APPENDIX B.

Pledges, Mortgages and Liens as Shown in the Code.

A pledge or mortgage was but accessorial, just as in our law, contrary to the general rule prevailing among the Greeks.(286) That fact is expressed in various ways: "The law is undoubted," we are told, "that creditors have the option to sue the debtor in a personal action, or the persons who possess the property in a real action."(287) Or they might pursue both courses at once.(288) Again, we are told that "If a creditor first resorts to his pledges, a personal action is not thereby extinguished, but remains in force as to the balance due after the amount which is able to be realized from the sale is applied on the debt."(289) The fact that the debtor was willing to give up the property pledged or mortgaged did not release him.(290) Nor did the fact that the creditor had obtained a judgment.(291) And if the property was destroyed without the fault of the creditor, the

(286) Weiss, Pfandrechtliche Unters, 11, 19.
(287) C.8,13,14 and 24.
(288) C.4,10,14.
(289) C.4,10,10; also C.8,27,3 and 9.
(290) C.8,13,1.
(291) C.8,13,8.

personal liability remained.[292] Even though a personal action was barred, the right to pursue the property still remained.[293] This is contrary to the general rule in our country, except in states where it is held that a power of sale given by a mortgage is not extinguished simply because a personal action does not lie. Rules similar to the foregoing applied when a creditor took a mortgage and pledge, as well as a surety. That was contrary to Hellenic custom, under which a creditor was first required to exhaust his pledge or mortgage before suing the surety.[294] We find it stated that in such case the creditor could omit resort to his lien and sue the surety. He might, however, be required to assign to the latter the security which he had.[295] Of course, the surety might be taken only for indemnity -- that is to say, to stand good only for the amount which could not be made out of the property of the principal, and such agreement was binding.[296] So, on the other hand, even though the creditor might have a judgment against

(292) C.4,6 and 9; C.8,13,25.
(293) C.8,30,2.
(294) Weiss, supra, 19-21, 45.
(295) C.8,40,2. The rule was changed by Novel 4, cc.1 and 2.
(296) C.8,40,17.

the surety, he could still resort to the security which he had, in order to receive back his loan.(297)

The Romans knew the distinction, of course, between a pledge, in which case the creditor obtains possession of the property, and a mortgage, when, ordinarily at least, the mortgagor retains possession until at least default. The texts, however, treat hypothecation or mortgage as a species of pledge, and I, too, shall use the terms indiscriminately, without pointing out distinction which might exist in a specific case. We learn that the Romans gave special mortgages, in which case some specific property was mortgaged, and general mortgages in which case the creditor obtained a lien on all of the mortgagor's property.(298) The same creditor might have a special as well as a general mortgage.(299) If that was so, and the debtor gave a subsequent lien, the prior mortgagee might be compelled to marshall assets, and in doing so would be compelled to first sell the specially mortgaged property before resorting to any other.(300)

(297) C.8,13,8.
(298) C.8,13,2; C.8,16,4; C.8,17,6.
(299) C.8,13,2.
(300) C.8,13,2.

We are not informed by the Code as to the specific form of words by which a special mortgage or pledge was created. But a creditor secured a general mortgage by very simple words. If a debtor promised to pay or perform on the "faith and peril of his property," or agreed that in case of default the creditor might secure satisfaction by seizure of the debtor's property, that was sufficient, and it would include all future acquired property as well.(301) A mortgage (or pledge) was given pursuant to agreement of the parties.(302) Hence under Justinian's law (probably of late development), when a man pledged his title deeds, it was treated as a mortgage on the land embraced therein.(303) This provision of the Code, singular as it is, does not stand alone. A better known text relates to gifts.(304) It provides that if a man makes a gift of documents evidencing the purchase of slaves, such gift should be considered as a gift of the slaves. Of similar import is the provision that when a creditor's debt and pledge was

(301) C.8,16,9.
(302) C.8,17,7.
(303) C.8,16,2.
(304) C.8,53,1.

evidenced in writing, the return of the writing to the debtor released the debt as well as the lien.(305)

There are not many specific provisions as to what property a man might mortgage. But there are some. Children, or free men,(306) consecrated ground,(307) and prizes which the debtor hoped to win in the future,(308) could not be included in a mortgage. We may, however, from general provisions, infer that almost all other kinds of property might be mortgaged. A pledge of land included the produce,(309) a pledge of a female slave included her subsequent offspring.(310) If a man mortgaged a piece of land, without owning it, but he subsequently became the owner thereof, the mortgage took effect.(311) And what would appear to us a peculiarity is that some imperial positions -- positions in what we may call civil service -- could be pledged.(312) The provision, however, does not seem so peculiar, when we bear in mind that many civil-service positions during the middle ages were salable.

