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FIDUCIA AND PIGNUS IN SOURCES OF POST-CLASSICAL ROMAN LAW – SYNONYMS OR TERMS UTILIZED FOR DIFFERENT KINDS OF PLEDGES?[1]

It is well known that the *fiducia cum creditore contracta* in the classical period practiced all over the Empire was changed by *pignus* in postclassical times. Therefore, in the books of the Justinian's Codification the term *fiducia* was replaced by the term *pignus*. On contrary, on the utilization of the term *fiducia* for pledge in postclassical sources of the so-called `West Roman vulgar law` the literature offers only shallow information.

This article aims to:

1. inform the reader about the postclassical/ early medieval sources which utilize the term *fiducia* as a kind of pledge;

2. find out, whether there are or not dogmatical differences between *fiducia* and *pignus*, particularly:

A) does *fiducia* means the transfer of ownership on the pledged thing to the pledgee;

B) whether *mancipatio* was still needed in case of *fiducia* and what was the meaning of *mancipatio* in those times;

3. find out, whether the connection of *fiducia* with *fides* could be a reason for retention of *fiducia* as a kind of pledge.

4. As conclusion, the articles offers a hypothetical answer on the question: why *fiducia* was preserved in these sources and in which sense?

[1] Since in post-classical times the institutions and terms utilized for *fiducia* and *pignus* have been changed compared to their classical meaning this research needed more place, and therefore the article will be divided into two parts.`Part II` will be published in the next edition of the `Zbornik Pravnog fakulteta u Novom Sadu`.

Key words: *fiducia, pignus*, pledge, postclassical Roman law, vulgar law, *mancipatio, fides.*

Part I.

In the first part we will inform the reader about the sources containing the word *fiducia* as a kind of a pledge *(fiducia cum creditore contracta)* and we will elaborate on the question: was the ownership of the pledged thing transferred to the creditor (pledgee) in case of *fiducia* even in the observed period?

1. The postclassical /early medieval sources including the term *fiducia* as a kind of pledge *(fiducia cum creditore contracta)*

The prevailing opinion is that *fiducia* was a practiced institution throughout the classical period. It was regulated in the praetorian edict[2] and treated by classical jurists like *Gaius, Pomponius, Africanus, Marcellinus, Iulianus, Ulpianus, Paulus*[3] and by the last classical Roman jurist *Modestinus* (Coll, 10, 2, 2).[4] It is incorporated in the preserved documents coming from the classical period: the *formula Baetica* (Spain, 1 – 2 century A.D.)[5]; the *mancipatio Pompeiana*[6]; the *tabulae Herculanenses*[7], the *lex colonis fundi Villae Magnae data ad exemplum legis Mancianae*[8].

In the post-classical period only a few sources mention *fiducia*, but it is believed, this institution was used almost on the whole territory of the Empire until the end of the 4th century.[9] From the beginning of the 5th century the destiny of *fiducia cum creditore contracta* was different in the Western and in the

[2] O. Lenel, Das edictum perpetuum, Leipzig, 1883, 3th ed. Restamp. Aalen, 1956; Palingenesia iuris civilis, Leipzig, 1889, Restamp. Graz, 1960.

[3] See the sources in, B. Noordraven, Die fiduzia im römischen recht, Amsterdam, 1999, p. 12 sqq.

[4] C. Longo, Corso di diritto romano, La fiducia, Milano, 1933, p. 163.

[5] Formula Baetica (AD 1st-2nd century) Bronze tablet discovered near Seville, Spain, in 1867. CIL II, n. 5042 (Epigraphik-Datenbank Clauss/Slaby); Bruns, Fontes iuris Romani antiqui, I, Tübingen, 1909, pp. 334-335, n. 135; Degenkolb, ZRG, 9, 1870, pp. 117 sqq.; Gide, Revue de législation ancienne et moderne, 1, 1870, pp. 74 sqq.; Huebner, Hermes, 3, 1868, pp. 283 sqq.; Krueger, Krit. Versuche, 1870, pp. 41-58; Rudorff, ZRG, 11, 1873, pp. 52 sqq.

[6] FIRA III, Nr. 91, 291 sqq.

[7] V. Arangio- Ruiz, La parola del passato, 12 (1957), pp. 52 sqq.

[8] CIL, 8, Suppl. 4, 2561, n.25902 (from 116 or 117 A.D.), IV, 3 in fine: `*...hoc tempus lege Manciana...ritu...fiducieve data sunt dabuntur...vi ius fiduciae lege Manciana servabitur.*`

[9] Having in mind that there are some rules about in the Vatican fragment, and that the *fiducia* is mentioned in the C.Th. 15, 14, 9 from 395 A.D. See, Longo, op. cit. p. 164.

Eastern part of the Empire. On the West, *fiducia* is spotted in some legal sources like: *Codex Theodosianus*[10], *Consultatio veteris cuiusdam iureconsulti*[11]; *Mosaicarum et romanarum legume collatio*[12]; *Fragmenta Vaticana*[13]; *Lex Romana Visigothorum* (506).[14] It can be found also on the papyri from Ravenna (445 - 46) that is speaking about the land `*quem Tranquillus quondam…fiduciae nexu obligaverat*`.[15] F*iducia* is contained in the writings of *Boethius*[16], *Isidorus* from Seville,[17] *Saint Ambrosius*[18] and *Sidonius Apollinaris.*[19] On the basis of these sources Longo believes that *fiducia* was utilized all over Western part of the Empire even after the end of the 4th century. However, it is questionable whether the institution remained unchanged and whether the term *fiducia* was utilized in all these sources for a kind of a pledge named *fiducia*.[20] On the East-

[10] CTh. 15, 14, 9 (395); *`pignoris adque fiduciae obligatio perseveret`;* about the *fiducia* in the case of emancipation, CTh. 5, 1, 3 [=brev.5, 1, 3] (383): *`Quoties de emancipatae filiae successione tractatur, seu eam fiduciae nomen obstrinxit…`;* Interpretatio*. Filia, quam fiduciatam nominavit, hoc est emancipata*; The only text of the Breviary which refers about the hypotheca is the: CTh. 4, 14, 1 pr. [=brev.4, 12, 1 pr.] (424) *`qui pignus vel hypothecam non a suo debitore, sed ab alio possidente nititur vindicare`)* – given at Constantinople! In the same constitution the *fiducia* is utilized in the sense (par. 5) `…*qui se fiducia perpetuitatis actionem non movisse commemorat*…` (non instituted action on account of his confident belief in the perpetuity of his claim).

[11] Cons. 6, 8 Liber II sent. Pauli titulus Ex empto et vendito: *`heredibus debitoris adversus creditorem, qui pignora vel fiducias distraxit, nulla actio datur, nisi a testatore inchoata ad eos transmissa sit.`*

[12] Coll. 2, 3, 1: *`fiduciae iudicio`*; Coll. 10, 2, 1:*`fiduciae iudicium`*.

[13] FV. 18: *`actione fiduciae`;* FV. 37, 1: *`fiduciam sibi esse servatam`*; FV. 94: *`ex causa fiduciae ablatus est`*; FV. 252: *`quod ne fiduciae daretur`*; FV. 334: *`fiduciae actione`*.

[14] The majority of texts about *fiducia* can be found in these sources. For our research we used the reconstruction made by Gustavus Haenel, Lex Romana Visigothorum, ad LXXVI librorum manu scriptorium fidem recognovit, septem eius antiques epitomis, quae praeter duas adhuc ineditae sunt, titulorum explanatione auxit, annotatione, appendicibus, prolegomenis, edition post Sichardum prima, Lipsiae, 1849, reprint, Scientia Verlag Aalen, 1962.

[15] Ravenna ChLA20,705 (The Duke Databank of Documentary Papyri, P.Ital.: Die nichtliterarischen lateinischen Papyri Italiens aus der Zeit 445-700)

[16] Anicius Manlius Severinus Boethius (480–524 or 525) was a Christian philosopher of the 6th century. He was the Consul in 510 in the Kingdom of the Ostrogoths and was executed by King Theodoric the Great, who suspected, he conspired with the Byzantine Empire; Boethius, ad Cic. Top. 10, 42: *`fidem praestare debet…si qui fiduciam acceperit`*.

[17] Isid. Etym. 5, 25, 23: *`Fiducia est, cum res aliqua sumendae mutuae pecuniae gratia vel mancipatur vel in iure ceditur`*.

[18] Ambrosius (also known as: Saint Ambrose of Milan), De Tobia, 12, 40 (ca.339 - 397) (P.L., XIV, 759). the text was not reachable to us.

