Book VIII.
Title XIII.

Concerning pledges.
(De pignoribus.)

8.13.1. Emperors Severus and Antoninus to Timotheus.

A debtor who declares that he will give up the pledges to his creditors will not thereby be released.

Promulgated February 25 (194).

Note.

A pledge was simply security for debt, and the debtor could not claim a release from his debt by simply turning the pledged property over to the creditor. He was responsible for any deficiency remaining after the sale of it. D. 12.1.28; C. 8.27.3 and note.

8.13.2. The same Emperors to Lucius.

Although it is clear that some property was pledged to your opponent specially, and all of it generally, and that he has an equal right (with you) to all of it, still the law must be administered justly. If, accordingly, it is certain that he can collect his whole debt from the property which is specially pledged to him, the president will direct that the things afterwards pledged to you out of the same property (but not pledged to him specially) shall not, in the meantime, be taken from you.

Promulgated May 31 (204).

Note.[1]

The principle of marshalling assets is applied here. It will be noted that a debtor might mortgage or pledge all of his property generally, or he might mortgage some of it specially and also the remainder generally, or he might simply mortgage some of it. Where some of it was mortgaged specially as here, and the remainder generally, a subsequent mortgagee was entitled to have the first mortgagee satisfied, if possible, out of the property mortgaged to him specially. If all of the property had been mortgaged generally to the first mortgagee, the subsequent mortgagee could protect himself only by paying the first mortgagee. See, D. 20.4.2.; 9 Donellus 1014-1016. In fact the creditor was, in any event, required to first sell the property pledged specially, before resorting to the property pledged generally. C. 8.27.9.

8.13.3. The same Emperors to Maximus.

Though creditors who, upon nonpayment of the money, take possession (of pledged property) according to agreement, are not, indeed, considered as using force, still they should acquire possession pursuant to the authority of the president.

Promulgated May 1 (205).

Note.

[1] Blume penciled in here: "Make note general. Mtg. [mortgage] included future property C. 8.16.1 n. [illegible] Pringsheim 159 [illegible].

It was customary, in Greek countries, to make agreements in connection with loans, that, in case of default, the creditor should have the right to seize the debtor's property as though pursuant to a judgment. No official authorization was necessary to carry such agreement into effect. Mitteis, R.R.u.V.R. 413ff. So among Germanic nations, creditors had the right to seize the debtor's property in case of default. Dernburg 2 Pfandrecht 329. And that was probably the original Roman law. Mitteis (p. 431ff) thinks that the instant rescript is an echo of the Greek custom, showing its persistence, and that this is also true of C. 2.3.14; C. 2.16.1; C. 4.10.9; C. 5.10.9; C. 5.22.1; C. 7.32.9. It appears in the instant rescript that there was an agreement that the creditor might take possession of the property, not delivered to him, without official intervention, if default occurred. That was contrary to the Julian law against violence, enacted by Caesar or Augustus and broadened by Marcus Aurelius, in cases in which the creditor had no specific lien and agreement of entry. D. 4.2.3; D. 4.7.7 and 8; see note C. 8.4.6. But it is doubtful that this was true in case in which the creditor had a specific lien and the right to take possession in case of default (see Paul., Sent. 5.26.4), until Diocletian decided in 293 A.D. that to take forcible possession even in such case should be unlawful (C. 9.33.3), and that official authorization should be necessary, C. 4.24.11 (294 A. D.). The instant rescript, written in 205 A.D. probably merely provided that to take possession under such agreement was not in violation of the Julian law, and the last sentence is probably an interpolation. Festschrift f. Hanausek 50. After Diocletian's time, an action was necessary to obtain such possession, (C. 4.24.11), except where the property was unoccupied, when a simple official order was, apparently, sufficient. Nov. 167. In Egypt, a proceeding somewhat more summary than an action was customary, but even there, official intervention was essential, and an opportunity was given to the debtor to object. Schwartz, Hypothek u. Hypallagma 77ff; 29 Z.S.S. 42ff; 36 Z.S.S. 231ff; 40 Z.S.S. 78ff.

8.13.4. The same Emperors to Bellius.

Since you acknowledge that you received money and pledged your lands as security, you complain without reason that you were forced to give a pledge. If you, accordingly, want your property back, pay your creditor the money which is due him. Given May 30 (208).

Note.

The force here mentioned was evidently simply the force of necessity to borrow money, which, of course, would be no excuse for repudiating the mortgage.

8.13.5. Emperor Antoninus to Domitius.

The honorable president of the province will hear you when you demand your pledge. Nor are you prejudiced by the decision given against your debtor, if it is evident that he was in collusion with your opponent, or if, as you say, the cause was not investigated, but he was defeated by the defense of prescription.
Promulgated May 15 (212) at Rome.

