EXTINCTION OF OBLIGATIONS AND SECURITIES
IN THE ROMAN LAW

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Abstract
There were several modalities of extinction of the receivables in the Roman law, depending on the periods of development of the civil life and of commercial relationships. The extinction of the obligations may be classified starting from the characteristics of the legal relations existing in the Roman state, as follows: modalities of extinction of obligations under the civil law (ipso iure); modalities of extinction of obligations under the praetorian law (exemptionis ope).

Personal and real securities mean those legal relationships accessory to the main obligation, conferring more surety to the creditor, in case of the debtor’s insolvency, in the fulfillment of the performance due to it. The oldest forms of security are personal securities, which could be found in the Roman society with a low level of economic development. At that age, both the monetary circulation and the money loan were quite reduced.

Keywords: obligations, personal securities, real securities

1. Introductory aspects on obligations

The notion of obligation materialized after a long evolution in the process of transition from the gentile society to the political society\(^1\). As an institution of law, the obligation appears at the same time as the private property, social classes, diversification of the civil and commercial life\(^2\). Under conditions of reduced labor productivity and insecurity caused by numerous wars, the poor often had to borrow from the rich and, since most of the times it was impossible for them to return the loan, many of them remained at the creditor’s discretion.

In the Roman law, the evolution of the term obligation included two stages.

In the first stage, the civil obligation had the meaning of a purely material relation (vinculum corporis) between two persons, materialized in the physical chaining of the debtor by the creditor, if the first failed to willingly execute its duties to the latter. In this stage, the civil obligation was an actual ius in personam, namely a right of a physical person over another physical person, exercised just like the right of ownership over an asset (ius in rem). Consequently, just like the owner of a good, the creditor could dispose of the person of the insolvent debtor\(^3\); this meaning was due to the fact that the notion of

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right of claim, obligation was very imprecise in primitive societies. Practically, the essential character of the obligation was ignored, the fact that the obligation has to be temporary and not perpetual like the property.

In exchange, in the subsequent stage, the civil obligation becomes a legal relation (*vinculum iuris*) between the creditor and the debtor. In fact, in the Roman law, the creditor was called *reus credendi*, and the debtor was called *reus debendi*. The expressions *reus credendi* and *reus debendi* had the meaning that, if needed, the creditor could sue its debtor in justice, which became possible because of the evolution of the legislative system which continuously adapted eliminating what became rigid and bringing new elements according to the interests of the respective society. This explains why, in time, the term *reus* was used only to designate the *creditor*. In other words, the notion of obligation starts to change its primitive structure, the idea of relation turning into a legal relation, based on which, in case of non-fulfillment of the obligation, the creditor no longer had the right to act on the debtor’s person, but on his patrimony, proceeding to the enforcement of his assets. This conception is theorized in the classical age and is gradually developed, but rests of primitive conceptions shall continue to be found during this period (the example of private prisons that the potetiones continued to use).

The notion of “obligation” is defined in two Roman texts. The first text belongs to the juristconsult Paul, and the second is due to the Institutes of Justinian which is closer to the modern sense. In a text preserved in the Digest⁴, juristconsult Paul defines the obligation as follows: "*Obligationum substantia non in eo consist, ut aliquod corpus nostrum aut servitutem nostrum faciat sed ut alium nobis abstringat ad dandum aliquot ver faciendum vel prestandum*” (the essence of an obligation does not consist in its making any material object our property, or a servitude ours, but in its binding another person to grant something, or to do or make good something in our favour).

According to Justinian: "*Obligatio est iuris vinculum quo necessitate adstringimur aliguus solvendae rei secundum nostrae civitatis iura*” – an obligation is the legal bond by which, according to the laws of our State, we are of necessity constrained to the performance of something⁵.

Although the definition of Justinian presents the obligation as a legal relation – *vinculum iuris*, it also presents some imperfections. Thus, it presents only the situation of the debtor – *quo necessitate adstringimur*, without reminding about the creditor’s right to receive the payment. This text designates an action of giving, doing or performing and not an obligation which is assumed and should be fulfilled, showing that the debtor is forced to pay, connecting by this definition the notion of obligation to the notion of constraint. The word *obligatio* is formed of *ob* and *legare*, meaning to bind. In its original sense – *solver* means to unbind, which in time acquired the meaning of to pay. In time, this etymology of the word remained, but its meaning was no longer found in the future social culture⁶.

