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# THE DEVELOPMENT OF THE LANDLORD'S HYPOTHEC

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## 1 Introduction

In ancient Rome personal security was the most common form of security. This may be attributed to the large number of relationships based on fidelity.<sup>1</sup> Most substantial transactions on credit were accompanied by such security. *Fideiussio* (suretyship or a fidelity bond) was concluded by means of *stipulatio*. In terms of this verbal contract the surety or guarantor pledged himself to fulfil the debtor's agreement towards the creditor if the debtor could not honour it.

The Romans also knew real security. According to Lee "[b]y a real security is meant a real right created to secure the performance of an obligation".<sup>2</sup> Buckland states that the essence of transactions creating real security is to give the creditor some right, essentially a right *in rem*, over property by way of security for the debt.<sup>3</sup> Schulz defines a real security as a right over a thing (movable or immovable) granted to a creditor in order to secure his claim against a debtor.<sup>4</sup> Real credit developed slowly and imperfectly in Roman economic life.<sup>5</sup> In this article the development of this real right will be explored. Attention will also be given to the development of tacit hypothecs and the differences between rural and urban premises as far as the landlord's hypothec is concerned.

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1 Schulz *Principles of Roman Law* (1936) 237. See, further, Schulz *Classical Roman Law* (1961) 402 who emphasises that in the law of the Republic as well as the classical period, the principal form of credit was personal and not real security: "Roman *fides*, Roman pedantic accuracy, honesty, and reliability in business matters were the strong pillars of that credit." Furthermore, execution on the person of the debtor was still in force, and personal credit consequently implied much greater security for the creditor than it provides in modern times. The giving of sureties and pledges, which was obligatory for contracts with the censors, also presupposed friends and patrons ready to step in and undertake the charge. Cf Hallebeek *Fons et Origo. Een Historische Inleiding tot het Vermogensrecht* (2006) 84; Honsell, Mayer-Maly & Selb *Römisches Recht* (1987) 195; Thomas *Textbook of Roman Law* (1981) 328; Nicholas *An Introduction to Roman Law* (1962) 150-151; Schulz *Classical Roman Law* 407-408. According to Kaser *Das Römische Privatrecht* Vol 1 (1971) 457 the fact that it was seen as more important than real security may also be proven by the fact that all the legalities of real securities – even during the classical period – had not yet been finalised and crystallised.

2 *The Elements of Roman Law with a Translation of the Institutes of Justinian* (1952) 170.

3 *A Textbook of Roman Law from Augustus to Justinian* (1975) 473.

4 *Classical Roman Law* (n 1) 400.

5 *Idem* 403.

## 2 Real security

In this discussion it is important to keep in mind that real security was always dependent upon an obligation. The relationship between creditor and debtor was essential, and without it there could be no security. When such security was given and the secured obligation ceased to exist, the real right of the secured creditor in principle came to an end.<sup>6</sup>

In the course of Roman legal development there were three forms of real security namely *fiducia*, *pignus* and *hypotheca*. *Fiducia* was a form of real security where ownership of the object was transferred to the creditor.<sup>7</sup> The next form of security to be introduced was *pignus*, in which case possession passed to the creditor but ownership remained with the debtor.<sup>8</sup> The last form of real security was that of *hypotheca* where the creditor had the right to take possession, but the thing was not actually handed over.<sup>9</sup> In Roman law there was not much difference between *pignus* and *hypotheca*: the first term was usually used in those cases where possession of the pledge was transferred to the creditor and the second when the debtor retained possession of the

6 *D* 20 1 5pr; *D* 20 4 1; *D* 20 4 9pr; *D* 20 6 6pr. See also Buckland (n 3) 317-318; Thomas (n 1) 329; Van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) 113.

7 See Joubert *Romeinse Reg vir Regspraktisyns en Akademici* (2004) 210-211; Spruit *Cunabula Iuris. Elementen van het Romeinse Privaatrecht* (2003) 235 237-239; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 191-192; Watson *The Law of Obligations in the Later Roman Republic* (1965) 172; Jolowicz *Historical Introduction to the Study of Roman Law* (1954) 318; Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 169-173; Sohm *The Institutes. A Textbook of the History and System of Roman Private Law* (tr by Ledlie) (1935) 352-353; Buckland (n 3) 473-474; Lee (n 2) 171; Thomas (n 1) 329-330; Van Warmelo (n 6) 113-114; Hallebeek (n 1) 85; Honsell, Mayer-Maly & Selb (n 1) 200-201; Kaser Vol 1 (n 1) 460-463; Schulz *Classical Roman Law* (n 1) 406-407; Nicholas (n 1) 150-151. *Fiducia* was the oldest type of real security. It was used to constitute real security for the creditor and consisted in the transfer of ownership of the object which was to serve as security to the creditor. This was done by means of *mancipatio* or *in iure cessio*, subject to an agreement of trust (*fiducia*) that it would be reconveyed once the debt was paid. The transfer was subject to an agreement of trust to the effect that ownership was transferred only for a specific purpose. The inherent dangers of this kind of security, from the debtor's point of view, were (1) that the debtor would only have a personal action against the creditor if he were to be untrustworthy; (2) that the debtor took all the risk; and (3) that successive mortgages were not possible. It was probably for these reasons that other types of real security evolved. However, in spite of these disadvantages *fiducia* remained in use throughout the classical period.

