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Remarks on the Reasons of *Commissoria Rescindenda* (CTh. 3, 2, 1 /=Brev. CTh. 3, 2, 1 = CJ. 8, 34, 3/)

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Abstract. On the prohibition of contracting *lex commissoria (commissoria rescindenda)*, there is only one unclear Constantine's constitution. It is unusual because in the post-classical legislation the important measures were repeated several times. Since the preamble of the constitution was cut out by the compilers, the reason of its issuance is unknown. The general opinion is that it was introduced to protect the debtor against the pressure of his powerful creditor. As this prohibition was accepted by modern civil codes and today its effect is questionable, the author is searching for more direct reasons of the issuance of this rule based on other texts and on the social and economic circumstances.

Keywords*: lex commissoria, commissoria rescindenda*, pledge, corruption, Roman law

1. Introduction

Though we have in the annulment of the forfeiture clause *(commissoria rescindenda*) a very important measure which found its place in the modern civil codes, there is only one constitution dealing with it: the Theodosian Code (CTh. 3, 2, 1) issued by Constantine the Great. This is unusual for the post-classical legislation, where the most important measures were repeated several times.

The constitution was taken over by the compilers of *Lex Romana Visigothorum* without changes (Brev. CTh. 3, 2, 1) and it was inserted in the *Codex Iustinianus* (CJ. 8, 34, 3) with some modifications.[1] In the western part of the Empire, the text was followed by the *Interpretatio*[1] (Int. CTh. 3, 2, 1). Therefore, there are three versions of the same constitution.

1 In *Codex Iustinianus* (CJ) 8, 34 (35), 3: after the word *commissoriae,* "*pignorum*" was added and the verb *recipere* was replaced by *recuperare*.

The modern civil codes accepted the version of Constantine's constitution (CTh. 3, 2, 1), which was inserted into the Justinian Code (CJ. 8, 34, 3).[2] This means that the rule on prohibition to the pledgee to contract *lex commissoria*, i.e. to contract a clause that the pledgee would acquire the ownership of the pledged thing if the debtor failed to pay his debt in due time, was accepted.

The prevailing opinion is that the prohibition to contract *lex commissoria* was introduced to protect the debtor against the pressure of his powerful creditor. Some authors added as a motivation the Christian humanity of Constantine.

Since the first version of the constitution (CTh. 3, 2, 1) is imprecisely formulated and its preamble was cut out by the compilers (hence the original text was not preserved), the meaning of the constitution and the reason of its issuance is dubious. The aim of this research is to find out the more direct reasons which could help explain the rule more precisely. For that reason, besides the textual analyses of the constitution, the analysis will also concern other constitutions. Primarily those Constantine's constitutions will be observed which were issued close to the time of the constitution on *commissoria rescindenda* (year 320 AD).[3] Replacing the observed constitution in its own time, using the historical method of research, the more direct reasons of its issuance will be explained.

2. The Texts on the *Commissoria Rescindenda*

The first available version of Constantine's constitution is to be found in the Theodosian Code.

CTh. 3, 2, 1 (=Brev. CTh. 3, 2, 1): Imp. Constantinus A. ad Populum. "Quoniam inter alias captiones praecipue commissoriae legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit et futura prohibet. Creditores enim, re amissa, iubemus recipere, quod dederunt." Dat. prid. Kal. Febr. Serdica, Constantino A. VI. et Constantino Caes. Coss."[4]

2 The *Interpretatio* was usually called "visigothic". However, I am more inclined to adhere to the general opinion that they emerged in law schools of the West during the 5th century. For more details, see: Sič 1984, 157–167. According to Hänel (1962, XII–XIII), the legal practice applied the *Interpretatio*.

3 However, the problem of finding out the exact date of other Constantine constitutions occurs here. The date of the constitution about the *commissoria rescindenda* is also questionable: in the Theodosian Code, Mommsen gives the date of 31 January 320, with a question mark, because in the subscription of the constitution stays the VII. Consulship of Constantine and his son Constant (Constantio). Consequently, Krüger, in the edition of the Justinian Code, accepts 31 January 326 A.D. In the recent reprint of *Codex Iustinianus* from 1998 by Keip Verlag, the VI. Consulship of Constantine and his son Constantine is accepted. Hänel marked their VI. consulship as well. Therefore, the acceptable date is 31 January 320 because in this year Constantine the Great held his sixth consulship together with his son Constantine. See also Sargenti 1986, 311.

4 In Pharr's translation (1952): "Emperor Constantine Augustus to the People. Since among other

Though the text opens up more questions, its preliminary explanation could be as follows. The text has three parts. In the first part, the Emperor points out the problem that, among others, captious practice (seizures), especially those on the basis of the *lex commissoria*, has increased. Therefore, he ordered that such provisions shall be invalidated. In the second part, he repeated the prohibition more precisely: past and present agreements of that kind were cancelled and any future agreement would be prohibited. At the same time, alluding to the fact that the agreement pressures the debtor, the Emperor emphasized that the debtor shall be relieved by this sanction *(hac sanctione respiret)*. It remains uncertain what the meaning of lex commissoria is and, therefore, which agreement *(tali contractu)* the constitution is speaking about.

The pledge is not mentioned in the constitution. In my opinion, it was not mentioned because the prohibition concerns not only those appropriations of the debtor's property which were based on private contracts of pledges, but also those forfeitures which were made by public officers in the process of tax collection. The treasuries' right of *pignosris capio* was not based on the contract, but it was a right *vice pignoris*, which was *tacite contrahitur*.

The third part of the constitution *(creditores enim, re amissa…)* must neither relate to the pledge. The creditor must not be the pledgee, but it could be every creditor who had taken over the debtor's land or other thing on account of debt payment.

However, despite the fact of oppression emphasized in the constitution, the sanction in its third part is not as grave as it would be expected. Only the annulment of the transaction is foreseen: the creditor will lose the thing (pledge), but the debtor must pay his debt *(creditores enim, re amissa, iubemus recipere*[5]*, quod dederunt)*.[6]

captious practices, the harshness of the provision for forfeiture is especially increasing, it is Our pleasure that such provision shall be invalidated and that hereafter all memory of it shall be abolished. If any person, therefore, is suffering under such a contract, he shall be relieved by this sanction which cancels all such past and present agreements and prohibits them for the future. For We order that creditors shall surrender the property and recover that which they have given".

5 In the Justinian Code, instead of *recipere*, the word *recuperare* was used.

6 Why the sanction was not tougher against the creditor? There are expressions showing that the creditor used the pressure, i.e. some kind of violence against the debtor not honouring the due payment of his debt. The use of any kind of violence is threatened with punishment. For example, according to the constitution of Constantine from 334 A.D. (CTh. 8, 15, 2 /= Brev. CTh. 8, 8, 1/), if the pressure was utilized by the person employed in imperial office staff, he must give the thing bought back to the vendor, and he shall be punished by losing the price paid. (Imp. Constantinus a. ad Veronicianum vicarium Asiae. „Post alia: Damus provincialibus facultatem, ut, quicumque sibi a numerariis, qui diversis rectoribus obsequuntur, conquesti fuerint aliquas venditiones extortas, irritas inanesque efficiant, et male vendita ad venditoris dominium revertantur, amissione etiam pretii illicitis ac detestandis emptoribus puniendis. Dat. XIV. kal. iun. Optato et Paulino coss."). However, on the other hand, according to the constitutions, everybody is compelled to pay debts. The last short and, therefore, unclear sentence (creditores enim, re amissa, iubemus recipere, quod dederunt) shows the conflict of interests of the Empire: on one side, the interest of the Empire was to punish the use of violence and, on the other

The next version of the constitution was inserted in the *Codex Iustinianus* (CJ. 8, 34, 3). Comparing with its first version inserted in the Theodosian Code (CTh. 3, 2, 1), the only differences are the following: after the word *commissoriae* the word *pignorum* was added (*commisssoriae pignorum legis)* and the verb *recipere* was replaced by the verb *recuperare*.