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⁴ Ş. Cocoş, *op. cit.*, p. 204.
⁵ Ş. Cocoş, *op. cit.*, p. 205.
2. Extinction of obligations

Treating the obligation as a legal bond established between the debtor and the creditor, it shall have to be extinguished, meaning that the debtor is released from the legal bond, acquiring its freedom again, while the creditor shall obtain a profit from the receivable. There were several modalities of extinction of the receivables in the Roman law, depending on the periods of development of the civil life and of commercial relationships.

In the ancient period, when the primitive religious elements played an important role, the modalities of extinction were based on the principle of symmetry which was also present on other levels of the life of the state. According to this principle, “the validity of an act is terminated only by solemn forms reversed to those which gave rise to its birth”\(^7\). We can speak in this period of a rigid modality of extinction of obligations precisely because of the solemnity and formalism imposed. These have gradually evolved, being provided by the civil law and extinguish the receivable \textit{ipso iure}, in full, namely the creditor loses the action and may no longer prosecute the debtor which shall be finally released.

To the civil modalities of extinction of the obligations, those in the praetorian law were added, which lead to the release of the debtor by an exception, \textit{exceptionis iure}, which means that it blocks the creditor’s action, rendering it useless.

Thus, the extinction of the obligations may be classified according to the characteristics of the legal relations existing in the Roman State and the characteristics of the Roman law. Thus, the following types are considered\(^8\):

a) modalities of extinction of obligations under the civil law (\textit{ipso iure});

b) modalities of extinction of obligations under the praetorian law (\textit{exceptionis ope}).

2.1. Modalities of extinction of obligations under the civil law (\textit{ipso iure})

\textit{a) Payment (solutio)}

The payment represented the modality in which the extinction of the debtor’s receivable was understood, in a strict sense.

In the old law, the form in which the payment was made was very important and its execution did not lead to the extinction of the debtor’s obligations if it did not involve legal solemnities. After the development and diversification of the civil and commercial life, the solemnities and legal forms hindered the economic development and it started to be considered that the essential elements in the extinction of the obligations is the performance which includes an economic value and not the forms. This principle starts to be imposed to the end of the Republic, when the civil law took it over and the praetorian law and the imperial law conferred it a larger scope of application.

Depending on the type of contract concluded, the solemnities which were required at the time of making the payment were different. Thus, in the case of verbal contracts, the obligations were extinguished by uttering words which were the reverse of those whereby they were created; the debtor asked the creditor: \textit{quod ego tibi promise, habesne acceptum?} (did you receive what I have promised to you?), and the creditor had to


\(^{8}\) V. Hanga, \textit{op. cit.}, p. 294.
answer yes: habeo (I received) releasing the debtor from its obligation, as a result of the fulfillment of the performance its undertook.

Thus, the payment could have as its object either the remittance of an amount of money or the conveyance of property over an asset, or the execution of a work, and, according to the object, the payment may consist of an action of giving, doing or performing.

Because of the fact that the satisfaction of the creditor was pursued, the payment could also be made by a third party, not only by the debtor.

The payment may be received by the creditor or its legal representative (guardian, curator) or conventional representative (attorney-in-fact). The person who receives the payment has to hold such capacity. If the payment is made to a ward without auctoritatis tutoris, the obligation is not extinguished. In this case, the payment does not have a releasing nature, meaning that the debtor may be constrained to make a new payment.

As regards the payment modalities, the “theory of imputability of the payments” established that the payment had to cover the entire debt and, in case a debtor had several debts and failed to specify which of them he wanted to extinguish, the most onerous of the debts was extinguished (for instance, the one which generated interest was extinguished).

The object of the payment had to be precisely the object of the obligation established by the parties’ convention, and the creditor could not be forced by the debtor to receive something else. Juristconsult Paul emphasized that a thing could not be paid to the creditor instead of another thing, without his will.

The place of the payment – the payment had to be made at the place established by the concerned persons or where the obligation was contracted or where the thing is located. In case of silence of the parties, the choice is given to the debtor. If the debtor delays the payment, and the creditors requests that such is made in another place, it shall commit a pluris petitio loco, and its action shall be rejected.

