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

Part II

In the first part of the paper2 we analyzed the sources on fiducia and pignus of the West from the late Roman Empire and early middle ages in order to find out whether dogmatical differences have been kept in a sense that in case of fiducia the ownership on the pledged thing is transferred onto the creditor and in case of pignus only the possession. We came to the conclusion that based on the analyzed sources it cannot be considered proven that in case of fiducia the ownership is transferred onto the creditor. Also, it cannot be claimed that the difference between fiducia and pignus is in the fact that one of these two forms of pledges transfers the possession while the other establishes a pledge without possession in favor of the creditor. In both cases it was up to the will of the parties to decide whether the thing will be handed over to the creditor or rather it will stay in the possession of the debtor charged by pledge in favor of the creditor.

In this part in search for an answer on the question whether fiducia and pignus are synonyms or these terms rather relate to different kinds of pledges we are considering the following questions:

1. Was mancipatio still needed in case of fiducia and what was the meaning of mancipatio in those times?

---

1 Рад је посвећен пројекту Право Србије у европској перспективи бр. 149042 који финансира Министарство за науку и технолошки развој Републике Србије.
2 Published in: Zbornik radova Pravnog fakulteta u Novom Sadu, Novi Sad, br. XLII 1-2/2008, ISSN 0550-2179, UDK 3, str. 475-498
2. In what relation are fides and fiducia?

The paper will be concluded with giving answer on the question why fiducia was preserved in the sources of post-classical and early medieval West and in which sense.

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

1. FIDUCIA AND MANCIPATIO

The *communis opinio* is that fiducia is a complex negotium: it consists of solemn transfer of ownership mainly by mancipatio (nummo uno)\(^3\) and the non formal pactum fiduciae\(^4\) added to it.\(^5\) As Frezza states, the words “fidi fiduciae” saved in epigraphic documents could not be part of mancipatio itself,\(^6\) it is connected with it, but not included in the formalities of mancipatio.

However, *iure cessio* of ius civile was recognized as a valid act which transfers the ownership even on a provincial lend,\(^7\) but it is not mentioned by

\(^3\) Gai, Inst. II, 59; III, 201; The epigraphic documents about fiducia (FIRA III, 292 sq. 296 – 297) confer only to mancipatio; V. A-Ruiz, Istituzioni di diritto romano, Napoli, 1957, II, p. 262; R. Monier, Manuel élémentaire de droit romain, Scientia verlag Aalen, 2nd edition, 1977, Tom. II, p. 314; B. Noordraven, Die fiduzia im römischen recht, Amsterdam, 1999, p. 124 sqq. The traditio was not utilized probably because the fiducia needed some publicity (Noordraven, op. cit. p. 158); A. Biscardi, Appunti sulle garanzie reali in diritto romano, Milano, 1976, p.27 sqq; P. Frezza, Le garanzie delle obbligazioni, parte terza, Pisa, 1958, p. 8 sqq; Longo, Corso di diritto romano, La Fiducia, Milano, 1933, p. 42 sqq; The formality of in iure cessio was complicated (Frezza, op. cit. p. 8-9) and there are no evidences that the fiducia could be formed transferring the ownership by traditio. For the other reasons see in Frezza, op. cit. p. 10. The utilization of mancipatio ‘fiduciae causa’ one can find in documents: mancipatio Pompeiana from 61 A.D. FIRA III, 291; formula Baetica from 1th or 2.ond century A.D. CIL II. 5042. (FIRA III, 295.); tabula Herculanenses from the 1.th century (79) A.D.

\(^4\) About the opinion that the pactum fiduciae was conceptualized by the classical jurists as a contract, see, Frezza, op. cit. p. 17 – 19;

\(^5\) It does not mean that it consists of two independent acts. C. Longo (op.cit. p. 17 – 18; p. 42 – sqq) emphasizes the unity of negotium (p. 55): ‘Tutto cio non nuocceva all’ unita del negozio fiduciario perché i suoi due elementi (reale e obbligatorio) erano collegati e resi inseparabili dall’ identita del loro obietto.’

\(^6\) Frezza, op. cit. p. 12. also Geib, SZ, VIII, 113; Erbe, Die Fiducia im römischen Recht, 1940, p. 105 sq.; contra Keller, SZ, LXII, 197; see also Longo, op. cit. p. 24.