8 A term usually used for a pledge delivered to the creditor and which was made possible by the praetor granting protection of possession: see Buckland (n 3) 474-475; Watson (n 7) 179-184; Jolowicz (n 7) 317; Lee (n 2) 171-172; Schulz *Classical Roman Law* (n 1) 407; Spruit (n 7) 235, 239-240; Hallebeek (n 1) 85; Honsell, Mayer-Maly & Selb (n 1) 201-203; Kaser Vol 1 (n 1) 463-469; Van Zyl (n 7) 192-193; Thomas (n 1) 330-332; Van Warmelo (n 6) 115-116; Sohm (n 7) 353-354; Van Oven (n 7) 166-181. At 168 Van Oven points out that pledge was a late Roman development. It was a creation of praetorian law and only regarded as a real right because it could eventually be enforced with an *actio in rem*. Under the word *pignus* the Romans understood the right as well as the thing itself. The pledgee's real right was established by (1) the transfer of possession; (2) an agreement by the parties (*conventio pignoris*) and (3) a debt which was secured by the parties.

9 A term used for a pledge which was not delivered: Kaser Vol 1 (n 1) 463; Buckland (n 3) 475-476; Jolowicz (n 7) 319; Lee (n 2) 172; Schulz *Classical Roman Law* (n 1) 407-408; Watson (n 7) 179-180; Spruit (n 7) 235 239-240; Honsell, Mayer-Maly & Selb (n 1) 203-206; Van Zyl (n 7) 193-196; Thomas (n 1) 332-334; Van Warmelo (n 6) 116-119; Sohm (n 7) 354-357.

pledge.<sup>10</sup> The final development came with an agreement, sometimes tacit, which eventually culminated in a real right for the creditor. The development of this form of security will now be discussed.

### 3 Development of the (tacit) hypothec

#### 3.1 First appearance

The need for a significant change in the field of security, namely a right *in rem* against the mortgaged property without either possession or ownership passing, must have been felt fairly early.<sup>11</sup> Under the Republic the history of the protection of the creditor without possession started with cases in which a landlord was willing to lease his land to a tenant (*colonus*).<sup>12</sup> The landlord obviously wished to collect the rent, but in most cases it could not be paid before the harvest and there was thus a need for credit until such time as the crop was gathered.<sup>13</sup> He therefore required some form of security. Usually the only property an agricultural tenant could pledge would be his cattle, slaves and farming equipment, that is, everything he would require to farm. In the case of both *fiducia* and *pignus* this would mean that the tenant would lose control of the property pledged and would consequently not be able to farm.<sup>14</sup> This impossible situation led to the development of a new form of security.<sup>15</sup> The rural hypothec originally arose by special agreement between the parties that the landlord would be entitled to take the pledged property as well as the harvest if the tenant failed to pay the rent when it became due: “A debtor agreed that whatever was brought on the mortgaged land or there arose or was

10 *D* 13 7 9 2: “Strictly speaking, we use *pignus* for the pledge which is handed over to the creditor and *hypotheca* for the case in which he does not even get possession”; *D* 20 1 5 1: “The difference between *pignus* and *hypotheca* is purely verbal”. These translations from the *Digest*, as well as others in this article, are from *The Digest of Justinian* (1985) (Latin edited by Mommsen & Krueger and English by Watson). See also *D* 50 16 238 2.

11 Prichard *Liege's Roman Private Law Founded on the Institutes of Gaius and Justinian* (1961) 223.

12 Schulz *Classical Roman Law* (n 1) 408; Kaser Vol 1 (n 1) 472; Buckland (n 3) 475; Jolowicz (n 7) 319; Honsell, Mayer-Maly & Selb (n 1) 204.

13 Van Oven (n 7) 173.

14 Schulz *Classical Roman Law* (n 1) 408.

15 Borkowski & Du Plessis *Textbook on Roman Law* (2005) 304 refer to it as a “modified form of *pignus*” and Nicholas (n 1) 151-152 refers to it as a “variant of *pignus*”. Kaser Vol 1 (n 1) 458, Joubert (n 7) 212 and Van Oven (n 7) 173-174 call it a “formless” pledge. Van Oven at 177 points out that as result of the pledge being “formless”, there was no publicity. However, it may be said that by the time it had become a tacit agreement, and even earlier, when the agreement between the landlord and the tenant had become usual, everybody would have been aware that the *invecta et illata* and the crops had been pledged for the rent. No publicity seems to have been necessary then. Kaser Vol 1 (n 1) at 457 is also concerned about the lack of publicity following upon the fact that already during the late Republic a pledge without possession was allowed. This developed in the case of landlord and tenant, and later with respect to all other kinds of formless pledges since it was apparent that in a developed economy and civilisation this kind of security was necessary. From the time of the classical period pledge without possession was called hypothec.

produced should be subject to the mortgage.”<sup>16</sup> There was a mutual understanding that he obtained neither ownership nor possession of the pledged property but a bare *ius in re aliena*.<sup>17</sup> The advantage of this kind of pledge was that the tenant could continue using whatever he needed to farm whilst it was pledged as security for the rent.<sup>18</sup> The meaning of the mortgage at the time of agreement would be that the pledge would come into existence at some time in the future if the rent was not duly paid.<sup>19</sup> In terms of this agreement the landlord had no action *in rem* and was dependant upon self-help if the tenant failed to deliver the things to him. The agreement was therefore not enforceable as such. It was nevertheless a practical and convenient custom, although it was further limited since it was only applied in the case of the agricultural tenant.

