



Why the opinion of Papinian preserved by *Fragm. Vat. 9* was not inserted into Justinian's Digest?

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Abstract. According to the text of the Vatican fragment, the author of which was supposedly Papinian (*Fragm. Vat. 9*), the creditor properly purchases the pledged thing from his debtor for the price which is determined by the sum of debt and interests. The question, whether the creditor should be permitted to purchase the object of the pledge from his debtor, is very important today. If permitted, besides being an uncontrolled “private” method of enforcement, it could potentially lead to defrauding the prohibition of *lex commissoria*, to impoverishment of the debtor and enrichment of its creditor. Since even today legal science intends to approve the contemporary rules originating from the Roman law, in case of *Fragm. Vat. 9* one has to be cautious, and before coming to a final conclusion about Papinian's authorship, besides dogmatic analyses also has to pay attention to historical circumstances. The fact that the *Fragm. Vat. 9* was not inserted in Justinian's Digest opens ambiguities regarding its authorship and content. Therefore, the questions the article deals with are the following:

I. Was Papinian's real opinion preserved by *Fragm. Vat. 9*?

II. Why the rule from *Fragm. Vat. 9* was not inserted into the Digest?

Keywords: *Fragm. Vat. 9*, Papinian, pignus, *lex commissoria*, classical Roman law, Digest

I. Was Papinian's real opinion preserved by *Fragm. Vat. 9*?

The text of *Fragm. Vat. 9*¹ is preserved by the postclassical code named Vatican fragment.² According to this document, the creditor properly purchases the pledged thing from his debtor for the price which is determined by the sum of

1 Hereafter: F. V. 9.

2 The Vatican fragment (Cod. Vat. 5766) was recovered by Cardinal Angelo Mai in 1821. The manuscript originates from the beginning of the 4th century. It is a collection of texts based on fragments of juriconsults: Papinianus, Paulus, and Ulpianus, and on imperial constitutions. For more details, see Schulz 1967, 310–311.

debt and interests. Its author, as believed, was Papinian, because in the preamble of *Fragm. Vat. 9* it is written that the text was taken over from Papinian's third book of Opinions.

F. V. 9 (*Papin. III respons*): "*Creditor a debitore pignus recte emit, sive in exordio contractus ita convenerit sive postea; nec incerti pretii venditio videbitur, si convenerit, ut pecunia fenoris non solute creditor iure empti dominium retineat, cum sortis et usurarum quantitas ad diem solvendae pecuniae praestitutam certa sit.*" (The creditor properly buys the *pignus* from his debtor, regardless if it was contracted at the same time when the contract was made or later; the price is not considered uncertain in case the consensus is reached that, if the money of the loan (*fenus*) was not paid, the creditor retains the ownership by right of purchase, (the price) is determined by the capital and the sum of interests from the time when the payment of the debt was due.)

The Vatican fragment was made shortly after 318 A.D. Regardless of the fact that it is a postclassical source, according to the Romanist literature Papinian's authorship of F. V. 9 is not questionable. However, the authenticity of the text is also not proved.

According to the opinion of Schulz, which is prevailing in the literature, the compilers of the Vatican fragment only shortened the texts of classical jurists, eliminating the parts they considered unimportant. Other changes they did not make. However, besides to this opinion, there are also those Romanists who claim that the compilers of the Vatican fragment did not use the original texts of classical jurists, but they used those which had already been modified in previous times.³

Leaving aside these facts, the authenticity of Papinian's opinion preserved in F. V. 9 is considered proven by *Tryphoninus*.⁴ According to *Tryphoninus* (D. 20, 5, 12 pr.), Papinian as an imperial officer *a libellis* formulated the constitution (*rescriptum*) about the possibility that the creditor buys the pledge (*pignus*) from his debtor: D. 20, 5, 12 pr.: "*Rescriptum est ab imperatore libellos agente Papiniano creditorem a debitore pignus emere posse, quia in dominio manet debitoris.*" (Tryphoninus, Disputations, Book VIII. It was stated in a rescript by the Emperor, in reply to an application made by *Papinianus*, that a creditor could purchase a pledge from his debtor because it still remained in the ownership of the debtor.)

The part of the text "*quia in dominio manet debitoris*" (since it remained in the ownership of the debtor) alludes to the fact that in case of *fiducia* the purchase of the pledged thing by the creditor is not possible as the creditor is already the owner of the pledge (P. S. 2, 13, 3 / = Brev. P. S. 2, 12, 6/: "*Debitor creditori vendere fiduciam non potest...*" / The debtor could not vend the *fiducia* to his

3 Regarding to Ulpian's texts preserved in Vatican fragment it is confirmed. See Schulz 1967, 213.

4 For example Levy 1956, 188; Peters 1973, 142–144.

creditor.../)⁵. According to Biscardi, the “*quia in dominio manet debitoris*” part of the text is interpolated.⁶ However, having in mind that the rule: “*neque emptio... rei sue consistere potest*” (nobody can buy his own thing—Ulp. D. 50, 17, 45) was a well known classical rule to which Papinian resorted too (D. 13, 7, 41) “*rei suae nulla emptio est*” (the purchase of one’s own property is void),⁷ the question of interpolation should not necessarily rise here.

The fact that Papinian was a secretary, a *libellis* to *Severus* in the period from 26 Sept. 194 to 12 Feb. 202 (*Severus* and *Caracalla*), and that he was murdered by *Caracalla* in 212 A.D., is confirmed.⁸ On the other hand, no constitution of *Antoninus Caracalla*, about which *Tryphoninus* informs, has been preserved on the purchase of the pledge by the creditor. There are only constitutions concerning the *lex commissoria* in case of sale, but these constitutions originated from the time when Papinian was not in the imperial office any more.

Biscardi supposed that among those rescripts of *Caracalla* concerning *lex commissoria* as a clause of sale contract could be that one as well which confirms the standpoint of *Tryphoninus*.⁹ He quoted the rescript of *Caracalla* on a case, which says that if the buyer fails to pay the price in the given time, he will lose the earnest (*arra*). According to him, it is the same punishment as the interest payment in case of pledge if the debtor is in delay with debt payment: C. 4, 54, 1 (216): *Imperator Antoninus*, “*Si ea lege praedium vendidisti, ut, nisi intra certum tempus pretium fuisset exsolutum, emprix arras perderet et dominium ad te pertineret, fides contractus servanda est.*” (If you sold your land under the condition that if the price should not be paid within a certain time, the purchaser would forfeit the earnest money, and the ownership revert to you, the terms of the contract must be observed.)

However, this rescript could not be the one which confirms Papinian’s standpoint. Not only because it does not concern the purchase of the pledge from the creditor, but because of the fact that it originates from 216 A.D., when Papinian was not alive any more – he was executed by *Caracalla* in 212 A.D. Another question rises as well, whether the earnest (*arra*) was considered as a punishment around the beginning of the 3rd century A.D. or the rescript is interpolated?¹⁰

5 According to some authors, the *lex commissoria* was originally included in *fiducia cum creditore contracta* (see references in Burdese 1951, 16².); other Romanists thought that the *lex commissoria* was included in *pactum fiduciae* (see references in Burdese 1951, 17¹.). According to Frezza, no one of these opinions could be accepted since they are contrary to the principle of *fides* (Frezza 1958, 59: “la *fides*, puo essere qui invocate per negar fede all’una come all’altra opinione”); also Longo 1933, 55–56.

