Book VIII.
Title XVII.

Concerning the sale of pledges.
(De distractione pignorum.)

Bas. 25.7.23, etc; Dig. 20.5.

Headnote.

Under the early law there was no foreclosure except under an agreement that the property should belong to the creditor if the debt was not paid by a certain day. Such agreement was called lex commissoria, but was forbidden by Constantine, as being too harsh. C. 8.34.3. It became a rule of law, just when is uncertain, that if an agreement was made as to sale, such agreement was valid, and the sale might be made accordingly. Even in the absence of an agreement, the right of sale was implied. Where it was agreed that no sale should be made, this was construed as simply limiting the time, and the debtor could be called on - presumably in the same manner as an absent defendant - three times to pay, after which a sale made was valid. D. 13.7.4 and 5.

Justinian provided that where the contract specified the mode of sale, such contract should govern. If no contract had been entered into with reference thereto, a procedure was provided which was cumbersome. It is set out in detail in C. 8.33.3 and need not be further referred to here. See Buckland, Textbook 474, 475.

8.27.1. Emperor Alexander to Pacata.

If a creditor obtains his debt from the income of a farm pledged therefor, he cannot sell it, since the pledge is released by operation of law.
Promulgated January 13 (223).

Note.

As to application of such income on the debt, see C. 4.24.1.

8.27.2. The same to Maximus.

A creditor who sells property hypothecated or pledged to him, does not seem to sell property in dispute, since the debtor (if in possession) has only a permissive possession.
Promulgated September 20 (223).

Note.

To the same effect as this law is C. 8.36.1. Property in litigation was forbidden to be sold, but it was not considered to be in litigation, unless in an action in court.
C. 8.36.2; Nov. 112, c. 1, attached to C. 8.36.

8.27.3. The same to Lucianus.

If property which is hypothecated or pledged is sold by a creditor, he has a right of action against the debtor or his surety for the amount remaining due.
Promulgated November 3 (223).

Note.

To the same effect see C. 8.13.1; C. 8.27.9; C. 4.2.8; C. 4.10.10. Under the custom of the Greeks, the mortgagor was not responsible for a deficiency. In the instant case, as in others to the same effect, when the rescript was addressed to a Greek, the emperor had, doubtless been asked, whether liability for such deficiency existed - such question being natural in view of the custom mentioned, and showing the persistency of such custom. But that was contrary to the Roman law. See Weiss, Pfandr. Unters. 34-36.

8.27.4. The same to Crescens.

When a creditor publicly offers (cum proscribit) property hypothecated or pledged for sale, he should, if he does so in good faith, notify his debtor, and, if possible, in the presence of witnesses (testato). So if you can prove that any fraud was perpetuated in connection with the sale of the pledged villa, go before the person having jurisdiction, so that you may bring an action which lies on that account.
Promulgated June 1 (225).

Note.

A sale was required to be made in good faith, in the accustomed manner (C. 8.29.4), and it would seem for a just price (C. 8.29.3; C. 8.40.18), and it would not have been in good faith in the absence thereof. Judicial and fiscal sales had to be made at public auction. C. 7.53.3; C. 4.44.16, and references. But notwithstanding the language in the instant law, public sales of pledged or mortgaged property fell out of use (C. 8.33.3 pr), and sales in that manner seem not to have been absolutely necessary. But the requirement of good faith included looking after the interests of the debtor; hence notification of the debtor, if possible, and some sort of public notice doubtless was necessary in order to constitute the usual method of sale. See 9 Cujacius 1157-1158; 9 Donellus 1174; D. 14.3.11.3; C. 8.29.

8.27.5. The same to Sossianus.

If you are ready to pay the remainder of the debt, the president of the province will appoint an arbitrator before whom an examination will be made as to the remainder due. And whether after the opposite party fails to appear before him, or after the amount due is offered him, he proceeds to sell, such fraudulent sale cannot deprive you of your right of ownership.
Promulgated July 21 (231).

Note.