Once the principle of pledge without possession was accepted, it was extended to tenants of urban premises where the rent was secured by the tenant's *invecta et illata*.<sup>20</sup> In the case of urban hypothecs all things brought onto the premises for use, even without the tenant's knowledge, were included in the

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16 *D* 20 1 32. See also Gaius 4 147; *D* 19 2 24 1; *D* 19 2 53; *D* 20 1 4; *D* 20 2 7*pr* & 1; *D* 47 6 62 8; *C* 8 14 3. Cf Kaser Vol 1 (n 1) 464; Jolowicz (n 7) 319; Buckland (n 3) 475; Lee (n 2) 172; Van Warmelo (n 6) 116; Sohm (n 7) 354; Borkowski & Du Plessis (n 15) 304; Schulz *Classical Roman Law* (n 1) 407-408; Joubert (n 7) 212; Honsell, Mayer-Maly & Selb (n 1) 204; Prichard (n 11) 224; Van Zyl (n 7) 194.

17 The first reference to things offered as security without delivery is found in Cato *De Agri Cultura* 146 5 where he refers to fruits which have not yet been harvested (*pigneri sunt*). See also Nicholas (n 1) 151-152. Watson (n 7) at 180-181 discusses three texts from Cato *De Agri Cultura* 146 5 (“*quae in fundo inlata erunt, pigneri sunt*”), 149 7 (“*pecus et familia quae illic erit, pigneri sunt*”) and 150 7 (“*donec domino satisfecerit aut solverit, pignori esto*”) as constituting the main evidence of the existence of the *interdictum Salvianum*, the *actio Serviana* and the *actio quasi Serviana* during the late Republic. Although the texts, according to him, deal with sale and not the lease of land, they show that the seller can have a real right over the objects pledged. In none of the texts mention is made of delivery of the pledge. He assumes that we are dealing here with *hypotheca* and not *pignus*. He furthermore assumes that Cato had the *actio Serviana* or the *actio hypothecaria* in mind when writing (at 181). Jolowicz (n 7) 319 states that the existence of pledge without possession is attested to in Cato's time (234-149BC) by a clause in his form of contract for the sale of olives on a tree, which provides that everything that the purchaser brings into the olive grove is to serve as security for payment (Cato *De Agri Cultura* 146 5; and a similar clause with respect to slaves and cattle in the form of a sale of pasture, there being in the latter case a further clause which provides that any litigation concerning the matter is to take place in Rome (Cato *De Agri Cultura* 149 7-8). Cf Kaser Vol 1 (n 1) 464 n 15.

18 Hallebeek (n 1) 86.

19 Gaius 4 147.

20 Book 20 title 2 of the *Digest* is entitled “Implied *pignus* or *hypotheca*”. In *D* 20 2 2 Pomponius writes that “[p]roperty brought on to an urban tenancy is hypothecated not only for the rent, but also for any deterioration of the premises due to the tenant's fault ...”. See also *D* 20 2 4*pr* (Neratius): “We accept that property brought on to an urban leasehold is hypothecated, as if this had been impliedly agreed”; in *D* 20 2 4 1 he states that this also holds true for stables, although they are not directly adjacent to urban property, and in *D* 20 2 6 Ulpian says that “[a]lthough it is understood that in urban tenancies properties brought on the premises is impliedly hypothecated as if this had been specifically agreed ...”. Paul, in *D* 2 14 4*pr*, states that “[l]ikewise, on the ground that even agreements by implication are valid, it is settled that in the letting of urban dwellings, the movables (of the tenant) are constituted a pledge for the landlord even though nothing is expressly agreed”. See, too, *D* 13 7 11 5: “Hence, if you rent a house and sublet part of it to me and I pay my rent to your lessor, I will have the action on *pignus* against you ...”. Cf Crook *Law and Life of Rome* (1967) 246; Lee (n 2) 172; Prichard (n 11) 224. Du Plessis “The *Interdictum de Migrando* revisited” 2008 *RIHDA* at 5 states that it was already established in urban tenancy by the end of the first century BC.

security. This security was extended to inns and warehouses, where the rent was likewise secured by the *invecta, illata et inducta*.<sup>21</sup>