(305) C.8,25,7.
(306) C.8,16,6; C.4,10,12.
(307) C.8,16,3.
(308) C.8,16,5.
(309) C.8,14,3.
(310) C.8,24,1.
(311) C.8,15,5.
(312) C.8,13,27.

A man could give two or more mortgages or pledges.(313) He was not forbidden to do so. And he who was prior in time was prior in right.(314) That applied to voluntary as well as involuntary liens.(315) But difficulties would naturally arise in that connection, for it was possible to ante-date the lien. The Romans had no general system of registration as we know it today, and as was common in early Greece and in Egypt till into the fourth century,(316) although they apparently had books in which the names of the owners of land were inscribed and which seem to have been substantially the equivalent of our assessment rolls.(317) So, too, documentation of gifts of certain amounts was prescribed, commencing with Constantine the Great.(318) It is disputed whether all documents of every kind might be placed upon the public records or not.(319) In any event, there was no requirement that pledges or mortgages should or could be registered or recorded. This would seem to indicate either that the Romans either intentionally disregarded all requirements in connection

(313) C.8,17,2.
(314) C.8,17,2,3,8.
(315) C.8,17,4.
(316) See Hofmann Beitr. 98
(317) See C.4,47,3; C.8,53,7.
(318) See laws C.8,53.
(319) See Steinacher, PrivaturKunde, 63-83.

with credit,[320] or that credit given pursuant to mortgages and pledges was not nearly so customary as it is with us. Still, more than 20 titles of the Code deal with the subject, and difficulties must have arisen. Ante-dating a document was easy. The difficulties were recognized by the emperors at least as early as the first half of the third century. They required a pledgor or mortgagor to disclose to a creditor whether or not he had given a previous lien.[321] They called it stellionate -- swindling -- not to do so. The emperor Alexander wrote in 231:[322] "You acknowledge it to be dishonest and criminal to have pledged the same things to several persons, concealing the fact, in connection with the later obligation, that these things were pledged to others." And the emperor Philip wrote in 244:[323] "To take advantage of the ignorance of a creditor by pledging or mortgaging property to him which had already been pledged to others, is not done without peril. For such frauds demand a summary prosecution, and it has often been

(320) Rabel, Grundzuge, 431.
(321) C.8,15,2.
(322) C.9,34,1.
(323) C.9,34,4.

stated in rescripts that stellionate is to be most severely punished." In 472, the emperor Leo provided[324] that while simple documents not having the required number of witnesses or no witnesses at all would be recognized, yet in case of dispute a pledge or mortgage publicly executed -- evidently meaning before a notary -- would, in case of dispute as to priority be given the preference. A document attested by three witnesses was placed on the same footing.[325] Furthermore, I have already mentioned the delivery of title deeds. That may have been usually and customarily required,[326] thus furnishing to the creditor some measure of security.

The most valuable part of a mortgage or pledge is, of course, the power to sell it, in order to be able to get back the money loaned. Now it was fundamental in Roman law, that only the person who had a first mortgage or pledge could sell. A second or subsequent mortgagee or pledgee could not do so without first paying the prior lien holder.[327] He had no right to sell the property subject to the prior lien. Of course,

(324) C.8,17,11.
(325) Dernburg, Pfandrecht, 418 ff.
(326) Rabel, supra, 438.
(327) C.8,17,8; C.8,19,1,2; C.8,17,10.

if he actually sold it, and the prior lien-holder stood by without offering objection, an estoppel arose against the latter.(328) A second lien-holder, however, had the absolute right to pay off the one having a lien ahead of him. The latter could not refuse to accept his money, if the offer to him of the amount due him was kept good.(329) By so paying the first mortgagee or pledgee he stepped into the latter's shoes, and he could then proceed to sell.(330) There was a time when a contract could be made that the property should become that of the creditor in case of default of payment. That was under the lex commissoria -- an agreement or condition similar to strict foreclosure under the common law. The agreement to that effect was required to be clearly expressed. If the debtor merely agreed to "yield up" the property to the creditor, in case of default, that did not (unless the rescript is interpolated) create a contract of that character, and the creditor was still compelled to sell, in order to obtain his money.(331) Constantine the Great

(328) C.8,25,6; See C.8,15,2.
(329) C.8,13,22; C.8,17,1.5.
(330) C.8,17,8; C.8,13,22; C.8,17,1; C.8,18,3. As to lien for sum paid, see Schultz, 27 Z.S.S. 107.
(331) C.8,34,1.

abolished the right to make a contract for strict foreclosure.[332] The language of the law is itself instructive, as showing what the emperor thought, so I quote:

> "Since among other dangerous contracts, agreements for strict foreclosure of pledges have become increasingly harsh, we direct that such agreements shall be void and that the future shall not even have any recollection of them. If a man, accordingly, is burdened by a contract of that kind, he may breathe more freely after the enactment of this law, which invalidates those of the present along with those of the past, and prohibits them in the future."

