on the theory that the courts will not investigate subtle issues of the creditor's intent. D.20.6.8.16. If the creditor consents to a sale, but the debtor makes a gift, the pledge remains; while if the creditor consents to a gift, but the debtor sells, the pledge is released (unless the creditor's consent was contingent upon the donee's being a specified friend of the creditor's). D.20.6.8.13. The distinction is eminently sensible: the creditor may have consented to the sale only so that he would be repaid, and how can he be repaid if the debtor makes a gift? But if the creditor allows the debtor to give the pledge away, how is the creditor injured if the debtor chooses to profit from it instead?

Even though released, the pledge may subsequently revive. If the debtor sells with the creditor's consent, but the sale is later rescinded, the pledge reattaches to the res. D.20.6.10.pr. Likewise, when the creditor consents to the debtor's bequeathing the pledge by legacy, if the legacy is rejected, the pledge revives upon the res in the possession of the heir. D.20.6.8.11.

Following the rule that the causa pignoris indivisa est, the creditor retains his pledge until the full debt is satisfied, even though one of several co-debtors (as the heirs of an original debtor) has paid his share. C.8.31(32).1; C.8.31(32).2. As has been noted above, even though the debt secured by the pledge has been paid, and the pledge released, a creditor in possession may remain in possession by the jus retendi of Gordian should the debtor continue to owe any unsecured debts. C.8.26(27).1. This retention however was in the nature of a lien, not an implied new pledge.

Should the creditor sue a third party on possession under his actio Serviana and recover damages, the in rem rights of the creditor are ended, and he is precluded by his election of remedies as well from proceeding in personam against the debtor. D.20.6.8.19. However, should the creditor initially sue the debtor on the pledge, a judgment does not end his in rem rights. Only satisfaction of the judgment or the giving of fresh security will do so, for otherwise the creditor will have lost his in rem right in the pledge for an in personam right in the satisfaction of the judgment. D.20.1.13.4.

The in rem interest of a subsequent creditor is extinguished by sale of the pledge by a prior creditor, although the subsequent creditor retains his personal right to recover on the debt and is entitled to first call on any excess from the sale. D.20.4.12.5; C.8.33(34).3.4. Likewise, a prior creditor who refused to accept
the money tendered him in payment of his debt by a subsequent creditor exercising his right of *jus offerendī* or *succedendī* has impliedly released the pledge. D.20.4.11.4.

The last common method of extinction of the pledge was by agreement of the creditor to accept the personal protection of a surety instead. D.20.6.5.2; D.20.6.14. Three less common ways were by merger, destruction of the *res*, and prescription. Merger of interests could occur when the creditor acquired title to the *res*, as when he was the heir of the debtor.\(^{128}\) Although changes in the external form of the pledge do not affect the existence of the pledge (substitution of a house for a garden), D.20.1.16.2, under some circumstances the physical destruction of the *res* (as a chattel) will end the pledge, leaving the creditor to his personal remedies. D.20.6.8.pr.

Extinction of the pledge by *longi temporis praescriptio* was a late classical innovation. If the creditor refrained from acting for the period of the prescription, and the other requirements were met, the debtor was protected. C.4.10.7. However, the creditor might still resort to personal remedies against the debtor. C.7.36.1. But if the debtor gave the *res* to a third party, and the latter remained undisturbed in possession for the prescriptive period, not only was the pledge ended, but the creditor lost his in *persona* rights against the donee as well. C.7.36.2.

\(^{128}\) Merger could also occur in a rather interesting manner. Suppose the debtor is the bona fide possessor of a *res*, which he pledges to the creditor. The true owner dies, leaving the creditor as his heir. The pledge ends, and the creditor becomes the owner, with in *persona* rights against the debtor on the debt. D.13.7.29.