CJ. 8, 34, 3: Imperator Constantinus. „Quoniam inter alias captiones praecipue commissoriae pignorum legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. 1 . Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit et futura prohibet. Creditores enim re amissa iubemus recuperare quod dederunt".

Therefore, the compilers of Justinian's Code explained the prohibition that concerns the *lex commissoria* in case of a pledge.

The *Interpretatio* (the third version of the text) accepts the constitution as a prohibition to the creditor to buy the pledged thing from his debtor.[7]

Int.: "Commissoriae cautiones dicuntur, in quibus debitor creditori suo rem, ipsi oppignoratam ad tempus, vendere per necessitatem conscripta cautione promittit: quod factum lex ista revocat et fieri penitus prohibet: ita ut, si quis creditor rem debitoris sub tali occasione visus fuerit comparare, non sibi de instrumentis blandiatur,[8] sed quum primum voluerit ille, qui oppressus debito vendidit, pecuniam reddat et possessionem suam recipient."[9]

According to the interpreters, the *lex commissoria* was prohibited in case of a pledge and, while from the text of the constitution one could not notice

side, to compel the debtor to fulfil his obligation. This problem requires more elaboration, and therefore will be dealt with in details in a separate paper.

7 According to Levy (1956, 189), the compilers of the Theodosian Code followed the classical concept about *lex commissoria* as a sale of the pledged thing, and placed the Constantine law "De commissoria recindenda" under the title "De contrahenda emptione". In the edition of Mommsen, it is not under this title but after it, as a separate title.

8 For the sale contract, the special form was needed. C. Th. 3. 1. 2: „Qui comparat, censum rei comparatae cognoscat: neque liceat alicui rem sine censu vel comparare vel vendere. Inspectio autem publica vel fiscalis esse debebit hac lege, ut, si aliquid sine censu venierit, et id ab alio deferetur, venditor quidem possessionem, comparator vero id, quod dedit pretium, fisco vindicante, perdat. 1. Id etiam placuit, neminem ad venditionem rei cuiuslibet accedere, nisi eo tempore, quo inter venditorem et emtorem contractus solenniter explicatur, certa et vera proprietas a vicinis demonstretur: usque eo legis istius cautione currente, ut, etiamsi subsellia vel, ut vulgo aiunt, scamna vendantur, ostendandae proprietatis probatio compleatur. 2. Nec inter emtorem et venditorem solennia in exquisitis cuniculis celebrentur, sed fraudulenta venditio penitus sepulta depereat."

9 In Pharr's translation: "Those written acknowledgements of debt are called agreements for forfeiture in which a debtor through necessity promises in a written acknowledgement of debt to sell to his own creditor a thing which he had pledged for a time to the creditor. This law cancels any such agreement for forfeiture which has been made and absolutely prohibits one to be made. Thus, if any creditor should appear to have bought property of his debtor under such a pretext, he shall not delude himself with written documents, but as soon as the debtor wishes, who sold when oppressed by debt, the creditor shall recover his money, and the debtor shall receive back his property".

which contract was annulled (i.e. what the meaning of *lex commissoria* is), its *Interpretatio* and the interpretations of the *Pauli Sententiae* unanimously accepts that the prohibition concerns the purchase of the pledged thing by the creditor[10].

3. The Romanist Literature on *Commissoria Rescindenda*

The prevailing opinion regarding Constantine's constitution on *commissoria rescindenda* is that it concerns the prohibition of contracting *lex commissoria*, i.e. the acquisition of ownership on the pledged thing by the pledgee. There are only a few academic papers that pay more attention to this prohibition. One of them is the study of Peters, who gives dogmatic analyses of the sources,[11] and the other one is that of Nijmegen,[12] which points onto the development of the conception of *lex commissoria*. The Romanist literature usually does not make any difference between the text inserted in the Theodosian Code and its version accepted by the Justinian Code.

According to the opinion of Burdese[13] and Frezza,[14] the *lex commissoria* has to be considered as a convention *creditoris causa cavetur*. As Frezza points out, in order to protect the interests of the creditors, *lex commissoria* gives them alternative possibilities: to realize the claim for the payment of the debt or to acquire the pledged thing in ownership. Upon acquiring the object of the pledge in ownership on the basis of *lex commissoria (lex commissoria = iusta causa traditionis)*,[15] the creditor has no obligation to pay the eventual surplus *(superfluum)* back to the debtor.[16] Thus, according to Frezza, Constantine prohibited the creditor from acquiring the ownership of the pledged thing; however, he recognized that in practice, as it can be supposed, the utilization of the *lex commissoria* as *conditionalis venditio* could also be used. As reasons of practising *lex commissoria*, Frezza emphasized the economic and monetary difficulties of the time, which Constantine's law intended to bring to an end. Having in mind the *Interpretatio*, he does not negate that the prohibition was applied in practice also on the sale of the pledged thing to the creditor.[17] The

10 See about Szűcs 2011, 67–68.

11 Peters 1973, 137–168.

12 Nijmegen 2011, 109–144.

13 Burdese 1951, 110–118.

14 Frezza 1963, 225–227.

15 Frezza (1963, 225) proves his opinion by: Gaius, Inst. II, 64; Scaev. D. 44, 3, 14, 5. Burdese (1951, 114–115) invokes to D. 21, 3, 1, par. 5.

16 As an argument, he invokes to: Paulus, D. 45, 1, 85, 6 (about the debtor's partial payment): „Item si ita stipulation facta sit: 'si fundus Titianus datus non erit, centum dari?', nisi totus detur, poena committitur centum nec prodest partes fundi 'tradere' cessante uno, quemadmodum non prodest ad pignus liberandum partem creditori solvere." and C. 8, 34 (35), 3 in fine (about *commissoria rescindenda*): "creditores enim re amissa iubemus recuperare quod dederunt".

17 Frezza 1963, 226[5]. He considers the sale of the pledged thing to the creditor as an analogue situation to the *lex commissoria in causam emptionis (*226–227, quoting Tryph. D. 20, 5, 12 pr.; Pap. Vat. Fr.

unclear part of the constitution is: "creditores enim re amissa iubemus recipere (in CJ. recuperare) quod dederunt". In Frezza's interpretation, the creditors must give the eventual partial payment of the debt back to the debtors, which – without the prohibition of *lex commissoria* – they would retain.[18]

Burdese explains *lex commissoria in casusam obligationis* and Constantine's prohibition by the old Roman practice of the pledge and by *fiducia* to which he considers inherent the *lex commissoria*. According to Burdese, regarding the possibility of the creditor to retain the pledged thing if the debtor would not pay his debt, *pignus* was under the influence of the *fiducia cum creditore*. Regarding the *causa* of appropriation, comparing *lex commissoria* in case of a pledge with the *lex commisoria in casusam emptionis,* Burdese finds that the special *iusta causa* was not needed.[19] He accepts as a possible intent of Constantine to embrace with *commissoria rescindenda*, besides the typical *lex commissoria*, the similar clauses customary in the Hellenistic provinces as well. According to Burdese: "colla costituzione del 326 si accelero un processo gia iniziato nel diritto ellenico, diretto al disconoscimento di ogni sorta di clausola commissoria".[20] Being mainly on the same standpoint, Burdese and Frezza left the question unanswered: if the creditor seeks to utilize the prohibited *lex commissoria* and the negotiation would be annulled, does the creditor still have the right to ask for the payment of the debt?