If the debt is subject to a suspensive term (dies a quo), the performance may not be requested by the creditor before the expiry of such term, but, however, the debtor can pay earlier. If the debtor paid before the agreed term expired, it may no longer request back what he paid, considering that he executed what was due by the contract. The extinctive term (dies ad quem) consists in a future and sure event at whose fulfillment the obligation shall be extinguished. The use of such a term was admitted in particular in the good faith contracts precisely due to the fact that reaching the term entailed the extinction of the obligations.

As regards the obligations undertaken on conditions, in the classical law, the obligation did not exist as long as the condition was not fulfilled, but the debtor’s commitment was born at the time of contracting. If the debtor had fraudulently attempted to prevent the fulfillment of the condition, it shall be held liable as if the condition were fulfilled. Emperor Justinian took some measures helping the creditor to preserve the patrimony of its debtor which could become insolvent or die. If the condition is fulfilled,
the obligation shall become pure and simple and the idea that the obligation is born from the moment of its conclusion was admitted\textsuperscript{13}. Some practical consequences resulted from here in favor of the creditor.

The evolution of the proof of payment was marked of the Roman’s conception in respect of the form of legal acts. In the ancient age, this was made either with witnesses, either by oaths, and, starting from the classical age, the writs called receipts (statements) were also used. If the receipts came from a debtor using the formula “He said he has!”, they were considered objectively drafted and stood good against the creditor only provided that they had the witnesses’ seals affixed. If the receipts came from a debtor using the formula “I have written that I have received”, there were considered subjectively drafted and they stood good against the creditor even if the witnesses’ seals were not affixed.

\begin{itemize}
\item[b)] Debt relief (forgiveness of debt)
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The debt relief constitutes in fact a waiver of the obligation, consented by the parties in full agreement. Like the payment, the debt relief is made in solemn forms which are the reverse of those which were initially contracted and which established the respective obligation. If it was a verbal obligation (\textit{verbis}), the obligation was extinguished by uttering words contrary to those by which the obligation was concluded and constituted a debt relief. For the obligation arisen from consensual contracts, the civil law added to such solemn forms a new modality of debt relief but without forms (\textit{contraries consensus}) and based on the same principle of symmetry. Thus, it was considered that what is born by the mere consent may be unbound by a contrary agreement of the parties.

Some analysts consider this procedure as being a debt relief, but it is in fact a termination of the contract which occurred before any beginning of execution (\textit{rebus adhuc integris})\textsuperscript{14}.

\begin{itemize}
\item[c)] Novation (novatio)
\end{itemize}

The novation, as means of extinction of the obligations, represents the replacement of a previous (old) obligation with a new one. Consequently, the novation is not a special legal act, but the effect of a contract, usually the effect of a novation stipulation.

The novation may take place between the same debtor and creditor, and also between persons which are different from the old participants in the legal relation of the obligation. In the first case, the novation was used to add a new modality (terms or conditions) or to turn a good faith obligation into a strict legal obligation. The second version of the novation was used by the usurers in order to maximize their profit from the profitbearing operations conducted.

For the novation to produce the specific legal effects, it was necessary to simultaneously fulfill several conditions:

- there should have been an \textit{old obligation} which was to be replaced by a new one; the new obligation had to arise from a verbal contract and have the same object as the old one;

\textsuperscript{13} V. Hanga, \textit{op. cit.}, p. 302-304.

\textsuperscript{14} V. Hanga, \textit{op. cit.}, p. 296.
- there should have been the intention to novate (the intention to novate was presumed in the classical law, and in the time of Justinian, it had to be surely expressed); in the old law, the parties’ intention to novate resulted from the form of the stipulation or from the form of the litteris contract, because whenever these contracts were used for the novation of an obligation, they were presented in a special form;
- there should have been a new element (aliquid novi), which differentiated the old obligation from the new one; the new element could consist, if the novation took place between the same persons (inter easdem personas), in adding or changing a modality (for instance, a pure and simple obligation is replaced with an obligation subject to a term or to a condition) or the replacement of a good faith obligation with a strict legal obligation, in order to restrain the judge’s power of assessment. 