[19] Sidonius Apollinaris, Letters. Tr. O.M. Dalton (1915) vol. 2. pp. 3-47; Book IV http://www.tertullian.org/fathers/sidonius_letters_04book4.htm 4, 24, 1: To his friend Turnus A.D. 461-7.

[20] Longo, op. cit. p. 164; In the Novels of Valentinianus and Marcianus we can find *fiducia* only in the sense of guarantee, trustworthiness, confidence: Nov. Val. 1, 3, 2 (= Brev. 7) A.D. 450. *`quas servare nescit simplicitas et fiducia nihil debentis`* (which simplicity and the confi-

ern part of the Empire, according to Longo, from the beginning of the 5th century there is no evidence on the utilization of *fiducia*, hence Justinian by changing the term *fiducia* with the term *pignus* has introduced nothing new.[21]

2. The question of dogmatical differences between *fiducia* and *pignus*

A) *Fiducia* and the question of ownership transfer of the pledged thing to the pledgee

Regarding `vulgar law` a number of texts about *fiducia cum creditore contracta* can be found in Breviary's *(Lex Romana Visigothorum)*[22] books dedicated to *`Pauli Sententiarum*.`[23]

Texts of the *Pauli Sententiae* that are in the Breviary and contain the word *fiducia* can be differentiated in three groups. In the first are those which utilize only the word *fiducia:* Brev. PS. 2, 12, 4; 5;6;8; 2, 13, 1; 2;3, 9, 53; in the second are those in which the word *fiducia* is present together with the word *pignus*: Brev. PS. 1, 9, 8; 2, 4 /the title/; 2, 12, 7; 3, 8, 15; 5, 1, 1; 5, 28, 4; and in the third group are the *Sententiae* which *Interpretatio*[24] utilizes the term *fiducia* as well: Brev. IP. 1, 9, 8; 2, 13, 1 and 2.

What could be the reason that the *Sententiae* and the *Interpretatio* uses more terms for the same institution? Levy raises the question of this `*pleonasmus*,`[25] Burdese observes the similarity of the meaning of these terms, but neither gives acceptable explanation for their parallel utilization.[26]

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dence of owing nothing do not know to preserve); Nov. Val. 21, 1, 4 (Brev. 4, 1) A.D. 446. `*praeter fiduciam (trustwothiness) precum pridem*`; Nov. Val. 27, 5 (Brev. 8) A.D. 449. `*fiducia legum*` (assurance of the laws); Nov. Marc. 5, 2, A.D. 455. `*securitati vel fiduciae morientium providentes*` (for the security and confidence of the decedents).

[21] Longo, op. cit. p. 165.

[22] Lex Romana Visigothorum which is also called Breviarium Alaricianum will be referred to in this paper as `Breviary`.

[23] About drafting and the content of Breviary see: M. Sič, Lex Romana Visigothorm, Zbornik radova Pravnog fakulteta u Novom Sadu, Novi Sad, 1-3/ 1984.

[24] Iulii Pauli sententiarum interretatio (A.D 5th century), Based on the edition of M. Kaser & F. Schwartz, Die Interpretatio.., Köln, 1956). http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Responsa/interpret.html

[25] E. Levy, Weströmisches vulgarrecht das obligatonenrecht, Weimar, 1956, pp. 183 sqq. Ambros. De Tobia 12, 40; Gloss Amploniana (Gloss. Latina edd. Loewe – Goetz) V 294, VI 450; gloss. Scalig. V 601 VI 572. Contra, Isidor. Etym. 5, 25, 23.

[26] A. Burdese, Lex commisoria e ius vendendi nella fiducia e nel pignus, Torino, 1951, p. 205, n. 3 writes: "i compilatori visigoti mostrano la loro tendenza ad assimilare la fiducia al pignus". Contra, Keller, rises the thesis about the existence of "einheitliches Phandedikt" about all types of the pledge in the classical period. Critic, M. Kaser, Studien zum römischen pfandrecht, reprinted, Napoli, 1982, p. 107 sq.

However, the process of harmonization was ongoing in the late Roman Empire by merging similar institutions of different nations and provinces. Therefore, we raised the question whether this happened with *fiducia* and *pignus*, i.e. whether it was the same institution with two names, or the maintenance of the word *fiducia* for pledge in these texts had its particular raison d'etre.

The research will go step by step. Firstly the rules of *Pauli Sententiae* will be observed together with their *Interpretatio* searching for an answer whether there are or not dogmatical differences between *fiducia* and *pignus.* Since some rules of these types of pledges became similar already during the classical period, only the main dogmatical differences between them will be followed. Namely, the transfer of ownership in case of *fiducia* and a transfer of possession in case of *pignus datum* or in case of *pignus conventum (hypotheca)*, the pledge without possession.

At the beginning we will analyze the three groups of the texts of the *Pauli Sententiae* (hereinafter: PS) – what could they say about the pledge with and without possession, and do the texts about *fiducia* allow the transfer of ownership on the pledged thing to the creditor.

I. By analyzing the first group of texts, those which contain only the word *fiducia (*Brev. PS. 2, 12, 4; 5;6;8; 2, 13, 1; 2;3, 9, 53) it can be seen that the *Sententiae,* Brev. PS. 2, 12, 4; 5; 6; 8 are placed under the title *"De deposito",*[27] while in the PS. they are located under the title XIII *"De lege commissoria"*. Reading these Sentences the following observations can be made: Under the title *"De deposito"* the Brev. PS. 2, 12, 4 (= PS. 2, 13, 1) *"distractis fiduciis"* gives no information about the pledge with- or without possession. If this is interpreted in a classical sense we suppose the ownership was transferred to the creditor, but it should not happen in the postclassical period. The next Brev. PS. 2, 12, 5 (2, 13, 2)[28] about *"fiduciarium servum*" where the price of the labor[29] was counted towards honoring the debt *("sortem debiti minuit")* shows that the creditor is the possessor (which could be even *possessio naturalis*) but whether he is an owner too, remains uncertain. Frezza considers the right of the fiduciary to acquire the fruits of the pledged thing as an evidence of his ownership.[30]

[27] The term *depositum* beside its strict classical sense (as a contract of deposit), in vulgar law has in *lato sensu* the meaning of giving the thing to somebody for some other reason: in *pignus* or in *commodatum*. According to Levy, (E. Levy, Obligatonenrecht, p. 187) from the late 4th century there was an influence of less technical pros-literature on legal texts, therefore the often-used term *pignus deponere* meant *pignus dare*.

[28] Brev. PS. 2, 12, 5 (2, 13, 2): `*Quidquid creditor per fiduciarium servum quaesivit, sortem debiti minuit.*`

[29] Connecting with Brev. PS. 5, 1, 1.

[30] P. Frezza, Le garanzie delle obbligazioni, parte terza, Pisa, 1958, p. 26; also, A. Biscardi, Appunti sulle garanzie reali in diritto romano, Milano, 1976, p. 91, writes: `Il creditore fiduciario

Breviary is at another standpoint regarding the acquisition of the fruits. While one of the texts of *Pauli Sententiae* (Brev. PS. 2, 5, 2) allows keeping the fruits by the pledgee[31] on the debtor's consent, the *Interpretatio* does not suggest such a possibility – the fruits always belong to the debtor.[32]

The other Sentence of this title (Brev. PS. 2, 12, 6 /= PS. 2, 13, 3 / *`vendere fiduciam`),* provided it is interpreted in a classical sense, it is possible for the *fiduciant* to sell the thing under the fiduciary agreement even if the ownership is transferred to the creditor. However, this was not possible in postclassical times, because the alienation of *res aliena* was prohibited. Therefore, if this Sentence is interpreted in a postclassical sense the ownership was not transferred to the creditor *(fiduciary*).[33]

Finely, the Sentence: Brev. PS. 2, 12, 8 /= PS. 2, 13, 5/ *"fiduciam sibi vendere"* and *fiduciae actio"*), sounds as a rule of *fiducia* with creditors *ius vendendi* as *naturalia negotii*[34] and the *actio fiduciae* that means – the debtors (in this case annulled) right *in personam*, but it could not be taken as an evidence that even the ownership was transferred to the creditor.[35]

The other Sentences of this group: Brev. PS. 2, 13, 1 (=PS. 2, 13, 6) *"rem fiduciae datum /am/"* and *"actio fiduciae"* means, in a classical sense, the transfer of ownership to the creditor on the pledged thing and the possibility of the debtor to use *actio fiduciae* against the *creditors successors*[36] (it seems that this

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acquista iure domini tutti i frutti naturali e civili della cosa fiduciata…`. However, the CJ. 8., 27, 1 (223) in the same sense speaks about pignus, if it is not interpolated, also, CJ. 4, 23, 3; Lex Dei Coll leg Mos et Rom 2.3.1 (Papinianus Definitiones). See, B. Noordraven, op. cit. p. 165 connected with the question of *condictio furtiva*, see also H. Ankum, Furtum pignoris und furtum fiduciae im klassischen römischen Recht, II RIDA 27 (1980), 126.