According to Biscardi, the opinion that the pledgee acquires the pledged thing in ownership directly by the clause of *lex commissoria* provided the condition that "the price (debt) was not paid in due time" was fulfilled is not acceptable for the classical period. He argues that this clause could not be accepted as *iusta causa traditionis.* The pledgee could attain ownership on the pledge only based on the title of sale contract *(iusta causa)* by *traditio.*[21] Biscardi's opinion could be confirmed by the fragment of Marcian, which is considered interpolated,[22] and by the fragment of Papinian, which is questionable as well.[23] As Biscardi writes, the contract of sale is one of the sources of *obligatio rei* and "la compravendita in funzione di garanzia" is the same as the "lex commissoria in causam obligationis" (pledge). In his opinion, Constantine's prohibition of *lex commissoria* concerns "cautiones con efficacia reale, relative alla res oppignerata – diffuse assai nell'ambiente provinciale, e soprattutto elenistico;"[24] however, he does not exclude that there were proper historical reasons for this prohibition, as Levy thought.[25]

9; Marc. D. 20, 1, 16, 9). There was some reservation only about Marcian's *conditionalis venditio* because of the estimation of the value of the pledged thing. See, e.g. Korošec 2005, 210.

18 Frezza 1963, 226[3].

19 More Burdese 1951, 110–118.

20 *Ibid.* 125[2]. For the critic on the standpoint of Burdese, see Peters 1973, 162–163.

21 Biscardi 1962, 589; Biscardi 1976, 176–192.

22 D. 20, 1, 16, 9; Biscardi 1962, 585[26].

23 Pap. Vat. Fr. 9; Tryphoninus, D. 20, 5, 12, pr.; see about, Sič (Szűcs) 2010, 155–179.

24 Biscardi 1976, 190[24].

25 Biscardi 1976, 191–192.

Levy's standpoint is that the *lex commissoria* prohibited by Constantine, in essence, was the same as the purchase of the pledge by the creditor of the late classical period. Therefore, it is not surprising that the compilers of the Theodosian Code placed the rule about "de commissoria rescindenda" under the title "de contrahenda emptione" (CTh. 3, 2),[26] and not under the title "de pignoribus" (CTh. 2, 30).[27] According to Levy, in times of military anarchy, the creditors made pressure on the debtors to sell them the pledged thing of higher value than that of the debt. As the sales contract in the vulgar law conception was a cash sale, it means that the buyer (pledgee) became the owner of the pledge from the moment when the contract of sale was made (Verfallsabrede). The *Interpretatio* of the law is about the purchase of the pledge by the creditor, but this is because the sale contract had a translative effect, meaning that, at the same time, it transferred the ownership as well (verkaufen = übereignen). Regarding the sanction, Levy concluded that the creditor should lose the pledged thing *(re amissa)* and the debtor would get only some more time *(respiret)* to pay his debt. Using this time, the debtor himself could find a buyer and sell the pledged thing from which he would get the money to pay his debt to the creditor (PS. 2, 13, 3 and IP. 2, 12, 6).[28] In this purchase, the creditor could not take part, not even through a straw man, "persona supposita" (PS. 2, 13, 4 and IP. 2, 12, 7).[29]

According to Feenstra,[30] Constantine's rule was not influenced by the economic crises of the period of anarchy. He is of the opinion that Levy's evidence is not acceptable. Referring to Kaser, that in the late classical period the creditor could buy the object of the pledge if his claim remained unpaid, he argues that it is not the same as a right to acquire the ownership on it on the basis of the purchase which was made in the circumstances of the anarchy under the pressure of the creditor, as Levy explained it. Feenstra gives no new sources to support his argument, but he applies for help to Papinian's text saved by Fr. Vat. 9. He gives an acceptable explanation interpreting it in the sense that the creditor's claim (for the settlement of the debt from loan) is nothing else than the price of the thing (pledge).[31] According to Feenstra, Constantine's prohibition relates to this case, having in mind the last sentence: "creditores enim re amissa iubemus recipere quod dederunt" (CTh. 3, 2, 1).[32] However, on the other hand, he gives no answer to the questions why Constantine called it

26 More precisely, this constitution was placed under the title "De commissoria rescindenda," separately, but after the title "De contrahenda emtione".

27 Levy 1956, 189.

28 Brev. PS. 2, 12, 6 (= PS. 2, 13, 3): "Debitor creditori vendere fiduciam non potest; sed aliis, si velit, vendere potest: ita ut ex pretio eiusdem pecuniam offerat creditori, atque ita remancipatam sibi rem emtori praestet."

29 Levy 1956, 188–194.

30 Feenstra 1957, 514.

31 Or, according to Kaser (1950, 565), *datio in solutum*.

32 Feenstra 1957, 514.

lex commissoria and why at all he prohibited this practice if the debtor got the estimated value of the pledged thing.

Wieacker is of the opinion that Constantine's prohibition concerns the "Verfallspfand" (the creditor will acquire ownership on the object of the pledge if the debtor would not pay his debt) of the late 3rd century A.D. According to him, it is not a vulgar law concept.[33]

According to Peters, Marcian's fragment[34] is not identical to *lex commissoria*.[35] He submits (accepting Kaser's and Biscardi's opinion)[36] that Constantine's prohibition was not based on the classical clause, but it was a result of the practice of vulgar law as a consequence of crises of the third century, influenced by the Hellenic law.[37] According to him, the modification of the formula of *lex commissoria* in case of a sale is: "si ad diem pecunia soluta non sit, ut fundus inemptus sit (Pomp. 18, 3, 2)" in a sense of the *lex commissoria* in case of a pledge: "si ad diem pecunia soluta non sit, ut fundus emptus sit" permit to suppose that the acquisition of the pledge was levelled with the *lex commissoria in causam emptionis* by the legal practice of Diocletian's time. Therefore, according to Peters, the meaning of the clause is: "Lex commissoria bedeutet nichts anderes als Verfallsklausel".[38]

Nijmegen is of the opinion that under the circumstances of inflation the creditors practised the appropriation of the pledged thing since otherwise they could not realize the value of their claims.[39] Because of the depreciation of money, the value of the debt from the time when it was contracted to the time when it was payable became less, and after a longer period it could become even symbolic.