\(^7\) For transfer of ownership on res nec mancipi (solum provinciale) in the classical period according to Boetius the in iure cessio was an adquate way. However, the differentiation between res mancipi and res nec mancipi was still not actual for a long time before his times. Boethius (480–524 or 525), ad Cic. Top. 10, 95C (http://individual.utoronto.ca/pking/resources/boethius/Topica_Ciceronis.comm.txt): ‘Quaecumque igitur res, lege duodecim tabularum, aliter
the documents. The Breviary is silent about it as well, probably because *in iure cessio* was replaced by *cessio*.

The fact that *mancipatio* was going out of practice in the post-classical times, is claimed to be the main reason why *fiducia* vanished from the late post-classical sources. It is also emphasized that Justinian did not need to cancel *fiducia* expressly, as he commonly has done like in the case of *mancipatio*, because it was not used in practice any more. Our opinion is that this was not the main reason. On the other hand this standpoint is logically incorrect: taking in consideration that if *fiducia* was going out of practice as a consequence of *mancipatio* not being utilized any more, why the emperor find important to cancel the *mancipatio*?

The main reason of disappearing *fiducia* can be found in the struggle against the practice of acquiring ownership on the pledged thing by the creditor if the debt remained unpaid. Was *fiducia* expressly cancelled? To answer this question we must take in consideration the rules of *impetratio domini* and *commissoria rescindenda*. In these imperial prohibitions we will find the reaction on the practice and the reason to cancel the effect of the *negotium*: the transfer of ownership on the pledged thing to the pledgee. We suppose the reason for the removal of *fiducia* as a kind of pledge by Justinian was not a dogmatical problem like the absence of *mancipatio* from the post-classical practice, but to stop the possibility of uncontrolled ownership transfer. On the Western part of the Empire a different way was chosen: the struggle against the abuse of *fiducia* and *pignus*. On the West the legislator saving *fiducia* intended to protect by different measures the interest of the debtors and the Empire as well. Therefore the institute of *fiducia* remained but the question is, in which sense?

To answer this question we must take in consideration some other questions:

- does the pledge in form of *fiducia* meant still in post-classical times a complex *negotium: pactum fiduciae* added to *mancipatio*;

8 A. Pezzana (Intorno alla lex Manciana, Studi in onore di Emilio Betti, III, Milano, 1962, p. 643, n. 29), states that *in iure cessio* was only a theoretical possibility.

5 Frezza, op. cit. p.10. Longo, (op. cit. p. 45 – 46) adding that if *fiducia* could be constructed by *traditio* ‘non sarebbe facile spiegarsi come non si sia proceduto alla sua espresso abolizione prima di cancellarla dai testi classici o dal diritto giustinianeo.’ also, A. Biscardi, Appunti, p. 30.
or maybe this transfer could have been made by informal *traditio* (a causal mode of ownership acquisition)\(^{10}\); or on West some modified form of *mancipatio* was practiced?

### 1.1. The use of *mancipatio* in the provinces during the classical period

Observing the use of *mancipatio* in classical period, having in mind the whole territory of the Empire, particularly the provinces, more questions emerge: who could be the subject,\(^{11}\) what could be the object and whether the formalities of *mancipatio* were respected in practice entirely in this period? These questions are elaborated in Pólay’s book about the documents from Dacia saved on wax tablets.\(^{12}\) The documents analyzed by Pólay are approximately from the middle of the second century A.D. Pólay regarding *mancipatio* states that these documents point onto irregular practical application of the institute. The subjects of *mancipatio* were also peregrins without *ius commercii*\(^{13}\) and the object could be the *soulum provinciale* (*res nec macipi*) as well.\(^{14}\) Regarding the formalities of *mancipatio* he concludes: the clauses ‘*emit mancipioque accipit*’ utilized on the wax tablets from Dacia gave no information about the practice of *mancipatio* according to the form of *ius civile*.\(^{15}\) As Pólay states, in these documents we could not speak about the *mancipatio* in its distinct meaning, but only

---

\(^{10}\) About the question, could *fiducia* be *iusta causa traditionis* see, Frezza, op. cit, p.1o – 13; Longo, op. cit. p. 42 sqq. Longo emphesises that *traditio* is incompatible with *pactum fiduciae*, because the *negotium* which could be *iusta causa traditionis* is forced onto a definitive (not temporary) transfer of ownership. Therefore, *traditio* could not be followed by *pactum fiduciae* because this *pactum* implies a temporary transfer of ownership. About the times when *mancipatio* was an effective way of sale which means that *pactum fiduciae* was added to a causal *negotium*, see, Biscardi, Appunti, p. 32 – 34.

