CONSEQUENCES OF A PLEDGE EXTINGUISHED BY MERGER IN CLASSICAL ROMAN LAW

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1 In his last year as Senior Lecturer of Roman Law and Legal History at the University of Amsterdam Eric Pool presented a seminar on book VIII of Justinian's *Codex* in which I participated with pleasure. We briefly discussed the constitution of Alexander Severus known to us through *Codex* 8.19.1. The undogmatic approach of § 1 of this text that had as result that some legal effects were given to a pledge extinguished by merger, awakened my interest in the position of a pledge creditor who acquired ownership of the *res pignerata*. In this case of merger, to which I limit myself in this paper,[1] a mechanical application of the rule *pignus rei suae consistere non potest*[2] would have led to unjust results. These were avoided in the rescript of Alexander Severus of A.D. 230 and in two texts of Paul written shortly before Alexander's rescript, namely *Digest* 44.2.30.1 and *Digest* 36.1.61(59)*pr*. in which we find a comparable pragmatical approach. Though these texts have been interpreted separately very well in recent publications, a comparative study of the two *responsa* by Paul and of the rescript by Alexander Severus may still yield some new insights. I dedicate this discussion to Eric, a dear friend of forty years and an excellent Romanist, with whom I discussed more problems of Roman law than with any other colleague.

2 Before we are able to study the texts of Paul and Alexander Severus, we must answer the following question: What happens in Roman law when a *creditor pigneraticius* acquires ownership of the thing pledged to him, for example because he becomes heir of the debtor or as a consequence of a *datio in solutum*? As in modern legal systems,[3] the rule normally applicable is that the *confusio* provokes the extinction of the pledge. This principle is expressed in several texts.[4] The most well known of these is Ulpian *Digest* 50.17.45*pr*.[5] The foundation of this rule is that the right of pledge cannot exist side by side with ownership or, formulated differently, that this right is merged into the more

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1 In my paper I do not occupy myself with the case in which the debtor who pledged a thing belonging to him becomes heir of the pledge creditor.

2 This rule will be explained *infra* in par. 2

3 I quote as an example § 1256 Abs. 1 of the German BGB: "Das Pfandrecht erlischt wenn es mit dem Eigentum in derselben Person zusammentrifft."

4 See Jul. *D*. 13.7.29 and Ulp. *D*. 50.17.45*pr*. See on these texts, M. Zimmermann, *Der Rechtserwerb hinsichtlich eigener Sachen. Rei suae sive de re sua contractum consistere non potest*, (Berlin 2001) (hereafter Zimmermann, 2001), pp. 19-26. It is also clearly formulated at the end of Paul *D*.44.2.30.1 interpreted *infra* in par. 3.

5 This text probably started with the words "*Neque fiducia* ..." . See O. Lenel, *Palingenesia Iuris Civilis*, (Lipsiae 1889) (hereafter Lenel, *Palingenesia)*, II, nr. 901, col. 618, who proved that the context of the text was *fiducia*.

encompassing ownership and totally looses its independent character.[6] Normally the pledge creditor who becomes owner of the pledged thing has no interest in legal remedies like the *actio Serviana* or the *exceptio rei sibi ante pigneratae*. He will not wish to use them and if he does, the praetor will not admit them. However, we will see, *infra,* that in exceptional cases the former pledge creditor has an interest to invoke certain legal effects of the right of *pignus* which has been extinguished in the meantime.

3.1 We may now start our interpretation of the two texts by Paul taken by the compilers from his *Quaestiones*. Paul's *Quaestiones* were written between the death of the emperor Septimius Severus in 211 and Paul's death at the beginning of the years thirty of the third century.[7] It is a fascinating work[8] which combines acute replies on practical questions addressed to Paul with profound dogmatic reasonings. We find these two elements, too, in the two texts of Paul we are going to study. Both texts are rather complicated and extremely long. I shall focus on the problems concerning pledge and merger and shall not enter into details of the other legal problems examined by Paul. I shall only touch on these insofar as it is necessary for the understanding of the topic under consideration. To facilitate the interpretation of Paul's long texts we will divide them into parts indicated by letters.

3.2 I shall now give the text, an English translation and an exegesis of *Digest* 44.2.30.1.[9]

> *Digest* 44.2.30.1 Paulus l.14 *quaestionum.*[10] *Latinus Largus: (a) cum de hereditate inter Maevium ad quem pertinebat, et Titium, qui controversiam moverat, transigeretur, traditio rerum hereditariarum Maevio heredi a Titio facta est, in qua traditione etiam fundum ei suum proprium, quem ante multos annos avo eiusdem Maevii heredis obligaverat quemque alii postea in obligationem deduxerat, ex causa pacti tradidit. (b) his gestis posterior Titii creditor ius suum persecutus est et optinuit. (c) post hoc iudicium Maevius heres repperit in rebus avitis*

6 See about this explanation, Zimmermann, 2001, p. 35. *Cf.* also M. Kaser, *Das Römische Privatrecht* (hereafter Kaser, *RPR*, I[2]), (München 1971), p. 469.

7 See on the time of composition, Schmidt-Ott mentioned in the following note, p.15.

8 See on this work the instructive monograph by J. Schmidt-Ott, *Pauli Quaestiones*, *Eigenart und Textgeschichte einer spätklassischen Juristenschrift*, (Berlin 1993) (hereafter Schmidt-Ott, 1993).

9 See on this text, A. Wacke, "Prozessformel und Beweislast im Pfandrechtsprätendentenstreit" in *TR* 37 (1969), pp. 371-372; P. Frezza, *Le Garanzie delle Obbligazioni*, *Corso di diritto Romano*, II, *Le garanzie reali*, (Padova 1963), (hereafter Frezza, *Le Garanzie*, II), p. 295; Schmidt-Ott, 1993, pp. 121-127; P. Kieß, *Die confusio im klassischen Römischen Recht*, (Berlin 1995) (herafter Kieß, "*Confusio*" 1995), pp. 57-59; and Zimmermann, 2001, pp. 26-31. Older literature is enumerated by Schmidt-Ott, 1993 p. 122, n. 75.