[31] The Interpretatio uses the word *pignus,* however this does not mean it could not have been applied for *fiducia* as well, having in mind that the Interpretatio of the quoted Brev. PS. 2, 12, 5 (2, 13, 2) instead of *fiducia* speaks about `*oppignoratum…servum*`.

[32] Brev.PS. 2, 5, 2: *`Fetus vel partus eius rei quae pignori data est pignoris iure non tenetur, nisi hoc inter contrahentes convenerit.` Int: `Si quis gregem equarum, vaccarum vel ovium accepta mutua pecunia pignori creditori dederit, foetus earum rerum ad debitorem, non ad creditorem pertinet. Ita est et si ancillam dederit, et partum ediderit, ad debitorem pertinet, non ad creditorem.`*

[33] Compar, B. Noordraven, op. cit. p. 167.; According to the Sentence (Brev. 2, 32, 20 = PS. 2, 31, 19) even in case of *pignus (pignus datum)* the debtor could not take back the thing from his creditor against his will – it is a *furtum* though the debtor remained the owner.

[34] According to Biscardi (op. cit. p. 86), the *ius vendendi* was *naturalia negitii (pactum vulgare*) at the beginning of the classical period but it became even *essentialia negotii* in postclassical times. To support his findings Biscardi only referrs to PS. 2, 13, 5., from which he concluded that because *ius vendendi* became *essentialia negotii*, if the creditor could not find a buyer for the pledged thing and since the creditor could not buy it himself, nor the other person (middleman), the only solution remaining for him was the *impetratio possessionis* (D. 13, 7, 24 pr).

[35] See about the *lex commissoria*, Biscardi, op. cit. p. 86.

[36] See about this Sentence in B. Noordraven, op. cit. pp. 162 – 163.

Sentence was shortened); The next: Brev. PS. 2, 13, 2 (= PS. 2, 13, 7) *"creditor rem fiduciariam fecerit meliorem"* and *"iudicio fiduciae"*[37] as a proceeding in which the creditor has a right from *pactum fiduciae* (a right *in personam*) to ask for the reimbursement of expenses - shows the creditors possession, but we do not know whether he is also the owner.

The text of the Brev. PS. 3, 9, 53 (PS. 3, 6, 69)[38] is very confusing and has different parts from different periods – it reflects some postclassical problems. The part of the text important for us: *"fiduciae datae sunt"*, seems as a real *traditio ancillae* to the creditor, but does not prove the transfer of ownership. The addition: *his scilicet esceptis "exceptis", qui fiduciae dati sunt* – opens the question whom will belong the fruits? If the *servus* or *ancila* was charged by *fiducia* their work price[39] will be counted towards paying off the debt. The *legatum* made by *do, lego* transfers the ownership to the *legatarius*. Postclassical jurists were not sure how the ownership over a thing could be transferred if it was charged by the right of another person that narrows the right of a future owner and also, to whom *partus ancilae* would belong.

It can be concluded that in this group of the Sentences the term *fiducia* was mainly used in the sense of a pledge with possession; however its meaning as a pledge without possession is not excluded. Still the issue whether *fiducia* transfers the ownership over the pledged thing to the creditor remained uncertain.

The interpreters of *Sententiae* replaced the word *fiducia* under *title "De deposito"* with: *`rem sibi pro debito positam`; `oppignoratum`; `oppignoratam`; `pignus`*[40]. In other *Interpretatio* belonging to this group the following possibilities are present: *`rem (fiduciae), quam a debitore pignori acceperit`*[41]; *`praedium sibi fiducia obligatum`; `loco pignoris posuerit`*[42]. Clearly, the term *fiducia* was used only once: *`praedium sibi fiducia obligatum`*.[43]

From the wording used by interpreters it could not be conclude they are speaking solely about the pledge with possession. The word *`oppignorare`*

[37] Biscardi (op. cit. p. 107 sq) oposit to Biondi takes this Sentence as very important evidence of creditors (fiduciary) right for *actio fiduciae contraria*. See also, B. Noordraven, op. cit. p. 267 sqq.

[38] Brev. PS. 3, 9, 53: *Servis do lego legatis ancillae quoque debebuntur: non item servi legatis ancillis: sed ancillarum appellatione tam virgines quam servorum pueri continentur: his scilicet esceptis "exceptis", qui fiduciae dati sunt.*

[39] According to the Interpretatio of PS. 2, 5, 2. = Brev. 2, 5, 2 *partus ancillae* belong to the debtor.

[40] Brev. IP. 2, 12, 4 (= 2, 13, 1); Brev. IP. 2, 12, 5 (= 2, 13, 2); Brev. IP. 2, 12, 6 (= 2, 13, 3); Brev. IP. 2, 12, 8 (= 2, 13, 5).

[41] Similar formulation in Gai Inst. 2, 60: *`…fiducia contrahitur…cum creditore pignoris iure…`*

[42] Brev. IP. 2, 13, 1 (= 2, 13, 6); Brev. IP. 2, 13, 2 (= 2, 13, 7); Brev.IP. 3, 9, 53 (= 3, 6, 69).

[43] This Interpretatio will be analyzed later.

could refer to all kinds of pledges. The descriptions *`rem sibi pro debito positam`; `praedium sibi fiducia obligatum`; `loco pignoris posuerit`* means more the charged or offered thing in the pledge than the pledge with possession.

II. Sentences of the second group utilize both terms *(fiducia* and *pignus)*. The Brev. PS. 1, 9, 8 (= PS. 1, 9, 8) *"pignorum et fiduciarium"* which are sold by the creditor (common postclassical phraseology *"a creditore distractae sint")* can be interpreted as a pledge with possession. However, in the classical period it dose not necessarily require possession of the creditor, and even does not mean that the creditor is an owner – the creditor could sell the pledged thing simply due to the right of a pledge and because *ius vendendi* was *naturalia negotii*.

The title Brev. PS. 2, 4 (= PS. 2, 4): *`De commodato, et deposito pignore fiduciave`* signify, as it is commonly accepted, contracts made *re* (transfer of detention, possession or ownership). However, it is questionable whether this group belonged to real contracts before Justinian![44] Gaius did not mentioned them in his *Institutiones* when talking about the contracts *re contrahitur* (3, 90 – 91). Only later *commodatum, depositum* and *pignus* can be found among real contracts in Justinian's Institutions (3, 14) and in parallel fragments of the Digest coming from *Res cottidianae* (Gaius, D. 44, 7, 1, 2 – 6). F*iducia* here is absent; however the reason for this can be in the removal of *fiducia* from the texts in Justinian's time. Particularly, regarding *fiducia,* Noordraven is of a standpoint that it could not be put under real contracts because of its different effect; however he acknowledges there is an obvious similarity.[45] For the formation of *fiducia* it is very interesting whether the de *pactum (contractus) fiduciae* existed prior to the *mancipatio* or *vice versa*? If *pactum fiduciae* was created before *mancipatio*, it is not a contract made re; if it follows *mancipatio* it could be only a transaction made *re.* However, even in this second case the thing could remain in the possession of the debtor *(fiduciant)* in *precarium* or leasing. In the *Epitome Gaii* only *mutuum* is mentioned as a contract made *re* (Brev. E. G. 2, 9, 1). On the other hand, under the title Brev. PS. 2, 4 (=PS. 2, 4): *"De commodato, et deposito pignore fiduciave"* are the rules on *commodatum* and *aestimatum*. In these cases the transfer of the thing to the other party is temporal or conditional and is based on confidence.[46] *Gai Institutiones* emphasizes the

[44] A. Biscardi (Appunti, p. 136) states that this group belongs to real contracts in the system of Gaius. For his arguments, see p. 128 – 132; about this problem Frezza, op. cit. pp. 145 sqq.

[45] See for the arguments: Noordraven, op. cit. pp. 140-142; also Burdese, Manuale di diritto privato romano, 3. ed. Torino, 1975, restamp. 1987, p. 430: `si presenta analogo, dal punto di vista strutturale, ai contratti reali.`

[46] According to Frezza (op. cit. pp. 146 – 148) the obligation *re contracta* does not mean exclusively that it was made by *datio* (transfer of ownership) `ma da una nozione di creditum, in

temporality of the ownership transfer in case of *fiducia cum amico* and *creditore contracta*. The texts about pledge of the Breviary point to these temporally transfer as well. We believe the transfer (or charge) of the thing in favor of the other person *ad tempus* was the reason not to accept it as an ownership transfer in case of *fiducia* in postclassical times. Under the title Brev. PS. 2, 4 (=PS. 2, 4): *`De commodato, et deposito pignore fiduciave`* nothing can be found about *mutuum*, because in case of *mutuum* the ownership transfer was definite.