6 Biscardi 1962, 584.

7 Also Biscardi 1962, 588.

8 The office he held from February 202 to January 205 is not known, but there are data about him having been *praefectus praetorio* from 205 to 211 in the time of *Septimius Severus*; in 211 he was suspended and finally executed by *Caracalla* in 212. See Honoré 1994, 73–81; 190.

9 Biscardi 1962, 584.

10 According to *Gaius*, the earnest (*arra*) was the only sign that the contract was made (*Gaius Inst.* 3, 139). In the *Institutions* of Justinian (*Inst.* 3, 23 pr.), primarily under Greek influence, it

The comprehensive analyses of F. V. 9 could point out the parts of the text which are in accordance with and also those which do not correspond to the rules of classical law and to Papinian's standpoints.

There is no doubt that the quoted rule of F. V. 9 is in favor of the creditor (*creditoris causa cavetur*)¹¹, as it allows the creditor to retain the pledge as an owner (*iure empti dominium retineat*) provided that the debtor has not fulfilled his obligation within the given time (*emptio conditionalis*).¹² The acquisition of the ownership is under suspending condition. Though the creditor would not become the owner directly by the effectuation of the condition, but only on derivative way, on the basis of *iusta causa traditionis* (in the case at hand it is the contract of sale).¹³ If the pledged thing was *res nec Mancipi*, the mode of the acquisition was tradition (*traditio*)¹⁴, which in case of *pignus datum* could also be *brevi manu traditio*.¹⁵ If the object of the pledge was *res Mancipi*, only the praetorian ownership could be acquired.

As Biscardi states, according to the rules of classical law, even in the case of the sales contract with *lex commissoria* the creditor should not acquire the ownership immediately by the effectuation of the condition (that the buyer has not paid the price within the time-limit) because the sales contract is not a translatiue act (negotiation for transfer of ownership). Therefore, as Biscardi writes, in this case too, the creditor (*venditor*) should acquire the ownership of the thing only based on the sales contract (*iusta causa traditionis*) by tradition (*traditio*).¹⁶

The right of the creditor to sell the pledged thing (*ius vendendi*) in the classical period was a natural element (*naturalia negotii*) of *pignus*. In Justinian's time it even became *essentialia negotii*.¹⁷ Although the classical rules also permitted the purchase of the pledged thing by the creditor, it was not a typical solution in case of the pledge. Observing the fragments of classical jurists inserted into the Digest, one could state that besides the quoted text of *Tryphoninus* only the mostly disputable

became *arra poenalis*. However, besides the quoted, even other fragments of the *Digest* testify about the penal character of the earnest, for example: Scaevola, D. 18, 3, 6; 8. According to D. 18, 3, 6. Scaevola, Opinions, Book II: "Having been interrogated with reference to a contract for the sale of land dependent upon payment, I answered that, if anything was done by the purchaser to prevent the execution of the contract, and the vendor wishes to enforce it, the land would remain unsold; and whatever had been paid by way of earnest, or for any other reason, should remain in the hands of the vendor."

11 About *ius vendendi* and *lex commissoria* in function to protect the interests of creditors in classical Roman law, see Burdese 1962, 110–118; Frezza 1963, 225–227. To the contrary see Kaser 1950, 562; Peters 1973, 162–163.

12 Burdese 1951, 121; Biscardi 1962, 584.

13 Also Biscardi 1962, 589.

14 Gaius Inst. 2, 19–20; Paulus, D. 41, 1, 31 pr. *Paulus libro 31 ad edictum*.

15 Gaius, D. 41, 1, 9, 5.

16 Biscardi 1962, 589.

17 See Wigmore 1897, 28–30; Zimmermann 1996, 223–224; 1996, 436; Nótári 2011, 273.

fragment of *Marcianus* (D. 20, 1, 16, 9)¹⁸ contains a rule on purchase of the pledged thing by the creditor. In the other texts of the Digest, the problems raised by cases if one of the creditors is purchasing the thing which was charged by pledges for more creditors is discussed.¹⁹

The fragment of *Marcianus*, on first sight, proves the authenticity of the F. V. 9;²⁰ D. 20, 1, 16, 9: “*Potest ita fieri pignoris datio hypothecaeve, ut, si intra certum tempus non sit soluta pecunia, iure emptoris possideat rem, / iusto pretio tunc aestimandam /: hoc enim casu videtur quodammodo conditionalis esse venditio, et ita divus Severus et Antoninus rescripserunt.*” (A pledge or an hypothecation can be made as follows: “If the debt is not paid within a certain time, the creditor may hold possession of the thing by the right of a purchaser, and an estimate of the value of the same must then be made at a just price.” In this instance the transaction is held to be a species of conditional sale. The Divine *Severus* and *Antoninus* stated this in a rescript.)

Similarly, to the expression *iure empti* used by the F. V. 9, *Marcianus* utilizes the expression *iure emptoris*. While according to the F. V. 9 the creditor by the right to purchase retains the ownership of the pledge (*iure empti dominium retineat*), according to *Marcianus*, based on this right the creditor may only hold the possession of the thing (*iure emptoris possideat rem*). As it will be shown later, this difference in formulation of the texts is not negligible.

Ebrard is on the standpoint that the text of *Marcianus* is «*unheilbar interpoliert*».²¹ In the first place, the phrase *hypotheca* is a later addition.²² It is also accepted that the part of the text “*iusto pretio tunc aestimandam*” was added only later, in postclassical or in Justinian’s time.²³ The last part of the fragment, which refers to the rescript of *Severus* and *Caracalla* (probably originated from the time when *Papinian* held the imperial office), supposedly was interpolated as well. It is a fact that one could not find the phantom *rescript* of *Severus* and *Caracalla* on the purchase of the pledged thing by the creditor.²⁴

18 Besides the fragments of the Digest there are also rescripts of Diocletian which relate to purchase of the pledge by the creditor, for example: C. 8, 27, 10, 1. According to these rescripts, the contract was valid if the principle of bona fides was respected. However, the other rescripts of Diocletian point to the fact that the creditor should acquire only the possession of the purchased pledge by the reason to sell it (C. 8, 27, 9, 20).

19 By the reason of pauperization of the population the pawning of one thing as a security of more creditors became more frequent. If one of the creditors (who should not be the first) purchased the pledge, besides the questions of legal dogmatics (on it Ankum 2006, 9–18; Ankum 2005, 3–20), practical problems appear too: the enforcement of the claims by the pressure of *potentiores*; which one of the creditors will be in better position; as the *fiscus* had a priority right of enforcement, how to protect its interests? See on this Szűcs 2006, 613–637.

20 The works of *Marcianus Aelius* belong to the period after the government of *Caracalla*, i.e. to the end of the first half of the 3rd century.