10 Fragment 30 is from the context *De exceptionibus*; *cf.* Lenel, *Palingenesia*, I, nr. 1388, col. 1211. The subject of the fragment is clearly the *exceptio rei iudicatae vel in iudicium deductae*.

chirographum eiusdem Titii ante multos annos conscriptum, per quod apparuit eum fundum, qui in causam transactionis venerat, etiam avo suo ab eodem Titio fuisse obligatum. (d) cum ergo constet prius avo Maevii heredis in obligationem eundem fundum datum, de quo Maevius superatus est, quaero, an ius avi sui, quod tunc cum de eodem fundo ageretur, ignorabat, nulla exceptione opposita exsequi possit. (e) respondi: si de proprietate fundi litigatum[11] *et secundum actorem pronuntiatum fuisset, diceremus, petenti ei, qui in priore iudicio victus est, obstaturum rei iudicatae exceptionem, quoniam de eius quoque iure quaesitum videtur, cum actor petitionem implet. quod si possessor absolutus amissa possessione eundem ab eodem, qui prius non obtinuit, peteret, non obest ei exceptio: nihil enim in suo iudicio de iure eius statutum videtur. (f) cum autem pigneraticia actum est adversus priorem creditorem, potest fieri, ut de iure possessoris non est quaesitum, quia non, ut in proprietatis quaestione quod meum est alterius non est, ita in obligatione utique consequens est, ut non sit alii obligatum, quod hic probabit sibi teneri. et probabilius dicitur non obstare exceptionem, quoniam de iure possessoris quaesitum non est, sed de sola obligatione. (g) in proposita autem quaestione magis me illud movet, numquid pignoris ius extinctum sit dominio adquisito: neque enim potest pignus perseverare domino constituto creditore. actio tamen pigneraticia competit: verum est enim et pigneri datam et satisfactum non esse, quare puto non obstare rei iudicatae exceptionem.*

Latinus Largus wrote the following: (a) As a settlement about an inheritance was reached between Maevius, to whom it belonged, and Titius, who had started a lawsuit with regard to it, a transfer of things of the inheritance was made to Maevius, the heir, by Titius, and in this transfer to him he included at the basis of the agreement a plot of land belonging to him [Titius], which he had mortgaged many years before to the grandfather of the said heir Maevius and which he had mortgaged afterwards to someone else. (b) After this happened, the second creditor of Titius pursued his right and won the suit. (c) After this judgment the heir Maevius found among the things of his grandfather a private deed of the said Titius drawn up many years before, from which it turned out that the piece of land which had been an object of the settlement, had also been mortgaged to his [Maevius'] grandfather by the same Titius. (d) Since, therefore, it is certain that the said piece of land, with regard to

11 I prefer the reading *litigatum* of the Bolognese manuscripts to *litigatur* of the *Codex*

which Maevius had been defeated, was first mortgaged to Maevius' grandfather, I ask whether he can claim, without the risk of an *exceptio* being opposed, the right of his grandfather, of which he did not know at the time when the lawsuit about the said piece of land took place. (e) My reply was: If the suit concerned the ownership of the piece of land and if the *pronuntiatio* had been pronounced in favour of the plaintiff, we would say that when the man who was defeated in the first lawsuit would claim, the *exceptio rei iudicatae* would be opposed [with success] to him, because also his right is considered to have been examined [by the judge in the first lawsuit], when he establishes his claim. But if the possessor who, after being absolved, had lost the possession, claimed the said piece of land from the same person who did not win in the first suit, the *exceptio* would not be applicable against him, for nothing is considered to have been decided about his right in the suit which had been favourable to him. (f) When the *actio Serviana* was brought however against the first [mortgage] creditor, it can happen that the right of the possessor was not examined [by the judge in the first lawsuit], because as in a question of ownership that what is mine is not belonging to another, so it follows under no circumstances with regard to a pledge, that what he will prove here to be pledged to him was not pledged to another. And it is more proper that the *exceptio* [*rei iudicatae*] is not applicable, since the right of the possessor was not examined [by the former judge], but only the question whether the thing had been pledged [by the plaintiff]. (g) With regard to the proposed question this makes me more hesitant whether the right of pledge was not extinguished as a consequence of the fact that the creditor obtained ownership [of the pledged thing]; the pledge can indeed not continue when the creditor was made owner. The *actio Serviana* however can be brought, for it is true that a pledge was constituted on the thing and that there had not been satisfaction. And therefore I am of the opinion that [against the *actio Serviana* instituted by Maevius] the *exceptio rei iudicatae* cannot be opposed.[12]

Florentinus, which makes the construction of the sentence irregular.

12 For this translation I used Ben Beinart's excellent translation in *The Digest of Justinian*, English translation ed. by Alan Watson, (Philadelphia 1985). There are, however, several differences between our translations. Essential is the difference in part (e) of the passage "*si ... secundum actorem pronuntiatum fuisset*". I translate: "If the *pronuntiatio* had been pronounced in favour of the [first] plaintiff." Beinart's translation "and the second plaintiff was pronounced owner" is not correct.

3.3 This text, which gives proof – as we will see – of the excellent dogmatic and practical qualities of its author,[13] in my opinion hardly suffered from later interventions. I have to point out only one interpolation. As I showed in a paper published more than twenty years ago, the *exceptio rei iudicatae vel in iudicium deductae* was proposed in the praetorian edict and was always used in concrete cases as a unity including both alternatives of the consuming effects of *res iudicata* and *litis contestatio.*[14] Paul must have spoken – as Gaius always does in his *Institutes* – of the *exceptio rei iudicatae vel in iudicium deductae*. Justinian abolished the extinguishing effect of *litis contestatio*; the compilers only conserved the *exceptio rei iudicatae* and everywhere eliminated the words *vel in iudicium deductae.*[15] Because in cases in which there was an earlier valid sentence only the alternative of the *res iudicata* in the exception was relevant,[16] and for reasons of simplicity, I will speak in this paper only of the *exceptio rei iudicatae.*