The next Sentence of this group, Brev. PS. 2, 12, 7 (= PS. 2, 13, 4) *`creditor pignus`* and *`pignoris vel fiduciae finiri non potest`* says noting about the pledge with- or without possession. The remaining three not interpreted *Sententiae* are formulated (by looking only at wording) in the sense of a pledge with possession, however it remains unclear whether it means the transfer of ownership as well: Brev. PS. 3, 8, 15 (=PS. 3, 6, 16) *"testator si postea pignori vel fiduciae dederit"* – because the part of the text: *`ex eo voluntatem mutasse non videtur`* shows the thing was charged by the pledge only temporary.

The next: Brev. PS. 5, 1, 1 (= PS. 5, 1, 1) gives no answer on the above question, but having in mind that, by analyzing it, one can learn about the practical problems related to the temporality of the pledge in postclassical times, it will be examined entirely:

`Qui contemplatione extremae necessitatis aut alimentorum gratia filios suos vendiderint, statui ingenuitatis eorum non praeiudicant: homo enim liber nullo pretio aestimatur. Idem nec pignori ab his aut fiduciae dari possunt: ex quo facto sciens creditor deportatur. Operae tamen eorum locari possunt.`

The text raises the following question: if a freeborn son could be sold, why he could not been given a security, as a pledge? Selling children due to poverty was present in all societies.[47] In Roman classical period it was accepted only as a temporary `slavery` of a freeborn *(mancipium, noxa deditio)* or maybe as a kind of adoption. The real sale of a freeborn person in an eternal slavery was prohibited.[48]

The first sentence of the quoted *Sententiae* (PS. 5, 1, 1) reflects the classical stanpoint. The father gave his son to the buyer (or the creditor) to compensate for his debt by labor, which is not a real slevery. The buyer is the father's creditor. The next setence is unclear. Only the creditor will be punished if the son is charged by *fiducia* or *pignus*, but who is the creditor? Is the creditor

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cui rientrava, secondo il pensiero di Celso, qualunque affidamento di una cosa ad altri, che fondase in questi ultimi una responsabilita per la restituzione (D. 12, 1, 1 par. 1).

[47] M. Sič, . Izlaganje i prodaja dece u rimskoj imperiji (The Exposition and Sale of Children in Roman Empire), Pravni život, Kopaonička škola prirodnog prava, on the topic – Pravo i ljudske vrednosti, Beograd, Serbia, No. 9/2001, Tom I, p. 573 – 585.

[48] P. Hoffmann, Institutiók, Budapest, 1875, p. 632; W.W. Buckland, The Roman Law of Slavery, Cambridge, 1970, p.420.

a person who bought the son from the father, or the person whom the buyer gave the son in pledge, or maybe the father's creditor whom he himself give his son in pledge? Additionally another question arrises: did the punishment by deportation belonged to the time of Paul or it is was added later?

Probably the father as a debtor gave his son to his creditor to compensate the debt by labor – he sold the work of his son. In the Sentence it is emphesized that only the work of a freeborn could be leased. It is in accordance with the preception of Paul`s time as we can read from the constitution of Caracala. Freeborn sons could not be given in real, permanent slavery.[49] Later (294) Diocletian will prohibit the sale of free persons.[50]

In the year of 391 A.D. (Brev. C. Th. 3, 3, 1 = C. Th. 3, 3, 1 /391/ under the title *"De patribus, qui filios distraxerunt")* the emperors, recognizing the reality of children's alienation *"parentum miseranda fortuna"* tried to retain the classical principle, according to which the sold *filius* would get back his status of a freeborn person automatically, after paying off the debt (price) by his work.[51]

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[49] C. J. 7,16,1.

[50] C. J. 4,43,1 *(De patribus qui filios distraxerunt*) Imperatores Diocletianus, Maximianus:`*Liberos a parentibus neque venditionis neque donationis titulo neque pignoris iure aut quolibet alio modo, nec sub praetextu ignorantiae accipientis in alium transferri posse manifesti iuris est.*` Commonly the prohibitions resulted from real problems. Could this Diocletian's prohibition stop the practice in times of economic crises? Constantine tried to help poor parents by establishing national care foundations *(De alimentis quae inopes parentes de publico petere debent* C.Th. 11, 27, 1 /315/; C.Th. 11, 27, 2 /322/). However, a few years later (329) recognizing the gravity of the problem he permitted the selling of newborn and little children with the prohibition of resale by the buyer except the buyer's insolvency, giving the possibility to the parents to liberate the child from this kind of slavery. In this sense the selling of children remained even in Justinian's time (C.Th. 5, 10, 1 /329/, =brev.5. 8. 1 = C.J. 4, 43, 2 Imperator Constantinus:.` *Si quis propter nimiam paupertatem egestatemque victus causa filium filiamve sanguinolentos vendiderit, venditione in hoc tantummodo casu valente emptor obtinendi eius servitii habeat facultatem. 1. Liceat autem ipsi qui vendidit vel qui alienatus est aut cuilibet alii ad ingenuitatem propriam eum repetere, modo si aut pretium offerat quod potest valere, aut mancipium pro huiusmodi praestet.*` On the West the situation was worst. In the preamble of Nov. Val. from 451 (Brev. Nov. Val. 3, 11, 1 = Nov. Val. 33, 1) issued after the invasion of Italy by the Goths, we can read about the selling of adult persons, sons and parents (near kinsman) as well: *"Notum est, proxime obscoenissimam famem per totam Italiam desaevisse, coactosque homines filios et parentes vendere, ut discrimen instantis mortis effugerent."*- The emperor is asking: *"Cui non ingenuo mori satius est, quam iugum servile perferre*?" However, he expressed the intention to help the sold freemen. According to his law, the sold man would not be freed automatically if he compensate the price by his work, but only if somebody pays for him a 20% higher purchase prices than what was paid for him. Because, a freeborn person *(emptum ingenuum)* is involved, Valentinian prohibited the possibility of sale to barbarians or to transfer to the other side of the see. This rule is not in accordance with the concept of the Pauli Sententiae. Practically in the time of Valentinian's Novell there was no difference between the position of a colon and a slave and even freeborn poor people did not consider their freeborn status as a value.

[51] Brev. C. Th. 3, 3, 1 = C. Th. 3, 3, 1: `Imppp. Valentinianus, Theodosius et Arcadius AAA. Tatiano pf. p. *Omnes, quos parentum miseranda fortuna in servitium, dum victum requirit,*

The last part of the quoted *Sententiae* Brev. P. S. 5, 1, 1: `…*Idem nec pignori ab his aut fiduciae dari possunt: ex quo facto sciens creditor deportatur. Operae tamen eorum locari possunt*` is in harmony with the concept of this constitcotion. Since slavery must not be eternal, the prohibition that the *filius* could not be given in *pignus* or *fiducia* was added later to the Sentence [52] The reason is evident. Regarding *ius vendendi* of the pledged thing *(filius),* the fathe if could not pay his debt, the creditor would use his right and sell the *filius*, than the buyer would become a real owner and this way the *filius* would enter into an eternal slavery. On the other hand, the creditor firstly benefiting from the work of the *filius* and afterwards selling him would realize unjust profits.

In the other Sentence: Brev. P. S. 5, 7, 14 = P. S. 5, 6, 16 the exclusion from the possibility to be charged by pledge is extended to the *concubina, filius naturalis* (the son of the *concubina),* and *alumnus*.

Brev. P. S. 5, 7, 14 = P. S. 5, 6, 16: *"Omnibus bonis, quae habet qaeque habiturus est, obligatis, nec concubina, nec filius naturalis, nec alumnus, nec ea, quae in usu quotidiano habet, obligantur: ideoque de his nec interdictum redditur."*

This Sentence is about a poor family. However, even though it does not uses expressely the word *„oppignorare",* the part „o*mnibus bonis, quae habet qaeque habiturus est"* is similar to the formulation which we can find in the *Fragmentum de iure fisci: `...fisco* obligan*tur, non solum ea q*uae *habent, sed* et *ea, quae postea habituri sunt.`*– therefore the text could relate the pledge in favor of the treasury.[53]

Though in case of public fiscal debt the pledge was *`tacite contrahitur`*, the interpreters extended the rule on the pledge between private persons made by agreement. The *Interpretatio* prohibits the debtor to charge with pledge those family members with whom he is in a non-legitimate family relationship.