As Wigmore thought in the third century, both *lex commissoria* and *lex venditionis* were in place not to prevent the pledgor from claiming a restoration of the surplus. The efforts to abuse the *lex commissoria* seem, however, to have continued, and Constantine was obliged to prohibit its use entirely in the following century. Therefore, according to Wigmore, the reason why Constantine prohibited *lex commissoria* was to prevent the abuse of the clauses *lex* or *pactum* for the purpose of evading the duty of returning the surplus.[40]

Observing the Romanist literature on *commissoria rescindenda*, the standpoint is that Constantine prohibited the appropriation of the pledged thing by the creditor (pledgee) on the basis of the *commissoria* clause. In general, it is correct, but there are more unanswered questions regarding the constitution and its

33 Wieacker 1960, 143–144.
34 Marc. D. 20, 1, 16, 9.
35 Peters 1973, 163.
36 Kaser 1950, 565; Biscardi 1962, 584.
37 Peters 1973, 163.
38 *Ibid.* 166.
39 Nijmegen 2011, 113–115.
40 Wigmore 1897, 28–29.

Interpretatio. Concerning the question why the clause was called *lex commissoria*, the standpoint is: because it is a reverted version of the *lex commissoria* in case of a sale. However, it seems that the more questionable is: why was the clause of the sale called *lex commissoria*? According to Peters, the compilers of the Digest under the title "de lege commissoria" of the sale (D. 18, 3) have inserted two fragments related to *fiducia*.[41] Does this mean that the *lex commissoria* practised in case of *fiducia* was the first application of it? The meaning of *lex commissoria* is also unclear. There is no exact answer to the question: why was the appropriation of the pledge covered by the sales contract in the postclassical times?[42] And not less doubtful is: does the first version of the constitution concern only the debt secured by a pledge?

4. On the Meaning of the *Lex Commissoria* in the Theodosian Code

In the constitutions of the Theodosian Code issued close to the time of Constantine's constitution on *commissoria rescindenda* (320), the *lex commissoria* was utilized in case of the *emphyteusis* (long-term tenure). In this case, *lex commissoria* signifies the right of the treasury to forfeit (take over from the possessors as a punishment) the imperial emphyteutic and patrimonial estates if the rent (which was in those times nothing else than the tax of the land) was not paid promptly. This kind of forfeiture in Constantine's constitution from 325 A.D. (issued by reason of preventing the abuses of the officers) can be found as "legem commissi frustratus incurrat" (to become liable to the law of forfeiture) and as "debitam commissi nexu" (the bond of forfeiture because of the debt).

CTh. 12, 6, 2, 1: "Hoc quoque addimus, ut unusquisque quod debet intra anni metas, quo tempore voluerit, inferat et per tabularium apparitorem illatio cognoscatur absque omni mora auro suscipiendo, ne quis in aliena civitate sumptus faciat vel, quod est gravius, *legem commissi frustratus incurrat***.** Nam si solvere volens a suscipiente fuerit contemptus, testibus adhibitis contestationem debebit proponere, ut hoc probato et ipse securitatem *debitam commissi nexu* liberatus cum emolumentis accipiat et qui suscipere neglexerit, eius ponderis

41 Peters 1973, 162. D. 18, 3, 2 „Pomponius libro 35 ad Sabinum Cum venditor fundi in lege ita caverit: 'Si ad diem pecunia soluta non sit, ut fundus inemptus sit,' ita accipitur inemptus esse fundus, si venditor inemptum eum esse velit, quia id venditoris causa caveretur: nam si aliter acciperetur, exusta villa in potestate emptoris futurum, ut non dando pecuniam inemptum faceret fundum, qui eius periculo fuisset." D. 18, 3, 3 „Ulpianus libro 30 ad edictum Nam legem commissoriam, quae in venditionibus adicitur, si volet venditor exercebit, non etiam invitus."

42 Szűcs 2011, 65–72.

quod debebatur duplum fisci rationibus per vigorem officii tui inferre cogatur"[43]. Dat. XIIII kal. aug. Paulino et Iuliano conss. (325 iul. 19).[44]

The constitution is about the problem that the tax receivers refused to accept the payment from the taxpayers who were willing to pay. Their reason for it was to take over the land from the possessor because of his debt in tax payment, and they would retain it illegally afterwards. The punishment of the tax receiver who refused to accept the payment was to pay to the account of the treasury double the amount of the tax which was due.

The reason of the tax receivers to refuse to accept the tax payment was described in the constitution of Valentinian and Valens, CTh. 5, 15, 15 (= Brev. 5, 13, 15) from 364 A.D. According to this law, from the year of the consulship of Leontius and Sallustius (twenty years previously, 344 A.D.), some emphyteutic estates which fell into the fortune of forfeiture *(in commissi fortunam inciderint)* were held in ownership by private persons occupying the estates.[45]

Therefore, the utilization of *lex commissoria* in case of emphyteutic and patrimonial estates, if the rental (tax) was not paid, led to the misappropriation of these imperial lands by private persons.

In the following constitution CTh. 5, 15, 16 (Brev. = 5, 13, 16) which was given in the same year, the emperors have formulated the prohibition as a rule:

CTh. 5, 15, 16 (364 sept. 12): „Idem aa. ad provinciales Byzacenos. Nequaquam emphyteuticos fundos ante commissi vitium ad alterum transire debere sancimus. Et cetera. Dat. prid. id. sept. Aquileia divo Ioviano et Varroniano conss."

43 CTh. 12, 6, 2, 1: "We also add that each taxpayer shall have the right to pay whatever he owes within the limits of the year, at whatever time he may wish, and the apparitors who act as registrars shall acknowledge such payment. The gold shall be accepted without any delay in order that a taxpayer may not incur any expense in a municipality not his own, or on account of any frustrative device he may not become liable to the law of forfeiture, a much more serious matter. For, if the taxpayer should be willing to pay but should be scorned by the tax receiver, he must employ witnesses and file an attestation so that, when the case is proved, he shall be freed from the bond of forfeiture and shall receive the due tax receipt, along with the emoluments. The tax receiver who refused to accept the payment shall be forced through the power of your office to pay to the account of the fisc twofold the sum which was due."

44 There is one more Constantine's constitution about the *lex commissoria* CTh. 3, 30, 5 (=Brev. 3, 19, 3) given a few years later, in 333 A.D., for the case when the possessor *iuris emphyteutici* is a *minor*. If the landholding is being torn from the minor as the result of default involving forfeiture *(vitio intercedente commissi; commissi offensa)* – because the negligence or betrayal by tutors or curators –, they shall restore to the minor the value of the forfeited property from their own resources.

45 CTh. 5, 15, 15: „Idem aa. ad Mamertinum praefectum praetorio. Emphyteutica praedia, quae senatoriae fortunae viris, praeterea variis ita sunt per principes veteres elocata, ut certum vectigal annuum ex his aerario penderetur, cessante licitatione, quae recens statuta est, sciat magnifica auctoritas tua a priscis possessoribus sine incremento licitandi esse retinenda ita, ut quaecumque in commissi fortunam inciderint ac pleno dominio privatis occupationibus retentantur a Leontii et Sallustii consulatu, ius pristinum rursus adgnoscant. Dat. iiii kal. aug. Sirmio divo Ioviano et Varroniano conss." (364 iul. 29).

(We decree that by no means shall an emphyteutic estate pass to another person before the fault of forfeiture has been incurred. Etc.).