\(^{11}\) Ulp. Reg. 19, 4: ‘*Mancipatio locum habet inter cives Romanos et Latinos coloniarios, Latinosque Junianos eosque peregrinos, quibus commercium datum est.*’

\(^{12}\) E. Pólay, A dáciai viaszostábák szerződése, Budapest, 1972.

\(^{13}\) According to E. Weiss (Peregrinisiche Manzipationsakte, SZ 37, 1916, p. 139), the peregrins without *ius commercii* were prohibited to use the form of *mancipatio*, i. e. the *negotium* was invalid. See the critics in, E. Pólay, op. cit. p. 132 sqq. The earlier prevailing oppinion (L. Mitteis, Röm. Privatrecht, Leipzig, 1908, 1, p. 285. n. 72) was that the utilization of *mancipatio* between the peregrins was an ‘abusiv’ phenomenon.

\(^{14}\) E. Pólay, op. cit. p. 127 sqq. Biscardi (Appunti, p. 55) states that the *soulum provinciale* could not be an object of *mancipatio* and for this reason also nor the object of *fiducia*. About the literature on this question see: E. Volterra, Mancipatio, in Novissimo Digesto Italiano, Torino; M. Kaser, RPR, I, p. 107, n. 9 – 10.

\(^{15}\) M. Kaser, Vom Begriff des ‘commerccium’, St. in onore di V. Arangio – Ruiz, Napoli, 1953, 2, p. 143. W. Kunkel (Herkunft und soziale Stellung der römischen Juristen, Köln – Graz – Wien, 1967, p. 141) states that the documents of the wax tablets from Dacia about *mancipatio* show the disappearance of *mancipatio* because the names of the *librippens* and *antestatus* are missing. The other reason of vanishing *mancipatio* according to him is that these documents testify about both the sale and *mancipatio*. 146
about the reception of some elements of its form. In these adapted form ‘mancipatio’ could have had some legal effects in the province if the judge was willing to take it in consideration.16

Regarding formula Baetica, the formulary made based on the Italian pattern, applied for mancipatio fiduciae causa in Spain, Pólay observes that it was utilized for the mancipatio of a provincial estate. The Formula Baetica17 has more requirements of mancipatio needed by ius civile (libripens and antestatus) than the documents from Dacia.18 The question which arises even in this case is: whether the formalities of mancipatio were really observed in practice or mancipatio was replaced by the document (testatio). Regarding the classical period the prevailing opinion is that the document without the formal act of mancipatio was not valid. The documents about the mancipatio without the performance of formalities were accepted instead of mancipatio only later (in post-classical times) as its authentic utilization disappeared.19

Pezzana have made investigation on the questions of the subject and the object of mancipatio and in iure cessio relating to fiducia mentioned in lex colonis fundi Villae Magnae20 (IV, 3) issued for the province of Africa:

‘…hoc tempus lege Manciana…ritu…fiducieve data sunt dabuntur…vi ius fiduciae lege Manciana servabitur.’

He accepts the opinion that the right of the ‘cultura manciana’ could be charged by fiducia,21 and states that the cultores manciani mainly belonged to the population without Roman citizenship. Hence, according to him the words fiducia and ius fiduciae were most probably not utilized in a strict technical sense ‘ma in quello generico di diritto di garanzia’.22 He also considers possible that this is an example of a peregrine institute (maybe neopunic) camouflaged in the Roman from.23

---

16 E. Pólay, op. cit. p. 133 – 134.
17 Formula Baetica (A.D. 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, p. 334-335, n. 135.
18 E. Pólay, op. cit. p. 151 – 152.
19 P. Jörs – W. Kunkel – L. Wenger, Römisches Privatrecht, 3. ed. Berlin – Göttingen – Heidelberg, 1949, p. 95. Regarding mancipatio Pompeiana; formula Baetica; tabula Herculanenses, Noordraven, (p. 127.) states that these documents have a character of testatio, therefore these documents cannot prove that the transaction accomplished the formal requirements of mancipati.
20 Lex Manciana, Lex de villae Magnae colonis (A.D. 116-117) CIL VIII, Suppl., n. 25902 (Epigraphik-Datenbank Clauss/Slaby), Source, Stone altar discovered in Henchir Mettich, Tunisia, in 1896.
21 According to him, fiducia was established by an act of a public authority on the land in public ownership in case of concessions regulated by lex Manciana. The purpose of fiducia in this case was to grant the fulfillment of the cultivator’s obligation (duty), see, A. Pezzana, op. cit. p. 655.
22 A. Pezzana, op. cit. p. 646.
23 Ibid. p. 646, n. 35.
In the first and second century in Spain, in case of the utilization of *ius civile* institutes as *mancipatio* and *fiducia* (which are *ius proprium civium Romanorum*), we could not speak about the irregularity in the subjects of *negotium*. In the time to which *formula Baetica* belongs the mass of Spanish population already gained Roman citizenship or Latinity\(^{(24)}\), therefore they had *ius commercii*. The population of Gallian territories (Gallia Cisalpina) got the Roman citizenship even earlier, in time of Caesar.\(^{(25)}\)

