

Book VIII.
Title XVI.

What property may and may not be pledged and how a contract for a pledge is made.)
(Quae res pignori obligari possunt vel non et qualiter pignus contrahatur.)

Bas. 25.5. ?¹ et seq.; Dig. 20.3.

Headnote.

Generally speaking, everything that might be sold might also be pledged or mortgaged. A mortgage on a herd included the increase. That was true even in case of a pledge or mortgage of a female slave. A pledge by a testator did not, however, cover the separate property of his heirs. If a store was pledged or mortgaged, it covered also future additions thereto, the property that had been sold, being, however, released from the operation of the pledge or mortgage. D. 20.1.9.1 and 13 pr; D. 20.1.29 and 34; C. 8.24.1.

8.16.1. Emperors Severus and Antoninus to Oplatus.

It is in accordance with reason that your foundlings and other property, which is not credible to have been specially pledged, were not included in the general pledge which was given as to your property.

Note.

The constitution speaks of a general mortgage against all of the mortgagor's property. D. 20.1.6-8, states the same general principle. Household goods, clothing, concubines, children of such concubines and natural children were not included in such general mortgage. An alumnus mentioned in the foregoing law was a foundling, deserted by its parents and generally considered and treated as a slave by those that picked it up, although the contrary was not unknown. C. Th. 5.9.1. Justinian provided that all foundlings should be free. C. 8.51.3.

8.16.2. The same Emperors to Rogatus.

Since it is clear that the giving of a pledge is a matter of consent, we do not doubt that a man who pledged the purchase-deed of his land, considered that he pledged the land itself.²

Promulgated June 27 (207).

8.16.3. Emperor Antoninus to Restitulus.

If you buried the body of your son in a sepulchre, you consecrated that ground; and there is no doubt that when this was done, no lien could be created against it, since the sanctity of the law forbids that.

Promulgated March 30 (215).

¹ Question mark in original.

² [Blume] Similar in effect is 8.53.1.

8.16.4. Emperor Alexander to a veteran.

It has long been considered the law that an account (against a debtor) may be pledged by a general or a special pledge. Hence if the man to whom you gave credit does not pay you, the man whose account was pledged to you may, unless he paid his creditor before learning of your pledge, be compelled, by an analogous action (*utilis*) to pay you to the extent that you prove your claim against his creditor, but within the amount which he himself owes. C. 4.39.5 n; C. 4.39.7.

Promulgated February 28 (225).

8.16.5. The same to Septimius.

It is not at all permissible to pledge a hoped-for prize in an athletic contest by a private pact; neither is it, accordingly, held, if a general agreement of pledge concerning all property was made.³

Promulgated April 29 (233).

8.16.6. Emperors Diocletian and Maximian and the Caesars to Rufus.

A man who took your sons, or free men, as a pledge for money which he loaned you, deceived himself by a misconstruction of the law, since it is clear that an obligation of a pledge cannot exist as to property which the pledgor owns and made subject thereto. Subscribed at Heraclia May 1 (293).

Note.

For full note on pledge or sale of children, see C. 4.43.2, and C. 7, Nov. 134.

8.16.7. Emperor Constantine to all provincials.

Enforcement officers (*exsecutores*) appointed by any judge whatever, must not, for the purpose of collecting any debt in any civil proceeding, take from lands any slaves, oxen or instruments used for plowing, by which the collection of taxes is hindered. If, therefore, a tax collector (*intercessor*), creditor, prefect of a district or village, or decurion is found doing so, he shall be subjected to the punishment fixed by the judge.

Given at Sirmium June 3 (315).

C. Th. 2.30.1.

Note.

This and the next law deal with the seizure of instruments of husbandry, and were inspired perhaps partially in order to protect poor men and partially to enable farmers to pay their taxes. Both are doubtless due to some extent to Greek influence, for Greek custom had prohibited not only the seizure of such property for debts, but also the right to pledge or mortgage such property. It is, perhaps, true that the first of these laws did not deal with contracts; that is to say, did not prevent a man from pledging or mortgaging the property mentioned, but prohibited merely the seizure of such property in case there was no pledge or mortgage. Gothofredus ad C. Th. 2.30.1; 9 Donellus 1085-1088; Weiss, Pfandrechtliche Untersuchungen 57-59. That point is not so clear, however, in connection with the next law, although Donellus holds that it did not apply to contracts of pledge or mortgage, and it is true that it does not refer to such contracts. 9 Cujacius 1134, held that no seizure of such property could be made even pursuant to a contract,

³ [Blume] But it might be levied on under execution and sold. D. 42.1.40.

apparently on the theory that this title deals with the subject of what may and may not be pledged by contract, and it must be confessed that the argument is not without force. For that very reason, Gothofredus thinks that these two laws have no place in this title. The latter holds that the first of these laws was applicable only to collection of taxes or perhaps also other public debts - only to intercessores, tax collectors, the term *exsecutores* meaning the same, and that the word "creditor" has no place in this law. He construes "*quae civiliter poscuntur*" as referring to taxes. It would seem that this construction is strained, and that the law was intended to apply at least to all seizures either under execution or for taxes. It might be mentioned here that Constantine, in enacting this law made it a capital crime to seize the property here mentioned.

8.16.8. Emperors Honorius and Theodosius to Probus, Count of the Sacred Largess.

It is not permissible to seize as a pledge and carry away anything used for the cultivation of land on account of any pledges.

Given June 11 (414).

8.16.9. Emperor Justinian to Mena, Praetorian Prefect.

If a man uses these words in any written contract: "On the faith and at the peril of the property owned by me," or "I permit you to make satisfaction by seizure of that property," such words shall suffice for a hypothecation of property which the debtor then has, as well as the property which he shall have in the future; nor shall it, as under former laws, have any less force than a special agreement of hypothecation, since it is just that the intentions of the contracting parties, rather than their words, should be considered. 1. We also ordain this as to general hypothecation, in order to carry out the intention of contracting parties, that if a debtor states that he mortgages his property, without adding "the present as well as future," such general hypothecation shall be construed as including future property.

Given at Constantinople December 11 (528).