In the constitution CTh. 5, 15, 18 (Brev. = 5, 13, 18) from 368 A.D., they prescribed the control of auction of those emphyteutic estates which have incurred the fault of forfeiture *(in vitium delapsa commissi)*. According to the law: "…no person who has outbid all the others shall obtain the strength of perpetual validity for his ownership before the judgment of Our Tranquillity has been consulted in a loyal manner and has prescribed what must be observed in regard to the amount of rent, the name of the lessee and the amount of the inventory".[46]

According to these texts, the *lex commissoria* in Constantine's times signified the law (right) of forfeiture, the right of the treasury to take over the land from the lease-holder if he was in delay with rent/tax payment. On the other hand, regarding the delinquent taxpayer whose all present and future property served as a tacitly contracted pledge in favour of imperial treasury, the treasury had a right of *pignoris capio*, to take over the debtor's things in the amount of tax payment. These rights were not based on contracts.

In the same time, the quoted texts points onto the abuses of these rights of imperial treasury by private persons for their own profit.

5. The Abuse of the *Lex Commissoria* in Favour of the Treasury by Private Persons

The question that emerges is: by which contracts *(tali contractu)* do the private persons manage to take over the debtor's things?

In the Marcian's Novell about the remission of delinquent taxes (Nov. Marc. 2: „De indulgentiis reliquorum" from 450),[47] there is one important part which shows the practice of converting public debts into private contracts.

46 CTh. 5, 15, 18 (Brev. = 5, 13, 18): „Idem aa. ad Florianum comitem. Quotienscumque emphyteutici iuris praedia in vitium delapsa commissi actis legitimis ac voci fuerint subicienda praeconis, super facto licitationis et augmento nostra perennitas consulatur, nec prius eius dominio, qui ceteros oblatione superavit, perpetuae firmitatis robur accedat, quam si super pensionis modo, conductoris nomine, enthecae quantitate nostrae tranquillitatis arbitrium fideli ratione consultum observanda praescripserit. Dat. iiii k. mart. Triveris Valentiniano et Valente aa. conss." (368? 370? 373? febr. 26); The constitutions CTh. 5, 15, 15; 16; 17; 18 are not inserted in the Justinian's Code.

47 This subject-matter is explained shortly by Interpretatio: „Lex ista hoc continet, ut per provincias relaxatae beneficio principis tributorum reliquiae non quaerantur, tamen quod exactum est, si apud exactores residere constiterit, id praecipit, ut publicis debeat utilitatibus non perire, sed quod exactum est, a retentatoribus thesauris inferatur, et a provincialibus vel a possessoribus, quod solutum non fuerit, non quaeratur."

Nov. Marc. 2, 2: „Et ne qua liberalitatem nostram caligo fraudis possit impedire, etsi in privatum contractum vel in cautionem debitum publicum transiisse vel novatum esse dicatur, aut si quis curialis exactor vel cohortalis compulsor pro obnoxio se intulisse commemoret, nihilominus liberalitas nostra firma permaneat". (In order that no obscurity of fraud may be able to impede Our generosity, even if a public debt is said to have passed into private contract or a written acknowledgment of debt, or to have been novated, or if any curial or gubernatorial apparitor as tax collector should allege that he has paid taxes for an obligated person, nevertheless, Our liberality shall remain valid).[48]

According to Pharr: "The tax collectors often contracted, at a good profit, to pay the taxes for taxpayers who were unable to pay. By assuming such obligations, the tax collectors converted public debts into private contracts."[49]

Maiorian's Novell refers to the same practice.

Nov. Mai. 2, 1: "Therefore, by a law that shall remain eternally We sanction that delinquent taxes of all fiscal tax accounts…shall not be required of the landholders…which either remain delinquent in the case of a landholder or have passed to the bond of a private obligation, as customarily happens by the intervention of craftiness, by a written acknowledgement of debt issued to curials or collectors of the regular tax or to any other person whatever, such delinquent taxes shall not be demanded at all, so that the stipulation which was contracted for the reckoning of the fiscal accounts and which was remitted by the humanity of Our Clemency shall be deprived of collection."

This way of chicanery[50] Pharr explains as the taxpayers for the borrowed money from the tax collector signed a note or private stipulation in order that they might meet their tax payments.[51]

Therefore, the unclearly formulated part of the constitution on *commissoria rescindenda* (CTh. 3, 2, 1) "Si quis igitur tali contractu laborat…" covered different agreements by which the taxpayers usually became debtors of tax collectors or of other members of the city and the imperial office.

48 Translation by Pharr.
49 Pharr, CTh. Nov. Marc. 2, n. 7.
50 See also CTh .2.29 (= Brev. CTh. 2, 29) Si certum petatur de suffragiis; Nov. Val. 1, 1, 1.
51 Pharr, CTh. Nov. Mai. 2, n. 8.

6. The Reason for *Commissoria Rescindenda* in Constantine's Time

As the reason for the annulment of forfeiture clause (*lex commissoria*), a few authors emphasized[52] that, although the creditors – if the debtors were in delay with debt payment – had a right to sell the pledged thing *(ius vendendi)* or to buy it from the debtors, because of the depreciation of money (inflation) from the late classical period, the practice of forfeiture of the pledge became frequent. The creditors could realize the value of the landed amount of money (without the revalorization of the debt amount) only this way. As the value of the pledge was usually higher than the amount of the debt, Constantine prohibited this practice. This is one possible explanation, having in mind that Constantine introduced the measure of money stabilization.[53] As Constantine's measure remained without effect and the economic situation became even worse,[54] this thesis could not explain the reason of *commisoria rescindenda*. The fact that during the 5th century the constitution was interpreted as the prohibition to the creditor to buy the pledged thing from his debtor indicates also other reasons.

In my opinion, Constantine's reason to introduce the *commissoria rescindenda* could be explained more exactly by the fiscal policy of the Empire.

Namely, during the classical period, in the provinces which were not liberated from tax payment by the privilege of *ius Italicum*,[55] the amount of the taxes were determined on basis of the land owner's profession.[56] If the owner sold something from the registered property, his successor had to take over the taxes for the purchased thing.[57]

The Empire surrounded by barbarian nations was turned from the end of the second century A.D. into defence. The economy of Rome and Italy based primarily on successful wars, on the subordination and exploitation of provinces, could not overcome the new financial problems. There are opinions that already August had a plan to introduce the equal tax charges on the entire territory of the Empire.[58] August established the new territorial organization of Rome and Italy,[59]

52 For example, Nijmegen 2011, 122.

53 The inflation manifested in the times of Comod (180–192) became a serious problem during the third century. According to Romac (1966, 59), the *antonianus*, which had in the times of Caracalla 50% of silver, by 260 A.D., it had only 5% of it.

54 For example, CTh. 11, 2, 0. *Tributa in ipsis speciebus inferri,* ordered the collection of taxes instead of the money in goods.

55 Italy was freed from basic land-taxes *(tributum)* from 167. B.C. From the time of Augustus, *ius Italicum*, which means liberation from tributum, was given to the provinces as well (D. 50, 15, 1, 6 – 8). Vilems 1898, 538[2]. *Ius Italicum* was firstly mentioned in Plin. III, 3; 25, 21; 139.

56 According to the *forma censualis* from the second century A.D. – preserved in Ulpian's book »*de censibus*« D. 50, 15, 4 –, the population and their whole property was taken in evidence.

57 D. 19, 1, 13, 6 *Ulpianus, 32 ad edictum;* CIL III. p. 945.

58 About the imposts before August, see Vilems 1898, 364–369; De Martino 1967, 336–341.

59 Endeavouring himself to the stronger unification of the Empire, Augustus changed the traditional

and began to realize the project of measuring the entire territory of the Empire and of evidencing its population.[60] The work of making cadastres took more time and it was finished only during the reign of Trajan.[61] The intention of Augustus to unify the Empire, its population not only in rights but also in duties, was not even later realized, in the time when Caracalla introduced in Roman citizenship the whole free population of the Empire.