I. P.*"Si quis debitor creditori suo talem fecerit cautionem, ut omnia ei, quae in bonis suis habet, vel quae habiturus est, oppignorasse videtur, in tali conditione nec concubina, nec filius naturalis, nec alumnus, nec ea, quae in usu*

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addixit, ingenuitati pristinae reformentur. Nec sane remunerationem pretii debet exposcere, cui non minimi temporis spatio satisfecit ingenuus.` The Interpretatio clearly shows the contract of sale excludes the possibility that the son would be given in the pledge: Int. *`Si quemcumque ingenuum pater faciente egestate vendiderit, non poterit in perpetua servitute durare, sed ad ingenuitatem suam, si servitio suo satisfecerit, non reddito etiam pretio, revertatur.`*

[52] According to W. W. Buckland (The Roman Law of Slavery, Cambridge, 1970, p. 420), this Sentence is classical and proves that the sale of children was prohibited in the classical period. ; C. J. 7, 16, 1.

[53] "Fragmentum de iure fisci" from anonym author, 2nd or 3rd. century A.D.: Fol. I, 5: *`Bona eorum qui cum fisco contrahunt lege uacuaria uelut pignoris iure fisco obligantur, non solum ea quae habent, sed et ea, quae postea habituri sunt.`*

quotidiano habet, obligata videri possunt. Nec momentum, si creditor petat, de his rebus, quas superius diximus, accipere potest."[54]

From these texts we could not make a conclusion that the charge of freeborn persons by pledge was prohibited because they would pass into the ownership of the creditor by *fiducia* (here *pignus* is also mentioned*)*, but because the creditor as a pledgee has a right to sell the pledged thing in the lack of payment of the debt. Afterwards, the father could not take back his child and the principle of *favor libertatis* would be annulled.

The last Sentence of this group Brev. PS. 5, 28, 4 (= PS. 5, 26, 4) *"per vim debitoris sui pignora"* and *"fiduciam vero et pignora apud se deposita"* is unclear and most probably was not written by a sole author. Later we will turn back to this Sentence.

The interpreters of this group from six cases four times did not give an *Interpretatio* (one time is the title). In remaining cases only once they use the term *pignus,*[55] in the others the explanation is: *"oppignoraverat vel fiduciae causa posuerat"*[56]. Only in this last case the possibility of *pignus conventum* cannot be excluded.

III. The third group where the term *fiducia* is also present in the *Interpretatio* [57] is the most interesting. It is visible how the interpreters explained the term *fiducia*, and if there were differences between *fiducia* and *pignus* the *Interpretatio* pointed on them. Maybe we manage to find out why in the time of Breviary or even earlier in the 5th century besides the term *pignus, fiducia* was also used. We will analyze them entirely.

The first Sentence utilizes the terms *pignus* and *fiducia* but the question is in which sense: as a pledge with possession or as a pledge without possession?

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[54] This differentiation was not made in the other texts about the selling of the family members. The reason could be, that in practice the father gave in pledge just these members of his family, however most probably the members of the poor family (as it is a colon's family) are just the persons mentioned in the text. We can prove it with the fact that for the marriage of the colon the sources did not utilize the word *connubium*, but: *consortium* (C. Th. 5, 18, 1, 4); *coniunctio* (Nov. Mai. VII, 1); *copulatio* (Nov. Sev. 2). The *concubina* could be his wife, the *filius naturalis* his son and the *alumnus* is some other child who remained without parents (or was given to nurture) and was accepted by the father of the family.

[55] Brev. IP. 2, 12, 7 (= 2, 13, 4: `*Creditor pignus, quod a debitore accepit...*`

[56] Brev. IP. 1, 9, 8 (= 1, 9, 8)

[57] Brev. PS. 1, 9, 8 (=PS. 1, 9, 8)`*pignorum et fiduciarium*`
IP. `*oppignoraverat vel fiduciae causa posuerat*`
Brev. PS. 2, 13, 1 (=PS. 2, 13, 6) `*rem fiduciae datum*` *and* `*actio fiduciae*`
IP. `*creditor rem (fiduciae), quam a debitore pignori acceperit*`
Brev. PS. 2, 13, 2 (= PS. 2, 13, 7) `*rem fiduciariam*` *and* `*iudicio fiduciae*`
IP. `*praedium sibi fiducia obligatum*`

Brev. PS. 1, 9, 8 = PS. 1, 9, 8: `*Minor adversus distractiones eorum pignorum et fiduciarum, quas pater obligaverat, si non ita ut oportuit a creditore distractae sint, restitui in integrum potest.*`

It is evident the sale was realized, however, it is not clear whether in case of *fiducia* the creditor sold the pledged thing as an owner or on the bases of his *ius vendendi*. It must be noted that according to the commonly accepted opinion the creditor's right to sell the pledged thing is coming from *pactum de vendendo* or *ius vendendi* of the fiduciary and not from the fact that he has ownership on the pledged thing.[58] At this point one must not forget that the rule relate to *pignus* as well. On the other hand, the text is about a *minor* whose transactions were under special control in post-classical times.[59]

According to the imperial constitutions, if the minor alienates something from his property he should do it under the public control *(decretum interpositum).*[60]

We believe, this Sentence was inserted in the Breviary just for this reason.

The *minor* was entitled, according to the praetorian edict, to use *restitutio in integrum /ob aetatem/* when his interests were infringed by the contract he concluded (though the above example is about the negotiation in which the

[58] P. Frezza, op. cit. pp. 46. sqq.

[59]. Minors were protected even earlier: D. 4, 4, 9, pr.; D. 4, 4, 49; C. J. 2, 20, 5 (293); 2, 32, 1 (241); 2, 36, 1 (231); A.- Ruiz, La compravendita in diritto romano, Vol. I, Napoli, 1978, p. 107 and 144; M. Horvat, Prekomjerno oštećenje, Rad JAZU, Zagreb, 1961, p. 227; A. J. B. Sirks, La laesio enormis en droit romain et Byzantin, The Legal History Review, Antverpen, LIII, 1985, pp. 300 – 301; Regarding contracts of sale made by minors the Breviary protects the interest of minors by different rules: the rules of Pauli Sententiae allowed *restitutio in integrum* (Brev. PS. 1, 9, 7 = PS. 1, 9, 7: `*Minor adversus emtorem in integrum restitutus, pretio restituto fundum recipere potest. Fructus denim in compensationem usurarum penes emtorem remanere placuit`.);* the Gaii Epitome incorporates the rule about the curators assistance (E. G. tit. 8: `*Peractis pupillaribus annis, quibus tutores absolvuntur, ad curators ratio minorum incipit pertinere…Hi qui minores sunt, usque ad viginti et quinque annos impletos sub curatore sunt.`)*; and finally the imperial constitutions prescribe a special control by imperial officers `*auctoritate iudicis aut consensu curiae*` (Brev. CTh. 3, 1, 3 = CTh. 3, 1, 3 /imp. Iulianus, anno 362/: The iudex or the curia controlled the behavior of the buyer. Public control was also important for a *minor* who was liberated from curatorship (venia aetatis) if he sells a land (Brev. CTh. 2, 17, 1 = CTh. 2, 17, 1 /imp. Constantinus, 321 or 324). It is important to say, that even thought these rules are coming from different times they are not in collision. The guiding norm is in the *leges*: the alienation realized by a *minor* without public control is invalid. Because the transaction was invalid it was sanctioned by *restitutio in integrum* (of the Pauli Sententiae). When not an alienation was involved but some other negotiation, the presence of the curator was necessary (E. G. tit. 8 and Brev. CTh. 2, 4, 1). If the curator was for some reason not present the negotiation became invalid and it was also a reason for *restitutio in integrum.*

[60] Brev. CTh. 3, 1, 3 = CTh. 3, 1, 3 /imp. Iulianus, anno 362/: `*…Vetus igitur ius revocamus, ut omnis venditio, quacumque fuerit a minore, viro sive femina, sine decreti interpositione celebrate, nulla ratione subsistat.*`; From the Interpretatio we can notice that the *decretum interpositum* is: `*...si ita necessitas exegerit, ut aliquid vendere velint, qui comparare voluerit, auctoritate iudicis aut consensu curiae muniatur: nam aliter a minoribus facta venditio non valebit.*`

minor has not taken part). According to Frezza, in case of *fiducia* as *bona fidei iudicia* the behavior of the parties must be *bona fidei* and they are responsible for *dolus* and *culpa*.[61] Thus, the *minor* as *heres*[62] has a claim from *fiducia (actio fiduciae)*. However, Paul himself made this solution questionable in his *Sententiae* regarding the creditors *ius vendendi,* probably because the buyer's ownership must be protected.