In our opinion, in the provinces the Roman citizens (soldiers, provincial magistrates, the members of their family, and other privileged categories of the population) utilized the formalities of the Roman *ius civile*, not to acquire *res mancipi* in Italy but to acquire the land or the things of higher value in their own provinces. The formalities of the Roman civil law in practice could have been accepted by provincial population that were not Roman citizens because they thought transactions would be more firm; or as Pólay supposed, in order to realize protection even if the case is judged before the Roman magistrate.\(^{(26)}\)

Thus we can state that the population of the Romanized Gaul and Spain (to which the Breviary was issued) has respected the formal requirements of Roman civilian institutes during the classical period. What happened later, mainly from the government of Constantine the Great onward?

### 1.2. Mancipatio in the post-classical period

The sources of the post-classical period give only some fragmentary information, but even these rare documents reflect the influence of the Roman civilian law on the provincial practice. However, it does not mean that the Roman institutes retained their classical authenticity. The Roman institutes were accommodated to provincial needs and changed under the influence of the provincial customs, local and barbarian as well. This is the problem of the mutual influence of different legal systems, which is present even now in our process of so-called harmonization of law.

As we have seen regarding *fiducia cum creditore contracta* the texts of the Breviary does not mention *mancipatio* and the dogmatical rules about *fiducia*

---

\(^{(24)}\) According to Biscardi (Appunti, p.38) from the end of the first century B.C. many cities of southern Spain has *ius Italicum*. As Maskin (Istorija starog Rima, Beograd, 1978, p. 381) writes, Vespasian (69 – 79 A.D.) gave finally Latin status also to those cities which have not got earlier *ius Italicum*. The Hispano-Romans – the romanized Iberians and the Iberian-born descendants of Roman soldiers and colonists – had all achieved the status of full Roman citizenship by the end of the first century A.D.

\(^{(25)}\) Under Julius Caesar and the triumvirs, whole regions—Cisalpine Gaul, Sicily, along with Romanized provincial cities in the West—had received citizenship. Latin status was granted to the Alpine provinces by Claudius and Nero.

\(^{(26)}\) Pólay, op. cit. p. 247.
show no difference in relation to *pignus*. One could not find this connection even in other postclassical codes. Thus, we cannot accept that *fiducia* remained even in postclassical period (and in the Breviary) entirely the same institute as it was earlier. This is our standpoint also in relation to *mancipatio*. The question which rises here is: does the modified *mancipatio* meant ownership transfer even in the post-classical period?

1.2. 1. *Fiducia* and *mancipatio* according to Boethius and Isidor from Sevill

*Fiducia* is joined to *mancipatio* and *in iure cessio* only in two mostly theoretical works: in Boethius (480–524 or 525 A.D.) ad Cic. Top. 10, 42; and in Isidor. (560 – 636 A.D.) Etym. 5, 25, 23. However, both sources belong to the times close to when the Breviary was issued and applied, but these sources give more information about the history of the institutes than about the actual practice of their time.

Boethius, between those who are obliged to ’*fidem praestare’* (to behave faithfully), mentions the *fiduciarius* who is a friend of the *fiduciant*. However from the text which follows we can conclude that he is speaking more about the *fiducia cum creditore contracta* than about *fiducia cum amico contracta*.

Boethius, ad Cic. Top. ’*Fiduciam uero accepit cuicumque res aliqua mancipatur, ut eam mancipanti remancipet, uelut si quis tempus dubium timens [1117A] amico potentior fundum mancipet, ut ei cum tempus quod suspicatum est praeterierit reddat; haec mancipatio fiduciaria nominatur, idcirco quod restituendi fides interponitur.’”