3.4 I now come to my interpretation of Paul's text and I first have to explain the role of Latinus Largus. In four texts from Paul's *Quaestiones* incorporated in the *Digest*[17] one finds legal questions addressed to Paul by someone called Latinus Largus. There is no other information available about this man, but one may assume that he was a legal practitioner approached for legal advice by Maevius, the heir and creditor in our text. Because the problem is rather complicated, Largus on his part addressed himself to Paul, who gave him the reply we find in this fragment of his *Quaestiones.*

3.5 In part (a) of the text, Latinus Largus gives a written summary of the case. There was a dispute between Maevius and Titius about the succession of a person not mentioned in the text. Titius had started a lawsuit, instituting the *hereditatis petitio* against Maevius, of whom Largus states several times in the text that he was the heir. Before a judgment had been given the parties came to a settlement (*transactio*). Titius gave up the claim of the inheritance and Maevius probably promised not to claim from Titius certain things which, according to him, belonged to the inheritance. Titius transferred to Maevius several things of the

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13 This is in conformity with the view of modern Romanists about this late classical jurist. See e.g. C.A. Maschi, "La conclusione della giurisprudenza classica all' età dei Severi. Iulius Paulus", in *ANRW* II, 15, (Berlin-New-York 1976), pp. 688-689 who writes: "Paolo è collocato tra gli esponenti della giurisprudenza classica per indipendenza di pensiero, che si rivela nel sostenere i propri convincimenti anche contro le decisioni imperiali e contro l'avviso di Papiniano, prefetto del pretore, per acuta valutazione critica dei suoi predecessori, per inclinazione alla costruzione dogmatica."

14 See H. Ankum, "Deux problèmes relatifs à l'*exceptio rei iudicatae vel in iudicium deductae* dans la procédure formulaire du droit romain classique", in *Mnèmè G.A. Petropoulos*, (Athènes 1984) (hereafter Ankum, 1984), pp. 189-194. This view has generally been accepted in later literature; *cf.* M. Kaser - K. Hackl, *Das Römische Zivilprozeßrecht* (hereafter Kaser-Hackl, *ZP*), (München 1996), p. 302.

15 See Kaser-Hackl, *ZP*, p. 615.

16 See Ankum, 1984, pp. 182-189.

17 See our text, *D*. 21.1.56, *D*.31.83 and *D*.40.8.9.

hereditas as well as a plot of land belonging to him. Many years earlier Titius had created a mortgage (a *pignus* without possession of the creditor) on the land in favour of the grandfather of Maevius, the heir of the testator. Schmidt-Ott assumes[18] that Maevius was his grandfather's heir. Reading the text, one gets the impression that there is a relation with the succession which is the issue of Largus' report. Therefore, I adhere to the supposition brought forward by Franciscus Accursius in his *Casus* of *Digest* 44.2.30.1 that Maevius had become the heir of his father, Sempronius, so-called by the son of the author of the *Glossa ordinaria,* who was the son of Maevius' grandfather. In this way Maevius succeeded to his father who had been the heir of Maevius' grandfather and acquired the *ius pignoris* that Titius had created for his (Maevius') grandfather. Titius had afterwards (i.e. after the creation of a *pignus obligatum* in favour of Maevius' grandfather) created a second mortgage on the same *fundus*.

3.6 A new fact of which Largus informs Paul (and us), is that the second mortgage creditor (C2) brought the *actio Serviana* against Maevius who was not aware of the right of *pignus* acquired by him as heir of Sempronius. He therefore did not oppose the *exceptio rei sibi ante pigneratae* and C2 consequently won the suit.

3.7 After the judgment in that lawsuit had been pronounced, Maevius found among the things of his grandfather, which he had obtained as heir of his father Sempronius, a *chirographum* originating from Titius in which, many years before, the latter had declared to mortgage to Maevius' grandfather a piece of land. This land had been transferred recently by Titius to Maevius in terms of the settlement. Largus gives this information at the end of part (c) of the text.

3.8 It is now sure that Maevius mortgaged the *fundus* to Maevius' grandfather before he created a *pignus obligatum* to C2 and that Maevius lost the suit in which C2 brought the *actio Serviana* against him, because as a consequence of his ignorance of this right of pledge, he did not oppose the *exceptio rei sibi*[19] *ante pigneratae*. Therefore Largus, who is seemingly unaware of the problem of the merger of the pledge following on the *traditio* of the pledged *fundus* to Maevius, now asks Paul in part (d) whether Maevius may institute the *actio Serviana* against C2 without having to fear that the *exceptio rei iudicatae* would be raised against him.

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18 Schmidt-Ott, 1993, p. 123: "Offenbar hatte Maevius seinen Großvater beerbt ... ."

19 Here the *formula* must have had a wording according to which the *res* had earlier not been pawned to him, but to his grandfather whose *pignus* he acquired when he succeeded to his father Sempronius.

3.9 Paul starts his reply in part (e) of the text with a very instructive passage about the effect of *res iudicata*, where the first lawsuit had been on ownership and the second concerned *pignus*. Paul's students must have noted every word of their master's opinion. Paul first discusses two hypothetical cases in which the issue of the first lawsuit was ownership. I call them cases 1a) and 1b). In case 1a) the defendant in the second suit can oppose the *exceptio rei iudicatae,* while in case 1b) he cannot. These cases are the following: The plaintiff, A, brought a *rei vindicatio* against the defendant, B, and the judge decided in his *pronuntiatio*[20] that A was the owner and B, who in this way prevented being condemned to the payment of a sum of money, handed over to A the thing claimed. When afterwards B, who lost the suit, instituted the *rei vindicatio* against A, the latter could raise the *exceptio rei iudicatae* (case 1a)). When A lost his case concerning ownership of a thing and, some time after the procedure, B lost possession of the thing and claims it from A, who is now the possessor, the *exceptio rei iudicatae* cannot be raised against the *rei vindicatio* since there is no judgment about B's right which was not examined in the first lawsuit (case 1b)).

