Medieval and Post-Medieval Roman Law

Roman law allowed both movable and immovable pieces of property to be used as security for a claim, especially for the benefit of a lender. Such securities were termed *pignus* or *hypotheca*; Justinian ruled on them in his Digest and Codex. Alongside these sources, innumerable local and regional ordinances emerged in the Middle Ages and early modernity, through both common law and

legislation. Since the seventeenth century a greater portion of these have been special mortgage laws. For the most part these laws treat of security through real estate or through an entire estate; at the same time, they regulate bankruptcy to some extent.

Originally *hypotheca* and *pignus* were distinguished from one another through possession, although *pignus* was often used as an overarching term for both. *Hypotheca* was a lien with no possession for the creditor. With *pignus* the creditor held the lien object, which was transferred (*traditio*) to him by its owner. Both real estate and movable property could be used for either *hypotheca* or *pignus*; the lien of movable objects without the creditor taking possession was still allowed under certain conditions in the Allgemeines Landrecht für die Preussischen Staaten (General Territorial Law for the Prussian States, 1794). In the Middle Ages and early modernity, commercial practice and law ultimately developed in the direction of allowing lien without possession mainly for real estate and of allowing lien with possession only for movable property. For a long time, though, mortgage could be used not only for pieces of real estate but also for entire estates; this continued until the principle of "specialty" took sway beginning in the eighteenth century.

A mortgage (*hypotheca*) was entered upon through simple agreement (*adsignatio, contractus, conventio, pactus*), and this agreement could take any form. In order to be able to prove its existence, however, people generally preferred to record the agreement in writing, often with a witness, in a notarized document (*instrumentum publicum*). Often, parties to such an accord (similar that for to the transfer of real estate) would register with a parish—particularly famous were the *Schreinsbücher* (shrine books, treasury books) of Cologne—with a public authority, or with the court. From this initially voluntary exercise, in many cities and territories there developed, either in the common law or in statutory law, a mandatory requirement that parties secure insurance or even validation from the state. This has remained true up to the present day. Also still in force in the twenty-first century is the principle of accessoriness. Mortgage could not exist where the claim to be secured did not exist, but an abstract—independent of claim and thus extremely flexible—lien did develop. It was also not only the debtor who could construct a mortgage to secure a claim; a third party could make his or her property available for the encumbrance, too.

Following the model of antiquity, some creditors enjoyed statutory rights to a mortgage; examples include builders, wards, and wives. Also, above and beyond the law of antiquity, church institutions and parishes held general mortgages on the property of their custodians and administrators. Statutory mortgages were generally construed as implicitly agreed-upon mortgages (*hypotheca tacita*). Statutory mortgages, or at least statutory rights to expect mortgage—for example, those for the benefit of builders—still exist in the twenty-first century. Sometimes it was understood that a general mortgage on a debtor's entire property was established with the recording of a debt. A mortgage could and can still today also be established by court order.

The purpose of a mortgage—as also of *pignus*, or lien—lay in pressuring the debtor to make good on his or her obligation, and in making the object available for the creditor's satisfaction. The object of the security could be liquidated when the secured claim fell due and the creditor defaulted, although the creditor was required in many places first to announce the impending foreclosure and then to wait for a predetermined period of time. The liquidation worked through public sale by the court (*subhastatio*). This usually had to be announced a specified time in advance. Alternatives included simple delivery of the object of security itself to the creditor, commitment of the creditor-forced administration, or transfer of possession. Compulsory public sale and forced administration of the encumbered piece of property are still common in the twenty-first century. Nevertheless when a loan secured by a mortgage on a property falls severely in arrears, banks generally first seek to accomplish its sale through the owner.

The rules for rank-ordering of competing mortgages differed. These included—in various combinations—precedence according to chronological order (the priority principle), in deference to verification status, with respect to possession, or according to the type of claim. Toward the end of the eighteenth century, creditors won a further possibility for satisfaction through the creation of bonds for mortgages. In the form of these bonds, creditors could easily convert their mortgage rights into capital on the market.

Because of its dependence on the claim to be secured, a mortgage ended through normal completion of the debt, either by the debtor or by a third party. It ended, too, with the liquidation of the object, because the buyer was to receive the object free of encumbrance or lien. It could also end because an agreed-upon or statutory time-limit had been reached, because of the appearance of a resolvent condition, because of consensual abrogation, or because of a unilateral abdication.

The mortgage also could lose its actionability through a statute of limitations—more precisely, through adverse possession of freedom from mortgage (*praescriptio longi temporis*). For this, the possessor of the mortgaged object must have held it in good faith for an uninterrupted ten years—or twenty years when the possessor and the creditor lived in different places. If the owner was in bad faith, the owner had to wait thirty years; even then, though, the mortgage would be once more actionable as soon as the owner in bad faith lost possession.

[*See also* Pledge, *subentry on* Medieval and Post-Medieval Roman Law.]

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