This law furnishes a means whereby a dispute between the creditor and debtor as to the amount due might be settled, or to determine the amount, if the debt was uncertain. On this law, see Brassloff p. 19. If, in such case, the debtor brought an action and tendered what was due, the creditor could not sell the pledged or mortgaged property until the amount due had been determined by the judge. Vangerow, Pand. § 379 (2). He might bring the action mentioned in C. 4.24 to recover a pledge, and if he tendered the money found due, he recovered. D. 13.7.9.5. See note C. 8.13.9.

In case the sale was not in good faith, as explained in the note to the proceeding law, but was fraudulent, the sale was voidable. It would seem that under the foregoing law the sale could be treated as void, though ordinarily, where a purchaser was not a participant in the fraud, it was not void or voidable as to him. Law 7 of this title.

8.27.6. Emperor Gordian to Rogatus.

As long as the whole amount due is not paid to a creditor, even though the greater amount thereof is paid, he does not lose the right to sell the property on which he has a lien.[1]

Promulgated August 20 (238).

8.27.7. The same to Carus.

If a creditor sells the property which was pledged to him before his debt is paid, and without violating the terms of the agreement, it is unjust to hold the sale invalid, since if any fraud was perpetuated in the matter (by the creditor), the creditor and not the purchaser should be sued by you.[2]

Promulgated October 28 (238).

8.27.8. The same to Maximus.

If, before the property pledged was sold, you offered the money to the creditor, and he did not accept it, but you deposited it, and a testimonial, with witnesses (canterlatio [?]) has been made thereof, and the matter remains in that condition now, a sale of the pledge is not valid. But if the creditor exercised the right of sale before you offered the money, such lawful act ought not to be held to be void.

Promulgated April 3 (239).

8.27.9. Emperors Diocletian and Maximian to Cyrillus.

If the debtors refuse to pay, you should sell the property specially pledged to you, in good faith and in the usual manner; for in that way it will be apparent whether or not the sale-price suffices to pay the debt. If anything remains due, you are not forbidden to pursue the remaining property, on which, by right of agreement (you may have been given a general lien).[3]

Promulgated May 20 (287).

8.27.10. The same to Rufinus.

A person who (pretends to have disposed of property) but continues to hold it in the name of another person, whom he fraudulently interposes, since he but negotiated with himself, and is not considered as having disposed of the property. So, a creditor who has purchased land pledged to him through a supposititious person, or who awards it to himself (at a sale), does not thereby prejudice the debtor, but remains in the same situation in which he was before the commission of such fraud. 1. Of course, if he bought when the debtor was the vendor, and the sale was made neither through fraud of the creditor nor through fear, it would be a bad example to rescind a completed sale

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[1] [Blume] To the same effect, law 16 hereof and C. 8.30 and 31 - contrary to Greek custom, see headnote (1) C. 8.13.

[2] [Blume] See law 5 hereof, and also C. 8.29, laws 1, 4 and 5.

[3] Blume lined out the last two clauses but also but also struck the alternative reading he had penciled in above, which was "by which you were also given a general lien." [Blume] See C. 8.13.2, as to selling specially pledged property first.

which was completed by consent. 2. If, therefore, you can show by clear proof that the creditor continued to hold possession in the name of a supposititious purchaser, and did not truly buy the land after a sale thereof was made in good faith, you can, upon offering him the debt due with interest, compel restitution.
Promulgated October 5 (290).

8.27.11. The same Emperors and the Caesars to Rufina.

Though a woman specially gives a pledge for another, the creditor has no right to sell it, unless she imposed on an innocent creditor through dissimulation while the husband pledged the property as though it were his own.
Promulgated April 27 (293) at Heraclia.

Note.

A woman could not ordinarily, and only in exceptional cases, become a surety for her husband. This subject is fully treated in title 29 of book 4. She could not pledge her property for his benefit, but would be bound, according to the terms of the present law, if she was guilty of fraud, and made the creditor believe that the property pledged by the husband was the latter's property. See also. C. 4.12.2.

8.27.12. The same to Zoticus.

If a debtor, without your consent, sold property pledged to you, he transferred it to the purchaser with the lien against it (cum sua causa).[4]
Subscribed at Heraclia April 30 (293).