3.10 Hereafter, in part (f) of the text, where Paul discusses the case in which the first suit was about *pignus*, he comes closer to replying to Largus' question as in reality, C2 has brought the *actio Serviana* (here, as frequently, called *actio pigneraticia*) against Maevius. In contrast to a suit on ownership where the decision that A is the owner implies that B cannot be *dominus,* in a suit between two mortgage creditors (*in casu* C2 and Maevius), the representations of the parties do not exclude each other and the judgment that the plaintiff is pledge creditor leaves open the possibility that the defendant is also mortgage creditor. In the lawsuit between C2 and Maevius, the point of the priority had not been examined by the judge, since the *exceptio rei sibi ante pigneratae* had not been opposed by Maevius, who at the time of that procedure was not aware of the right of *pignus* acquired by him as a consequence of hereditary succession. A *res iudicata* on the point of the priority of the mortgage of one of the parties did not exist. Therefore, when Maevius brought the *actio Serviana* against C2, the *exceptio rei iudicatae* could not be raised in this new lawsuit. This reasoning was according to Schmidt-Ott[21] "nicht entscheidend" and even "irreführend". I do not agree with him on this. In my opinion Paul's statement that Maevius' *actio Serviana* could not be neutralised by an *exceptio rei iudicatae* is an essential part

20 This is the technical term for the intermediate judgment by which the judge being convinced that the plaintiff is the owner, gives an authorization to the defendant to transfer the claimed thing and the fruits to the plaintiff (*iussum restituendi*); if he does so, the defendant does not have to pay the sum of the *litis aestimatio*. See Kaser-Hackl, *ZP*, pp. 337-338.

21 Schmidt-Ott, 1993, pp. 121 and 127.

of the jurist's reply. A preliminary point had however to be decided first. This point had been forgotten by Largus.

3.11 The issue discussed by Paul in part (g) of the text is the topic that interests me in particular. The preliminary question which has to be answered before the problem of the possibility or impossibility of the *exceptio rei iudicatae* may be raised, is whether Maevius is "überhaupt" entitled to bring the *actio Serviana*. Largus apparently did not consider the extinction of Maevius' right of pledge by means of merger at the moment the pledged land was delivered to him by Titius. Paul is evidently aware of this problem. He writes that he is hesitant as to the correctness of his statement that no *exceptio rei iudicatae* lies against the *actio Serviana* of Maevius. The ground of his hesitation is the principle of Roman law that the right of *pignus* is extinguished after the acquisition of *dominium* by the pledge creditor. He is very explicit when he writes that "the pledge cannot continue after the creditor has become *dominus*".

Before we study how Paul overcomes the unjust effect of this dogmatically exact reasoning, we must say something about the meaning of the words *dominus* and *dominium* in this context. I hope to discuss elsewhere[22] the opinions recently defended by Schmidt-Ott and M. Zimmermann[23] which differ from mine. Here I wish to call to mind one of the results of the study on the meaning of the words *in bonis alicuius esse*/*in bonis habere* written by Eric Pool, Marjolijn van Gessel and myself. We established that in the classical law since Julian, the words *dominus* and *dominium* were also used to indicate the position of someone who was either full[24] or praetorian owner of a thing.[25] In our case a *fundus Italicus* had been the object of the *traditio* from Titius to Maevius. The latter had acquired praetorian ownership and if the period of two years had already expired, also civil ownership. With regard to the merger, this was not of any importance. The point has not been discussed by Romanists before, but I suppose that no author will deny that the extinction of the right of *pignus* was also caused by the fact that the pledge creditor acquired praetorian ownership.

3.12 It is not surprising that Paul refused to accept the unjust consequence of a mechanical application of the merger-principle. It would have been strange that Maevius who acquired the most encompassing right of *dominium* on the pledged

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22 I hope to come back in more detail on the two texts of Paul *D*. 44.2.30.1 and I. 36.1.61*pr*. in the forthcoming *Festschrift für Herbert Hausmaninger*, (Vienna 2006).

23 Schmidt-Ott, 1993, p. 125 and Zimmermann, 2001, p. 29.

24 I mean a person who was at the same time civil and praetorian owner.

25 See H. Ankum, E. Pool and M. van Gessel-de Roo, "Die verschiedenen Bedeutungen des Ausdrucks *in bonis alicuius esse/in bonis habere* im klassischen römischen Recht", in *SZ* 104 (1987) (hereafter Ankum, Pool and Van Gessel-de Roo, *SZ*, 104 (1987)) pp. 417-418).

fundus, would thereby come to be in a worse position towards C2 who became C1 as a result of the merger. Therefore Paul gave Maevius the *actio Serviana* against C2, making use of the wording of the *formula* of that action. In the *formula* of the pledge action it was written that for the condemnation of the defendant it had to appear[26] 1) that a right of pledge for a debt had been given to the plaintiff,[27] 2) that, at the moment of the creation of the pledge, the thing was *in bonis* of the debtor,[28] and 3) that a *solutio* or a *satisfactio*[29] had not taken place. Paul only mentioned the first and third conditions and he focused on the satisfaction, since it was absolutely sure that a payment had not occurred or since payment was, for him, included in the term *satisfactio*. In this practical way Paul comes to the satisfactory result that Maevius may bring the *actio Serviana* against C2 even though his right of pledge was extinguished by merger.

At the end of the text he comes back to the point of the *exceptio rei iudicatae*. Now that he decided in part (g) the preliminary point that Maevius had the right to institute the *actio Serviana,* he can repeat that the *exceptio rei iudicatae* cannot be raised against that action. Therefore he had already given an argument in part (f).

In a typically pragmatical and procedural way Paul came to a just result.

4.1 The second text in which Paul examines a case of *pignus* and *confusio* is *Digest* 36.1.61*pr*. Like nearly all texts from the jurist's *Quaestiones*, it is very long. The situation is even more complicated than in *Digest* 44.2.30.1. We must therefore be brief in our commentary and focus on the problem of the extinction of the pledge. The main difference between the texts is that in *Digest* 36.1.61*pr*. the debt was extinguished by merger, while in *Digest* 44.2.30.1 it continued to exist without being discharged. Paul had to find a solution favourable to the creditor who had to become heir of his debtor briefly before he was compelled to transfer the inheritance to the fideicommissary.

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26 See the reconstruction of this *formula* by Lenel, *Das Edictum Perpetuum*[3], (Leipzig 1927) (hereafter Lenel, *EP*[3]), (R. Aalen 1956), p. 494.