### 3 2 Pledged property and tacit hypothecs

As stated above, the parties to the agreement, namely the landlord and the tenant, would agree that the *invecta et illata*<sup>22</sup> which the tenant brought onto the property would serve as security. It is important to note that not all the possessions of the tenant (*res coloni*) could be pledged, but only those which could be used to work the land and which were brought in by agreement with the landlord.<sup>23</sup> The oldest text on this subject is that of Iavolenus Priscus (ca AD 70-110), making use of the work of M Antistius Labeo who wrote during the time of Augustus: "You agreed with your tenant [*cum colono tibi convenit*] that goods brought on the premises leased should be hypothecated until the rent was paid or satisfaction given."<sup>24</sup> An agreement with the tenant is mentioned, but nothing is said about a tacit pledge or mortgage. Africanus, who wrote during the second half of the second century, also mentions an agreement regarding the landlord's right of pledge.<sup>25</sup> "I let you some land and (as is customary) [*et (ut adsolet) convenit*] it was agreed that its produce would be in pledge to me in respect of the rent." Both texts refer to rural premises and in *D* 13 7 1*pr* Ulpian states that the security was created "nuda conventione".<sup>26</sup> This means that there were no formal requirements that had to be complied with.<sup>27</sup> We thus find a pledge without transfer or possession by means of a formless agreement (*pignus obligatum*). All three texts use the word "convenire". It follows that without an agreement there would have been no security.

With time, however, the agreement became a standard clause in two instances, namely first where the crops on rural premises were hypothecated, and secondly in the case of urban leases. During the height of the classical period (second century AD) it appears that the clause was no longer required in these cases. The agreement to constitute the security had become so general that it was said to be tacitly included in the case of crops on rural premises as

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21 See *D* 20 2 3 (Ulpian): "If a warehouse, hotel or site is leased, Neratius thinks that there is here also an implied agreement for the hypothecation of goods brought in. This is the better view."  
 22 This was the technical term used for animals and slaves (which were chased in) and farm implements (which were carried in). See Gaius 4 147; *D* 20 6 14. See, too, Van Oven (n 7) 174; Spruit (n 7) 245; Honsell, Mayer-Maly & Selb (n 1) 204.  
 23 See Hunter *A Systematic and Historical Exposition of Roman Law in the Order of a Code* (1903) 444.  
 24 *D* 20 6 14.  
 25 *D* 47 2 62 8.  
 26 "The contract of pignus is made not only by delivery but also by mere agreement even in the absence of any delivery."  
 27 Kaser Vol 1 (n 1) 144-145.

well as in contracts of lease regarding urban premises.<sup>28</sup> The first tacit hypothec is mentioned in the first half of the second century AD. With regard to crops on a rural property, Pomponius, a jurist from the second century, explicitly states that “the crops are impliedly taken [*tacite intelleguntur*] to be hypothecated to the owner of the land, even if not agreed in so many words”.<sup>29</sup>

Soon thereafter this was extended to the urban lessee's *invecta et illata*, and in *D 20 2 4pr* Neratius, writing somewhat later in the second century AD, mentions a tacit hypothec in the case of urban property: “We accept that property brought on to an urban leasehold is hypothecated, as if this had been impliedly agreed [*quasi id tacite convenerit*].” In the third century AD Ulpian, too, mentions a *tacita conventio* in *D 20 2 6* which deals with an urban lease: “Although it is understood that in urban tenancies property brought on the premises is impliedly hypothecated as if this had been specifically agreed ...”. As far as urban premises are concerned, the final development came with a constitution of Justinian<sup>30</sup> which states that the tenant's property brought into a house<sup>31</sup> shall be “tacitly pledged” to the owner for rent. It continues by stating that this law will apply not only to “ancient and modern Rome” but also in the provinces so that all the inhabitants shall have the benefit of this “equitable presumption”. The landlord's right thus no longer arose by agreement, but by operation of law.<sup>32</sup>

During this period, however, there was no mention of a tacit hypothec with regard to the *invecta et illata* brought onto rural premises in the case of lease. The position here was different: In the case of *praedia rustica* the hypothec only followed upon an express agreement.<sup>33</sup> Further, title 2 of Book 20 of the *Digest* entitled “Implied pignus or hypotheca” mentions property brought onto rural premises only once, namely in *D 20 2 4pr*, where it is explicitly stated that property brought on to urban premises is tacitly hypothecated, whilst “[t]he

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28 Honsell, Mayer-Maly & Selb (n 1) 206 state that already during the Principate the landlord had a tacit hypothec on the tenant's *invecta et illata* for the rent of his house. See further Kaser Vol 1 (n 1) 464-465 with reference to *D 20 2 2-7pr*, *C 8 14 3* & *D 13 7 11 5*; and also Kaser *Das Römische Privatrecht* Vol 2 (1975) 315 who states that in post-classical period tacit hypothecs (*tacita conventio*, *tacita pactio*) became customary and was accepted in many cases. One such acknowledged case was that of the tenant and landlord with regard to the crops, and another was the landlord's tacit hypothec on the tenant's *invecta et illata inducta* in the case of houses, inns and granaries. This started in the classical period and was finalised in the post-classical period.

29 *D 20 2 7pr*.

30 *C 8 15 7* (AD 532).

31 It is important to note that the reference to “house” clearly implies that rural premises were not included in this constitution.

