Book VIII.
Title XVII.[1]

Those whose rights in a pledge are superior.
(Quit potiores in pignore habantur.)

Bas. 25.5.29, et seq.; Dig. 20.4.

8.17.1. Emperors Severus and Antoninus to Secundus.

A man who has an inferior right in a pledge, may strengthen it by paying to the creditor prior in right the amount due him, or if the amount is offered and not accepted, by sealing and depositing it without turning it to his own use.

Note.

See to the same effect C. 8.13.22; law 5 hereof; see 29 S.Z 370. A subsequent creditor had the absolute right to pay off a prior lienholder, so as to be put in the place of the prior lienholder. D. 20.4.11.4; D. 20.4.19.

8.17.2. Emperor Antoninus to Chrestus.

If you, by decree of the praetor (judge) who gave a decision as to a trust, were put in possession of a farm, which was part of an inheritance, for the purpose of preserving the trust left you upon condition, and this was done before your adversary seized it, to satisfy a judgment (against the heir), by order of the judge, who rightfully ordered the decision carried out, you are prior in right by reason of time. For when two parties contest over a lien, he who is prior in time has the stronger right.
Promulgated May 11 (212).

Note.

The principle of priority of time was applied to judicial as well as to contracted liens, as noticed in the foregoing law. In that case a trust, analogous to a legacy, had been left to someone, upon condition - e.g. that he should have the farm if a ship should arrive from Asia - and he had been put in possession by the judge for the purpose of preserving this trust, in accordance with provisions of law dealt with at C. 6.54, and by thus being put in possession, he acquired a lien on the farm. Subsequently a general creditor obtained judgment, against the heir, and the same property was seized in execution. In this case the former had the superior lien, because first in time. See also law 4 hereof.

8.17.3. The same to Varus.

If a farm was pledged to you before it was pledged to the municipality, then as you are first in time you are first in right.
Promulgated October 11 (213).

8.17.4. The same to Silvanus.

Since you say that the municipality of Heliopolis was, by reason of a decision in its favor, put in possession of the property of (Sosianus)[2] the heir and of the inheritance

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[1] Blume penciled in here a note to himself stating: “Make headnote. Put in what is said in Pauly-Wissowa as to record lien.”

(which fell to him), you may know that, although your father had a contract with Sosianus, still if the latter was liable to him (only) in a personal action, the municipality's right is prior, by reason of the lien which it acquired by taking possession, pursuant to the authority of the judge who had the right to make such order for the purpose of enforcing the judgment.
Promulgated December 9 (215).

8.17.5. Emperor Alexander to Septimius.
A prior creditor cannot be compelled to pay you your debt for which you received a lien which is subsequent to his. But if you pay him what is due him, you strengthen you lien.
Promulgated April 29 (233).

8.17.6. Emperors Valerian and Gallien to Philoxonus.
If a lien was given on property generally, and subsequently particular things are specially pledged (to someone else), since the creditor who has the first contract and has a general lien has the better right, if you bought from him, you cannot be disturbed by the subsequent creditor.[3]
Promulgated May 14 (260).

8.17.7. Emperors Diocletian and Maximian and the Caesars to Julianus.
Although, when the same property is pledged to many creditors at different times, the prior pledges have the better right, still the law declares that a man with whose money land is proven to have been purchased and which at the time was specially pledged to him, has the preference over all others (as to such land).
Subscribed January 16 (293).

Note.

"Certain hypothecations, though later in date, have a preference granted them under the laws, over those that are earlier in date, as in the case where a man has bought, built or repaired a ship or a house, land or something else (for another) with his money. In these cases the later creditor with whose money property is so ought or repaired has a prior right over the earlier creditors." Nov. 97, c. 3 (539 A.D). This lien was, however, by the same law subordinated to the lien which a wife had on the property of her husband, to secure the return of her dowry.

8.17.8. The same to Fabricus.
The law is certain and clear that where the same property is pledged at different times to two persons, the creditor who received the earlier pledge when he made a loan has the better right, and the subsequent creditor cannot acquire the pledged property under the power of sale, unless the amount due to the prior creditor has been paid.[4]
Subscribed at Heraclia April 30 (293).