PS. 2, 17, 15 (16) = Cons. VI, 8: *`Heredibus debitoris adversus creditorem, qui pignora vel fiducias distraxit, nulla actio datur, nisi a testatore inchoate ad eos transmissa.`*

This Sentence is not inserted in Breviary. As it will be seen from the *Interpretatio* (IP. 1, 9, 8) the compilers of the Breviary had a reason not to insert it – they have not recognized unconditionally the ownership of the buyer in this case.

We are of the opinion that the observed Sentence has been shortened. If we would like to reconstruct the case, in a classical sense, we must realize that the *minor* would recognize the fact that the pledged thing is *non ita ut oportuit a creditore distractae sint*, if the creditor requests from him to pay the part of the debt which was not covered by the value of the pledge, or if he expects to take back the *superfluum*. Most probably the first situation is present here. The creditor asked from the *heres - minor* to pay the part of his father's debt which was not covered by the value of the pledge and the minor paid it. In the classical period if a minor concluded a contract the *curator'*s assistance was obligatory. In this case the father's contract has been fulfilled by the *minor* probably under the pressure of the creditor or his fraud. The *minor* covered the fathers *`uncovered part of debt`*. Consequently, the only protection remained for the *minor* is *restitutio in integrum* of the value he gave to the creditor. It did not mean the *minor* could take back the pledged thing from a third person, who bought the pledged thing and who became its owner. Even if it is *pignus* and not *fiducia* the creditor has *ius vendendi as naturalia negotii*[63] and the ownership will be transferred to the buyer.[64] None of them (nor the *fiduciant* nor the pledgor in case of *pignus*) remained owner. The *minor* can use the *restitutio in*

[61] Frezza, op. cit. pp. 95. and 98.

[62] Regarding problems surrounding the transmission of the *actio fiduciae* to the debtors successor see, Frezza, op. cit. pp. 99 – 1o3; Burdese, op. cit. pp. 83 – 84. Gai. Inst. II, 22o; PS, 2, 13, pr.; on regard the claim from the *pactum de vendendo*: mancipatio Pompeiana, p. III, lin. 11-12, F.I.R.A. III, 293 – 294; PS. 2, 17, 15 (16) = Cons. VI, 8; PS. 1, 9, 8.

[63] Frezza, op. cit. p. 49. starting from the concept that as *fiducia* is based on *fides* its structure is elastic: `non si presta ne a ritenere implicite clausule come quella "ut vendere licet", ne ad argomentare della clausola "ut vendere non liceat" alla inerenza al contratto di fiducia, come naturale negotii, di una facultas distrahendi. Chi voglia considerare una simile facolta come implicita nel negozio, deve d'altro canto precisare che, anche quando e esplicita in una pattuizione ad hoc, essa puo venire paralizzata se il suo esercizio leda la norma fondamentale della fides.` See also, Burdese, op. cit. p.84 sq; Longo, Corso, p. 43 sq.

[64] About problems surrounding the eviction of the sold *fiducia* see, Frezza, op. cit. pp. 72 – 83.

integrum or the *actio de dolo malo* against the creditor based on the creditor's fraud. *`Non ita ut oportuit`* in connection with D. 10, 18, 2 means = *`non potest videri bona fide negotium agi`*.[65] The creditor must act in the limits of the principle of *bonus pater familias*.

Having in mind that the pledgee in both cases *(fiducia* and *pignus*) by selling the pledged thing transfers the ownership to the buyer, from this Sentence, we could not conclude that the difference between these two kinds of pledges is the ownership of the creditor in case of *fiducia* and his possession in case of *pignus.*

The *Interpretatio* gives an entirely new version of the Sentence.

IP. 1, 9, 8: *`Minor annis ea, quae pater eius oppigneraverat vel fiduciae causa posuerat, si viliore pretio, quam oportebat, a creditore distracta convicerit, potest soluto debito ad recipiendam rem suam integri restitutionis auxilium promereri.`*

In this *Interpretatio* we would expect from the interpreters to use the uncertain term *`oppigneraverat`* for *fiducia,* but they use it for *pignus*, explaining *fiducia* as *`fiduciae causa posuerat`*. The interpreters usually changed the word *fiducia* by the word *pignus* or *oppignoratam*, but there are also descriptive explanations: *`rem sibi pro debito positam`* or *`loco pignoris posuerit`*.[66]

The part of the text *`si non ita ut oportuit a creditore distractae sint`* means, according to the interpreters, alienation for *`viliore pretio`*(a lower price). The *minor* would notice this, if the creditor would ask him to pay the rest of the debt after selling the pledged thing. In the classical period the *minor* could ask for *restitutio in integrum* for this reason, if he himself sold something for a lower price.[67] In the postclassical period the unjust price was one of the main problems.[68] According to *Interpretatio*, the *minor* could annul the sales contract (the fathers creditor sold the pledged thing to the buyer) as *heres,* if he would be able to pay the debt. If the *minor* paid the debt, he could ask for the restitution of his own thing *(rem suam)* from a third person (buyer). But, hasn't

[65] More about this, Longo, Corso, pp. 91-92.

[66] *propono, posui, positum* has a meaning: it is promised, offered, but also that it is given

[67] V. Arangio-Ruiz, La compravendita in diritto romano, Vol. I, Napoli, 1978, pp. 107; 144.

[68] The general standpoint of the Breviary is, that if the contract was made in accordance with the principle of *bona fides,* its annulment was not possible only because the price was low.: Brev. CTh. 3, 1, 1 = CTh. 3, 1, 1 (Constantinus, anno 319); Brev. CTh. 3, 1, 4 (= CTh. 3, 1, 4), 383 A.D.; Brev. CTh. 3, 1, 7 = CTh. 3, 1, 7 (396); The Breviary has not accepted the rule of the *laesio ultra dimidium*: C. J. 4, 44, 2 (285); C. J. 4, 44, 8 (291); nor the Edict of Diocletian *`de pretiis rerum venalium`* (301 A.D.), however it does not mean that the unjust price due to fraud or pressure was tolerated. Besides rules against fraud and extortions there were rule on the control of transactions concluded by weaker parties (e.g. a *minor*) or for the protection of a public interest, provided it was present.

he lost the ownership when the creditor sold the pledged thing? According to the classical law the creditor by selling the pledged thing transferred the ownership to the buyer. It seems that in the post-classical period this fact was not important. To solve this problem the part of the text: *`soluto debito ad recipiendam rem suam`* is significant. It is a layman's thought: I have paid for it the thing is mine, if you have not paid the entire price the thing is not yours. Therefore, if he pays the debt the thing must be his entirely *(in integrum),* it is not relevant that now the thing is in a possession (ownership) of the buyer. Technically, the *fiduciant* did not lost the ownership charging the thing by *fiducia.* From the other point of view the thing is charged by the pledge *`ad tempus`* while the debt is not paid. It means that even in case of *fiducia* according to the common belief, the ownership is not transferred to the creditor definitely but it is given or charged in confidence in accordance with *fides*. This temporality of the ownership (possession[69]) caused problems even in classical period in solving different dogmatical questions.

At this point, we stand one step closer to negate that the reason to retain the special kind of pledge named *fiducia* in post-classical times was the transfer of ownership to the fiduciary.

The second Sentence of this group is not much of a help to determine the differences between *fiducia* and *pignus.* The question is: can the right of *pignus* be legated as well?

Brev. PS. 2, 13, 1 (=PS. 2, 13, 6) *Si creditor rem fiduciae datam uni ex heredibus vel extraneo legaverit, adversus omnes heredes actio fiduciae competit.*[70]

Regarding the ownership of the fiduciary the tacit confirmation of ownership transfer is visible to the creditor *(fiduciar)* as the debtor has only the *actio fiduciae (not in rem actio)* against the successors of the creditor.[71] However, it is much easier to use the *actio fiduciae* than *rei vindicatio* (having in mind that proving the ownership is *probatio diabolica*).[72]

The *Interpretatio* changes the meaning of the Sentence again.

IP. 2.13.1 (hae.)= Tit. 2, 13,6 (ed.). *`Si creditor rem (fiduciae), quam a debitore pignori acceperit, uni ex heredibus vel extraneo legati titulo*

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[69] About the concept of *momentaria possessio* see, C. A. Cannata, `Possessio` `possessor` `posidere` nelle fonti giuridiche del basso impero romano, Milano, 1962, p. 186.