If the novation takes place between other persons than those who contracted the first obligation, the element consisted either in the change of the creditor or in the change of the debtor. In the first case, i.e. in the situation in which the old debtor undertakes an obligation to a new creditor, which thus substitutes the rights of the old creditor, it is a delegation of credit, because the old creditor delegates in its place the new creditor; in the second case, i.e. in the situation in which the old creditor was to receive the payment from a new debtor, which substitutes the old debtor, it is a delegation of debt, because the old debtor delegates the new debtor in its place.

The new obligation, usually resulting from a stipulation, is necessarily a strict legal obligation. The necessity of this formal contract is explained by the fact that the novation was already known in the ancient age, an age when the payment did not produce effects unless it took a solemn form.

The effect of the novation is the creation of a new obligation by the extinction ipso iure of the old obligation.

d) Confusion (confusio)

It refers to the fact that the same persons has the capacity as both debtor and creditor. It is materialized, most frequently, by the inheritance of the creditor by the debtor or the other way round. The execution of the obligation in this situation becomes impossible and the obligation shall be extinguished ipso iure.

e) Death

In the old Roman law, the obligation was extinguished by the death of one of the parties, because the principle of non-transmissibility of obligations operated.

The principle of non-transmissibility of debts and receivables should be considered in the context of the origin of the first obligation, which was born on the occasion of perpetration of an offence by turning the material dependence into a legal relation. Since the obligation was seen, at its origin, as an equivalent of the right of revenge, it could not be transmitted, like the right of revenge cannot be transmitted.

In the classical law, the idea of transmission of the receivables and debts was admitted, but the old principle left, however, numerous traces in the field of obligations.

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15 C. Murzea, Drept Roman [Roman Law], All Beck Publishing House, Bucharest, 2003, p. 150.
16 Ibidem.
17 V. Hanga, op. cit., p. 297.
For instance, the debts born from tort do not pass to heirs, because the victim’s right of revenge, which lays at the origin of its receivable, is intimately connected to the offender’s person.

f) *Capitis deminutio* (loss of personality)

We only take into consideration the *capitis deminutio minima*. This is applied in the case of loss of personality by effect of adrogation, because the adrogated person becomes in person *sui iuris* the person *alieni iuris*, passing under the power of the person who made the adrogation.

As such, the assets and rights of the adrogated person shall pass to the patrimony of the person who makes the adrogation, to the detriment of the creditors of the adrogated person: they cannot sue the person who makes the adrogation because this was contrary to the principle of relativity of contractual effects, nor the adrogated person. Thus, an inequity appeared.

For this reason, in order to protect the interests of the creditors, the praetor conditioned the acquiring of the receivables belonging to the adrogated person by the person who made the adrogation, on the payment of the debts belonging to the adrogated person.

### 2.2. Modalities of extinction under the praetorian law

In order to improve the modalities of extinction of the obligations in the civil law by debt relief, the praetor has created another one, lacking the forms, which had the name of pact of waiver of debt (*pactum de non pedento*).

This was a meeting of wills appeared between the parties whereby the creditor waived the receivable. This could tacitly result when the document acknowledging the receivable was returned to the debtor, could be expressly given, verbally or in writing, only the act of will of the creditor had to exist. The efficiency of this act was only by means of judgment, when it was opposed to the creditor which wanted the recovery of the receivable by an action in court.

a) *Compensation*

The compensation is the legal operation of extinction of the obligations which occurs when the same credit and debt relations exist between the same persons, and the receivable is extinguished up to the smallest.

According to Modestinus, *compensatio est debiti et crediti inter se contributio*\(^\text{18}\) (the compensation is the deduction of some debts and receivables from one another).

As it can be seen, the compensation implies the existence of two mutual debts and two mutual receivables, which are set off between each other, in order to avoid the performance of two payments. The compensation was made by the parties’ consent, in which case it was called *conventional* (*voluntary*). If the parties failed to reach an agreement, the compensation was to be made by *judiciary* means.

In the ancient age, when the exceptions were not known, the judiciary compensation could not be performed because for the judge this would have implied discussing two

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\(^{18}\) V. Hanga, *op. cit.*, p. 298.
receivables, meaning two different cases. At the end of the Republic, the compensation was admitted in several exceptional cases due to the development of speculative transactions specific to usury. In these cases, the usurers could only prosecute the clients for the balance. Another situation was when a purchaser had to take possession of the patrimony of a bankrupt debtor (bonorum emptor). This could not capitalize its loans, which had belonged to the bankrupt debtor, except by compensation of his debts to the persons sued in justice.

