Book IV.
Title XXIV.

Concerning the action (by the pledgor) as to property pledged.
(De actione pigneraticia.)

Bas. 24.1.43; D. 13.7.

Headnote.

This action was one given to a pledgor or mortgagor or his heirs (C. 8.13.12; D. 13.7.8.4), against the lien holder, the object of which was to recover the things pledged or mortgaged on payment of the debt, or to recover the surplus, if the property was sold. All interest which the lien holder received on such surplus accrued to the benefit of the debtor; and the former was also liable to pay interest if he delayed an unreasonable time in paying the surplus to the debtor. D. 13.7.6.1 and 7. The subject of pledges and hypothecations or mortgages is fully dealt with in C. 8.13-34, and should be read in conjunction. Several laws there contained, as for instance C. 8.26.1, deal with the action mentioned in this title. See also C. 4.32.4.

A contract lien in favor of a creditor was of two kinds, one by which possession was delivered to the lien holder, and one by which the debtor retained possession. The former, was, in strictness, called a pledge, the latter was generally known as a mortgage or hypothecation. The word "pledge"-pignus-is, however, at times used indiscriminately whether the property was delivered or not. D. 13.7.9.2; Inst. 4.6.7. And D. 20.1.5.1 says that there was no difference between them except in the name. In other words, a creditor had the same rights whether he had possession or not, in so far as the enforcement of his debt was concerned. Some differences existed as to immediate rights; for instance, a creditor in possession could sell under the pledge and give immediate possession and transfer ownership. A mortgagee not in possession might first have to sue for possession, before he would be able to sell with effect. See note to C. 8.27.13. So again, certain duties arose in connection with possession by the lien holder, which did not arise if he did not have possession.

The action here treated, to recover possession of property under a lien could, of course, arise only where the property was delivered into the possession of the creditor either by the debtor or pursuant to an action by the creditor to obtain possession, and consequently would be infrequent in cases of hypothecations as opposed to pledges, strictly speaking. The action for the recovery of a surplus might arise as often in the one case as the other.

The foregoing title deals mainly with payments to be applied on debts, the responsibility of the pledgee for the property which he received, and the limitation of action for the recovery of property pledged or mortgaged, in case payment had been received.

It might at times happen that the action mentioned in this title was available to the creditor. It was the counter-action or contrary action on the pledge (action prinoritica contraria). That action lay when the property mortgaged was not the property of the debtor, or was in such legal position that the creditor was lawfully deprived of his possessory right, and when he could not bring the usual hypothecary action. In such case, the debtor was liable on his contract whether he knew of the defect or not. D. 13.7.9 pr. An illustration as to when this action lay is given in C. 8.15.6 where a woman lawfully

gave certain property to her sons and thereafter pledged it. The pledge was void, and while the property could not be recovered by the creditor, she could be sued on the counter-action on the pledge.

4.24.1. Emperors Gordian and Antoninus to Metrodonus.

Income and profits received from property pledged must be applied on the debt, and when it equals the debt, the action on the latter becomes extinct and the pledge is returned. If the income exceeds the debt, the surpluses are to be returned.[1]
Promulgated October 15 (207).

4.24.2. Emperor Alexander to Demetrius.

What has been received from the work of a female slave or from rentals of a house, which you say is detained as a pledge, will reduce the amount of the debt.[2]
Promulgated October 1 (222).

4.24.3. The same Emperor to Victor.

The creditor who held land as a pledge must credit the increase which he received, or should have received, toward payment of the debt, and if he made the field worse, he is also liable in an action on the pledge on that account.[3]
Promulgated December 8 (222).

4.24.4. The same Emperor to Hermaeus and Maximilla.

The common agreement mentioned by you, that if within a stated time the money were not paid, it would be permitted to sell the land given as a pledge or mortgage, does not take from the debtor the right of action on the pledge against the creditor.[4]
Promulgated April 20 (223).

4.24.5. The same Emperor to Dioscorida.

If a creditor has, without his fault, lost silver given him as a pledge, he will not be compelled to restore it, but if he is found to be at fault, or he does not show by clear proof that he has lost it, he should be condemned in judgment to the extent of the interest of the debtor.
Promulgated April 19 (224).

Note.

A pledgee in possession was responsible for damage caused by intentional misconduct (dolus) as well as by neglect. Law 7 h.t. C. 8.13.19. See also C. 4.34.1 note. But not for unavoidable casualty. Law 6 h.t.

---

[1] [Blume] This law provided that the income from mortgaged property in possession of a mortgagee should be applied on the indebtedness. To the same effect are laws 2, 3 and 12 hereof; C. 8.24.2; C. 8.27.1. This was contrary to Greek custom, under which the mortgage received the income without computing it on the indebtedness. By reason of this custom, the persistency of which is shown hereby, the inquiry herein was addressed to the emperor, the inquirer only to be assured that the Roman law was different.