[70] Frezza, op. cit. p. 27 sates that it is legatum per vindicationem, also, PS. 3, 6, 16: `*Rem legatam testator si postea pignori vel fiduciae dederit, ex eo voluntatem mutasse non videtur.*` A. Romac, Paulo, Sentencije, Zagreb, 1989, p.266, n. 29, explained the text in a sense that the legatum remained valid because the pledged thing establishing the pledge stayed in the ownership of the pledgor; cfr. C. 6, 37, 3

[71] Longo, op. cit. p. 83 states:`... il creditore puo legare *per vindicationem* (cioe come cosa sua) la fiducia senza che il fiduciante possa attacare il legato.`

[72] Longo, op. cit. pp. 140 sqq.

derelinquat, debitor pro pignore suo oblato debito omnes heredes creditoris poterit convenire.[73]

While the Sentence (accepted as classical) point on *in personam actio* of the debtor, according to the interpreters the debtor did not loose the ownership on the pledged thing *(pignore suo)*. If the debtor is ready to pay the debt he can reclaim the thing from all successors (the specification of *actio* is not important any more). It is the layman's, technically not precise, interpretation which is similar to the previous: *`soluto debito ad recipiendam rem suam`*.[74]

According to the third Sentence, which seems as it was classical, the possession of the object of *fiducia* passed onto the creditor, because otherwise he could not ameliorate it. According to Longo the creditor can take advantage of *actio fiduciae contraria* for the reimbursement of expenses.[75]

Brev. PS. 2, 13, 2 (= PS. 2.13.7): *`Si creditor rem fiduciariam fecerit meliorem, ob ea recuperanda quae impendit iudicio fiduciae debitorem habebit obnoxium.`*[76]

IP. 2.13.2 (hae.)= 7 (ed.): *`Si quis creditor praedium sibi fiducia obligatum studio et opere suo melioraverit, quidquid se pro melioranda re impendisse probaverit, ei a debitore reddendum est.`*

The interpreters explain *fiducia* as a pledge with possession and they concretize the object as: *`praedium sibi fiducia obligatum studio et opere suo melioraverit*.` The simply formulated duty of the debtor to compensate for the creditor's expenses seems more as an obligation based on *negotiorum gestio* than that based on the pledge named *fiducia*. Thus the text cannot prove the creditors ownership on the pledged thing.

Taking into account all the quoted texts we cannot exclude the possibility of a pledge without possession and cannot prove the creditors ownership in case of *fiducia*.

The dilemma on the pledge with or without possession due to the two expressions that were used: *fiducia and pignus* and the ownership of the creditor,

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[73] Fiducia is not a definitive ownership of a creditor: Gaius, Inst. 2, 60: *`Sed fiducia contrahitur aut cum creditore pignore iure, aut cum amico, quo tutius nostrae res apud eum sint...`* About the interpretation see, Kaser, Studien, p. 328 sq.

[74] Similar to *usureceptio fiduciae* of Gai. Inst. 2, 60: *`…usus receptio; si vero cum creditore, soluta quidem pecunia omni modo conpetit...`*

[75] Longo, op. cit. p.132 – 136. accepts this Sentence as classical (for the necessary expenses D. 13, 7, 8 pr; for the useful expenses, PS, 2, 13, 7 and D. 13, 7, 25). He criticized the thesis of Biondi that the creditor in the classical period has no right to move the *actio fiduciae contraria* but he could only compensate his expenses in the iudicio fiduciae. See also, B. Noordraven, op. cit. pp. 267 sqq.

[76] See also: D. 13, 7, 8, pr. (Pomponius XXXV ad Sab.); C. J. 4, 24, 7 paragr. 1 (A. C. 241), about the reimbursement of the taxes paid by the creditor: D. 2, 14, 52 paragr. 2 (Ulpianus, I opinionum). Frezza, p. op. cit. pp. 62 – 65.

fiduciary on the pledged thing, remained also unsolved in the Brev. PS. 5, 28, 4 (= PS. 5, 26, 4).

This interesting and not-interpreted Sentence, which could be more the *Interpretatio,* Longo and Frezza take as an evidence of the real effect of *fiducia*.[77]

Brev. PS. 5, 28, 4 (= PS. 5, 26, 4): *"Creditor chirographarius, si sine iussu praesidis per vim debitoris sui pignora, quum non habuerit obligata, ceperit, in legem Iuliam de vi privata committit. Fiduciam vero et pignora apud se deposita persequi et sine auctoritate iudicis vindicare non prohibetur."*

Frezza is of a standpoint, this Sentence is classical. He states (without analyzing it) that the *fiduciar* became an owner due to his protection by *rei vindicatio*.[78] Longo emphasized that the *rei vindicatio* belongs exclusively to the fiduciary as when the pledged thing is in the possession of a third party (fr. Vat. 94[79]). The situation is the same when the thing remained in the possession of the debtor or it was given back to him, as it is in the quoted Sentence. Longo`s only evidence for the second solution is the quoted, very disputable text. This Sentence hardly could be classical.

Its first part is not problematic. The creditor who has a document about the debtor's debt but has not contracted the pledge (*pignora, quum non habuerit obligata)* could not take over the pledge from his debtor by power *(vi),* without the decision of the judge. Using the power was against the prohibition of *lex Iulia de vi privata* in the classical and it also remained unchanged in the postclassical period. This prohibition can be also found in ET 123; 124 and in LRB 14, 1.[80]

According to the second part of the Sentence the pledged thing (*fiducia* and *pignus*) *`apud se deposita`* (placed to him)[81] the creditor could demand and vindicate without the decision of the judge. The verb *`vindicare`* here hardly

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[77] Frezza, Appunti, p. 27; Longo, Corso, pp. 76 – 77. Contra, B. Noordraven, Die fiducia, pp. 160 – 161.

[78] P. Frezza, Le garanzie, Parte terza, p. 27.

[79] Frag.Vat. 94 (=D. 24, 3, 49, 1) (Paul. 7. resp.): *`Fundus aestimatus in dotem datus a creditore antecendente ex causa fiduciae ablatus est…`*

[80] ET. 123. *De pignoribus (pigneribus) capiendis Capiendorum pro suo arbitrio pignorum unicuique licentiam denegamus: ita ut, si probabile fuerit, hoc agendi iudicis praestet auctoritas.* Paul. 5, 26, 4. 124. *Creditor si debitori suo res sibi non obligatas violenter rapiat. Creditor si debitori suo res sibi non obligatas violenter rapiat, intra annum criminis admissi conventus, sub poena quadrupli praesumpta restituat : post annum vero in simplum debebit exsolvere. Quod etiam de fructibus violenter ablatis servari debere legum ratio persuadet*. (Dig. 4, 2, 14, 7 Ulp. lib. 11 ad ed.); Lex Romana Burgundiorum 14.0. Titulus XIV. De ablatis pigneribus et fideiussoribus. 14.1 *Debitor solutionem differens potest ad satisfactionem pignerum usurpatione conpelli; quod tamen sine sententia iudicis fieri non licebit, secundum Ermogeniani constitutionem sub titulo: de pigneribus, Diocleciani et Maximiani ad Viventium, Erennium et Antigonum, vel aliam ad Septimum datam.*

[81] See, Noordraven, op. cit. p. 161; E. Levy, Obligationenrecht, p. 187; Kaser, RPR II, p. 313.

could be used in a classical sense as a protection of *dominium ex iure quiritium*, as a claim that originates from the ownership.[82] In this sentence it is used only in the sense of a simple petition *(petitio)*.[83] In Heuman – Seckel, Handlexikon (627) `*vindicare*` (Nr. 2) is explained as `an sich ziehen` - `to take it for himself`. The question is: why the creditor has to ask for the possession of the pledged thing if it is already in his possession? Most probably this sentence *(sine iussu praesidiis – sine auctoritate iudicis)* has been added by someone else. It could not refer to *rei vindicatio* even if we take the part *`apud se deposita`* in the sense of a pledge without possession or suppose that the pledged thing remained or was given back to the debtor (for leasing or in *precarium*)[84] and the creditor has only a document about the pledge. Frezza and Longo failed to notice that the Sentence refers not only to *fiducia* but to also to *pignus* (*`Fiduciam vero et pignora`)*. In case of *pignus* the creditor is not an owner, even having *pignus conventum* he cannot take advantage of the *rei vindicatio*. Secondly, the part: *`sine auctoritate iudicis vindicare non prohibetur`* means only that the creditor can use self-help to take possession of the pledged thing from the debtor because the cerditor has a right of the pledge, and not because he is an owner. The use of *rei vindicatio* is not possible *`sine auctoritate iudicis`*. Finally, the third argument against Frezza`s standpoint he gives himself. He states that the fiduciary has a right of *impetratio possessionis*[85] as a right *in personam* and not as a real right.[86] The *impetratio possessionis* could not be even used as self-help. According to Ulpian's fragment (D. 13, 7, 24 pr.) the creditor could *`impetrare a Caesare ut fiduciam possideret.`* Longo is of an option that because this rule contradicts to the fundamental right of the creditor, it could be only exceptional.[87]

In our opinion the standpoint, that the pledgee was entitled to take over the pledged thing by self – help against the will of the debtor in the classical and postclassical period is questionable as well.[88]

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[82] The same, B. Noordraven, op. cit. p. 160.