27 In our case the *pignus* had been constituted in favour of a legal predecessor of the plaintiff.

28 See on the meaning of these words, Ankum, Pool and Van Gessel-de Roo, *SZ* 104 (1987) pp. 369-414. This point was not in discussion here and was therefore not mentioned by Paul.

29 This occurred when a *fideiussor* or another pledge in stead of the *pignus* mentioned in the *formula* had been given; see Kaser, *RPR*, I[2], p. 468.

4.2 I shall now quote the text and give an English translation.

Digest 36.1.61(59)*pr*. Paulus l.4 *quaestionum.*[30] (a) *Debitor sub pignore creditorem heredem instituit eumque rogavit restituere hereditatem filiae suae, id est testatoris: cum nollet adire ut suspectam, coactus iussu praetoris adiit et restituit: cum emptorem pignoris non inveniret, desiderabat permitti sibi iure dominii id possidere. (b) respondi: aditione quidem hereditatis confusa obligatio est: videamus autem ne et pignus liberatum sit sublata [naturali] obligatione. atquin sive possidet creditor actor idemque heres rem sive non possidet, videamus de effectu rei. (c) et si possidet, nulla actione a fideicommissario conveniri potest, neque pigneraticia, quoniam hereditaria est actio, neque fideicommissum, quasi minus restituerit, recte petetur: quod eveniret, si nullum pignus intercessisset; possidet enim eam rem quasi creditor. (d) sed et si fideicommissarius rem teneat, et hic Serviana actio tenebit: verum est enim non esse solutam pecuniam, quemadmodum dicimus, cum amissa est actio propter exceptionem. igitur non tantum retentio, sed etiam petitio pignoris nomine competit et solutum non repetetur, remanet ergo propter pignus naturalis obligatio ...*"[31]

(a) Someone who had a debt [of money] secured by a pledge instituted his creditor heir and asked him to transfer the inheritance to his daughter, i.e. to the daughter of the testator. Since he was not willing to accept it arguing that it was suspect of insolvency, he accepted by order of the praetor and transferred it [to the said daughter]. As he did not find a buyer for the pledge, he wished to get permission to possess it as an owner. (b) My reply was the following: as a consequence of the acceptance of the inheritance the obligation is certainly extinguished by merger. Let us see now whether as a result of the extinction of the obligation the pledge is not freed too. Definitively we will have to examine how the case ends if the creditor, plaintiff and heir possesses the thing or not. (c) And if he is in possession, he cannot be sued with the [personal] *actio pigneraticia*, because this is an action belonging to the inheritance. Neither can a claim based on the *fideicommissum* be brought against him in conformity with the law, with the argument that he transferred less than he had to, what could happen had there been no

30 See on this text, D. Daube, "Sale of inheritance and merger of rights", in *SZ* 74 (1957), (hereafter Daube, *SZ* 74 (1957)) pp. 295-298; Frezza, *Le Garanzie,* II, pp. 104-111; and Kieß, "*Confusio*" 1995*,* pp. 164-169 who mentions older literature; see p. 164, n. 54.

31 We leave aside and hope to study elsewhere (see *supra*, n. 22) the long last sentence of the text; a serious examination of this sentence, which is not relevant for the topic of this paper, would take too much space here.

> pledge, for he is in possession of the thing as creditor. (d) But also if it be the fideicommissary who possesses, the *actio Serviana* will lie even here, for it is true that the [owed] money was not paid, just as we say [that it is unpaid] when the action was lost because of an exception. Therefore the pledge may not only be retained, but it may also be claimed and what was paid cannot be recovered back. Consequently a natural obligation remains because of the pledge ...[32]

4.3 This text of Paul is in my opinion free from interpolations. A strong argument for this view is the fact that according to Justinian's law there may not remain any *damnum* for the creditor who is compelled to become heir of his debtor and to transfer the inheritance to a fideicommissary.[33] Therefore, he may not loose his claim as a result of the acceptance of the inheritance to which he was compelled. I agree with Daube[34] who writes that in Justinian's law merged rights are fully subsumed under the Trebellian regulation, in which the actions of and against the heir are given to the fideicommissary, and according to whom "the fideicommissary now counts as heir, the principal debt is enforceable, and so, of course, is a pledge". We will see that our text is totally different on this point and this is a strong indication of its classicality.

I only admit a gloss in part (b). There it is asked whether, as a consequence of the acceptance of the inheritance by the heir, the pledge that secured the debt of the testator towards the heir was released *sublata naturali obligatione*. As we have no indication in the sources that the testator's debt towards the creditor-heir was ever considered as an *obligatio naturalis*, I suppose that a reader who found at the end of part (d) of the text the words *remanet ergo propter pignus naturalis obligatio* wrongly added the word *naturali* in part (b).

4.4 We now turn to an interpretation of Paul's text, touching only superficially on the problems concerning the *fideicommissum hereditatis* and paying attention mainly to the questions of the extinction of the debt and the pledge.

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32 Of course we made use of John Barton's translation in *The Digest of Justinian*, English translation ed. by A. Watson, vol. 2, (Philadelphia 1985); there are however many differences.

33 See *Inst*. 2.23.7 where we read in Tony Thomas' translation: "We have ... transposed to the Trebellian (senatusconsult) the distinctive feature of the Pegasian senatusconsult whereby, when the instituted heir refused to accept the inheritance, he was, at the instigation of the beneficiary, set under the obligation of transferring the estate to the latter, to and against whom all actions pass, it is accordingly under the Trebellian alone, that the heir is now under an obligation, if, when he be unwilling, the beneficiary requires him to enter on the estate, but with neither benefit nor detriment inhering in the heir." See *The Institutes of Justinian*, Text, Translation and Commentary by J.A.C. Thomas, (Cape Town 1975), p. 156.