If we accept that here he is speaking about *mancipatio* as a mean of ownership transfer the text expressed the fear of the debtor that he will lose the charged thing if his friend (amicus) as the owner mancipate it to someone who belongs to *potentiores*.

The other interpretation of the text could be: the debtor gave the thing as a guarantee of debt payment or for other reasons to his friend whom he trusted that the thing will be saved and given back to him (*ut eam mancipanti remancipet*). This means that the thing was transferred only temporary. However, he fears that his friend could alienate it to *potentior* and he will lose the thing forever. The person who belongs to *potentiores* must not be the owner in order to refuse to give back the thing – he has power (even military) to protect his interests even if it is *causa iniusta*. Emphasizing the temporality of *fiducia* and the problem of oppressions practiced by *potentiores*, *mancipatio* must not be any more an instrument of ownership transfer. The most problematic was the recov-

---

27 About the problem of ’*momentaria possessio’* in the post-classical period, see: C. A. Cannata, Possessio, possessor, possidere, Milano, 1962, p. 91 – 95 and 184 with n. 99.
Boethius explains *mancipatio* quoting Gaius, however, recognizing that the solemnity of *mancipatio* described in the *Gaius Institutiones* in his time belongs to history. According to Boethius, *mancipatio* is only one of the possible *iuris solemnitas* to make connection /obligation/ (*nexu faciendo*) between the parts and it was utilized for the alienation of *res mancipi*:

>`Mancipi res ueteres appellabant, quae ita abalienabantur, ut ea ab alienatio per quamdam nexus fieret solemnitatam. Nexus uero est quadam iuris solemnitas, quae fiebat eo modo quo in Institutionibus Caius exponit. Eiusdem autem Caii libro primo institutionem de nexu faciendo, haec uerba sunt: `Est autem mancipatio, ut [1095B] supra quoque indicauimus, imaginaria uenditio, quod ipsum ius proprium Romanorum est ciium, eaque res ita agitur, adhibitis non minus quam quinque testibus Romanis ciibus puberibus, et praeterea alio eiusdem conditionis qui libram aeneam teneat, qui appellatur libripens. Is qui mancipium accipit, aes tenens, ita dicit: Hunc ergo hominem ex iure Quiritium meum esse aio, isque mihi emptus est hoc aere aeneaque libra. Deinde aere percutit libram, indeque aes dat ei a quo mancipium accipit, quasi pretii loco.`

Quoting Gaius, Boethius explains that *mancipatio* is one kind of *iuris solemnitas* which makes connection (*nexum*), afterwards he describes the formalities of *mancipatio* (*de nexu faciendo*) which is `imaginaria venditio` and states that this form is important for the alienation of *res mancipi*. On another place according to Boethius *mancipatio* is `traditio altera nexu`.

Boethius, ad Cic. Top. `Definit enim quid sit abalienatio eius rei [1095A] quae mancipi est, dicens: ABALIENATIO EST EIIUS REI QUAE MANCIPI EST, AUT TRADITIO ALTERA NEXU, AUT CESSIO IN IURE, INTER QUOS EA IURE CIVILI FIERI POSSUNT.`

Later, Isidor from Sevill in his Etymologies28 5,29 25,30 23 writes:

>`Fiducia est, cum res aliqua sumendae mutuae pecuniae gratia vel mancipatur vel in iure ceditur.`

We can notice that according to Isidor *fiducia* was used when a thing `mancipatur vel in iure ceditur`31 as a security for money loan.32

---

28 http://penelope.uchicago.edu/Thayer/L/Roman/Texts/Isidore/5*.html#25
29 Liber V, De legibus et temporibus
30 Caput XXV. De rebus
31 About in *iure cessio* the Etymologi says nothing. *In iure cessio* maybe conceptualizes as *cessio* because after the explanation of *mancipatio* follows: 5, 25, [32] Cessio est propriae rei concessio, sicut est illud: «Cedo iure propinquitatis». Cedere enim dicimus quasi concedere, id est, quae propria sunt; nam aliena restituimus, non cedimus. Nam cedere proprie dicitur, qui
According to Isidor mancipatio needs less formality: it is manu capere (taking by hand).

Etym. 5, 25, 31: ‘Mancipatio dicta est quia manu res capitur. Unde oportet eum, qui mancipio accipit, comprehendere id ipsum, quod ei mancipio datur.’