21 According to Peters 1973, 143¹⁸.

22 See Peters 1973, 43¹⁵.

23 References in Biscardi 1962, 585²⁶; Peters 1973, 145²⁸.

24 From the time of *Severus* and *Caracalla* there is only one rescript from 194 A. D.: C. 8, 13, 1

According to the F. V. 9, the purchase of the pledge could be contracted at the time when the contract of the pledge was made, or at later times (*in continenti* or *ex intervallo*). The classical rules, however, demand that the additional pacts to *bonae fidei* contracts which are against the debtor's interest are to be made simultaneously with the main contract (*in continenti*) and not later.²⁵

Although, as Honoré states, Papinian belonged to the liberal group of jurists, which was open to answer on the requests of the changed society,²⁶ Ulpian writes that regarding this question, Papinian also accepted the rule that pacts made after concluding the contract are valid only if they served the interest of the debtor and by this reason are protected by exception (*exceptio*).²⁷ Consequently, the pact on the purchase of the pledge by the creditor contracted after the pledge contract was made could be accepted only as *datio in solutum*.²⁸

Impp. Severus et Antoninus AA. Timotheo "Debitor, qui pignoribus profitetur se creditoribus cedere, nihilo magis liberabitur." (A debtor who alleges that he has transferred to his creditors the property which he pledged to them is by no means released from liability.) According to Peters (1973, 156–158), this rescript interpreted in connection with C. 8, 34, 1 from 222 A.D. is a case of *datio in solutum* in which the *ius vendendi* was included. He treats the case as identical to that which the D. 46, 3, 45 pr. is speaking about. Paying no attention to the fact that it is a case of more creditors, Burdese (1951, 125) asks: which institution could the text relate to? However, the quoted rescript relates to the case when the pledge serves as a security for more creditors: *creditoribus cedere; cessurum creditoribus*, i. e. to the institution of *cessio bonorum*. According to the rescript, the debtor transfers the pledge to his creditors to sell it and from the purchase price to cover at least a part of their claims. The question—could one of the creditors buy the pledge for himself—was not the issue of this rescript. On *cessio bonorum* see Segura 2005, 46; Lewis 1996, 104–113; Zulueta 1921, 176. In the postclassical period the *cessio bonorum* was changed to *cessio rei*. See Szűcs 2009, 259–279.

25 Ulpianus, D. 2, 14, 7, 5 *Quin immo interdum format ipsam actionem, ut in bonae fidei iudiciis: solemus enim dicere pacta conventa inesse bonae fidei iudiciis. Sed hoc sic accipiendum est, ut si quidem ex continenti pacta subsecuta sunt, etiam ex parte actoris insint: si ex intervallo, non inerunt, nec valebunt, si agat, ne ex pacto actio nascatur...* also C. 4, 54, 8.

26 Honoré 1994, 20. Also Ankum 1989, 2811.

27 Ulpianus, D. 2, 14, 7, 5 *"...Idem responsum scio a Papiniano (D. 18, 1, 72 pr), et si post emptionem ex intervallo aliquid extra naturam contractus conveniat, ob hanc causam agi ex empto non posse propter eandem regulam, ne ex pacto actio nascatur. Quod et in omnibus bonae fidei iudiciis erit dicendum. Sed ex parte rei locum habebit pactum, quia solent et ea pacta, quae postea interponuntur, parere exceptiones."* (I am aware that Papinianus said that if, after a sale, any agreement was entered into which was not a part of the contract, an action growing out of the sale could not be brought on account of this same rule, namely: 'No action can arise on a simple contract', which may also be stated concerning all *bona fide* actions. The agreement, however, will have effect on the side of the defendant, for the reason that agreements which are later interposed usually give rise to exceptions.)

28 Gaius Inst. 3, 168: *"Tollitur autem obligatio praecipue solutione eius, quod debeatur unde quaeritur, si quis consentiente creditore aliud pro alio soluerit, utrum ipso iure liberetur, quod nostris praeceptoribus placuit, an ipso iure maneat obligatus, sed aduersus petentem per exceptionem doli mali defendi debeat, quod diuersae scholae auctoribus visum est."* (An obligation is extinguished principally by the payment of what was due. Wherefore, the question arises that if something else was given as a fulfillment with the consent of the creditor, whether he would be released from liability by operation of law, and this opinion was held by our preceptors; or whether he remains bound by operation of law, but should defend himself by an exception on

Having in mind the provincial practice, the question whether the F. V. 9 related to *fiducia* utilized in provincial practice arises.²⁹ The dogmatic and logical inconsistency of the text gives place to this question. In this case the unclearness of the rule could not be attributed to the concise but dogmatically correct style of Papinian.³⁰ The answer lies in other arguments. The dogmatical incorrectness could be explained by the fact that the compilers of the Vatican fragment shortened the rule of Papinian, or what is more acceptable, that they united several shortened Papinaian's opinions in one text. This way the new rule of F. V. 9 was born. The process of this kind of modifications began even before the compilation of the Vatican fragment was made.

Therefore, the F. V. 9 discusses mostly two different cases. Reconstruction of the first case: "*Creditor a debitore pignus recte emit, sive in exordio contractus ita ... nec incerti pretii venditio videbitur, si convenerit, ut pecunia fenoris non solute creditor iure empti dominium retineat ...*" (The creditor properly buys the

the grounds of fraud against his creditor who brings the suit, which opinion was adopted by the authorities of the other school.) Also Diocl. and Max. C. 8, 13, 13; Diocl. and Max. C. 4, 51, 4.

29 Burdese 1962, 125¹; Levy 1956, 188¹⁷⁶. According to Sztchlo (1938, 43), among the papyri from Egypt written in Greek language there are those which contain a kind of pledge similar to the Roman *fiducia* (Heidelberg num 1278 Z /i. e. 111./; A P. Lips. 1. /i. e. 104./ in connection with P. Grenf. II. 28 /i. e. 103). It is known as 'oné en pistei' (fiduciary purchase): the debtor transfers the ownership (sales the pledged thing) to the creditor under resolute condition. It means if he pays his debt, he will take back the ownership of the thing. Also Biscardi 1976, 183; Taubenschlag 1955, 272–275; Pringsheim 1950, 114–119. The other papyri are about contrary negotiation: sale under suspending condition. It means that the creditor (buyer) should acquire the ownership on the object of the pledge if the debtor should not pay his debt (*Verfallspfand*). It was the frequently utilized kind of pledge. It was utilized in both forms of pledge: as a pledge with transfer of possession (P. Fay. 12. 109.; P. Magd. 13.; P. Oxy. I. 114.; P. Oxy. III. 530; C. P. R. 12. /A. D. 93./) and without transfer of possession /*hypotheca*/ (P. Fior. 1. /i. u. 153./; P. Oxy. III. 506; P. E. R. 1444; B. G. U. II. 445; P. Lond. II. 311; P. Lond. III. 1166; P. Oxy. III. 507; P. Lond. III. 168). According to Sztchlo, furnished by the clause of *lex commissoria* its purpose was the *datio in solutum*. As he states, this kind of pledge was present in Roman law as a sale under suspending condition. For example: D. 20, 1, 12 pr. *Paulus libro 68 ad edictum. Sed an viae itineris actus aquae ductus pignoris conventio locum habeat videndum esse Pomponius ait, ut talis pactio fiat, ut, quamdiu pecunia soluta non sit, eis servitutibus creditor utatur (scilicet si vicinum fundum habeat) et, si intra diem certum pecunia soluta non sit, vendere eas vicino liceat: quae sententia propter utilitatem contrahentium admittenda est.* (Paulus, On the Edict, Book LXVIII. Pomponius says that it should be held that an agreement can be made to pledge the right of a pathway, and the right to drive cattle, or to conduct water in such terms that if the money is not paid, the creditor can make use of such servitudes provided he has adjoining land; and should the money not be paid within a certain time, he can sell the said servitudes. This opinion should be adopted on account of its benefit to the contracting parties.) Later, in Egypt this kind of pledge developed into a form of a pledge with creditor's *ius vendendi*, however, it has remained unclear whether it happened before or after the influence of Roman law in Egypt. On the basis of the papyri, Sztchlo finds it possible only if the *Verfallsklausel* (*lex commissoria*) was not inserted into the contract of pledge: P. Petr. III. 57b; P. Eleph. 27a. On these questions see as well Wigmore 1897, 24. According to him: "Fiducia is the sale-for-resale form". On the connection of fiducia with *mancipatio* and *in iure cessio*, see Noordraven 1999, 117 ff.; 143 ff.; Szűcs 2008, 143–172.