The divergences between the cities as centres of provincial administration vanished regarding the burden of land taxes only later, after the military anarchy, by the reforms of Diocletian. However, there are many unsolved questions about Diocletian's tax reform (*capitatio-iugatio*),[62] which was even not entirely new,[63] as the most important novelty was its introduction to the entire territory of the Empire. Italy had no more privileges of exemption from taxes,[64] nor the cities and provinces with *ius Italicum*. The *capitatio-iugatio* as a land tax was a good solution to fill up the imperial treasury and to stop military anarchy. The earlier taxes were retained and more new kind of imposts were added besides the land tax,[65] and the Empire had other incomes from mines and state factories. That the fiscal system of Diocletian remained for the most part throughout the late Roman Empire does not mean that in its realization there were no differences and problems. For the majority of the population, the biggest misfortune was the pressure of tax collectors, while for the Empire the independency of *potentiores*, the corruption of the city and higher chancellery officers caused serious problems. According to De Martino, the whole system of taxation was organized, giving the possibility for the internal augmentation of imposts by prefects and governors and not least from the members of the city council. All of these instances were responsible for the ordered amount, but if any problem occurred, the most in charge was the city and its officers (*curiales*). Quoting De Martino: "Si puó immaginare a quali abusi e quali nocive consegvenze desse luogo un sistema predisposto per garantire comunque l'entrata e fondato sulla piú assoluta indifferenza per la realtá dei raporti fiscali con il contribuente."[66]

According to Frezza, as a guarantee to realize the tax payments, from the age of August and in the provinces charged by *tributum*, the *fiscus* had a general privilege

position of Roman civitas (in the limits marked by Romul), dividing the territory of the city into fourteen territorial units (*regiones*). He divided the territory of Italy into eleven regions. See Vilems 1898, 534 and 568. According to Vilems, the new territorial organization of Italy was introduced by reason of making registers for the needs of the financial administration.

60 Vilems 1898, 509. (references and sources in n. 1); St. Luc. Evang. II, 1; Cassiod. Var. III, 52; Isid. Orig. V, 36. It does not mean that there was no such evidence before in the republican times, but it was not uniform.

61 De Martino 1967, IV/2. 824.

62 According to Vilems (1898, 640[8]), it was firstly introduced in the East. (Land 1862, 128.) See also De Martino 1967, V. 344–387.

63 De Martino 1967, V. 348[14].

64 Vilems 1898, 640[7]. Aur. Vict. De Caes. 39; Lactant. De mort. parsec. 23. CTh. 11, 28, 2; 4; 7; 12; 14.

65 See about, Vilems 1898, 637–649; De Martino 1967, V. 366.

66 De Martino 1898, V. 373.

"vice pignoris" for tributary claims.[67] The tributary debtors were registered in public books (*cesualibus paginis, publicis libris*). From the moment of registration, the goods of the debtors were held "veluti pignoris iure" even in case of alienation to third persons. Concurring with the private pledges, the *fiscus* had a priority right according to the principle "prior in tempore potior in iure".[68]

Practically, it was a general hypothec on all present and future goods of the debtors of imperial treasury.[69] We can read in the Fragmentum de iure fisci of the anonym author (2nd-3rd century A.D., Fol. I, 5[70]): "Bona eorum qui cum fisco contrahunt lege uacuaria uelut pignoris iure fisco obligantur, non solum ea quae habent, sed et ea, quae postea habituri sunt."

According to Dubouloz, the *fiscus* has priority right even in competition with the pledges in favour of the municipality.[71] As Dubouloz observes, there were two warranties: *praes* as a personal security right (*fideiussio*) in favour of the city and *praedium*, the real security right in favour of the treasury of Rome. It was expressed in the sources as a *cautio prædibus prædiisque* or *praedium praediorumque obligatio.*[72]

After Diocletian's tax reform, the provincial practice became general.[73] As a consequence of the right of the treasury "vice pignoris," the tax collectors were authorized to take over (seize) the possession of the delinquent taxpayer's thing or patrimony.

The emperors ordered the exactors not to use torture or imprisonment against the debtors;[74] "it shall suffice for a delinquent taxpayer to be summoned to

67 Frezza 1963, 170.

68 *Ibid.* D. 49.14.6 *Ulpianus libro 63 ad edictum pr.*; Dig. 49.14.28 *Ulpianus 3 disp.* „Si qui mihi obligaverat quae habet habiturusque esset cum fisco contraxerit, sciendum est in re postea adquisita fiscum potiorem esse debere Papinianum respondisse: quod et constitutum est. praevenit enim causam pignoris fiscus; CJ. 4.46.1 Imperator Antoninus. Venditionem ob tributorum cessationem factam revocari non oportet neque priore domino pretium offerente neque creditore eius iure hypothecae sive pignoris. Potior est enim causa tributorum, quibus priore loco omnia cessantis obligata sunt."

69 About the general hypothec for all claims of the *fiscus*, Caracalla issued two constitutions: CJ. 8, 14 (15), 1 from 213 A.D.: „Universa bona eorum qui censentur vice pignorum tributes obligate sunt"; CJ. 8, 14 (15), 2 from 214 A.D.: „Certum est eius qui cum fisco contrahit bona veluti pignoris titulo obligari, /quamvis specialiter id non exprimitur/". Also Hermogenian, D. 49, 14, 46 par. 3: „Fiscus /semper/ habet ius pignoris."

70 Fragments of two sheets of parchment discovered by Niebuhr in Verona, Italy, in 1816. See Girard–Senn 1967, 461–464. See also Böcking 1855, 145; Huschke 1988, II/1. 172–182; Kalb 1890, 146; Krüger 1868, 163–165.

71 D. 50.1.10 *Marcianus libro singulari de delatoribus: Simile privilegium fisco nulla civitas habet in bonis debitoris, nisi nominatim id a principe datum sit.* See more, Dubouloz 2003.

72 For example, *Lex Malacitana* (Spitzl 1984). Bruns 1893, 136–148. Also, Vécsey 1893, 332.

73 C. Th. 11. 3. 5 (391): „Quisquis alienae rei quoquo modo dominium consequitur, statim pro ea parte, qua possessor fuerit effectus, censualibus paginis nomen suum postulet annotari, ac se spondeat soluturum: ablataque molestia de auctore in succedentem capitatio transferatur." Also C. Th. 11, 3, 1 (319); 2 (327; 3 (363).

74 It was prohibited even earlier, in 320 A.D., by Constantine in CTh. 11, 7, 3.

the necessity of payment by the seizure of pledges (*satis vero sit debitorem ad solvendi necessitatem capione pignorum conveniri*)."