Does this mean that the thing must be transferred (tradere rem) to the creditor? We do not know whether it should be the real transfer or could be by chartula.

According to María Isabel Domínguez Agudo ‘…la mancipatio se recoge en la chartula mancipationis recogida en FV 34… La FV 34 elimina la solemnidad, pero pervive la figura de la mancipatio en esta fórmula notarial.’

1.2.2. Mancipatio and chartula

The written document about the sale was often used in practice in the post-classical period and was obligatory for fiscal needs if the immobile thing or things of higher value were sold. In the documents about the sale on the papyri from Ravenna we can read about traditio by epistula traditionis.

For example according to the document n. 116 (540): ‘…Quia in vestro est territorio constituta adque sola ei deest traditio ideoque Domini et iure colendi parentes accepta hanc epistulam meam lvv dignabitur memorato comparatori eiusque hominibus ex more sollemnem fieri traditionem legi actisque vestris indi Tabulario quoque Civitatis vestrae admonere cura vitis ut cispitis iugationem memorati loci quae in documentis insertum est siciuti supra legi tutor idem comparatori Actoribusque eius designari praecipiatis ut omnia a praesenti tertiam inductionem ad suum dominium pertinere cognoscat. Quam epistulam traditionis Eventio Not. scribendum dictavimus…’

Beside the epistulam traditionis the document mentions also the solemn delivery referring to customs (ex more sollemnem fieri traditionem) which could be some kind of mancipatio (manu traditio).

contra veritatem alteri consentit, ut Cicero (Ligar. 7,22): «Cessit» inquit «amplissimi viri auctoritati, vel potius paruit».

32 According to Frezza (op. cit. p. 24): ‘…tutti gli esempi a noi noti dale fonti epigrafiche, letterarie, giuridiche, ci parlano di crediti derivanti da mutui di danaro’, however he supposed that it could been extended also on the other fungibil (generic) things.

33 María Isabel Domínguez Agudo, Estudio léxico de “iura y leges” en el derecho romano vulgar occidental, Memoria para optar al grado de doctor presentada por, Madrid, 2003; FV. 34. Augg. et caess. Flaviae Aprillae. ‘Cum profitearis te certa quantitate mancipium ex sanguine comparasse, cuius pretium te exsolvisse diict et instrumentis esse firmatum…’, however, we cannot accept this text as an exact proof about that the written document replaced mancipatio.

34 In the documents: n. 115 (540); 116 (540); 117 (541); 118 (540?) on bases of A. Pezzana, op. cit. p. 666.
As Kircher states, *epistula traditionis* is one clause which substitutes *traditio* as an act of *translatio domini*. On the contrary, according to Riccobono the classical *traditio* was preserved along with *epistula traditionis*. Pezzana has an original idea. In his opinion the inscription of the purchaser’s name on the bases of *epistula traditionis* in *gesta civitatis* is an act with constitutive value, i.e. it transfers the ownership. According to him, even not the vendor, but the public office introduces the purchaser in possession after the inscription has been made.

Pezzana quoted the constitution of Theodosius I, Arcadius and Honorius CJ. 4, 3, 1, 2 /= CTh. 2, 29, 2/ (394) under the title `*Si certum petatur de suffragiis*` (in which the causa of the transfer is not the sale):

`Quod si praedia rustica vel urbana placitum continebit, scriptura, quae ea in alium transferat, emittatur, sequatur traditio corporalis et rem fuisse completam gesta testentur: aliter enim ad novum dominium transire non possunt neque ad veteri iure discedere...`  

At the first sight the text seems to confirm his standpoint, but in reality it is only an evidence of the imperial control of transactions. We could not agree with the opinion of Pezzana that only the inscription in public registers makes the buyer owner and that this document proves the technical rule of the transfer of ownership by registration in public records as it is the rule today for example in the ABGB. In the late Roman Empire the primary purpose of the public registers (*censualibus paginis, publicis libris*) was to list the tax payers. The owners were charged by the taxes. In case of a change (sale or gift) the new owner was obliged to register himself and take over the tax payment obligation. The parts of the quoted Ravennian document on sales proves it as well: `*ut omnia a praesiensi tertiam indictionem ad suum dominium pertinere cognoscat.*` It means: from this present third indiction the tax payer is a buyer, a new owner. We did not find any proof on the vendor’s right to take back the sold thing if the buyer failed to register himself on the bases of a written document. Here the legislation fell short.