30 The literature explains the difficulties of understanding Papinian's texts with his dogmatically correct and concise style, see Ankum 1989, 2810–2811.

pignus from his debtor, regardless if it was contracted at the same time when the contract was made ... the price is not considered uncertain if the consent rises about that if the amount of the loan (*fenus*) is not paid, the creditor retains the ownership by the right of the purchase ...)

If the purchase of the pledged thing was contracted at the same time when the contract of the pledge was made for the determined price (*certum pretium*), which covers the value of the pledged thing and the interests (*pecunia fenoris*, but not—*mutuua pecunia*), the sale was realised practically immediately. This means that the debtor (of the loan contract) got a sum of money equal to the worth of the pledged thing reduced by the interests, which means that he sold the pledge to his creditor and gave him the pledge in possession as well (*pignus datum*). The sale is conditional. In the event the debtor would not pay his debt on time, the creditor should definitely become the owner of the pledged thing. If the debtor is able to pay the debt with interests, he can liberate the pledge (redeem it).³¹ This practice could give basis to the opinion that really it was nothing else than a kind of *fiducia* utilized in provincial practice (*Verfallspfand*).

The fragment of the *Digest* taken from Papinian's third book of Opinions testifies exactly about these kinds of problems. D. 13, 7, 40 pr.: *Papinianus libro tertio responsorum. "Debitor a creditore pignus quod dedit frustra emit, cum rei suae nulla emptio sit: nec si minoris emerit et pignus petat aut dominium vindicet, ei non totum debitum offerenti creditor possessionem restituere cogetur."* (Papinianus, Opinions, Book III. A debtor cannot legally purchase a pledge which he has given to a creditor because the purchase of one's own thing is void; for if he buys it for less than the amount of the claim and demands it, or brings suit for the ownership, the creditor is not obliged to restore possession to him unless he tenders payment of the entire debt.)

This fragment is also questionable. One could not suppose that Papinian was so incorrect that firstly he states that the debtor could not buy from his creditor the *pignus* because he is the owner (the purchase of one's own thing is void), and that thereafter he is discussing the problem that the debtor could not buy the pledge or could not vindicate it only because he has not paid the entire debt. The most plausible solution is that the text was shortened and the *fiducia* was erased from the original text: *nec si minoris emerit et /fiduciam/ petat aut dominium /pignori/ vindicet*. Therefore the reconstruction of the fragment could be as follows:

A debtor cannot legally purchase a pledge (*pignus*) which he has given to a creditor because the purchase of one's own thing is void; for if he buys it for less than the amount of the claim and demands the *fiducia*, or brings suit for the ownership of *pignus*, the creditor is not obliged to restore the ownership or possession to him unless he tenders payment of the entire debt.

According to the F. V. 9, if the debtor has not paid the debt and the interests, he has not redeemed the pledge. Therefore, the creditor would acquire the ownership

31 Also Biscardi 1962, 589.

of it on basis of the previously made contract (pact) of sale. The realization of the contract (pact) depended on the condition: “*pecunia fenoris non solute creditor iure empti dominium retineat*”. The sale contract/pact was made under suspense condition (*Verfallspfand*). According to the Romanist literature, this negotiation could not be the *fiducia* of Roman law since in case of *fiducia* the transfer of ownership to the creditor (fiduciary) has to be effectuated by *mancipatio* or by *in iure cessio*, which means ownership transfer could not be conditional.

Reconstruction of the second case: “*Creditor a debitore pignus recte emit, sive ita convenerit ... postea; nec incerti pretii venditio videbitur, ... cum sortis et usurarum quantitas ad diem solvendae pecuniae praestitutam certa sit.*” (The creditor properly buys the *pignus* from his debtor, regardless if it was contracted ... later; the price is not considered uncertain, ... the price is determined by the capital and the sum of interests from the time when the payment of the debt was due.)

In this case the pledge could be *pignus datum* and *pignus conventum* as well. The debtor (borrower) got as a loan the monetary value of the pledged thing, probably diminished by regular interest rate. If the debtor did not pay his debt until the deadline, the pledged thing was purchased by the creditor. This means that the creditor had already paid the price. If the value of the pledge is the same as the value of the loan, having in mind that the loan is the *fenus*, and the debtor is in delay, the following question arises: on what grounds could the creditor ask for the accrued interest and a principal (if it was not already deducted from the outstanding loan)? According to Papinian (D. 20, 1, 1, 3³²), in case of loan the interests should be contracted by stipulation. As stipulation is not mentioned in F. V. 9, this second case could be a case of *datio in solutum* in form of a sales contract.

Regarding the F. V. 9, the most disputable question is: why does it not speak about the right of the debtor to *superfluum*? Wigmore, describing this obligation of the creditor through Roman history, states that according to classical rules, it was a commonly accepted obligation of the creditor,³³ however up to Justinian’s time the parties could exclude it by agreement.³⁴ For example, according to C. 8, 28, 20, (294): “*si nihil specialiter convenit, ... de superfluo competit actio*” (If nothing was specially agreed upon, ... an action lies for the surplus). Starting from the fact that the pledge serves not only as a security of the loan, but it is a general security right, in which case the amount of the debt and interests is usually not identical to the value of the pledged thing, Justinian strictly obliges the creditors to recover the surplus (*superfluum*).³⁵

32 D. 20, 1, 1, 3: “... cum ad diem minore faenore non soluto legitimae maiores usurae stipulanti recte promitti potuerint.”