32 Lee (n 2) 178 explicitly states that the landlord's hypothec developed into a tacit hypothec over the fruits of the land, and over the *invecta et illata* in the case of a house (urban premises).

33 *D 20 1 32*; *D 20 2 4pr*.

opposite is true of rural tenancies". This indicates that no such tacit hypothec came into being regarding the *invecta et illata* brought onto rural premises. An agreement between the parties remained a requirement for this hypothec.

Tacit hypothecs were imported by law into certain dealings.<sup>34</sup> They could be either general or special, and in the latter case we find the hypothec of the landlord for rent over crops on a farm, and over the *invecta et illata* on an urban *praedium*.<sup>35</sup> In the case of certain debts certain persons were thus invested by special enactments with a hypothec over the whole or particular parts of the property of the debtor. The most important instance was that of the urban hypothec.<sup>36</sup> In the case of urban buildings (*praedia urbana*) which were let, the practice was that whatever was brought in permanently, for example furniture, was tacitly deemed to have been pledged for rent and for any damage caused by the tenant.<sup>37</sup> It applied to warehouses (*horrea*), inns (*deversoria*) and threshing-floors (*areae*) as well as to dwelling-houses, but not to farms.<sup>38</sup>

The question remains: why did this development only affect urban premises and crops on rural premises?<sup>39</sup> Why did such a tacit agreement not develop with regard to the *invecta et illata* brought on to rural premises? Originally the parties had to conclude an agreement to the effect that the *invecta et illata* and the crops would serve as hypothec (probably at the same time they concluded the contract of lease).<sup>40</sup> Later, though, it seems that this became an implied agreement in the case of crops on rural premises and the *invecta et illata* on urban premises.<sup>41</sup> However, no mention is made of the hypothec on the *invecta et illata* on rural premises. It appears that an agreement between the parties remained a requirement to pledge them as security for the rent. One may suggest that the *invecta et illata* of a rural tenant was too important to be tacitly hypothecated: these were the things he needed to make a living. Without them he could not work or survive. As long as an express agreement for such things was required, he was protected since he could refuse to agree to such an arrangement. If that was not to the landlord's liking, he would have to rely on the tacit hypothec on the crops or look for another tenant. In this regard it may also be of interest to note Crook's statement that although the landlord had a

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34 Buckland (n 3) 480, with reference to *D 20 2 3*; *D 20 2 4pr*; *D 20 2 7pr*.

35 Buckland (n 3) 480; Hunter (n 23) 443; Thomas (n 1) 333.

36 Hunter (n 23) 444.

37 *Ibid.* Cf, too, *D 20 2 4pr* and *D 13 7 11 5* where Ulpian states that "furniture and movables" will be charged, and that the "agreement was impliedly taken to have been made". See Roby *Roman Private Law in the Times of Cicero and of the Antonines* Vol 2 (1902) at 105.

38 *D 20 2 4pr*; C 8 15 5.

39 Cf Du Plessis (n 12) 16.

40 See *D 20 1 32* (translation *supra* at 157-158) and *D 47 2 62 8* (translation *supra* at 159).

41 See *D 20 2 7pr* (translation *supra* at 160); C 8 15 3. Cf Hunter (n 23) 444; Roby (n 37) 105.

tacit hypothec on the urban tenant's *invecta et illata*, an express agreement was sometimes needed: According to Ulpian

[a] general mortgage of present and future assets does not cover things which someone is unlikely to mortgage specially. Thus, the debtor must be allowed to keep household equipment, clothing, and slaves so employed that he would certainly not want to mortgage them, for example, in services essential to him, or with whom he was on affectionate terms.<sup>42</sup>

This text gives an indication of why the rural tenant's *invecta et illata* could not be hypothecated tacitly: they may have fallen into the category mentioned above, namely things which someone is unlikely to mortgage since he regarded them as essential or was on affectionate terms with them. As in the case of urban hypothecs, it was up to the tenant to decide whether he would agree to have these things hypothecated. One may, in conclusion, assume that tenants of rural premises probably regarded their *invecta et illata* as just too important and valuable to be hypothecated tacitly.

At this stage it is important to point out that there are scholars who opine that the tacit hypothec of the landlord is not classical since the important texts have been interpolated. Schulz states that although the landlord of an agricultural estate had a legal hypothec on the fruits under Justinian's law, it was not classical.<sup>43</sup> According to him Pomponius's text stating that such mortgage is implied in the contract of lease, is obviously interpolated.<sup>44</sup> Africanus, he states, is not aware of a tacit hypothec and merely says that as a rule the tenant mortgaged the fruits to the landlord.<sup>45</sup> Furthermore, under Justinian's law the landlord of a house had a legal hypothec on the *invecta et illata* of his tenant which was not classical either: *D 2 14 4* is clearly interpolated<sup>46</sup> and consequently the passages in *D 20 2* which deal with the hypothec must also be regarded as interpolated. Finally, the *formula* of the *interdictum de migrando* knows nothing of a legal hypothec.<sup>47</sup> Schulz concludes that classical law was free from "devastating" legal hypothecs and was sound to this effect. Van Oven also regards it as "a true evil" that the emperors introduced "general legal

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42 *D 20 1 6*.

