## Medieval and Post-Medieval Roman Law

One of the many possibilities for ensuring the satisfaction of a debt (*securitas*) is the erection of a pledge or lien. Roman law recognized two variants of pledge: *pignus* and *hypotheca*. The rulings on this are to be found in Justinian's *Digests* and *Codex*. *Hypotheca* was the right of pledge without any transfer of property; *pignus* was the version of pledge in which the creditor takes possession of the pledge object. Both versions of pledge worked with both movable goods and real estate; the possession-transferring pledge of both movable and immovable property could still be found in the French Civil Code of 1804. In practice, however, movable goods were far more often pledged, as *pignus*. In canonical law, in the process of ensuring the accountability of a person caring for church property, a piece of real estate was to be burdened with *pignus* only when the person did not have a close tie to his or her movable property. Thus with *pignus* the following generally refers to the pledge of movable property.

The *pignus* could be based not only in material goods but also in nonmaterial goods, especially in claims held. A distinction from *hypotheca* is not necessary here because one cannot possess nonmaterial things.

In common law (*ius commune*) a *pignus* on a material thing arose through an informal agreement (*contractus, conventio, pactus*) with a transfer from the debtor to the creditor. The sources thus also speak of a commitment to pledge (*datio pignori*). Certain formalities did develop on local and territorial bases, however. Additionally, one could erect a *pignus* by testament.

For the most part only the pledge of an object belonging to the debtor is discussed, although a third party could also make his or her property available as a security. That said, the pledge could not go into effect if the claim to be secured did not actually arise. As with mortgage, the right of pledge is accessory to the fact.

When one could make a profit from the object of a pledge, the debtor and creditor frequently agreed to let whatever profit the creditor made during his or her possession serve as a substitute for interest on the debt itself. This agreement was called a *pactum antichreseos* (*Antichrese*). It was primarily, although not only, made when immovable property was used as a pledge. In cases such as the agreement to allow profit from a pledge, certain legal regulations were in effect. For example, interest from a claim used as pledge was owed to the one offering the pledge and was to be reckoned against the interest arising on the secured debt or against the secured debt itself.

In addition to coming into play through a contract, *pignus*—like mortgage, through force of law—could arise as a so-called implicit pledge (*pignus tacitum*). Legal pledge rights against movable property, with or without possession by the creditor, remain common in both civil and trade law. A third possibility for the grounding of a pledge right against a movable good was disposition by the court, especially in cases of compulsory satisfaction of all creditors (*pignus judiciale*).

The creditor could liquidate the pledged good in the event that the secured claim fell due and the debtor fell into arrears. This liquidation took place through public extrajudicial or judicial auction (*distractio*) following an announcement and waiting period (*denunciatio*). In such instances the debtor who had offered the pledge was to appear as the seller. Also conceivable was a court decision to transfer ownership of the pledged good to the creditor, possibly after a failed attempt to auction off the good. The contract of pledge could contain a clause whereby the pledge object would simply revert to the ownership of the creditor without court proceedings once it matured. Such expiration clauses were, however, eventually banned.

Because of its accessoriness, the right of pledge became defunct when the debtor made good on the debt or when another did so on the debtor's behalf. Further causes for the end of pledge included liquidation, the running out of an agreed-upon or legal time limit, the appearance of a confounding factor, the dissolution of the pledge by contract, or the reaching of a statute of limitations (as with mortgage). Even if the right of pledge ended because of satisfaction of the debt, the creditor could retain the pledge object for so long as other of the same debtor's other debts with the creditor remained unsatisfied (*ius retentionis*).

Alongside pledge, the Roman law of antiquity also foresaw the transfer by way of security—or chattel mortgage—of an object to a creditor (*fiducia cum creditore contracta*). Even in antiquity this began to supplant pledge. The Middle Ages and modernity maintained life in the concept through the gestalt of a security purchase—that is, the sale of an object to a creditor with an agreement to repurchase that object (*pactum de retrovendendo*). Such constructions sought at the same time to cross over the tight boundaries set around interest on credit. In the course of time, though, there was a move away from clothing security in a double purchase transaction. In this manner the chattel mortgage developed into a new thing,

one that is a popular means of security in the twenty-first century.

Chattel mortgage could and can theoretically work not only for movable, material objects, but also for real property, though in practice it has been used almost exclusively for movable goods. It won its particular practical significance with the restriction of mortgage to real estate. The pledge of a movable object as *pignus* was and often is not undesirable because the creditor would prefer not to take care of the object and the debtor would like to continue using it. The security purchase or chattel mortgage, however, can be construed in such a manner that the object remains with the debtor. Much as the chattel mortgage supplanted pledge in many business transactions, the twenty-first century's practice frequently prefers the assignment of a claim by way of security to its pledge.

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

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