33 Wigmore 1897, 26–27.

34 Wigmore 1897, 27¹.

35 C. 8, 33, 3 (530).

What did Papinian think about *superfluum*? In the fragment inserted into the Digest also from Papinian's third book of Opinions (D. 13, 7, 42), Papinian writes that the creditor is obliged to recover the surplus: D. 13, 7, 42 "*Papinianus libro tertio responsorum. Creditor iudicio, quod de pignore dato proponitur, ut superfluum pretii cum usuris restituat, iure cogitur, nec audiendus erit, si velit emptorem delegare, cum in venditione, quae fit ex facto, suum creditor negotium creat.*" (Papinianus, Opinions, Book III. The creditor is legally bound to surrender the excess of the price together with interest in an action similar to the giving of the pledge, and he should not be heard if he wishes to substitute the purchaser since in the sale which is made in pursuance of an agreement, the creditor is transacting his own business.)³⁶

According to Feenstra, from the text of F. V. 9 one could conclude nothing about the *superfluum* since the fragment does not address the question.³⁷ His opinion is acceptable in the sense that F. V. 9, regarding the difficulties of creditors to realise the payment of the loans, protects only the interest of creditors (*creditoris causa cavetur*). Actually, the creditor estimating the value of the pledged thing will be tempted to cover his entire outstanding (the capital and the interests as well). The fragment is silent not only about the surplus which belongs to the debtor if the pledge is worth more than the debt, but moreover, it says nothing about the deficit of the creditor if the value of the pledge does not cover the entire outstanding debt. The conclusion could be that it is supposed in F. V. 9 that the value of the pledge concurs with the capital with interests, therefore raises no question about surplus.

On the other hand, Papinian's fragments preserved in the Digest testify that Papinian protected also the interests of the debtors. For example, in case of sale made by the clause of *lex commissoria*, protecting the debtor's interest he did not allow the creditor to ask for the payment of the price after when the application of *lex commissoria* was chosen. This fragment was also taken over from Papinian's third book of Opinions: D. 18, 3, 4, 2: "*Eleganter Papinianus libro tertio responsorum scribit, statim atque commissa lex est statuere venditorem debere, utrum commissoriam velit exercere an potius pretium petere, nec posse, si commissoriam elegit, postea variare.*" (Papinianus very properly says in the Third Book of Opinions that as soon as the clause in the contract becomes operative, the vendor must determine whether he wishes the sale to be annulled, or whether he will demand the price; for if he chooses to annul the sale, he cannot afterwards adopt a different course.)

The rule becomes clearer when it is observed in connection with the rescript of Severus Alexander (C. 4, 54, 4; 222–234. A.D.). According to this rescript, the application of *lex commissoria* is incompatible with the claim for interest.³⁸

36 Also D. 13, 7, 24, § 2.

37 Feenstra 1957, 514.

38 C. 4, 54, 4; *Imperator Alexander Severus. "Commissoriae venditionis legem exercere non potest, qui post praestitutum pretii solvendi diem non vindicationem rei eligere, sed usurarum pretii petitionem*

The texts of the Digest testify that the creditors, even in this case, realised their demands for interest in different ways: by retaining the partial price payment or earnest, or they added to the sales contract the hire of a thing contract (*locatio conductio rei*) to collect the rent.³⁹ This way the sales contracted under the term of *lex commissoria* (if the price was not paid on time) contains also the interests. Therefore, it is reasonable that the claim for more interests was void.

Biscardi states that the purchase of the pledged thing by the creditor (pledgee) is a contrary negotion to the sale made with the clause of *lex commissoria*. Namely, in case of the sale made with the clause of *lex commissoria*, should the buyer not pay the price on time, the thing would not be purchased. On the contrary, in case of the pledge, should the debtor not pay his debt within the due time, the thing would be purchased by the creditor (pledgee). Therefore, according to Biscardi, the *lex commissoria* as a clause in the sales contract could also be utilised as a security right since the monetary debt is nothing else but the purchase price. According to him: “*la lex commissoria in funzione di garanzia, o per melio dire, la emptio-venditio in causam obligationis—che non doveva poi differire un gran che, nella struttura,*⁴⁰ *dal pactum de retroemendo ... è uno dei negozi, coi quali si può classicamente porre in essere un obligatio rei.*”⁴¹

Peters agrees too that the *lex commissoria* clause of sale: “*si ad diem pecunia soluta non sit, ut fundus inemptus sit*”⁴² if inverted and applied on the pledge, gives the same result: “*si ad diem pecunia soluta non sit, ut fundus emptus sit*”. In his opinion this inversion was made in the postclassical period, precisely by the legal practice of Diocletian’s times.⁴³

The procedure presented in F. V. 9 is more typical to the medieval practice⁴⁴ than to classical jurisprudence; however, one could not deny that it

sequi maluit.”The claim of interests is incompatible also with *impetratio dominii*. C. 8, 33 (34), 2 (238): *Imperator Gordianus. “Si creditor pignus iure dominii a nostra serenitate possidere petiit et post formam praescripti alio anno usuras a vobis accepit, a beneficio impetrato recessisse videtur.”*

39 See Szűcs 2006, 73–102.

40 C. 4, 54, 2; 7; D. 19, 5, 12.

41 Biscardi 1962, 589; Biscardi 1976, 182–192.

42 Pomponius, D. 18, 3, 2.

43 Peters 1973, 166.

44 In the Middle Ages, different kinds of pledges were utilised: a *wette*, *vadium*, or in Fench language *gage* as a pledge by which the debtor gave the object of the pledge to his creditor under the condition that if the debt was not paid he should lose its ownership; a mortgage which was made before a judge or a city council requiring the consent of the debtor’s heirs since by this pledge the creditor was authorized to collect the fruits of the pledged thing as far as the debt was not paid and it could last for ever. See more in: Ruzsoly 2002, 311–320. According to the literature, the creditor’s right to the fruits of the pledged thing and his right to acquire ownership on the pledged thing were the means to get around the prohibition of interest collection. See Zimmermann 1996, 170; Stanojević 1966, 166; 192; Ruzsoly 2002, 314. The prohibition to collect interests was based on the Holy Scripture (St. Lucas, 6, 35: “*mutuum date nihil inde sperantes*”) and has roots early in the ancient times (Stanojević 1966, 153, e.g. the Nicean Council in 325; Leo the Great /Pope 440–445/). However, a more energetic struggle was started only in the 9th

was present in the provincial practice even in classical times,⁴⁵ and probably, in case of loan secured by pledge it was also practiced by the Romans.⁴⁶

As F. V. 9 gives the creditors a right to take interest rate (*pretii venditio ... cum sortis et usurarum quantitas ad diem solvendae pecuniae praestitutam certa sit*),⁴⁷ the question regarding Papinian's opinion about the interests emerges.