CTh. 11, 7, 7: Impp. Constantius et Constans aa. Bibulenio restituto praesidi Sardiniae. „Provinciales pro debitis plumbi verbera vel custodiam carceris minime sustinere oportet, cum hos cruciatus non insontibus, sed noxiis constitutos esse noscatur, satis vero sit debitorem ad solvendi necessitatem capione pignorum conveniri." Dat. VIII id. dec. Thessalonicae Constantio VI et Constante III aa. conss. (353 [346?] dec. 6).[75]

What was the consequence of the *pignoris capio* in the postclassical period? Does it mean that the *fiscus* became an owner of the things which were taken from the debtors, or was he only a possessor? And what was the process of the execution? Without going into a detailed explanation, which needs more place, the preliminary answer is: the *fiscus* had only a right to take over the possession of the pledged thing[76] and to sell it under public control. For example, Constantine (CTh.11, 7, 4) 327 or 328 A.D. ordered: the things of the fiscal debtors who are in contumacious delay shall be sold (in controlled proceeding)[77] to the purchaser with the guarantee of perpetual validity of the possession.[78]

It was a regular way to realize the payment of fiscal debts and also the legal way for the payment of private debts secured by the pledge.

75 CTh.11.7.7: "The provincials must not suffer lashes of leaded whips or the custody of prison on account of unpaid taxes due, since it is recognized that such tortures have not been established for the innocent but for the guilty. It shall suffice for a delinquent taxpayer to be summoned to the necessity of payment by seizure of pledges." See also: C.J. 4. 46. 1; C.J. 7. 73. 4, (215); C.J. 7. 73. 6, (240); CTh.11.7.4 [=Brev.11.4.1] (C.J.: 10, 21, 1), CTh.11.9.2 (337).

76 According to Frezza (1963, 128–141), the creditor could realize only the possession of the things even in the classical period. He could manage it if he had contracted the *pignoris capio.* In deficiency of this pact, it was prohibited by the law. Frezza quoted the constitution of Severus and Antoninus CJ. 8, 13 (14) 3 (205): „Imperatores Severus, Antoninus. 'Creditores, qui non reddita sibi pecunia conventionis legem ingressi possessionem, exercent, vim (quidem) facere non videntur, (attamen auctoritate praesidis possessionem adipisci debent.'"; PS. 5, 26, 4; Modestinus, D. 48, 7, 8; Decretum divi Marci, D. 48, 7, 7.

77 C. Th. 11, 7, 1.

78 C. Th. 11, 7, 4. (= Brev. 11, 4, 1): „Imp. Constantinus a. ad Afros. Quoniam succlamatione vestra merito postulastis, ne qua his, qui praestationes fiscales differunt, reliquorum laxitas proveniret, specialiter praecipimus observari, ut res eorum, qui fiscalibus debitis per contumaciam satisfacere differunt, distrahantur: comparatoribus data firmitate perpetua possidendi etc. Dat. XV. kal. iun. Serdicae, Constantino et Maximo coss."

7. The Prohibition of *Lex Commissoria* and the Evasion of Tax Payment

In the constitution CTh. 11, 3, 1[79] under the title "Sine censu vel reliquis fundum comparari non posse," edited in 319. A.D., Constantine informs about one of the problems of the *fiscus* to realize the tax payment.

This constitution is one of the rarest from which the preamble, for reasons of issuance, was not cut out by the compilers. It was addressed to the Governor of the First Province of Lyons in 319 A.D. Constantine explained that, observing the annonarian accounts, delinquent taxes were found. Investigating the reason, the following was noticed: "We learned that the chief cause of delinquent taxes was the fact that some persons are taking advantage of the temporary exigencies of others (*nonnulli captantes aliquorum momentarias necessitates*), and are purchasing rich and choice farms under the condition that they shall not pay to the fisc the delinquent taxes of such farms and that they shall possess them tax-free." The sanction for it was that: if any person has made such a contract, he shall be held liable for the taxes of the purchased farm and for all the delinquent taxes of such landholding.

According to the constitution, the purchase of the lands was made abusing the temporary exigencies of others (*nonnulli captantes aliquorum momentarias necessitates*). The preamble shows the fact that for the purchased lands the taxes were not paid from certain time. Therefore, the problem of the vendor was that he could not manage to pay his debts, among others, those to the *fiscus*. For this reason, the vendor sold his land to the *potentior* (latifundist) or to the officer to get some protection (*patrocinium*,[80] or promised liberation from taxes – corruption). By this constitution, the interests of the Empire regarding the taxes were to be protected.

79 CTh. 11, 3, 1: „Imp. Constantinus a. ad Antonium Marcellinum praesidem provinciae Lugdunensis primae. Rei annonariae emolumenta tractantes, ut cognosceremus, quanta reliqua per singulas quasque provincias et per quae nomina ex huiusmodi pensitationibus resedissent, cognovimus hanc esse causam maxime reliquorum, quod nonnulli captantes aliquorum momentarias necessitates sub hac condicione fundos opimos comparent et electos, ut nec reliqua eorum fisco inferant et immunes eos possideant. Ideoque placuit, ut, si quem constiterit huiusmodi habuisse contractum atque hoc genere possessionem esse mercatum, tam pro solidis censibus fundi comparati quam pro reliquis universis eiusdem possessionis obnoxius teneatur. Dat. kal. iul. Agrippinae Constantino a. V et Licinio c. conss." (319 iul. 1).

80 The *patrocinium* was very harmful for the Empire. The emperors prohibited it without much success. See more, Romac 1966, 96; De Martino 1967, V. 516; Salv. De Gub. Dei, 5, 8: They put themselves under the care and protection of the powerful, make themselves the surrendered captives of the rich and so pass under their jurisdiction.; C.Th. 12, 1, 146 of A.D. 395: "We have noted that many hide under the shadow of the powerful to defraud their country of the payments due;" and, in general, C.Th. 11, 24; St. August. Civ. Dei, II, 10 (translated by M. Dods, Chap. 20 http://www.ccel.org/ccel/schaff/npnf102.iv.html "Let the poor court the rich for a living, and that under their protection they may enjoy a sluggish tranquillity; and let the rich abuse the poor as their dependants, to minister to their pride."; Salv. De gubern. V, 10.

In the next constitution, CTh. 11, 3, 2 from 327 A.D.,[81] Constantine called the attention of the purchaser of a slave or a land to make investigation about unpaid taxes before purchasing. The constitution also informs about the pacts on retention of tax payment. These pacts had to be annulled and, by the purchase, the burden of tax payment would pass to the buyer as the new owner and possessor.[82]

The problem of tax evasion was not resolved even by the registration of owners as tax-payers.[83] There were ways to damage the treasury. From the constitution CTh. 11, 4, 1 of Valentinian, Valens and Gratian from 372 A.D., under the title "Ne collatio per logografos celebretur" (No tax payment shall be made through tax accountants), one can learn about two practised ways of corruption. The first was when the taxpayer entrusted his taxable land to a tax accountant (*collator iugationem suam logografo conmiserit).* In this case, the sanction was that it would be vindicated to the *fiscus* (*eam fisco noverit vindicandam*). The second was when the tax-payer, in order to escape the taxes, gave to the tax accountants some payment in money, products or gold („Quidquid etiam vel in pretiis vel in speciebus aut aurum ordinem delegationis oblitus praetermissis susceptoribus aut horreis ad logografos detulerit."). According to the law, in this case, the tax-payer will lose the thing he has given and he must fulfil his obligation to the fisc. The punishment of the officials was the restitution of a double value of those which they have taken and they remained in ignoble status, which means that they would not be liberated from the investigation under torture („Officiales autem, qui ex huiusmodi commerciis aliquid fuerint accepisse detecti, quae avaritia praecipitante captarant exerta dupli animadversione redhibebunt, ipsis dumtaxat logografis in pristinae condicionis discrimine permansuris, si quidem his pro omnibus poenis sufficiat adsiduo tormentorum periculo subiacere.").[84]

81 CTh. 11, 3, 2: „Idem a. Acacio comiti Macedoniae. Mancipia adscripta censibus intra provinciae terminos distrahantur et qui emptione dominium nancti fuerint, inspiciendum sibi esse cognoscant. Id quod in possessione quoque servari rationis est: sublatis pactionibus eorundem onera ac pensitationes publicae ad eorum sollicitudinem spectent, ad quorum dominium possessiones eaedem migraverunt. Dat. III kal. mart. Thessalonicae Constantio et Maximo conss." (327 febr. 27).