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[2] [Blume] Sosianus might, however, have been the decedent.
[3] [Blume] See headnote C. 8.18.1. [It appears as if this refers to the note following C. 8.18.1, as there is no headnote there.]
[4] [Blume] See headnote C. 8.29; C. 8.45.1; See 27 Z.S.S, 106; C. 8.19.3.

8.17.9. The same to Asclepiodotus.

It is clear that the rights of persons who have received a lien are superior to any privileges attached to personal actions, since they have a right to an action in rem.
Subscribed December 2 (294).

8.17.10. The same to Polydeuca.

Since your husband gave you a lien on his property for the dowry which he received from you, and he has died, the creditors to whom he pledged the same property cannot in any manner claim it if they do not pay your debt. And it is clear that if they are only chirographic (general) creditors (without a lien), they can in no manner sue in rem or in personam persons who are not shown to be heirs of the debtor (which you seem not to be).
Promulgated December 5 (294).

Note.

The last sentence refers to the heirs of the debtor. Just as at the present day, debts against a decedent's property must be paid first. Heirs who accepted the inheritance were liable for the debts. Justinian, however, enacted a law whereby the liability might be limited to the amount of the inheritance, if an inventory was made by the heir. In the present case, the widow did not claim as heir, but simply sought to enforce her lien for her dowry.

8.17.11. Emperor Leo to Eutythrius, Praetorian Prefect.

Writings, frequently drawn in private, in or out of the presence of friends, for the purpose of showing a compromise, a pact, loans at interest or articles of partnership, or in connection with any other matter; or contracts, which are, in Greek, called idiochira (drawn up in their own hands) shall have, in any personal action, the legal force of publicly drawn documents, whether the whole thereof is in the handwriting of the contracting parties, or of a notary or of any other person, and whether witnesses are present or not, and whether these are slaves, commonly called tabularii (notaries), or not, provided only that the contracting parties have affixed their signatures thereto. 1. But if anyone claims rights as pledgee or mortgagee under these documents, the man who has a publicly executed pledge or mortgage (instrumentis publice confectis) has the better right, though later in date, unless, perchance, the first mentioned documents are witnessed in writing by three or more men of approved and unquestioned reputation; for in such case the documents will be received as publicly executed documents.
Given at Constantinople July 1 (472).

Note.[5]

By publicly drawn documents are undoubtedly meant documents which were registered with the public authorities (Buckland, R.L. 476), or at least those that were drawn and attested by a notary (3 Bethmann-Hollweg 281). Hence the principle of registration was partially introduced. However, a pledge or mortgage signed by three witnesses had, by this law, the same effect. Nov. 73, c. 2, also provides that no document relating to a loan shall be credited unless made a public document or signed by three witnesses. See also C. 4.2.17 and headnote C. 8.16 (2).

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[5] Blume penciled in here: “2 Dernburg 418; Hoffman, Beit. 98; Rabel 431.