Since F. V. 9 regulates the loan with interest (*fenus*⁴⁸), in the second reconstructed case the debtor in delay owes besides the principal interests also the accrued ones. In general, the classical Roman law accepts the interests within legal interest rate.⁴⁹ The interest which exceeded the higher interest rate was only exceptionally permitted.⁵⁰

Papinian recognises the creditor's right to interest or a right on the fruits (crops) of the pledged thing within the limits of legal interest rate: D. 20, 1, 1, 3 *Papinianus libro undecimo responsorum* "Pacto placuit, ut ad diem usuris non solutis fructus hypothecarum usuris compensarentur fini legitimae usurae. Quamvis exordio

century, when the church strengthened his influence. Thus, the Canon no. 17 of Reims, during the time of Pope Leo IX ordered: "*quis clericus vel laicus usuras exerceret*" (Stanojević 1966, 153; Zimmermann 1996, 170). One of the ways to get around the prohibition was the utilisation of the so-called stocks and bonds which were made out to the bearer (*Inhaberpapiere*). Pope Alexander III, in 1163, extended the prohibition of collecting interest to mortgage as well with the intention of transforming it into *vifgage* in the sense that the debt should be reduced by the value of the fruits. This intention, however, was rarely respected (Ruszoly 2002, 314 f.). For instance, in 13th century Hungary, property was given in pledge with the pledgee's right of use, and if the debtor failed to pay his debt in due time, according to the common clause of the contract of pledge (document of pledge), the pledgee-creditor should acquire the right to ownership of the pledged thing. (Zichy Codex, I. 49. 1; Hajnik 1872, 337). Also, according to the document from 1283 on replying due to failure of payment of the debt, with the clause that if the debt was not paid even in additional time, it became the pledgee's (or his heir's) eternal property along with the gains and accessories of the pledge. (Mezei 2000, 160 f.). On these problems see as well Szűcs 2002, 112–158).

45 See Burdese 1951, 197; About the absence of the right to surplus in Greek law, see Wigmore 1897, 19.

46 However, the only proof of it is the F. V. 9.

47 Biscardi (1976, 189) concerning the *pretium certum cum usuries* invokes the texts of *Ulpianus* relating to sale contract made with the clause of *lex commissoria*: D. 18, 3, 4 pr.

48 About the possibility in banking business to realize the interest established by simple pact, see Petrucci 1997, 63–97.

49 The *usura* (interest) is the value (price) for utilisation of money or other generic things (*usus—uso del capital*, see also Fuenteseca 1978, 248). It is a *fructus civilis*, which could be replaced by natural fruits or by the use of the thing (Ulpianus, D. 22, 1, 34; Paulus, D. 20, 2, 8: *Paulus libro secundo sententiarum* "Cum debitor gratuita pecunia utatur, potest creditor de fructibus rei sibi pigneratae ad modum legitimum usuras retinere."; Diocletianus, C. 4, 49, 5 /290/), see Wagner 1989, 2815–2825; Modestinus, D. 20, 1, 23: "Creditor praedia sibi obligata ex causa pignoris locare recte poterit"; Marcianus, D. 20, 1, 11, 1: "cum in usuras fructus recipiat"; Severus, C. 4, 24, 1; C. 4, 32, 17. Also Korošec 2005, 21. On the past and present statement of the Church about the interest: Coppola 1997, 250–258.

50 About pawning the land with creditor's right to collect the fruits (*antichresis*), in which case the value of the fruits is not primarily determined, therefore could exceed the legal interest rate, see Thomas 2008, 8.

minores in stipulatum venerint, non esse tamen irritam conventionem placuit, cum ad diem minore faenore non soluto legitimae maiores usurae stipulanti recte promitti potuerint." (It was agreed in a contract that if interest on a debt was not paid when due, the crops of the property hypothecated should be set off against the interest, to the limit of that which was lawful. Although the lower interest was established by stipulation when it was made, that agreement is not void since if the lower rate of interest should not be paid at the appointed time, the highest legal interest rate could be legally stipulated.)

In the classical period the interest could be settled also by retention of the pledged thing by the creditor.⁵¹ C. 4, 32, 4 *Imperatores Severus, Antoninus* "*Per retentionem pignoris usuras servari posse, de quibus praestandis convenit, licet stipulatio interposita non sit, merito constitutum est et rationem habet, cum pignora condicione pacti etiam usuris obstricta sint.*"⁵² (It has been established, and it is reasonable that interest can be demanded where a pledge is retained, even though no stipulation may have been entered into, as pledges are liable for interest even under an informal agreement.)

The collection of the higher form of legal interest rate by retention of the pledged thing, according to Papinian's opinion also from his third book of Opinions, was prohibited even in case of the maritime loan (*traiecticia pecunia*): D. 22, 2, 4 *Papinianus libro tertio responsorum* pr. "*Nihil interest, traiecticia pecunia sine periculo creditoris accepta sit an post diem praestitutum et condicionem impletam periculum esse creditoris desierit. Utrubique igitur maius legitima usura faenus non debetur, sed in priore quidem specie semper, in altera vero discusso periculo: nec pignora vel hypothecae titulo maioris usurae tenebuntur.*"⁵³ (Papinianus, Opinions, Book III. It makes no difference whether the maritime loan was not at the risk of the creditor when it was contracted, or whether it ceases to be at his risk after a certain time, or upon the fulfillment of a certain condition; and therefore in either instance a higher rate of interest than is legal will not be due. In the first instance, a higher rate can never be demanded; in the second, when the risk has ceased to exist, neither pledges nor hypothecations can be retained for the purpose of collecting a higher rate of interest.)

⁵¹ Thomas 2008, 13.

⁵² Also Ulpianus, D 13 7 11 3; C. 4, 32, 22 *Imperatores Diocletianus, Maximianus* "*Pignoribus quidem intervenientibus usurae, quae sine stipulatione peti non poterant, pacto retineri possunt.*" (When pledges have been delivered, interest which could not have been collected without stipulations can be retained under the agreement /pactum/).

⁵³ Also Papinianus, D. 22, 1, 9, 1; Paulus, D. 12, 1, 40; Tryphoninus, D. 3, 5, 37 (38).

II. Why was the F. V. 9 not inserted into the Digest?

Having in mind the previous contemplations on F. V. 9, one of the possible answers could be that the text was left out from the Digest because it does not give the real opinion of Papinian. However, according to the Romanist literature, the authorship of Papinian is not questionable, and some parts of the F. V. 9 are in accordance with Papinian's opinions and even with the classical rules (the right of the creditor to buy the pledged thing from his debtor, to charge interests), the text in the given formulation could not belong to Papinian.

The fragment in question could have been made by an unknown author, or by shortening the opinion (*responsum*) of Papinian, or more plausible, by merging more, previously already shortened opinions of Papinian in one text. This way a new rule was made, according to which the creditor could acquire the ownership on the pledged thing, regardless of its value, purchasing it from the debtor (*iure empti dominium retineat*). This rule was common in the provincial practice and its result was nothing else but the application of the *lex commissoria* in case of pledge. Therefore, the rule of F. V. 9 has provincial origin and does not correspond to the intention of classical jurisprudence to find in every case the best and most equitable solution.

The next possible answer lies in Justinian's legislative politics, motivated by the social and economic difficulties of the postclassical period. As the following arguments testify, the rule of F. V. 9 was not in accordance with Justinian's politics.