The compensation started to be admitted in the classical law, first in the case of good faith actions, when the defendant could oppose to the claimant in compensation the receivable which resulted in his favor, if the two receivables were generated by the same contract (ex eadem causa). In the case of the strict legal actions, the judge could not make the compensation, because he had to make a literal interpretation, without exceeding the indications received by the formula.

b) Reform of Marcus Aurelius

Marcus Aurelius extended the application of the compensation in the field of strict legal actions. The emperor made available to the defendant an exception of fraud, establishing that the person who sues his debtor and does not make, if applicable, the respective compensation himself, loses the trial. The fraudulent fact of the creditor was presumed by his refusal to make the compensation, thus leaving to the debtor the possibility to oppose the exception of fraud. This threat made the creditor perform the compensation in advance.

As a result of the disappearance of the formulation procedure, emperor Justinian shall introduce a new legal regime in this field, establishing that the defendant may request the compensation at any moment of the lawsuit without being necessary to invoke the exception of fraud, and the judge shall assess himself the need to invoke such. The compensation remains of a judiciary nature, and the legal compensation is not known in the Roman law.\(^\text{19}\).

c) Negative prescription (praescriptio longi temporis)

The ancient Romans have considered that the rights of claim are not time-barred, except for those which were sanctioned by praetorian actions. This is explained by the fact that the praetor’s edict was valid for one year and, consequently, the praetorian actions could be filed only within one year.

As a modality of extinction of the obligations, the negative prescription was introduced by Emperor Theodosius II by constitution in the case of personal actions and it provided that the negative prescription may be opposed to any action which is not filed within 30 years from the moment when it could have been capitalized.

The specialized literature provides another manner of classification of extinction of obligations, centered on the will of the subjects of the obligations and is considered as introducing a classification ground which is foreign to the Roman law.\(^\text{20}\).

\(^{19}\) Ibidem.

\(^{20}\) V. Hanga, op. cit., p. 294.
3. Securities – General Considerations

Personal and real securities mean those legal relationships accessory to the main obligation, conferring more surety to the creditor, in case of the debtor’s insolvency, in the fulfillment of the performance due to it.

The oldest forms of security are personal securities, which could be found in the Roman society with a low level of economic development. At that age, both the monetary circulation and the money loan were quite reduced. The most frequent practices of loan were in kind. When the poor who became debtors were no longer able to extinguish their debt at maturity, they were sold as slaves, forced to work for the creditors or, later on, their assets were foreclosed. In order to better secure their receivable, the creditors also requested that guarantors were brought, which could be subject to enforcement in their turn, either personally, in the primitive age, or in respect of their assets, in a subsequent age. Upon the development of the Roman economy, the creditors increasingly felt the need for securities as sure as possible, and they created the real securities which conferred a higher stability in case of insolvency of the debtors and their guarantors and, moreover, they also facilitated monetary speculations, being able to better quantify the gain obtained at the time of extinction of the debt.

3.1. Personal securities in ancient age

In the ancient age, the Romans knew two types of personal securities: sponsio and fidepromissio.

Both forms of personal security known by the Romans in the ancient age were born by a verbal contract, concluded by question and answer. The creditor addressed to the guarantor the question whether it undertakes the same performance as the debtor, and the expected answer was affirmative.

In the case of sponsio, after the main contract between the creditor and the main debtor was concluded, an adjoining contract was also concluded, between the creditor and the guarantor. Thus, the creditor asked the guarantor: “Idem dari spondes” (Do you promise the same thing?), and the guarantor answered “Spondeo” (I promise). Such a guarantor was called sponsor.

The verb “spondeo” could be uttered only by the Roman citizens, because it was considered that the respective verb had a particular, special vocation of attracting the favor of gods. Because the economic development also requested other such commitments intended also for the peregrini, the legal order created another one with the same content of the question and answer, but in a different formula, using another verb “fidepromitto” (I promise with faith)\(^2\)

Thus, the creditor asked “Idem fite promittisne?” (Do you promise the same thing?), and the guarantor answered “Fidepromitto” (I promise with faith). The guarantor was called fidepromissor.