In quoted texts the *traditio corporalis* follows after the written document which could help the vendor to oppress the buyer to make the inscription (*professio censualis*). However, we must make a difference between the written documents about the sale and the registration form of the new owner in public records. It is not at all clear if the *traditio corporalis* follows the inscription in the public registers or not, but we can notice from Salvian that one of the serious problems of his times was that the tax collectors collected payment from

35 Kircher, ZSS, 32, 1911, p. 118.  
37 Ibid. p. 668.
persons – non owners, for the property alienated already for a long time beforehand by their ascendants (fathers or grandfathers). Therefore we could not accept Pezzana’s standpoint that the registration as a public act was a constitutive element of the ownership transfer as it is today in ABGB and in the codes which were drafted based on it.

This does not mean that we do not like to accept traditio chartam (epistula traditionis) as a solemn act needed for the validity of the sale in case of immobile things where it figures besides the payment of the price and traditio corporalis. We agree with Arangio-Ruiz who states that a written document containing all necessary elements transfers the ownership, because this document confirms that the contract of sale was not only concluded but also have been realized (cash-sale). On the bases of scriptura the new owner was obliged to make professio censualis – to annotate his name in the geste (CTh.11, 2, 2). However, in the practice this was not respected (CTh. 11, 3, 3).

To avoid the problems of professio censualis, a public confirmation of the sales document would be a better solution, but it was provided for sale only later by the Nov. Val. 15, 3 (444-445): 

\[\ldots\text{prospicimus, ut gestis municipalibus immobiliwm rerum contractus constet initus} \ldots\] \(^{41}\), as it was before provided for the gift. If it was not respected the contract was invalid. Therefore there we have no technical rule that the inscription in the gesta transfers the ownership as Pezzana stays, but the contract is null (careat firmitatem) as it was not made.

Now we are going to return to the texts about mancipatio.

It is interesting that for the validity of gifts between children and parents mancipatio and traditio were no sine qua non elements, but only the registration in the public records was important (CTh.8.12.5: Idem a. ad Severum comitem Hispaniarum. ‘Data iam pridem lege statuimus, ut donationes interveniente actorum testificatione conficiantur. ...ne traditionis vel mancipationis sollemnis sit necessaria.’ /333 mai. 4/) \(^{42}\)

In the other cases, when gifts were made for extraneous personas it was adjudged invalid if mancipatio and delivery have not been legally executed.

\(^{38}\) Salv. De Gub. Dei, 5, 8: What an intolerable and monstrous thing it is, one that human hearts can hardly endure, that one can hardly bear to hear spoken of, that many of the wretched poor, despoiled of their tiny holdings, after they have completely lost their property, must still pay taxes for what they have lost!


\(^{40}\) M. Kaser RPR, II, München, 1959, p. 200.

\(^{41}\) In Pharr’s translation (Princeton University Press, 1952): "We provide...that the contract that has been entered into with respect to immovable property shall be established in the municipal public records ..."

\(^{42}\) See also, CTh.8.12.4; 6.
CTh.8.12.7 (355): `...nullam donationem inter extraneos firmam esse, si ei
traditionis videatur deesse sollemnis... donatio inter extraneos minus firma
iudicetur, si iure mancipatio et traditio non fuerit impleta.`

According to this constitution of Constantius and Constans the `traditionis
sollemnis` (as in the quoted document from Ravenna: `ex more sollemnem
fieri traditionem`) is the same as `iure mancipatio et traditio impleta`.

The formalities needed for the validity of the gift are described in CTh. 8,
12, 1, 1 /=Brev. CTh. 8, 5, 1, 1/ (316?):

`In conscribendis autem donationibus nomen donatoris, ius ac rem notari
opertet, neque id occulte aut per imperitos aut privatim, sed aut tabula, aut
quodcumque aliud materiae tempus dabit, vel ab ipso vel ab eo, quem sors min-
istraverit, scientibus plurimis perscribatur. 2 Et corporalis traditio subsequatur
ad excludendam vim atque irrepitio nem advocata vicinitate, omnibusque arbitris
adhibitis, quorum postea fide probabitur, donatam rem, si est mobilis, ex volun-
tate traditam donatoris, vel, si immobils, abscessu donantis novo domino pate-
factam, actis etiam annectendis, quae apud iudicem vel magistratus conficienda
sunt.`