The classical jurisprudence together with Papinian insists on respecting the legal interests limit. The F. V. 9 is silent about it. This part of the Fragment: "*cum sortis et usurarum quantitas ad diem solvendae pecuniae praestitutam certa sit*" gives the possibility to the creditor to count in the sum of the debt, even the eventually accrued interest, nevertheless the time of delay is not noticeable when the contract is made.

On the other hand, Justinian looks at the pledge not only as a security of the loan but in general as a security of the reimbursement of a debt originated from any negotiation. As a general security, the object of the pledge could be worth more but also less than the amount of the debt. Consequently, Justinian's law insists upon the just estimation of the pledge (*iusto pretio tunc aestimandam*⁵⁴),

54 Marcianus, D. 20, 1, 16, 9; C. 8, 33, 3, 5 (530): *Imperator Justinianus, "Sin autem dubitatio exorta fuerit pro venditione utpote viliore pretio facta, sacramenti religionem creditor praestare compellatur, quod nulla machinatione vel circumscriptione usus est, sed tanti vendidit rem, quanti potuerit venire: et hoc tantummodo reddi, quod ex iuramento superfluum fuerit visum."* (But when any doubt arises with reference to the sale, for instance, if it should be asserted that a lower price was paid than the property was worth, the creditor will be obliged to make oath that he was guilty of no machination or fraud, but that he sold the property for as much as he could obtain for it; and he shall only be compelled to return to the debtor any surplus which he may have sworn to.) In the Western part of the Empire, the just estimation of the pledge was required even before Justinian's time, particularly regarding the interest of the Empire (*utilitas publica*) to realise the public (*fiscal*) debt payments (primarily the taxes). Therefore, according to the law C.

even when the pledge would be sold to the creditor. Therefore, Justinian demands from the creditor to return the surplus (*superfluum*) to the debtor if the pledge is worth more than the amount of the debt, and also obliges the debtor to pay the rest of the debt if it was not covered by the value of the pledge.⁵⁵ About these obligations the F. V. 9 is also silent.

Besides these arguments, the following could also be mentioned, based on the tendency observable at Justinian that the different kinds of securities regulate in the similar way. Namely, the economic crises followed by inflation present already in the time of *Severus* and increased later as a consequence of military anarchy, barbarian invasions and constant wars made the problem of debt reimbursement an actual problem. Therefore, different ways of guarantees were utilised. On this process the provincial practice has also left its mark. In the text of the jurist from the late classical period, one can find different atypical security rights.⁵⁶

Th. 10, 17, 3 (= LRV. C. Th. 10, 9, 1 /391/) and its interpretation, the price has to be equal to the value of the sold thing. *Int.*: “*Si quicumque publici debiti enormitate constringitur, ut non possit hoc ipsum debitum nisi vendita propria facultate dissolvere, in eiusmodi debito hanc executores vel exactores formam servare debebunt, ut non ita rem praecipitent, ut res minore, quam valet pretio distrahatur nec tales sub quolibet conludio provideant emtores, ut et debitor proprietatem perdat et parum fiscus adquirat.*” (If any person should be overwhelmed by an enormous burden of public debt, so that he is not able to pay his debt except by the sale of his own property, in the case of such a debt, the enforcement officers and tax collectors must observe this general rule, namely, that they shall not so hasten the matter that the property will be sold for a price less than its value, nor shall they by any collusion provide such purchases that the debtor shall lose his property and the *fiscus* shall acquire too little). For more about this, see Szűcs 2005, 857–882; Sirks 1985, 297. On Justinian’s standpoint: Nov. Iust. 120, 6, 2, (544); Burdese 1951, 121.

55 C. 8, 33, 3, 4 (530): *Imperator Iustinianus, “Sed si quidem minus in pignore, plus in debito inveniatur, in hoc, quod noscitur abundare, sit creditori omnis ratio integra. Sin autem ex utraque parte quantitas aequa inveniatur, sine omni dubitatione totam rem antea pigneratam retineat. Sin autem minus quidem in debito, amplius autem in pignore fiat, tunc in hoc quod debitum excedit debitori omnia iura integra lege nostra servabuntur, creditoribus quidem feneratoris non suppositum, aliis autem debitoris creditoribus vel ipsi debitori servatum.”* (But if the pledge should be found to be worth less than the debt, the creditor shall have the right to proceed against his debtor for the deficiency. When the value of the pledge and the amount of the debt are found to be equal, there is no doubt that the creditor can retain the entire property previously pledged. If, however, the debt should amount to less than the value of the pledge, then, by Our law, the excess shall be reserved for other creditors to whom the property was not pledged, or for the debtor himself).

56 Regarding the regulation of security rights today, the rules on pledge of the late classical period (3rd century A. D.) are of utmost importance. In the 3rd century, economic crisis manifested itself in the deficit of the imperial treasury, which caused difficulties in paying salaries to military and civil officers. Since the taxes were the main sources of state incomes, to benefit the interest of the *fiscus*, the general hypothec was established on the property of taxcharged population, on the property of the persons who made a contract of public interest and also on the property of city officers, as a guarantee of fulfilment of their public obligations. The hypothec, which in the West was called *pignus* (*pignus conventum*), was frequently used not only as a security of public but also as a security of private debt. In this period appeared the problems caused by multiple pawning of debtors’ things, the problems of priority right and reimbursement of claims, and those connected with the clause of *lex commissoria*. Besides the *fiducia*, *pignus* and *hypotheca* even other ways of securities appeared: the *lex commissoria* as a clause of sale contract; a form of mixed contracts:

At the same time, the differences between the regulation of *fiducia*, *pignus* and *hypotheca* are dying out. By this reason Marcian reached to the conclusion that the *pignus* and the *hypotheca* differed only in their names.⁵⁷ This process was continued by Justinian towards a unified regulation of security rights, and the tendency is present also today, however, for other reasons.⁵⁸

Justinian's intention was to protect the interest of both parties, the creditor's and the debtor's as well. In the interest of the debtor he intended to prevent the creditor in uncontrolled acquisition of ownership on the pledged thing.

The rule of F. V. 9, which permits the creditor to acquire the ownership of the pledged thing on basis of sale (*iure empti dominium retineat*), particularly its application as a security of creditor's claim from any negotiation, without a just estimation of the value of the pledge and without the debtor's right to surplus, was not in accordance with Justinian's politics. The part of the text "*iusto pretio tunc aestimandam*" added to Marcian's text in the postclassical period points to the practice that the creditors simply took over (seized) the object of the pledge from their debtors without recovering the surplus.⁵⁹

According to F. V. 9, the creditor by purchase acquires the ownership of the pledged thing. In reality it is nothing else than the application of *lex commissoria* on the pledge. It was already practised during the government of the Severus dynasty since the rule that the creditor could only exceptionally acquire the

sale and *precarium*, sale and lease etc. A modified form of *fiducia* was also present: the sale of the pledged thing to the creditor by the debtor's right to redeem it (*pactum de retroemendo*); and to extend the existing pledge as a security for debtors' future debts (*pignus Gordianum*) became possible as well. In Roman law, regardless of the type of the pledge, its objects could be mobile or immobile things and rights as well. The strict differentiation of hypothec as a non-possessory pledge on non-movables from the *pignus* as a possessory pledge on movables is a product of the Middle Ages, and from this period the hypothec and *pignus* as specific kinds of pledges have been taken over by modern civil codes. See more in Zwölve 1887, *passim*.