The substantial rules of the two forms of security were similar, and the obligations of the sponsors and fide-promissors did not pass to descendants, having a strictly personal character. These securities had an autonomous nature, which entitled the creditor to aim at the debtor or the guarantor, at his choice, depending on the person that

\(^2\) V. Hanga, op. cit., p. 308.
he considered more advantageous to foreclose in order to recover the receivable. If the obligation was extinguished by the guarantor, it did not have the appropriate legal means to constrain the debtor that he secured. If there were several guarantors, the creditor could prosecute any of them for the entire debt, and the guarantor which executed the obligation had no legal means to claim their contribution from the co-guarantors.

The vulgus reacted against this inequitable system, which expressed the interests of the class of patricians, and, after a long fight, they succeeded to impose four laws in support of the guarantors. These were: *Lex Publilia*, which provided that the guarantor who undertook, in the form of *sponsio*, has the right to raise claims against the main debtor, if the latter fails to return to him what he paid to the creditor on behalf of the debtor.

*Lex Appuellia*, which was applicable both to the guarantors as per *sponsio* and to those as per *fidepromissio* and inserted new relations between co-guarantors, *i.e.* that any of them could be prosecuted for the entire debt.

*Lex Furia de sposu* (relation of personal security) is the most important and included two provisions:

a) the debt shall be divided among the living guarantors at maturity, regardless of whether they are solvent or not;

b) in order to force the creditors to prosecute the debtors so as not to increase the debt as a result of the application of penalty interest for the delayed payment, a statutory limitation was established in respect of the guarantors’ obligation, which was extinguished by the lapse of a two-year term from maturity, if the respective security contract had been concluded in Italy.

As a result of the development of usury transactions, the system of personal guarantees was subject to numerous improvements in the creditors’ interest. In the classical age, a new form of guarantee appears, called fidejussion, which could be applied over any receivable, so it was no longer limited only to receivables arising from a verbal contract. The obligation of the fidejussor was also transmitted to his descendants, which was superior to the other two forms of security. The *Fideiussio* is a personal security, formed by question and answer, with the difference that, at the creditor’s question, the guarantor uttered the verb “*fideiubeo*” (I agree on my word). In this case, the guarantor was called *fideiussor*.

In this case also, the creditor could prosecute the fidejussor before the debtor if he considered the first more solvent. During the reign of Hadrian, the benefit of division was introduced, which conferred to the fidejussor the right to request the creditor to extend his prosecution of the receivable over all the guarantors solvent at the time of initiation of the action.

The fidejussor who paid for the main debtor had the right to request the satisfied creditor to deliver the receivable to him, and thus he could claim it either from the main debtor, who should have returned the paid amount, or he could claim it from the other guarantors with whom he could jointly incur the payment; this is the so-called benefit of assignment of action.

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22 Ş. Cocoş, *op. cit.*, p. 255.
During the reign of Justinian, the character of fidejussion is subsidiary, meaning that if the main debtor was firstly pursued, the fidejussor could no longer be pursued.

**Other personal securities** classified by some of the authors as informal, existing in the Roman law, were *mandatum pecuniae credendae, pactum de constituto, receptum argentariorum*. By the mandate, the guarantor (principal) empowered the creditor (attorney-in-fact) to lend to the debtor, assuming the liability in his capacity as guarantor.

The pact of constitution was also considered a form of informal personal security, which was a creation of the praetor bearing the name *constitutum debiti alieni* and having the role to fix a new term for another person’s debt.

### 3.2. Real securities

The real securities were made of certain goods belonging to the debtor’s patrimony that he reserved to the creditor for the case when he could not extinguish his debt at maturity.

In the evolution of the Roman law, three distinct real securities were known: fiduciary and pledge (*pignus*), which appeared in the ancient age, and the mortgage, which appeared in the classical law.