34 Daube, *SZ* 74 (1957), p. 298.

Here the case is expounded by Paul himself in part (a) of the text. A debtor, for example someone who borrowed a sum of money, created a right of pledge as a surety for his debt in favour of his creditor. It is likely that it was a *pignus datum*, for from the end of this part we can conclude that the creditor was in possession of the pledged thing. The debtor (D) made a will and instituted the said creditor (C) as his heir with the request to transfer the inheritance to his daughter as fideicommissary (F). C did not want to accept the inheritance and affirmed that the estate was suspected of being insolvent.[35] On the basis of the *senatusconsultum Pegasianum* promulgated between A.D. 69 and 79, the *praetor fideicommissarius* compelled the heir to accept the inheritance and to transfer it to the fideicommissary at the latter's request.[36] The heir performed the *restitutio hereditatis* to the *fideicommissaria,* by which the actions belonging to the inheritance were transferred to and against the fideicommissary as if the norms of the Trebellian senatusconsult were applied.[37] C, who apparently was in possession of the pledge, wanted to ask the imperial chancery for an *impetratio dominii*, that is permission for the continuation of his possession as an owner.[38] Modern authors are of the opinion that he had already sent a request to the chancery. It seems more plausible to me that he first addressed himself to Paul wishing to know whether such a request might be successful.

4.5 Paul starts his *responsum* in part (b) of the text. He immediately signals a problem: As a consequence of the acceptance of the inheritance by C, the obligation existing between D and the latter was extinguished by merger. Even at the beginning of the third century A.D., Paul was not able to change the principle of the *ius civile* that the obligation was extinguished by *confusio* at the very moment a creditor accepted the inheritance of his debtor. The only actions that could be transferred to the fideicommissary after the praetorian *compulsio* of the acceptance of the inheritance by the heir, were actions existing at the moment of the *restitutio hereditatis* and at that moment the merged action no longer existed.[39] Now for Paul, the main question is whether the pledge is released as a consequence of the extinction of the obligation. Although modern authors do not pay much attention to it, it differs substantially from Paul's text in *Digest* 44.2.30.1.

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35 The heir who had to transfer the inheritance to the fideicommissary could limit himself to allege this without having to prove it; *cf*. U. Manthe, *Das senatus consultum Pegasianum*, (Berlin 1989) (hereafter Manthe, *Das senatus consultum Pegasianum*), p. 85.

36 See Gaius, *Inst.* 2.258, Ulpian, *Reg*. 25.16 and *Inst*. 2.23.6. For an excellent discussion of the *compulsio* and its consequences, see Manthe, *Das senatus consultum Pegasianum*, pp. 85-101.

37 See Gaius, *Inst*. 2.258.

38 See on *impetratio dominii*, Frezza, *Le Garanzie*, II, pp.230-233 and Kaser, *RPR*, I^2, p. 471.

39 See on this point, Daube *SZ* 74 (1957), pp. 295-298 and P. Voci, *Diritto Ereditario Romano*, II^2, (Milano 1963), p. 362. In Justinian's law the debt can now be enforced as if the fideicommissary were the heir; *cf*. Daube, *l.c.*, p. 298.

There Paul's question was whether the pledge was extinguished by the merger, to which the jurist replied in the affirmative. In *Digest* 36.1.61*pr*. the question is whether the pledged thing is liberated as a consequence of the extinction of the obligation for which it was a security. One could wonder why in the whole text Paul devotes no word to the *confusio pignoris*. I could not find a solution to this problem in the works of modern Romanists. I suppose that in this case, in which the temporary ownership of the charged heir (C) was very brief, Paul must have been of the opinion that C's right of pledge was only dormant during that very short period and that it became active again after the transfer of the estate to the beneficiary.[40] It is however striking that he, who discussed seriously the problem of the merger of the right of pledge in the case of acquisition of ownership of the pledged thing by the *traditio* to the creditor in *Digest* 44.2.30.1, does not even mention it here.

4.6 The question raised in part (b) of Paul's text *Digest* 36.1.61*pr*. is a different one; it concerns what we call in modern law the accessory character of the right of *pignus*. His questioning words "*ne et pignus liberatum sit sublata obligatione*" are followed by an examination of the legal situation in two differing cases. We already saw that C had possession of the pledge. For didactical reasons Paul also studies what the law is when the heir (C) is not in possession of the pledge.

4.7 In part (c) Paul examines the situation which is in all probability real, that C is in possession. In that case F has no action against him. She has no personal pledge action since this action is an *actio hereditaria*, an action belonging to the heir. And, as we know from texts such as Gaius, *Institutes* 2.258, actions against the heir after the compulsory transfer of the inheritance to the fideicommissary have to be addressed against the latter.[41] The *actio pigneraticia in personam* can therefore not be brought against the heir. Neither can F bring an action based on the *fideicommissum* against him with the argument that he had transferred to F less than he ought to have, since he possessed the pledge as creditor.

4.8 In part (d) Paul occupies himself with the situation which is in all likelihood imaginary, that F is in possession of the pledged thing. In this case the jurist grants C the *actio Serviana* with the reasoning that we know from *Digest* 44.2.30.1: The action lies because it is true that the owed money was not paid, as

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40 Here in the field of praetorian law the praetor can consider the creditor who transferred the inheritance to the fideicommissary as acquiring again the right of pledge which has not to be recreated again. The situation was different as to the extinction of servitudes when the dominant and the servient tenements came in the hand of one person; if the owner sold the dominant land afterwards, the servitude had to be created anew; see Daube, *SZ* 74 (1957), pp. 269-275 and Kaser, *RPR*, I[2], p. 446.

is a condition for the condemnation of the defendant in the *formula* of the Servian action.[42] Therefore, Paul concludes, C may keep the pledge if he is in possession and may claim it if F is in possession. And if F has already paid the sum owed by the deceased, she cannot claim it back with a *condictio indebiti*, since there would otherwise be a "circuit d'actions" which always has to be avoided. If C had to pay back the received money, he could sell the pledge after having claimed it, if necessary, with the *actio Serviana*.

Here Paul expresses the original view that because of the possibility of the *retentio pignoris* and of the *actio Serviana* the obligation secured by this pledge may be considered as a *obligatio naturalis.*[43]

The conclusion of Paul's reasoning is again satisfactory. Though the obligation is extinguished by merger and the existence of the *pignus* is therefore doubtful, C may keep the pledged thing if he is in possession and, if not, he may claim it with the *actio Serviana.*[44] Finally, if he cannot find a buyer, he may address himself to the imperial chancery and ask for an *impetratio dominii.* This is a reasonable result, for it would have been unacceptable if the creditor (who was compelled by the praetor to become heir for a short moment) would as a result have lost his claim and his pledge.