[2] [Blume] Similar in effect is C. 8.24.2.

[3] [Blume] Headnote C. 4.31.

[4] [Blume] I.e., for rights otherwise arising out of the pledge—for instance for the surplus, or fraud in the sale.

4.24.6. The same Emperor to Trophima.

No recovery can be had in an equitable action of things which happen by accident—including an attack by robbers—since they could not be foreseen, and a creditor, therefore, is not compelled to restore pledges which have been lost in that manner, and is not debarred from claiming his debt, unless it was agreed by the contracting parties, that the loss of the things pledged should release the debtor.
Note.

By the time of Justinian in any event, but how long before is unknown, the action herein mentioned had become an equitable one. Inst. 4.6.28. See C. 4.10.4 note.

A pledgee in possession was not responsible, in the absence of a contract, for unavoidable casualty. Laws 8 and 9 h.t. C. 8.13.19 and 25. Greek law appears to have been different. Hofmann, Beiträge 115.

4.24.7. The same Emperor to Julianus.

The creditor who has received lands and houses as a pledge or mortgage is chargeable with the damage inflicted by him in cutting down trees or destroying the houses, and if he made the property given into his care worse by fraud or negligence, he will be liable in an action on the pledge on that account, since he must restore it in the condition as it was at the time it became obligated. 1. The creditor, however, is entitled to be reimbursed for the necessary expenses which he incurred in connection with the property pledged.
Promulgated July 20 (241).

4.24.8. Emperor Philip and Caesar Philip to Saturninus.

If no negligence or sloth is chargeable to the creditor, he is not responsible for the damage arising from the loss of the property pledged to him. But if the loss is only pretended, and if, as you allege, the pledge is even now in the possession of your opponent (the pledgee), you can bring an action against him.
Promulgated February 22 (246).

4.24.9. Emperors Diocletian and Maximian and the Caesars to Georgius.

That a pledge remains the property of the debtor, and that the loss thereof is his, is not in doubt. Since, therefore, you say that the pledged property was deposited in a storehouse, and since, according to the perpetual edict, the loss of pledged property is the loss of the debtor, it follows that if the property was deposited in a storehouse which others also were accustomed to use publicly, your personal action for the recovery of your debt remains unimpeded.
Promulgated at Milan May 2 (293).

Note.

The pledge property was evidently lost. But the pledgee, by using a public warehouse, was not responsible. So his action to recover the debt remained unimpaired. See law 5 h.t., note.

4.24.10. The same Emperors and the Caesars to Apollodora.

Neither creditors nor their successors can, against debtors who reclaim property pledged, rely upon prescription of a long time (ten or twenty years), when the debt has

been legally paid, or, if not accepted by the creditors, has been offered to them, and sealed and deposited.

1. Hence you understand that if you can prove the origin of the transaction, you should bring an action (vindicatio) to recover the property held by your opponent.

2. In order, moreover, that the creditor may use the defense that the property is a pledge, he must prove the existence of the debt. The same thing is true in connection with an action in rem (brought by your opponent to recover the property) if you are in possession of the property, and it will not be difficult for you to obtain release of the pledge, either by payment, or by the offer and customary deposit of the amount due.[5]
Given May 7 (293).

4.24.11. The same Emperors and the Caesars to Ammianus.

The nature of an action by a pledgor on a pledge is to the effect that things obligated as a pledge should be restored when the debt is paid. And if you pledged your slaves, you may rely on this right in such action, and the creditor cannot arbitrarily carry off the debtor's property by reason of the debt, without an agreement or an order of the president.
Given at Sirmium December 28 (294).

Note.

A creditor could not take possession of the debtor's property without official authority---pursuant to an action in court. But that was not in accordance with Greek or Germanic ideas. C. 8.13.3 note.

4.24.12. The same Emperors and the Caesars to Heraiscus.

The lapse of a long time (ten or twenty years) is not a defense against the restoration to the debtor of property pledged, and remaining in the hands of the creditor, after the balance of the debt, taking into account the income and profits received by the creditor from the property has been paid, or after it became the fault of the creditor that such balance was not paid (but has been offered, sealed and deposited).
Given at Nicomedia November 20 (294).

Note.

The action here treated was a personal action and was not barred until after thirty years. See also law 10 of this title.

---

[5] [Blume] The limitation was thirty, not 10 or 20 years. See law 12 h.t. A debtor had the choice of three remedies when the debt was paid: an action in rem, the personal action on the pledge, considered in this title generally, and also the condiction. D. 12.1.4.1; C. 4.5. In the [first] he was required to prove ownership, and the action, to be available against the creditor, had to be in his possession. In the personal action, the proof was less strict. Now ["No" seems to have been intended here] ownership was required to be shown. The action could be brought even when a man had mortgaged another's property and then paid the mortgage. D. 13.7.9.4. See also C. 8.13.9 note.