**a) Fiduciary**

It is a contract constituting the conveyance of the *property* over an asset, by the debtor to his creditor, by *mancipatio or in iure cessio*, and the creditor promises to return the asset to the debtor, if such pays its debt. This contract only had a temporary nature, serving only as a security for the payment of the debt at maturity. Although this form of security is very advantageous for the creditor, since he becomes the owner of the asset (and debtor under condition of such asset), the fiduciary has obvious disadvantages for the debtor, which sometimes derive from the value of the asset established as security which may exceed the value of the receivable, and the debtor cannot use that asset in order to secure another debt. Other times, after the payment of the debt, the debtor has only a personal action, which was born from the fiduciary contract, so that he risks to compete with the creditors of his creditor and, moreover, if the asset established as security reaches the hands of third parties, the debtor has no right to pursue it. It should also be reminded that the fiduciary implied acts which could be accessible only to the citizens. From this standpoint, it does not correspond to the needs which occurred between the creditors. In consideration of the inconveniences presented by the fiduciary, the Romans have created new forms of security, better adapted to the requirements of the economy of trade.

**b) Pledge (*pignus*)**

Considered as a superior form of security, the pledge is formed by remittance of *possession* of an asset, by the debtor to his creditor, through conveyance, a transmission accompanied by a convention whereby the creditor promises to retransmit the possession of the asset if the debtor executes his obligation. As compared to the fiduciary, the pledge presents the advantage that the debtor remains the owner of the asset. Thus, since the debtor conveys only the possession of the asset, there is no risk that competes with the
creditors of his creditor and, at the same time, in his capacity as owner, he may pursue the asset irrespective in whose hands such is. However, the pledge presents for the debtor the disadvantage that he cannot guarantee several debts with the same asset, and for the creditor, the disadvantage that he cannot sell the asset for the capitalization of the right of claim.

The pledge could be established only by the parties’ will and did not require registration in the public records, which made it have a clandestine and not public regime. The pledge could also be established by means of authority (in order to compel the person who lost the trial to serve his sentence).

c) Mortgage

The mortgage is an evolved form of security, perfectly adapted to the requirements of a society based on commodities and credit. As starting point, the mortgage appeared when the farming leasehold appeared, being used in the conventions which were concluded for agricultural lease. In these situations, the lessee used to establish a security in favor of the landlords, securing the payment of the lease. The entire living and dead stock was established as security. This stock could go under the control of the landlord if he requested the Salivan interdict in case of non-payment of the lease. If the stock was in possession of a third party, then the interdict was no longer efficient because the landlord had no action against third parties. For this case, the Serviana action was created, whereby the landlord could pursue the stock irrespective of its possessor. In the first century of the Imperial age, the scope of this action extended under the name action quasi Serviana which required that, if such a convention existed between the creditor and debtor, the object of the receivable shall not be taken into account.

Thus, the mortgage was established, a real security presenting the big advantage that it was neither made by transfer of property nor of possession over the asset.

The mortgagee shall take possession of the asset or shall sell it, thus capitalizing his receivable. Consequently, the interests of the creditor are perfectly secured, because he does not risk to incur the consequences of the debtor’s insolvency, and the debtor may exploit the asset according to its purpose, and shall be dispossessed only if he fails to make the payment.

Emperor Constantine prohibits the creditor to become owner of the good, allowing only its sale. However, in Justinian law, a trace of this concept is kept under the following form: the creditor could request the Emperor to give him the asset if no purchaser is found for that asset, but under reserve of certain conditions which had to be fulfilled.

The mortgage has a clandestine (secret) nature, meaning that it does not require the use of publicity so that third parties become aware that a certain asset is mortgaged, like in the case of pledge. Because of the secret nature of the act, wanting to borrow new amounts of money, the debtors mortgaged the same asset several times, without declaring the existence of previous mortgages, which led to extremely serious consequences. There were cases when the mortgages were pre-dated, a more recent mortgage being fraudulently placed before an older mortgage. Most of these possibilities of fraud were stopped by the reform of Emperor Leo, according to which a mortgage
established by a public act or by a private act subscribed by three witnesses has priority to the mortgages established without forms of publicity, irrespective of their date.

The mortgage could also be established by the law, in the case of mortgages of the tax authorities over the estate of taxpayers, of persons lacking capacity over the assets of the curators and guardians etc.

The object of the mortgage, like the object of the pledge, could be a tangible movable or immovable asset. If the same asset was mortgaged to several creditors, the relations between them shall be governed by the rule: *prior tempore potior ture*, meaning the right of mortgage previously established prevails over that subsequently established. Thus, the first satisfied creditor shall be the first rank creditor, then the second rank creditor etc.

REFERENCES