43 Schulz *Classical Roman Law* (n 1) 411.

44 *D 20 2 7pr* (translation *supra* at 160).

45 *D 47 2 62 8*.

46 Van Oven (n 7) 177 n 250 also holds that *D 2 14 4* which determines that the landlord of an urban property has a tacit hypothec on the *invecta et illata* (furniture) of the tenant is interpolated.

47 This was a praetorian remedy available only to tenants of urban property. Du Plessis (n 12) 1-2 states that it was a prohibitory interdict dating from the late Republic. Frier *Landlords and Tenants in Imperial Rome* (1980) 106-107, however, suggests that it was created *ca* 27BC. The text can be found in *D 43 32 1pr*.

hypothecs” which were valid not because they had been created by agreements, but by law.<sup>48</sup>

Despite the arguments advanced by Schulz and Van Oven, one may now accept that the relevant texts are free from interpolations, thus agreeing with most of the modern Roman law authors writing on this topic.<sup>49</sup>

### 3 3 The tacit hypothec on rural crops

The oldest tacit hypothec was that of the landlord over the crops to secure the rent.<sup>50</sup> The essence of the landlord’s rights was the *ius possidendi*, in other words the right to possess the hypothecated thing/s as long as the rent was due but not yet paid. The question now is when did the landlord obtain possession of the crops? Did he (1) acquire possession of the crops immediately when the rent was due in view of the fact that the owner of the property normally acquired all its natural fruits without it having been severed or gathered, or did he (2) get the right to *perceptio* while the land was leased to the tenant, or could he (3) lay claim to it after the tenant had gathered it?

Ownership of natural fruits could be acquired by means of *separatio fructuum* (separation from the fruit-bearing thing) or *perceptio fructuum* (the gathering of fruits and thus gaining control of them).<sup>51</sup> Natural fruits usually belonged to the owner, whilst a tenant acquired ownership of the fruits by the will of the landlord<sup>52</sup> after he has gathered the fruits (*fructuum perceptio*).<sup>53</sup> It was a question of fact: reaping without stacking was enough.<sup>54</sup> By their separation, which first gave them a separate existence, they vested in the owner of the soil. He allowed the tenant to take them: in effect *traditio brevi manu*.<sup>55</sup> Since assent was the essence of the matter, if the landlord revoked his assent, the property would not vest in the tenant.<sup>56</sup> One may then assume that if the tenant could not pay the rent, the landlord could revoke his assent and keep the harvest which had been hypothecated tacitly.<sup>57</sup>

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48 Van Oven (n 7) 177 n 250.

49 Cf Kaser Vol 1 472.

50 See *D* 19 2 24 1; *D* 20 2 7pr; *C* 8 15 3.

51 Buckland (n 3) 221; Borkowski & Du Plessis (n 15) 192-1913; Lee (n 2) 131; Spruit (n 7) 78, 201-202; Van Zyl (n 7) 150-151.

52 *D* 47 2 62 8: “Crops, while in the soil, are part of the land so that a tenant makes them his own, because he is regarded as gathering them with the owner’s consent.”

53 See *D* 47 2 62 8; *D* 39 5 6; *D* 19 5 16pr. Kaser Vol 1 (n 1) 427; Thomas (n 1) 177; Van Zyl (n 7) 66.

54 In *D* 7 4 13 Paul states that “fruits are considered to be gathered when the ears of corn are severed or the hay cut or the grapes picked or olive oil made or the vintage completed”.

55 Buckland (n 3) 221; Nicholas (n 1) 138.

56 *D* 39 5 6. Buckland (n 3) 221 points out that the revocation might be a breach of contract, for example where the land was let for a certain time.

57 Buckland (n 3) 221; Lee (n 2) 131; Nicholas (n 1) 138.

In *D 19 2 24 1* Paul says that “[i]f a tenant farmer leases out his farm, the property of the subtenant is not obligated to the owner; but the crops continue as pledges, just as they would, had the first tenant harvested them”. This would seem to indicate that the landlord acquired possession after the crops had been harvested by the tenant.<sup>58</sup> Buckland also states that the crops served as security after the tenant had acquired them by means of *perceptio*.<sup>59</sup>

One may therefore accept that the landlord's hypothec came into being after the crop had been harvested by the tenant. It was only after harvesting that the landlord could acquire a real right, since before that moment the existence of the crop was only potential. A crop on the land does not necessarily constitute an asset. Furthermore he could lay claim to possession thereof before it had been gathered.<sup>60</sup>

### 3 4 Protection granted to the landlord

Since the landlord did not obtain any rights (real or personal) in terms of the agreement mentioned above it was of little use to him. At the end of the Republic an unknown praetor called Salvius recognised this agreement. He decided to protect the landlord by means of an interdict in terms of which he might claim possession of the *invecta et illata* if the rent was not paid when it fell due. This new interdict, the *interdictum Salvianum*, was included in his edict.<sup>61</sup>

Another interdict, called *Salvianum*, is provided for the purpose of acquiring possession; it is used by the landlord in respect of the goods of his farmer, which the latter has agreed shall serve as security for the rent.<sup>62</sup>

This interdict was an *interdictum adipiscendae possessionis* and was only available against the tenant.<sup>63</sup> The landlord could thus obtain possession of all the hypothecated things in the tenant's possession if the rent was not paid when it fell due.<sup>64</sup> But, it could not be claimed from third parties who had

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58 Hunter (n 23) 444.