5.1 I now come to the rescript of the emperor Alexander Severus from A.D. 230, *Codex* 8.19.1.1, which brought me to the study of this subject. Justinian's compilers put it in title 8.19 of the *Codex* entitled: *Si antiquior creditor pignus vendiderit.*[45] Only § 1 is relevant for the theme "*pignus* and *confusio*", but it seems instructive to study the whole rescript.

Tony Honoré convincingly argues that the imperial rescripts of the period A.D. 195-305, if they were of any importance, were composed by the *magister libellorum* (or the *a libellis)*, the secretary for petitions.[46] Our rescript dating from

41 *Cf.* Manthe, *Das senatus consultum Pegasianum*, p. 85.

42 Paul writes that the same thing holds true, *viz.* that the *actio Serviana* may be brought when the debtor could raise an *exceptio temporis* against the principal action of the creditor; see on this exception, also called *exceptio annalis*, since the period of 1 year in which the action had to be instituted had passed, Lenel, *EP*[3], p. 505.

43 Mostly the inverse reasoning was given, *viz.* that, if an obligation could be considered as an *obligatio naturalis*, the pledge created to secure this obligation could be considered as valid.

44 A solution comparable to that proposed by Paul was accepted shortly later, *viz.* in 240, by Gordian's chancery or, more exactly, by his *magister libellorum*, who was in function from March 238 to June 241 (see T. Honoré *Emperors and Lawyers*[2], (Oxford 1994) (hereafter Honoré, *Emperors and Lawyers*), p. 73) in *C.* 8.30.2: *Intellegere debes vincula pignoris durare personali actione submota*.

45 As we will see, the case indicated by this title is the case examined in the *principium* of our text.

46 *Cf.* Honoré, *Emperors and Lawyers*, pp.1-32.

the 11th of May 230 is probably worded, as Honoré[47] indicates, by an unknown secretary for petitions (nr. 11), whose tenure was from January 230 to September 234. Honoré[48] characterises him as an "accomplished writer who happily combines elegance and legal accuracy". We will see that this positive judgment of the learned Romanist from Oxford is fully applicable to the constitution we are about to study.

5.2 *Codex* 8.19(20).1. Imp. Alexander A. Athenioni.[49] *pr. Si vendidit is qui ante pignus accepit, persecutio tibi hypothecaria superesse non potest. 1. Cum autem debitor ipsi priori creditori eadem pignora in solutum dederit vel vendiderit, non magis tibi persecutio adempta est, quam si aliis easdem res debitor venum dedisset: sed ita persequens res obligatas audieris si, quod eidem possessori propter praecedentis contractus auctoritatem debitum est, obtuleris.*

pr. When someone who received a mortgage before you, sold the mortgaged thing, the right to claim it [with the *actio Serviana*] does not remain for you. 1. When the debtor gave the same mortgaged things as a substituted performance or sold them to the first creditor, you are deprived no more of the right to claim them than if the debtor would have sold the said things to third persons. But when you claim the mortgaged things, you will [only] be heard if you offer to the mentioned possessor what is due to him on the basis of the force of the preceding contract.

5.3 Two cases of sale of mortgaged things, namely by the first mortgage creditor (C1) to a buyer (B) and by the debtor (D) to the first creditor (C1), are examined in the rescript. If this was a fragment of a work like Paul's *Quaestiones*, we may have thought that the jurist discussed the two different cases for didactic reasons. But in rescripts the imperial chancery only replies to questions really asked. Here one may suppose that the question was not clearly formulated or that Athenion, the second mortgage creditor, who only knew that the mortgaged thing had been sold but did not know by whom, had addressed himself to the chancery wishing to receive information about his legal position in both possible cases.

47 Honoré, *Emperors and Lawyers*, p. 73.
48 Honoré, *Emperors and Lawyers*, p. 111.
49 See on this text, H. Siber, *Römisches Recht*, II, (Berlin 1928) (hereafter Siber, *Römisches Recht,* II), pp. 127-128; Frezza, *Le Garanzie*, II, pp. 296-297; Kaser, *RPR*, I^2, p. 469; F. Peters, Der Erwerb des Pfandes durch den Pfandgläubiger im klassischen und im nachklassischen Recht, in *Studien im römischen Recht Max Kaser gewidmet*, D. Medicus and H.H. Seiler (eds.), (Berlin 1973), pp. 150-153 and Zimmermann, 2001, pp. 32-34.

5.4 In the *principium* of the text the *a libellis* briefly writes that if the first mortgage creditor (C1) sold (and delivered) the mortgaged thing, the sold thing is freed from the right of *pignus* and the second mortgage creditor Athenion is no longer entitled to institute the *actio Serviana* against the buyer.[50] This is in conformity with a text of Marcian, *Digest* 20.4.12.7, and with later imperial constitutions.[51] I add that – as Kaser made plausible[52] – the only thing Athenion (C2) can do is to sue C1 and to claim from him a possible *superfluum* with an adapted *actio Serviana in personam*.[53]

5.5 The only case that is important for our present paper is the one with regard to which the secretary of petitions gives to Athenion (C2) an explanation about his legal position in § 1 of our text: With a *datio in solutum* D gave the *res pignerata(e)* to C1 or sold it (or them)[54] to C1. In Paul's time a legal consequence of the *datio in solutum* was the extinction of D's debt towards C1.[55] Of course, in case of a sale (and delivery) of the mortgaged thing to C1, the latter did not pay, but the parties agreed on the compensation of price and debt with the same result as to D's debt. In both cases the acquisition of ownership by C1 further led to the extinction by *confusio* of his right of *pignus.* To make clear the effect of these transactions on Athenion's (C2's) right, the rescript compares these cases with the less complicated case of the sale (and delivery) of a mortgaged thing by D to a third person. As in that case,[56] C2 retains the *actio Serviana*; in both cases he may sue the buyer with that action. The more problematical of these two cases is that in which C1 is the buyer. The author of the rescript writes that also in this case C2 (Athenion) did not loose the Servian action against C1. This is not surprising. What is surprising at first sight, is that the judge will only grant this action if C2 pays to C1 the sum of C1's claim *vis-à-vis* D. According to a strict dogmatic reasoning, as a consequence of the extinction of C1's mortgage, C2 obtained the position of first mortgage creditor and this would have the result that he could claim the pledge from C1 without paying him anything. This effect, however, would be absurd, since C1, acquiring the most encompassing right of

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50 After the sale of the *pignus* by C1 the second mortgage creditor lost his *ius offerendi*; see M. Kaser, "Über mehrfache Verpfändung im römischen Recht", in *Studi Grosso*, I, Torino 1968 = Kaser, *Ausgewählte Schriften*, II, (Napoli 1976) (hereafter Kaser "Über mehrfache Verpfändung") p. 54 = p. 186 n. 88 with texts.