Note.

This law supposes that an action was brought against the mortgagor by a third person; that the two were in collusion, and that thereby the ownership of the mortgaged

property was adjudicated to be in the third person. This adjudication was not res judicata as to the mortgages. As to that subject, see headnote C. 7.56.

8.13.6. The same Emperor to Quintus.

The amount clearly paid out by a creditor in possession as an assessment for protection of roads or for any other necessary purpose, will be computed as part of his debt.

Promulgated July 30 (213).

Note.

For necessary expenses incurred by the mortgagee in possession, for instance expenses of a physician to cure a mortgaged slave, or necessary repairs made on a building, the mortgagee had a lien. If the property was sold, he might reimburse himself for such expenses out of the proceeds. If the property was unavoidably destroyed, he had a right of action against the mortgagor the same as for the original debt. D. 13.7.8 pr and 5.

8.13.7. Emperor Gordian to Marcianus.

Usucaption (prescription) - by a third party - does not extinguish a pledge-agreement.

Promulgated September 5 (238).

Note.

The case supposed is that the mortgaged property got into the hands of a third party. Did the prescriptive period of three years for personal property, and the period of ten and twenty years for real estate, deprive the mortgagee of his rights by reason of adverse possession? This law says not. The hypothecary action which the mortgagee had to recover the mortgaged property became extinct only in thirty, and in some cases forty, years. C. 7.39.7. For full note as to the time, see note to C. 7.36.2, where the different views are set out.

8.13.8. The same Emperor to Festus.

Although you obtained judgment in a personal action against the debtor or his sureties or his mandators[2], you still have the right to pursue a pledge.[3]

8.13.9. The same Emperor to Atticus.

If ownership of land, which was pledged, was transferred to you by the female debtor as a gift, and it appears that the creditor or his heirs afterwards took possession thereof, commence an action to recover it (vindica eam), and the president of the province will see that after taking an account of its produce and after you pay any balance which is due, satisfying the debt in full, possession will be restored to you.

Promulgated September 29 (239).

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[2] [Blume] Author of a sort of letter of credit.

[3] [Blume] Until the modification by Nov. 4, a mortgage creditor had the right to resort to either remedy which he had. He might sue his debtor, his surety or sureties, without resorting to pledges. C. 8.40.2 and 17. Under Greek custom, resort was first had to pledges. Weiss, Pfandr. Untersuchungen 45-50.

Note.

A debtor or his successor in interest had the right before foreclosing to redeem the property mortgaged or pledged by paying the amount due. This principle is announced in the foregoing law. Apparently the doubt which existed in the mind of the petitioner for the foregoing rescript, was as to what action to bring. Donellus, 9-10-37-1038,[4] says that he could not bring the so-called action on the pledge mentioned in C. 4.24, since he was not the debtor but could, as stated in the law, bring the general action in rem - vindicatio - for the recovery of property. See also Colquhaun, R.C.L. § 1490. The debtor, when he paid the indebtedness, could bring the former action (D. 13.7.9.5), and evidently the latter as well. C. 4.24.10, and see note C. 8.27.5. The heirs of the debtor had a like right. Law 12 hereof.

8.13.10. Emperors Diocletian and Maximian to Alexander.

Debtors in the province should first be given notice to pay.[5] If they fail to do so, when called upon, the rector of the province will not hesitate to lend you the aid of his authority in claiming the pledges and hypothecations which you say are specially provided for in a document.
Given January 13 (290).

8.13.11. The same Emperors and Caesars to Euphrosynus.

It is unlawful for a party who nominates (a man to an office or position of trust) to seize without the authority of the president the pledged property of the person nominated.
Subscribed February 27 (293).

Note.

Persons who nominated anyone to a municipal office, or municipal officers who nominated a guardian for a minor became responsible for the nominee. See C. 5.75 and C. 11.36. The instant law provided that the property of the nominee, in case of liability on his party, should not be seized arbitrarily by the person who nominated him, but that the ordinary course of law should be pursued. Bas. 25.2.48, states this law as follows: "A creditor must not seize the pledged property of the debtor without authority of the president."

8.13.12. The same Emperors and Caesars to Eusebius.

If your wife pledged her own property for a loan which she received and you are her heir, sue the creditor in the usual manner, after the debt is paid, for the return of the property to you, although in the document of the pledge no reference to that fact was made.[6]
Subscribed March 28 (293).