8.17.12. Emperor Justinian to Johannes, Praetorian Prefect.

We have been disturbed by pressing complaints of women, decrying their loss of their dowries, and the seizure of the property of their husbands by prior creditors. 1. We have, therefore, looked into the ancient laws, which, among personal actions, gave great preference to a certain form of personal action for recovery of dowry - usoriae actioni - now abolished by us[6] - which had privileges over nearly all other personal actions and gave preference over other (general) creditors, though prior in time. 2. While that was the law as to personal actions, the vigor of justice was relaxed when it came to liens, giving preference to older liens over the more recent liens of a wife, if she had any right of action, without regard to the fact that a woman is frail, that her body, her property, her life is controlled by her husband, and that almost all that she has consists of her dowry. 3. It should, therefore, have been provided that husbands should pay their creditors out of their own property, and not out of the wife's dowry, which she has for her livelihood, and support, whether given by herself or by someone else for her. 4. Considering all these things, and remembering that we have also enacted two other constitutions[7], for the protection of the dowry of women, and embracing all these provisions in one law, we ordain that an action on a stipulation, which we have authorized women to bring for the recovery of dowry, and which carries with it an implied lien, shall give preference-rights over all creditors of husband though such creditors are prior in time. 5. For since, as we stated, dowry had such preference-rights in connection with personal actions, why should we not now grant to women the same rights in connection with liens, even though the dowry-property itself or that which was acquired with it, no longer exists, but is dissipated in some way or consumed, provided that the property was in fact given to the husband? For is there a man who does not have compassion for them, on account of the services which they render to their husbands, on account of the danger of child-birth and on account of giving birth to children, by reason of which many preferences have been provided by our laws? 6. We accordingly complete by the plain provisions of this law what antiquity indeed commenced but failed to perfect, and grant her the foregoing privilege whether she have children or not, or whether her children have died.
7. Excepting herefrom, however, as against a stepmother, the rights of children of a former marriage, to whom we have already[8] given a lien on the property, as against the father's property or his creditors, for the dowry of their mother, such lien being superior to the rights of creditors. This right is kept in force and effect as though their mother were living, lest we should deny to a former wife the rights granted to a later one. When two dowries are due from the same property, the preference as to time shall be preserved.
8. These provisions shall apply only to dowry, not to a pre-nuptial gift, the rights to which shall have priority according to the order of time, and which shall, as to creditor, rank accordingly. For we do not favor women for the purpose of gain, but take care that they shall not suffer damage or be defrauded out of their property. This law shall apply in the future and has no retroactive effect.
Given at Constantinople November 27 (531).

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[6] [Blume] In 5.13.1.
[7] [Blume] 5.12.30.31.
[8] [Blume] C. 5.9.8.4; and Nov. 91, c. 1.

Note.

9 Donn., <u>Comm</u> 1121-1126, argues at great length that the priority of lien here given women was only over liens given by law and not over liens created by contract. His position is that the law says she has priority over other creditors "licet sint anterioris temporis privilegio vollati," and construes the term "privilegio" only to mean liens created by law. This law, together with Novel 97, part of which is hereto appended, constituted the culmination of Justinian's efforts to protect the dowries of wives. Up to his time no implied lien, one give by operation of law, existed in favor of wives. It had become customary, however, to give contractual liens. The custom in connection therewith was probably influenced by Greek ideas, as shown by Weiss, <u>Pfandr. Unters</u>. 96-116. Aside from that the protection was not great. But Justinian enacted various laws, the first of which was in 528 A.D. C. 5.12.30. Other laws were C. 5.12.31; C. 5.13.1; C. 5.14.11. These laws weakened or abrogated former laws limiting the rights of a wife as to dowry. The instant law gave her a preferred lien over all mortgage or pledge creditors whether prior in date or note, her lien extending over all of the property of her husband, in insure the return of her dowry. She was given a lien also as to the prenuptial gift, to which she was entitled but that lien took priority only according to the ordinary rule, namely that the party who was first in time was first in right. Her lien, was, however, subject to the right which children might have by reason of the dowry of their mother, a former wife of the man. See further limitations in headnote C. 8.17 (202).

The instant law, accordingly, gave preferred lien to the wife for her dowry. Now provisions were made under which the dowry might be increased during the marriage. C. 5.3.19 and 20. And the question arose as to whether or not the priority of lien should also apply to such increase. Justinian perceived that this might lead to fraud. Hence he provided in c. 2 of Nov. 97, that "the women shall make the increase by giving immovable property in order that the dowry and also the increase will have a preference right over older creditors, since the increase is not in such cases at all in doubt. *** If the wife, having no immovable property, makes the increase by movable property, she shall have no preference right except as to the dowry first given, but not as to the increase, which may, perhaps be merely pretended."

Nov. 97, c. 3, gives a preference over a repair lien - doubtless one that was later in time, though some authorities think otherwise. C. 4, of the same Novel gives a preference right, already mentioned, in case of the purchase of an office, where the preference right is expressly created. This Novel was enacted in 539 A.D.