8.27.13. The same to Theodota.

Whoever buys pledged land from the pledgee, has no action in rem, if he has not been put into unquestioned possession.
A.D. 293.

Note.

This rescript involves one of the technical points in the Roman law in connection with the manner in which ownership of property might be acquired. C. 2.3.20 says that such ownership could not be transferred except by prescription or by delivery, and not by a mere pact. C. 3.32.27, states that, "if a slave is purchased, but not actually delivered, the purchaser cannot bring an action in rem to recover him." The only remedy for breach of contract to deliver was an action for damages. The owner of property could bring an action in rem, the vindication, (vindicatio), to recover the property. A mortgagee or pledgee had available the hypothecary action, also an action in rem, to gain possession of the property. Now since the instant law states that a purchaser of mortgaged (or pledged) property at a sale by the mortgagee (or pledgee), could not bring an action in rem unless the property was delivered to him, it seems to follow that the purchaser did not, as a result of such sale, acquire ownership of the property itself covered by the mortgage, that, in other words, it was necessary for a mortgagee, in order to make a sale of the property effectual, transfer ownership, it was necessary for him to have possession of the mortgaged property, so that he might deliver such possession to the purchaser. He could

[4] [Blume] See also C. 8.25.10 and note; C. 8.13.15.

not gain such possession by force, but was required, in the absence of peaceful delivery thereof, to bring an action. C. 8.13.3.

8.27.14. The same to Modestus.

If you have not been paid the amount due you, and the debtors hold the property pledged, the president of the province will, upon you going before him, give you the opportunity (facultatem) to sell it.
Promulgated November 16 (293).

Note.

See C. 8.13.3; C. 4.24.11. 9 Cujacius 1157, says that the authority of the judge was necessary in order to make a sale. The instant law and C. 3.1.7 give color to that, but they probably mean nothing more than that, where the debtor had possession, the creditor could obtain the possession, by the ordinary hypothecary or interdictal action, and thus have the opportunity to sell. A contract with reference to the sale governed, (C. 8.33.3) and the required authority of the judge might be entirely inconsistent therewith. See Mackenzie, Roman Law 227, where it is said that a sale might be made without judicial authority; and see note to preceding law.

8.27.15. The same to Aviana.

If slaves that were pledged were sold and delivered by the creditor, and the former debtor thereupon induced them to leave, the purchaser, and not the seller, has the right of action in rem against the possessor to recover them.[5]
Given at Sirmium March 1 (294).

8.27.16. The same to Silvanus.

One of many heirs of a debtor who pledge property (as security for a debt) cannot, by merely paying the amount that could have been recovered from him individually in a personal action, deprive the creditor of the right to sell the property pledged.
Subscribed April 3 (294).

8.27.17. The same to Agapa.

A creditor to whom property is pledged by a general or a special pledge-agreement, does not lose the right to follow it, when it is sold by another creditor to whom it was not pledged.
Given April 4 (294).

8.27.18. The same to Gaianus.

Whoever lawfully buys from a creditor property pledged to the latter, cannot be defeated in his right of ownership.[6]
Subscribed April 26 (294).

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[5] [Blume] Ownership was transferred by sale and delivery.
[6] [Blume] Assuming, doubtless, to bring this law in harmony with C. 8.27.13 that the property was delivered to him.

8.27.19. The same to Livia.

If your husband made a loan, though it was with your money, you have no right, unless you are his heir, to sell in your name property which he received as a pledge for the loan.[7]

Subscribed at Heraclia November 8 (294).

8.27.20. The same to Sabinus.

If pledged property is sold by the creditor pursuant to contract, and no special agreement is made, and the sale brought more than the amount due, no action in rem lies on that account, even though a farm was bought therewith, but only a personal action, that is, one on the pledge, may be brought (to recover the surplus).

Subscribed at Byzantium November 10 (294).

Note.

Though property was bought with another's money, it belonged to the purchaser. C. 4.50.1 note. It is intimated that it would be otherwise, if a special agreement had been made. See C. 8.13.17.

[7] [Blume] See C. 8.13.16 note.