57 Marcianus, D. 20, 1, 5, 1: *Inter pignus autem et hypothecam tantum nominis sonus differt.*

58 The intention to unified regulation of security interest is present today too. However, influenced by American law, the regulation of security on personal property (mobile things and rights and everything which is not considered immobile) and real property is observed separately: "The EBRD Model Law and UCC Article 9 both adopt the general view that personal property and real property should be dealt separately, and that the idea of personal property should be understood as widely as possible. The Model law provides that charged property may comprise anything capable of being owned; whether tangible or intangible, presently owned or to be acquired by the debtor in the future." One has to learn that the unified regulation of personal property, regardless of the kind of the charged thing and the kind of the security, is most understandable on basis of the knowledge of Roman law rules. The principle of 'single security interest' of article 9 US UCC (Uniform Commercial Code-Secured Transactions) is accepted by the Model law on secured transactions (MLST) of EBRD (European Bank for Reconstruction and Development 1994). According to the preamble of the law: "The Model Law is based on the idea of a single security right (a 'charge') in respect of all types of things and rights. The distinction between various traditional types of security rights, such as pledges of movables, pledges of rights, and mortgages is merged in one right."

59 Very possibly Marcian's pact was utilised already in Diocletian's time for evading the strict rules of *impetratio domini*. See Peters 1973, 166; Wigmore 1897, 28–29.

ownership on the object of the pledge belongs to this time. The creditor could manage transaction under public control in special procedure (*impetratio domini*).⁶⁰ Nevertheless, in the following period the forfeiture of debtor's things by creditors increased as in 320 A.D. Constantine edited the law which prohibited the creditors from the seizure the debtor's things contracting *lex commissoria* (C. Th. 3, 2, 1)⁶¹. It remains uncertain which agreement (*tali contractu*) the constitution speaks of. Later, this constitution was inserted into the *Codex Iustinianus* (8, 34/35/, 3) but at that time referring to the *pignus: commissoriae pignorum legis*. For the same reason (to prevent the uncontrolled ownership acquisition on the pledged thing by the creditor), the *fiducia* was also definitely removed from Justinian's law as a kind of pledge.

Justinian permits the *impetratio domini* (the creditor's claim to the emperor to acquire the ownership of the pledged thing) as a last solution, only under the conditions that the debtor is not able to pay his debt and an adequate buyer could not be found.⁶² Justinian regulated the proceeding related to this claim in details in 530 A.D.⁶³ by prescribing public control, just estimation of the pledged thing, even giving the debtor a possibility to repay the debt and take back the pledged thing within two years from the confirmation of the *impetratio domini*.⁶⁴ The ownership of the creditor would be definite only after the period of two years.

Regarding this rule, one has to pay attention to the fact that contrary to F. V. 9, according to Marcian's fragment, the creditor will become only a possessor of the pledged thing on purchaser's right "*iure emptoris possideat rem*", but not an owner. Modestin invokes this rule too in the case when one of more pledgees purchases the pledged thing. According to Modestin, the later pledgee does not purchase the pledge from the prior to become owner, but only to get a better position for the realisation of his own loan: D. 20, 5, 6 Mod. 8. reg. "*Cum posterior creditor a priore pignus emit, non tam adquirendi dominii quam servandi pignoris*

60 C. 8, 33, 1 (229): *Imperator Alexander Severus. "Dominii iure pignora possidere desiderans nomina debitorum, quos in solutione cessare dicis, exprimere et, an sollemnia peregistis, significare debuisti, dummodo scias omnia bona debitoris, qui pignori dedit, ut universa dominio tuo generaliter addicantur, impetrare te non posse."* (The Emperor Alexander to Nicola. When you desire to obtain the ownership of a property which has been pledged, the names of the debtors who you say have failed to make payment must be given, and you must state whether you have complied with the requisite formalities, for you are informed that you cannot obtain the ownership of the entire property pledged by your debtor, even though all of it was, in general terms, encumbered in your favor).

61 C. Th. 3, 2, 1: *Imp. Constant[inus] A. Ad populum. "Quoniam inter alias captiones praecipue commissoriae legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri."* (Emperor Constantine Augustus to the People. Since among other 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.)

62 Burdese 1951, 206; P. Frezza 1958, 322.

63 C. 8, 33 (34), 3, 1–6; For more details, see Burdese 1951, 206–215.

64 65 C. 8, 33, 3, 3, a–c.

suis causa intellegitur pecuniam dedisse et ideo offeri ei a debitore potest."⁶⁵ (Modestinus, Rules, Book VIII. Where a second creditor purchases a pledge from the first, he is understood not to have paid him the money for the purpose of acquiring the ownership of the same, but to hold the property in pledge for his own benefit; and therefore the money can be tendered to him by the debtor.)

This text points onto the fact that the reason of the purchase of the pledged thing by the creditor, regardless whether he bought it directly from his debtor or, in case of more creditors, from the prior creditor, is a temporary possession of the pledged thing. It is reasonable since the cause of the pledge is not the acquisition of the ownership but the security of debt payment. Hence the creditor–buyer, sooner or later, after finding the adequate buyer would sell the pledged thing. According to the classical rules and those of Justinian, the creditor has a right to vend the pledged thing to third persons (*ius vendendi*). The aspiration of the third person (*extraneus*), his reason to buy the object of the pledge is to become its owner.

Conclusion

The text preserved by F. V. 9, the supposed author of which was Papinian, was not inserted into Justinian's Digest not only because it does not represent the authentic opinion of Papinian, but primarily for the reason that it was not in conformity with Justinian's legal politics.

F. V. 9 permits the creditor, if the debtor failed to repay the debt in due time, to acquire the ownership of the pledged thing by purchase.

Justinian intended a uniform regulation of real securities, protecting the creditor's as the debtor's interests equally. He permits the creditor to purchase the pledged thing if it was estimated to a just price. However, even this way the creditor could only become the possessor and not the owner of the pledge. He prohibits the utilisation of the *lex commissoria* in case of the pledge and definitely removes the *fiducia* as a kind of pledge from his code. To the creditor he gives the possibility to acquire the ownership on the object of the pledge only exceptionally, if the debtor is not able to pay his debt and if an adequate buyer for reimbursement of the credit from the purchase price could not be found. The request for acquisition of ownership on the pledged thing should be realised by the creditor under public control on the course of the special procedure of *impetratio domini*.

Consequently, as the F. V. 9 is silent about the limit on interest rate as well as about the recovery of surplus, moreover, as it does not ask for the just estimation of the price of the pledged thing, and allows the creditor, without any control, to acquire the ownership on the object of the pledge, it was contrary to Justinian's rules, hence it could not be inserted into the Digest.

⁶⁵ According to Peters (1973, 153–154), the fragment is dogmatically incorrect.

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