In order that a sale under a mortgage might be made, the debt had to be due.[333] If there was a dispute as to the amount due, it was required to be settled by an arbitrator appointed by the governor.[334] If only part of the loan was unpaid, that did not prevent the creditor from selling the property.[335] And a debtor's protest was of no avail.[336] If the creditor had a special mortgage as well as a general mortgage, he was required to resort to the property covered by the special mortgage first, having the right, however, to

(332) C.8,34,2.
(333) C.8,27,7.
(334) C.8,27,5.
(335) C.8,27,6.
(336) C.8,28,2.

resort to the property also covered by the general mortgage for any deficiency.(337) It was not necessary to foreclose the mortgage in court.(338) But, according to a rescript of 225 A.D., public notice of the intended sale was required to be given, and the debtor was required to be notified.(339) It would seem that the mortgagee could not buy in the property himself, for he was by a law of Diocletian(340) forbidden to buy through a supposititous person. And whatever the creditor did, was required to be done in good faith.(341) Thus if a creditor whose debt amounted to 30, sold a slave worth more, for 20, out of favoritism toward the buyer, the sale was held to be voidable.(342)

Justinian, in his law of 530, already heretofore mentioned,(343) states that he knows of no mortgaged property having been offered for sale publicly. Dernburg(344) does not believe that this had reference to the public notice heretofore mentioned. I shall not here attempt to solve the difficulty. In any event the emperor provided that a contract with reference to the sale should

(337) C.8,27,9.
(338) C.8,27,4 and 10 - inferred.
(339) C.8,27,4.
(340) C.8,27,10.
(341) C.8,27,9.
(342) C.8,29,3.
(343) C.8,33,3.
(344) Pfandrecht 2, 141-142.

govern, but that in the absence of a contract, the creditor might obtain title to the property in about four year's time, reserving to the debtor a right in the property to the extent that the value thereof exceeded the amount of the debt.

If the property was actually sold to a third person, such sale itself, just as in the case of any other sale, did not of itself confer title upon the purchaser. To obtain such title another act was necessary, namely, delivery of the property to the purchaser.(345) We nowhere find that possession of the property by the creditor was necessary in order to sell, but he could assign his rights to the purchaser, so that, if the creditor did not already have possession, the purchaser could bring the proper real action to recover the property. Neither the creditor, nor the purchaser of the property, could forcibly take possession away from the possessor.(346) The use of force in gaining possession was strictly forbidden.(347)

(345) C.8,27,20.
(346) C.8,13,3 and 13.
(347) See C.8,4,6 and 7.

In addition to the liens created by contract of the parties, there were a great many liens which were created by law. I shall not mention any except those referred to in the Code, and these only in passing. A landlord of rural property had a lien on the crops,(348) a landlord of urban property on all the property which the tenant put onto it to be kept there.(349) If a guardian or curator bought property with the money of his ward, the latter had a lien on the property so bought.(350) A legatee of specific property had a lien on the property left to him.(351) And then there were liens which covered all of the property of a person liable, including property present and future. They were as follows: One in favor of the imperial treasury, not only for taxes but also for liability on any contract which a person had entered into with the treasury;(352) one in favor of a husband on the property of the person who promised to give a dowry for his wife;(353) one in favor of a wife and her heirs and her father for the return of the dowry which she brought to the marriage and of the prenuptial gift given by the husband to offset the dowry;(354) one in favor of children on the

(348) C.8,14,5.7
(349) C.4,65,5.
(350) C.7,8,6.
(351) C.6,43,1.
(352) C.4,46,1; C.7,73,1-3; C.8,14,1-2; C.12,61,3.
(353) C.5,13,1b.
(354) C.5,3,19; C.5,12,30; C.5,13,1; C.5,14,11.

property of their father or mother to secure the payment to them of property coming to them on the mother's side;[355] one in favor of minors and insane persons on the property of their guardians and curators.[356] The list, in fact, is so formidable that in many instances the credit of the person against whose property the lien or liens existed must have been almost wholly destroyed. And lastly, I should mention that in certain instances a man had a lien by reason of the right of retention of certain property in his possession, and which, accordingly, was similar to the laws relating to occupying claimants under our own laws.[357] That right was discussed by the writer in the case of Brewer v. Folsom Bros., 43 Wyoming 441.

(355) C.5,9,8; C.6,61,6,4.
(356) C.5,37,20; C.5,35,2; C.5,70,7,6.
(357) C.3,32,11,1.16; C.4,32,4; C.8,15,1; C.8,26,1.