8.13.13. The same to Matrona.

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[4] Citation as in original.
[5] [Blume] Before a mortgagee could sell mortgaged property (or pledged), the debtor had to be notified to pay. See C. 8.27. The instant law recognizes that rule. See Dernburg, 2 Pfandrecht 377-8; 29 Z.S.S. 103.
[6] [Blume] See headnote to C. 4.24.

Since you state in your petition that the woman, not under paternal power (domina) and not less than twenty-five years of age, transferred ownership to you of the property which she had pledge to you and gave it to you in payment, her contract and wish suffices for your protection.
Subscribed at Heraclia April 29 (293).

Note.

Payment of the indebtedness might be made by selling the property to the creditor. Such sale was valid. C. 8.34.3 note.

8.13.14. The same to Appianus.

When the debtor has sold pledged property, the law is undoubted that the creditors have the option to sue the debtor, in a personal action, or the persons who possess the pledged property in an action in rem.
Subscribed at Heraclia May 1 (293).

Note.[7]

An option was given by this law to the creditor to pursue whatever remedy he wished. That was the general rule at this time, though there are traces in the law which show that formerly the principal debtor was first required to be pursued. C. 8.13.24; C. 8.39.4; C. 8.40.28; 9 Cujacius 902. Justinian provided in Nov. 4, the order which the creditor was required to follow to recover his debt, and among other things provided in c. 2 thereof as follows: "The creditor shall not seek to obtain (in a hypothecary action) the property of the debtor which is held by other persons until after he has recourse to a personal action against the mandators, sureties or other guarantors. He may thereafter pursue the property of the principal debtor held by others, and having sued those who detain it, without receiving satisfaction in that manner, he may then have recourse to the (pledged) property of the sureties, mandators or other guarantors (held by others)." If the debtor paid the debt, the instant law, or course, did not apply. Nov. 112, c. 1.

8.13.15. The same to Basilida.

It is most certain that a debtor cannot make the condition of his creditor worse by making a sale or gift or leaving a legacy or trust (of pledged property). Hence if you are confident that you can prove that the property was pledged to you, you may lay claim to it.[8]
Subscribed at Heraclia May 3 (293).

8.13.16. The same Emperors and Caesars to Herais.

Although your brother loaned in his name money which did not if fact belong to him, but to you, and received a pledge, still he could not acquire the benefit of the pledge for you.
Subscribed at Hadrianople May 12 (293).

Note.

The right of subrogation was claimed, but as a purchase accrued to the benefit of the purchaser, though made with another's money, so a loan made with another's money

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[7] Blume penciled in here: “Law 1 h.t.; C. 4.10.10 and 14; C. 8.9.1.
[8] [Blume] C. 8.25.10; C. 8.27.12.

was the loan of the lender. C. 4.50.1 n; C. 4.2.7 n. And the security taken in that connection was governed by the same rule. C. 8.27.19. A loan could, however, be made in the name of another, and it then was the loan of such other. But even then - on the principle that the benefit of a contract inured generally only in favor of the direct contracting parties - a pledge or mortgage taken in connection with such loan did not accrue in favor of such other, till Justinian changed the law. C. 4.27.3.

8.13.17. The same Emperors and the Caesars to Pontia.

Although your brother bought land with the money which he received from you as a loan, such land did not become a pledge by the fact that the money was loaned, unless he pledged it specially or generally. Nothing, of course, prevents you from claiming the debt, in a personal action brought before the president.
Subscribed May 18 (293).

Note.

A lien was claimed by right of subrogation. But such subrogation was generally denied. C. 4.50.1 note. There were exceptions, and implied liens existed under the later law. C. 8.14 headnote. And a specific lien given by the purchaser on property bought with another's money, and given to such other, took precedence over a general lien given by such purchaser previously. C. 8.17.7.

8.13.18. The same Emperors and the Caesars to Euodius.

An action to recover property pledged or hypothecated is one in rem.[9]
Subscribed at Sirmium December 1 (293).

8.13.19. The same Emperors and the Caesars to Maximus.

Just as a creditor in possession of pledged property is not responsible for any acts of God, so he is responsible for fraud, or neglect, and lack of custody.[10]
Subscribed December 16 (293).

8.13.20. The same Emperors and Caesars to Alexander.

A creditor cannot be compelled to demand payment. Therefore offering to pay the amount which you believe you owe to the heirs of Evodianus, if they refuse to accept it, seal and deposit it and sue them in the presidential court for the return of the pledged property.[11]
Promulgated January 15 (294).

8.13.21. The same to Vitus.

A third person, liberating pledged property by payment may sue to recover what he has paid, but he cannot by such payment acquire ownership of the pledged property.
Subscribed October 29 (294).