59 (n 3) 475 with reference to *D 47 2 62 8*.

60 Cf Van Oven (n 7) 179 who opines that the landlord who had a hypothec on the crops if the tenant could not pay the rent when it became due, would obtain the right to *perceptio* and would thus get the fruit instead of the rent.

61 Schulz *Classical Roman Law* (n 1) 408; Lee (n 2) 172; Sohm (n 7) 354; Nicholas (n 1) 151-152; Spruit (n 7) 245. The landlord of urban property was even more effectively protected. He could simply take possession of the things belonging to the lessee without first requesting an interdict.

62 Gaius 4 147. From this short text we get the whole picture: the right was created formlessly (*pepigisset*); the object was the possessions of the tenant (*res coloni*); the secured claim (*mercedis fundi*); and the purpose of the interdict (*possessionem adipisci*). See also *D 43 33*.

63 Gaius 4 144.

64 Van Warmelo (n 6) 116-117.

obtained possession of it since the creditor had no real right and therefore could not lay claim to it.<sup>65</sup> It consequently did not constitute real security.

Another praetor, Servius (before the time of Hadrian), took the next step: he introduced a new *formula Serviana*<sup>66</sup> which the landlord could use to claim possession of the *invecta et illata* (thus becoming pledgee of the property) not only from the tenant, but also from any third party who had for some reason or another obtained possession of the property.<sup>67</sup> This, however, still caused difficulties since movables could be difficult to locate and the landlord would be unable to enforce his right if the property had disappeared. The action, known as the *actio Serviana*,<sup>68</sup> nevertheless deprived the interdict of much of its importance.<sup>69</sup> It avoided the dangers of the interdict process. Furthermore, it had restitutory nature and helped the landlord not only to obtain possession, but also to reclaim possession he had lost.<sup>70</sup> This action now constituted a valid pledge right. A real right, a *ius in re aliena*, was therefore created when the praetor granted the creditor an *actio in rem* against every possessor of the pledged items.<sup>71</sup> Since the landlord now had a real right without possession, it may be said that it was truly a hypothec<sup>72</sup> although it was still limited to the original case, namely that of landlord and tenant.<sup>73</sup>

At this stage only one step remained to generalise the situation: to give a real right to other creditors to get a formless pledge without possession, that is to make it possible for any debtor and any creditor to agree that a specific

65 Van Oven (n 7) 174; Kaser Vol 1 (n 1) 472, however, is of the opinion that it can also be used to obtain the hypothecated things from third parties.

66 Cf the reconstruction of the *formula of the interdictum Salvianum* by Kreller ("Pfandrechtliche Interdikte und Formula Serviana" 1944 ZSS at 324): "Si is homo quo de agitur est ex his rebus, de quibus inter illum et L Titium (colonus) convenit, ut quae in illum fundum, quo de agitur, introducta importata ibi nata factave essent, ea pignori illi pro mercede eius fundi essent, neque ea merces illi soluta eove nomine satisfactum est aut per illum stat, quo minus solvatur, ita quo minus ille eum ducat, vim fieri veto."

67 Schulz *Classical Roman Law* (n 1) 408; Lee (n 2) 172; Sohm (n 7) 354; Kaser Vol 1 (n 1) 472.

68 Cf the formula of the new action, the *formula Serviana*, as reconstructed by Lenel *Das Edictum Perpetuum* (1927) 494: "Si paret inter AmAm et L Titium convenisse, ut ea res qua de agitur AoAo pignori esset propter pecuniam debitam, eamque rem tunc, cum conveniebat, in bonis Lucii Titii fuisse eamque pecuniam neque solutam neque eo nomine satisfactum esse neque per AmAm stare quo minus solvtur, nisi ea res arbitrio iudicis restituatur, quanti ea res erit, tantam pecuniam iudex NmNm AoAo condemnato, si non paret, absolvito."

69 Van Warmelo (n 6) 117. It is interesting to note that it was inserted into Hadrian's *Edict* immediately after the *interdictum Salvianum*.

70 Gaius 4 144.

71 I 4 6 7: from this text it may be deduced that the action was originally only granted to the tenant of rural premises. See Van Oven (n 7) 174; Nicholas (n 1) 151-152; Spruit (n 7) 246; Jolowicz (n 7) 319. Honsell, Mayer-Maly & Selb (n 1) 204 state that the *interdictum Salvianum*, however, remained limited to its original area of application. It thus only applied in cases where the landlord claimed it from the tenant (C 8 9 1). The possibility that it could be used to claim the things from third parties is mentioned in D 43 33 1pr, but it is also possible that it does not stem from Julian and has been interpolated. See D 20 1 17 (Ulpianus): "A mortgage creditor has an action *in rem*."