[83] Cannata, (Possessio, p. 172) criticizes the opinion of Biscardi about the"dilazione della rei vindicatio" in postclassical times, and he concludes that the phenomenon of *vindicatio* we can characterize more "come un processo di 'sfocamento' dei contorni fra le varie vindications."

[84] Frezza, op. cit. pp. 39 – 41 and 61.

[85] D. 13, 7, 24 pr (Ulp. XXX ed.), Frezza, op. cit, p. 13 – 1; Burdese, Lex commissoria, p. 9o sq.

[86] Frezza, op. cit, p. 61.

[87] See, Longo, op. cit. p. 109. His arguments are not convincing. In our opinion it could be in the case when the whole property of the debtor was charged by *fiducia.*

[88] PS. 2, 14, 5 =Brev. 2, 14, 5: *Si quis pignora debitoris citra auctoritatem iudicantis abduxerit, violentiae crimen admittit*.; PS. 5, 5a 4 .= Brev. 5, 5, 4: *Eorum, qui debito confessi sunt, pignora capi et distrahi possunt*.; Lex Romana Burgundiorum 14.0. Titulus XIV. De ablatis pigneribus et fideiussoribus. 14.1 *Debitor solutionem differens potest ad satisfactionem pignerum*

From the texts of *Pauli Sententiae* inserted in the Breviary the difference between *fiducia* and *pignus* is not visible neither did the interpreters provide any help. The interpreters commonly used the expression *`res oppignorata`* instead of *pignus* (Brev. IP. 1, 9, 8 = IP. 1, 9, 8), or *fiducia* (Brev. IP. 2, 12, 5 = IP. 2, 13, 2; Brev. IP. 2, 12, 6 = IP. 2, 13, 3) and also instead of *`res obligata`* (Brev. I. P. 5, 7, 14 = I. P. 5, 6, 16). In our opinion the verb *`oppignorare`* relates to all kinds of pledges *(pignus datum* or *conventum; fiducia `datum* or *conventum`)*, its meaning could reach even the notion of *`res obligata`* described by Biscardi, having in mind that the most important type of a pledge was that in favour of the imperial treasury which was *`tacite contrahitur`*. According to Biscardi[89], before the postclassical times instead of the notion of real rights of Justinian's law, the notion of *`res obligata`* better expresses the multiplicity of real guaranties in Roman Law. As he observs *`res obligata`* covers `non soltanto di *fiducia cum creditore*, del *pignus datum*, degli *invecta et inlata* del colono, degli *inducta* dell'inquilino, del *pignus conventum* o ipoteca, ma altresi della *lex commissoria* come clausula della compravendita consensuale in funzione di garanzia, di *praedia subsignata* ad *aerarium* e del *servus noxae obligatus*.`[90]

3. Conclusion to Part I.

It was shown that the post-classical Roman and early medieval legal sources coming from the Western part of the Empire preserved *fiducia* as a kind of pledge. The term *fiducia* is used along with *pignus* seemingly as synonyms.

Motivated by the experience based on long years of work on post-classical legal sources, we put the task to prove that the retention of the term *fiducia* in these texts is not a product of ignorance of the lawyers from the so-called `vulgar law`, but was done by reason.

The research took the following steps:

Knowing that the most dogmatical rules of *fiducia* and *pignus* became identical during the classical period, the research was invited to answer the question whether the main differences between *fiducia* and *pignus* remained even in the post-classical period, particularly:

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usurpatione conpelli; quod tamen sine sententia iudicis fieri non licebit, secundum Ermogeniani constitutionem sub titulo: de pigneribus, Diocleciani et Maximiani ad Viventium, Erennium et Antigonum, vel aliam ad Septimum datam. ; Brev. PS. 2, 5, 1 = PS. 2. 5. 1. *Creditor si simpliciter sibi pignus depositum distrahere velit, ter ante denuntiare debitori suo debet, ut pignus luat, ne a se distrahatur. Int. Creditor si sine condicione pignus sibi depositum tenens ter debitorem suum convenerit, ut soluto debito pignora sua recipiat, et debitor noluerit post tres admonitiones soluto debito pignora sua recipere, creditor distrahendi pignoris habebit liberam facultatem.* The execution procedure will be treated in one other paper.

[89] Biscardi, Appunti, pp. 14 – 19.

[90] See the sources in, Biscardi, Appunti, p. 15.

1. if *fiducia* meant the transfer of ownership on the pledged thing to the pledgee,

2. if *mancipatio* was needed in case of *fiducia,* and what *mancipatio* meant in these times;

3. what is the relation between *fides* and *fiducia?*

In Part I. of the research we searched answers only to the first question. Since most of the texts containing the term *fiducia* in the sense of pledge are coming from *Pauli Sententiae* and its *Interpretatio* as part of the Breviary, we primarily focused on these texts

Analyzing the sources, regarding the first question we did not find differences between *fiducia* and *pignus*. The texts could not prove that one transfers the ownership *(fiducia)* and the other the possession *(pignus)*. Similarly, the texts did not confirm that only one could be realized without the transfer of possession, because in cases of both, *fiducia* and *pignus* the ownership was not transferred and the transfer of possession depended on the will of the parties.

Therefore the question why *fiducia* was preserved in the Breviary remains open.

Having in mind that according to the prevailing opinion *fiducia* was connected to *mancipatio* or *in iure cessio*, tough mostly the *mancipatio* was practiced, the next step of our research will be to see in which sense the sources from the time of the Breviary use the term *mancipatio* and whether it remained important for the formation of a pledge named *fiducia*.

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Fiducia i *pignus* u izvorima postklasičnog rimskog prava - sinonimi ili termini korišćeni za različite vrste zaloge?

Rezime

Imajući u vidu, da je malo poznato da je *fiducia* kao vrsta zaloge bila primenjivana u Zapadnom delu Rimske imperije i u postklasičnom periodu, autor ukazuje na postklasične i rano srednjovekovne izvore koji to potvrđuju. U ovim izvorima *fiducia* se pominje pored *pignus*-a, na prvi pogled, kao njegov sinonim.

Autor pokrenut iskustvom stečenim dugogodišnjim radom na izvorima postklasičnog (tzv. vulgarnog) prava, postavlja sebi za zadatak da dokaže, da zadržavanje termina *fiducia* u ovim tekstovima nije rezultat neznanja pravnika ovog perioda, nego je to učinjeno iz tačno određenog razloga.

Istraživanje obuhvata nekoliko pitanja:

Polazeći od toga, da većina pravno tehničkih pravila oba instituta kako fiducije tako i pignusa postala su identična već u toku klasičnog perioda, istraživanje je fokusirano na davanje odgovora na pitanje: da li su osnovne razlike ovih instituta zadržane i u ovom periodu, i to posebno:

1. da li u slučaju fiducije i dalje dolazi do prenosa svojine predmeta zaloge na založnog poverioca;

2. da li je mancipacija i dalje neophodan element fiducije i šta se podrazumeva pod mancipacijom u ovom periodu;

3. u kakvom su odnosu *fides* i *fiducia*?

U ovom prvom delu istraživanja, autor nastoji da odgovori samo na prvo od postavljenih pitanja.

Polazeći od toga, da većina tekstova o fiduciji kao vrsti zaloge potiče iz Paulovih Sentencija i njihove Interpretacije sadržanih u Alarihovom Brevijaru iz 506. godine, prventveno analizira ove tekstove.

Na osnovu analize izvora zaključuje, da u pogledu prvog navedenog pitanja ne mogu da se uoče razlike između fiducije i pignusa. Na osnovu ovih tek-

stova ne može da se dokaže da se u slučaju fiducije prenosi pravo svojine, a u slučaju pignusa samo državina na poverioca, niti da samo jedan od njih može da se ostvari bez prenosa predmeta zaloge u državinu poverioca, jer imajući u vidu obe vrste zaloge (kako fiduciju tako i pignus) svojina nije preneta na poverioca, a predaja predmeta zaloge u njegovu državinu zavisi od volje stranaka.

Prema tome, još uvek ostaje otvoreno pitanje: zašto je *fiducia* i dalje zadržana u Brevijaru?

Imajući u vidu, da prema vladajućem mišljenju, *fiducia* se javlja uz *mancipatio* ili *in iure cessio*, mada je u praksi najčeće korišćena mancipacija, autor naznačuje kao sledeći korak istraživanja da odgovori na pitanje: u kom smislu se koristi reč «*mancipatio»* u izvorima iz vremena Brevijara i da li je mancipacija (u ovom novom značenju) bila neophodna za nastanak fiducije i u ovim vremenima.