82 The rule was repeated later, CTh.11.3.3 [=Brev.11.2.1]: „Imp. Iulianus a. ad Secundum pf. p. Omnes pro his agris, quos possident, publicas pensitationes agnoscant; nec pactionibus contrariis adiuventur, si venditor aut donator apud se collationis sarcinam pactione illicita voluerit retinere, et si necdum translata sit professio censualis, sed apud priorem fundi dominum forte permaneat, dissimulantibus ipsis, ut non possidentes pro possidentibus exigantur. Dat. XIV. kal. mart. Antiochiae, Iuliano a. IV. et Sallustio coss. (363). Interpretatio: Fundum nullus audeat comparare, sed omnes pro his agris, qui ad eos quoquo modo pervenerint, publici canonis impleant functiones. Nec de solutione tributi cuicumque liberum sit pacisci, sed sive donetur ager sive vendatur, factus dominus integra rei tributa suscipiat." Also: CTh.11.3.4 (363); CTh.11.3.5 [=brev.11.2.2] (391).

83 Salvian (5th Century) testifies about the problem that the new owners were not registered as tax-payers. Salv. De Gub. Dei, 5, 8.

84 CTh.11.4.1 „Imppp. Valentinianus, Valens et Gratianus aaa. ad Modestum praefectum praetorio. Si quis collator iugationem suam logografo conmiserit, eam fisco noverit vindicandam.

8. Conclusion

Salvianus in the 5th century wrote (Salv. De Gub. Dei, 5, 8): "What an intolerable and monstrous thing it is, one that human hearts can hardly endure, that one can hardly bear to hear spoken of that many of the wretched poor, despoiled of their tiny holdings, after they have completely lost their property, must still pay taxes for what they have lost! Though possession has been forfeited, they are without property but are overwhelmed with taxes…"

Taxes were the principle income of the Empire in the post-classical period. Salvianus witnessed that even in the 5th century the adequate registration of tax-payers for tax payment purposes was not solved. After the Diocletian's tax reform, Constantine had a task to apply the reform in practice. In order to realize the fiscal policy of the Empire, Constantine extended the measures that were already in place in certain provinces onto the entire territory of the Empire, and introduced new measures to deal with concrete problems that emerged in practice.

In my opinion, the prohibition of *lex commissoria* was one of the measures that were supposed to provide for efficient tax collection; however, it was not successful.

Having in mind the first version of the text in *Codex Theodosianus* (CTh. 3, 2, 1), which was the closest to the original (even though it cannot be considered authentic due to the cutting of the text by the compilers), it cannot be stated that the contracting of *lex commissoria* was forbidden in case of a pledge. The constitution talks about the fact that the creditor cannot take away the things of the debtor based on some kind of contract (*tali contracu*) and, at the same time, points out the abuse of *lex commissoria* (*commissoriae legis crescit asperitas*). It is only known that the constitution talks about the debtor, from whom the creditor – relying on the contract (evidence of debt) – takes away the things because of the unpaid debt.

Taking a look at the sources form the time when this constitution emerged, the use of *lex commissoria* was allowed for the benefit of the imperial treasury in case the long-term lessee did not pay its debt (tax) in time. The sources show that the debt (tax) collectors used this law in order to make impossible for the debtor to pay his debt, and thereby take possession over the land.

On the other hand, at the time of Constantine, there was a practice, according to which, if the tax-payer did not pay its tax in time, the tax collectors had a

Quidquid etiam vel in pretiis vel in speciebus aut aurum ordinem delegationis oblitus praetermissis susceptoribus aut horreis ad logografos detulerit, omne hoc amissurum se esse cognoscat et exactionem a se debito ordine deposcendam. Officiales autem, qui ex huiusmodi commerciis aliquid fuerint accepisse detecti, quae avaritia praecipitante captarant exerta dupli animadversione redhibebunt, ipsis dumtaxat logografis in pristinae condicionis discrimine permansuris, si quidem his pro omnibus poenis sufficiat adsiduo tormentorum periculo subiacere. Dat. prid. non. april. Seleucia Modesto et Arintheo conss." (372 Apr. 4).

right to seize the debtor's goods in the value of the unpaid tax (*pignoris capio*). The sources confirm that such public debt has been very often transferred into a private benefit of tax collectors (private evidence of debt).

These were the ways to convert public debt into private and, based on such documents (which did not have to be documents on the pledge), to take away the goods of the debtors for the unpaid debt.

Based on the sources, it can be concluded that the practice of transferring the public debt into a private evidence of debt was based on a fraud of private individuals and it also defrauded the interests of the Empire in tax collection.

Therefore, in Constantine's times and afterwards, the main problem regarding *lex commissoria* was that if the creditors took over the debtors' lands or other things on account of the debt (it did not have to be guaranteed by pledge contract) the debtors could not satisfy their obligations to the *fiscus*. Deprived from their property, they became coloni of the latifundists, who intended to evade the taxes by privileges or by power, even military. This problem was constant in the Late Roman Empire, mainly in its western part. On this problem, a good illustration is given by the Novell of Theodosius II and Valentinianus III from 441. A. D.:

Nov. Val. 10, 1: „Justice must be preserved both publicly and privately in all matters and transactions, and We must adhere to it especially in those measures that sustain the sinews of the public revenues, since such measures come to the aid of the attenuated resourches of Our loyal taxpayers with useful equity. Very many persons reject this idea, since they serve only their domestic profits and deprive the common good wherein is contained their true and substantial welfare, although such welfare clearly comes better to each person when it profits all persons, especially since this necessity for tribute so demands, and without such tribute nothing can be provided in peace or in war. Nor can the continuity of such taxpayments remain any further if there should be imposed upon a few exhausted persons the burden which the more powerful man declines, which the richer man refuses, and which, since the stronger reject it, only the weaker man assumes."[85]

85 *Nov. Val.* 10, 1: „Cum publice privatimque in omnibus rebus ac negotiis iustitiam conservari oportet tum paecipue in his tenenda est, quae vectigalium nervos sustinent, quoniam adtenuatis devotorum viribus utili aequitate succurrunt. Quod plurimi respuunt, qui vera ac solida utilitas continetur melius plane ad singulos perveniens, cum profecerit universis, maxime exigente hac tributorum necessitate, sine quibus nihil in pace aut bello curari potest. Neque ultra valebit perpetuitas eorum manere paucis atque defessis inposita sarcina, quam potior detrectat, locupletior recusat et validiore reiciente solus agnoscit infirmior." Also: *Nov. Val.* 4, 1 (440): „Usu rerum frequenter agnovimus specialibus beneficiis generalem devotionem gravari recidente in reliquos tributorum sarcina, quae singulis quibusque subducitur..."

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