51 See Val. and Gall. *C.* 8.17.6 (260 A.D.), Diocl. and Maxim. *C.* 4.10.6 and *C.* 4.10.7.1 (both 293 A.D.) and *C.* 8.29.5 (294 A.D.).

52 See Kaser, "Über mehrfache Verpfändung", pp. 72-76 = pp. 214-216.

53 I wish to point out that also in this case an action may be brought by the second mortgage creditor based on an extinguished right of *pignus*.

54 Apparently it was not clear from the request whether one or several mortgaged things had been sold or given *in solutum*.

55 According to the Sabinians, whose opinion prevailed, the debt extinguished *ipso iure* as a result of the *datio in solutum*; *cf.* Kaser, *RPR*, I[2], p. 638.

56 When the debtor sold a thing that he had mortgaged to C1 and afterwards to C2, the latter can claim the thing with the *actio Serviana* from the buyer, but he has no *ius vendendi*; this is reserved to C1. *Cf.* Kaser, "Über mehrfache Verpfändung", p. 45 = p. 187.

ownership in stead of his right of *pignus,* would be in a worse position *vis-à-vis* C2[57] from whom, while he was first mortgage creditor, he could always have claimed the sum of D's debt before he had to hand over the *res pignerata* to him. The author of the rescript prefers a more just result. He gives C1 the right to raise the *exceptio rei sibi ante pigneratae*[58] against C2's *actio Serviana,* or the *exceptio doli* if C2 does not offer him the sum of his claim against D. In this way C1 would not be in a worse position after having acquired ownership. And for C2 there would not be any difference between the case in which he instituted the *actio Serviana* against D and that in which he brought it against C1, who had bought the mortgaged thing from D. In both cases he can only obtain the mortgaged thing if he offers to C1 the sum of the latter's claim.

Also in this case the results of the legal advice given by the secretary for petitions to the second mortgage creditor were reasonable and the unjust consequences of the merger of the first mortgage were avoided.

6 Our conclusions can be short. Paul in *Digest* 44.2.30.1 and *Digest* 36.1.61*pr*., as well as the excellent lawyer who composed *Codex* 8.19.1.1, give proof of an admirable undogmatic, pragmatic legal method. In *Digest* 44.2.30.1 the claim that Maevius acquires by succession from his grandfather still existed and the first mortgage was extinguished the moment (praetorian) ownership of the mortgaged thing was transferred to him. Nevertheless, Paul gave him the *actio Serviana* against the second mortgage creditor. In *Digest* 36.1.61*pr*. the compulsory *aditio hereditatis* made by the heir, who was creditor of the testator and who had to transfer the inheritance to the testator's daughter, gave rise to the extinction of the debt. Though Paul possibly did not have problems with the revival of the pledge which had been extinguished by the acceptance of the inheritance as a consequence of the *restitutio hereditatis* to the testator's daughter, he surely had doubts about the continuation of the pledge as a security for a claim extinguished by merger. Nevertheless, he gave the *actio Serviana* to the creditor-heir. And in *Codex* 8.19.1.1 a mechanical application of the rule that the first mortgage extinguished by the acquisition of ownership of the mortgaged thing by

57 Zimmermann, 2001, p. 34 rightly underlines this.

58 Siber, *Römisches Recht*, II, p. 128 and Zimmermann, 2001, p. 32 also accept that C1 had this exception. As it was true with regard to the *formula* of the *actio Serviana* that a pledge had been created and that there had not been *solutio* or *satisfactio*, so that the creditor could bring this action even after his right of *pignus* was extinguished by *confusio*, here C1 whose right of pledge had come to an end by merger, could oppose to C2's Servian action the *exceptio rei sibi ante pigneratae*, as even after the merger it remained true that the thing had been mortgaged to him earlier. We know the formulation of this exception by Marcian *D*. 20.4.12*pr*.: *si non mihi ante pignori hypothecaeve nomine sit res obligata.*

the first *creditor hypothecarius* would have resulted in the second mortgage creditor becoming the first in rank; still he had to offer the sum of the first creditor's claim.

In all these cases the consequences of a strict dogmatic reasoning were not accepted. Consequences[59] of the extinguished (first) right of *pignus* were recognized. The *actio Serviana* given to the first mortgage creditor against the second one (*D*.44.2.30.1), the *actio Serviana* given to the mortgage creditor-heir against the fideicommissary (*D*.36.1.61*pr.*), and the *exceptio rei sibi ante pigneratae* granted to the first mortgage creditor whose right was extinguished by *confusio* against the *actio Serviana* of the second mortgage creditor who did not offer the sum of the claim of the first one (*C*. 8.19.1.1), were legal remedies that were given, though the *ius pignoris* did not exist any more or its existence was at least doubtful (*D*.36.1.61*pr.*).

These texts studied by me to honour my dear friend Eric Pool found a late echo in § 1256, Abschnitt 2 of the German *Bürgerliches Gesetzbuch*, which reads as follows: "Das Pfandrecht gilt als nicht erloschen, soweit der Eigentümer ein rechtliches Interesse an dem Fortleben des Pfandrechts hat."

59 Kaser, *RPR*, I[2], p. 469 and Zimmermann, 2001, p. 32, n. 63 speak of "Nachwirkungen" of the right of pledge extinguished by merger.