72 Crook (n 20) 247.

73 Schulz *Classical Roman Law* (n 1) 408.

movable or immovable object could serve as security.<sup>74</sup> It was an advantage of the *hypotheca* that almost any object could serve as security. When Julian was instructed to codify the *Edict* for Hadrian, he extended the *actio Serviana* to all cases of hypothec and even to pledge.<sup>75</sup> The new *formula* was called the *formula Serviana*. It was applicable to any kind of pledge and hypothec and replaced that of Servius which was limited to the tenant's *invecta et illata*. In the *formula* of the *actio Serviana* the landlord now had to be replaced by the creditor who had claimed the pledge. This was done and under the name of the *actio quasi Serviana*,<sup>76</sup> *actio pignoratitia* or *actio hypothecaria*<sup>77</sup> this action ruled the Roman law of pledge.<sup>78</sup> Hadrian's *Edict* therefore brought about an important improvement in the field of real security by its general recognition of the *actio Serviana*.<sup>79</sup> This action was generalised by extending it to an *actio quasi Serviana* available to all other creditors other than landlords, that is, to all cases in which formless agreements created pledges without delivery of the pledge. The creditor could now claim the thing from anyone and he thus obtained a *ius possidendi*. According to praetorian law a hypothec gave the creditor (1) a real right of action enabling him to obtain possession of the thing hypothecated on non-payment of the debt, and (2) a right to realise the value of the thing for the purpose of satisfying his claim.<sup>80</sup>

Finally, it is important to note that the right of pledge was originally of a contractual nature. The landlord's right of pledge was no different from any other kind of pledge. It was the forerunner of the actual pledge without possession, namely the hypothec or mortgage. Pledge and hypothec are merely two forms of the same institution. In the case of the rural landlord's tacit hypothec on the crop and the urban landlord's tacit hypothec on the tenant's *invecta et illata* the move was away from the contractual origin of the landlord's hypothec. It culminated in the time of Justinian when he speaks of a just or legal presumption with regard to the tenant's *invecta et illata*. The contractual basis of the landlord's hypothec had thus fallen away. His right arose not by agreement, but by operation of law, independent of the wishes of the debtor.<sup>81</sup>

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74 Sohm (n 7) 354; Van Warmelo (n 6) 117.

75 Schulz *Classical Roman Law* (n 1) 408-409. See I 4 6 7; D 20 1 5 1.

76 See I 4 6 7: "Again, the Servian and the quasi-Servian actions, also called hypothecary, derive their efficacy from the jurisdiction of the praetor himself. By the Servian action, a person takes proceedings in respect of the goods of his agricultural tenant which are liable to him by way of pledge for the rent of the land; by the quasi-Servian, creditors and those with a legal charge claim their pledges or the things charged by hypothec. There is no difference between pledge and hypothec so far as concerns the action; for both kinds of things, in respect of which it is agreed – between creditor and debtor – that it shall be under charge for the debt, are comprised within this designation."

77 I 4 6 7. See Buckland (n 3) 475.

78 Van Oven (n 7) 174.

79 Schulz *Classical Roman Law* (n 1) 403.

80 Sohm (n 7) 354.

81 C 8 15 7.

Remnants of the agreement between the parties can, however, still be found in the title of C 8 15 (“In quibus causis pignus tacite contrahitur”) and in the first sentence of C 8 14 7 where it is said that the tenant’s goods “domino pro pensionibus tacite obligatur”.

#### **4 Conclusion**

In the light of the preceding discussion, it is possible to draw the following conclusions regarding the landlord’s hypothec.

As far as the development of the landlord’s real right on the tenant’s *invecta et illata* is concerned, it appears that on rural premises the landlord originally only had a personal right. This right gradually developed as a result of praetorial intervention in providing, consecutively, the *interdictum Salvianum*, the *actio Serviana*, and the *actio quasi Serviana* to constitute a real right. The landlord of urban premises, however, was protected from the beginning: he could simply take possession of the tenant’s *invecta et illata* without first requesting an interdict.

It is further apparent how the landlord’s hypothec, a formless pledge, developed into a tacit hypothec in the case of crops on rural premises as well as in the case of the tenant’s *invecta et illata* on urban premises. Arrangements between landlord and tenant gradually mutated into standard contract clauses which eventually disappeared when tacit hypothecs became acceptable.

The reason why the landlord’s hypothec never developed into a tacit hypothec has long been unclear. From my analysis it is apparent that the tenant’s *invecta et illata* were of great importance for his livelihood: it could not simply be hypothecated tacitly. This suggestion may be validated by Ulpian’s statement in D 20 1 6 that some of the tenant’s *res* fell into a category of things which he was unlikely to mortgage specially, and that those things would not be hypothecated automatically.

Finally, with regard to the rural landlord’s tacit hypothec on crops, it appears that the landlord acquired possession of the crop once the tenant had harvested it. It was only after the crop had been gathered that it was realised and could constitute security. Only then did the landlord’s real right come into being.