8.13.22. The same to Antiochianus.

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[9] [Blume] i.e. it could be brought against anyone who possessed it.
[10] [Blume] C. 4.24.5 and 6; C. 4.34.1 note.
[11] [Blume] See C. 8.42.9; headnote C. 8. 27. See also C. 10 h.t.

A subsequent creditor strengthens his right to a pledge (given him and a prior creditor) by paying the prior creditor[12], but he may demand from the debtor only the principal (so paid) and the interest due thereon, but he receives no interest on interest.
Subscribed at Nicomedia December 11 (294).

8.13.23. The same to Macedonius.

When a man more than twenty five years of age released a pledge, he can no longer claim it, since the praetors' edict (jurisdictio) upholds a mere pact (of release) in accordance with his wish.[13]
Subscribed at Nicomedia December 16 (294).

8.13.24. The same to Marcus.

A creditor cannot be compelled to refrain from claiming his pledge and sue the debtors in a personal action instead.
Subscribed at Nicomedia December 26 (294).

Note.

See C. 8.13.14 and note. C. 4.10.14, provided that the creditor had the option to sue the debtor or pursue the pledge. Nov. 4, c. 2, provided for a case where pledged property was in the hands of third parties, and directed the sureties to be sued first, before resorting to such property.

8.13.25. The same to Dracontius.

If a slave, who was pledged, dies, the claim for the debt remains unimpaired.[14]
Subscribed at Nicomedia December 26 (294).

8.13.26. The same to Mauricius.

If a debtor pledged a shorthand writer (notarium) to you, sue the man by whom, as you say, the slave was stolen, before the rector of the province.[15]
Subscribed at Sirmium December 26 (294).

8.13.27. Emperor Justinian to Mena, Praetorian Prefect.

As to hypothecations which money changers, dealers in silk or merchants of any other wares usually give to persons loaning money to them, we specially ordain, in order to eliminate every kind of fraud, that if, after making a contract of that kind, they purchase for their children or other relatives any kind of position in the imperial service, which may be sold and transmitted to heirs under a certain condition, creditors may, tho it is not shown that the children or other relatives acquired the position with the money of such business men - provided the contrary, that others gave the money from their patrimony, is not shown - demand their debt from those holding the official position in

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[12] [Blume] See C. 8.17.1; headnote C. 8.18-interest on interest was forbidden. C. 4.32.28.
[13] [Blume] An illustration that contracts without consideration might be good. See C. 8.25.1 and note. On the meaning of jurisdictio, as here used, see 9 Cujacius 1152.
[14] [Blume] When property pledged was accidentally destroyed, the loss fell on the debtor. C. 4.24.6 and 9, and 19 h.t. The custom in Greece was to the contrary. C. 4.24.6 note.
[15] [Blume] Shorthand writers at this period were ordinarily slaves.

the imperial service, or hold them responsible only to the extent of the amount for which the position may be sold. 1. This shall in like manner apply also if these merchants are shown to have purchased with their money an official position in the imperial service for others (by making them a loan); so that what is generally permitted as against debtors who serve in such positions which are salable and transmissible to heirs - (namely) that, unless they are paid, creditors may, by virtue of their mortgage, claim such position from such debtors, if living, and after their death demand the amount of the benefit which is usually granted in connection with such positions pursuant to the tenor of a general agreement of the parties serving therein or pursuant to an imperial sanction granting such benefit - that, too, shall be permitted to the creditors of such merchants, even though the persons who actually serve in such positions are in no way liable for the debt. 2. We ordain that this shall apply to state-positions acquired in the future, not to those which children or relatives of such merchants or outsiders now hold by the aid of the money of such business men.

Given June 1 (528).

Note.

Some positions in the imperial bureaus were saleable, and the benefit thereof, in an amount fixed by custom or an imperial order, transmissible to heirs. C. 12.19.11 and C. 12.19.13.1; Nov. 35. So, too, they became mortgageable. In the instant law, Justinian provided that if a banker or merchant gave a general mortgage on his property, any such position thereafter bought with his money for his children, relatives or strangers, should be subject to the lien of such mortgage. Ordinarily property acquired by any one - as by the children etc. here - though acquired with another's money, belonged to him, and no one else had a right thereto, or a lien thereon, but Justinian made an exception here, as he did in some other cases. C. 4.50.1 note. Justinian enacted further legislation on this subject in Nov. 53, c. 5; Nov. 97, c. 4; Nov. 136, c. 5, partially narrowing liens on such positions in favor of widows and children, and partially extending them in favor of bankers. As to bankers, see C. 4.34.