The important elements are: to note the name of the donor (int. also
the name of the person to whom the gift was made), the description of the thing,
and the notification of the right on it (int. only to name the thing); the deed shall
be written in presents of the witnesses and subscribed by the donor himself or
by one of the witnesses; the corporal delivery which follows must be made in
the presence of the neighbors and other witnesses, who will testify about the
free will of the donor and about the free possession of the thing if it is immov-
able; before the judge or the magistrates must be executed the public records
and appended to such deed of gift. (int. first mentions the formality of registra-
tion in the public records and later the corporal delivery). It is not easy to find
out from the text which formalities belong to mancipatio and which to traditio,
but maybe the corporal delivery (manu traditio) before the testimony of wit-
nesses could be observed as mancipatio.\(^{44}\)

\(^{43}\) Int. `In conscribendis autem donationibus hic ordo servandus est, ut donatio nomen prius
contineat donatoris vel illius, cui donatur deinde res, quae donantur, sive in agris sive in man-
cipiis sive in quibuslibet rebus atque corporibus, nominatim in donacione conscribendae sunt, non
occulte, sed publice, non privatarum vel secretes, sed aut in tabulis aut in chartis aut ubicumque
legatur facta donatio. Quam tamen donationem, si literas novit, donator ipse subscribat: si vero
ignorat, praesentibus plurimis eligat, qui pro ipso subscribat: et hanc ipsum donationem gesto-
rum solennias et corporalis traditio subsequatur, ita ut, si mobilia donatur, praesentibus
plurimis tradantur: si vero ager vel domus donatur, quod moveri non potest, ut inde donator
abscedat et novo domino pateat res donata, si tamen sibì de his rebus usurpumfructum donator non
reservaverit. Gesta vero donationum aut apud iudicem aut apud curiam alleganda sunt.`

\(^{44}\) Justinian abolished mancipatio since it belonged to the history, but he took some ele-
ments from its decedent form that was used in practice when the sale was made in a written form
In the Interpretatio of the constitutions (leges) sometimes ‘hic de iure addendum’ is added. In Pharr’s translation it means: ‘addition must here be made from the law.’ Pharr states that it is ‘a comment of the interpreter, to guide the advocates who use the Breviarium’. In our opinion the meaning of this addition is: see the part of the Breviary related to ius (the rules of E. G.; P. S.; Cod. Greg.; Cod. Hermogen.; Pap. Resp.).

However, the quoted constitution is not interpreted and there the consultation of ius is not advised, but we will still ask the rules of ius to help finding out the meaning of traditio sollemnitas.

In the Pauli Sententiae saved in the Breviary are traces not only of fiducia, but of mancipatio and actio auctoritatis as well. The texts in Pauli Sententiae containing mancipatio and traditio are about the sale.

(completio and absolution): Just. Inst. 3, 23, pr; CJ. 4, 21, 17 pr; about the validity of the written form of contracts, A. Ruiz, La compravendita, I, p. 93 – 100. We do not agree with A. Ruiz regarding his standpoint that it depends on the will of the contractual parties whether it will be made in a written form or not. In cases of selling things charged by taxes the sale should be made in a written form in Justinian’s time as well.

The texts of Sententiae about eviction contain the world auctoritas. Having in mind that the sale of the ‘res aliena’ was prohibited, the sale of res aliena should be null and the question of eviction in this regard could not be an important matter. Nevertheless, the rules of eviction are preserved in the Breviary. See about, E. Levy, op. cit. p. 212. Brev. PS. 2, 17, 1: ‘Venditor, si eius rei, quam vendiderit, dominus non sit, pretio accepto, auctoritatis manebit obnoxius, aliter enim non potest obligari.’ This Sentence is accepted as classical, however, its two parts mostly correspond with postclassical conception, namely the part ‘pretio accepto’ (According to A. Ruiz /La compravendita, II, p. 319/ Paul’s text is a record about the vendor’s responsibility for auctoritas based on mancipatio, and the vendor’s responsibility for auctoritas raises only when the buyer has paid the price.) The addition in fine: ‘aliter enim non potest obligari’ is very discutable. For the classical lawyer it means nothing. For the postclassical lawyer it could be connected with the payment of the price: if the buyer has not payed the price the mancipant has no responsibility for auctoritas – because there was no sale. In our opinion, observing the rules of the Breviary we could not speak about the responsibility for eviction because the vendor would be punished with the repayment the double of the paid purchase price, every time when he sold somebody else’s thing. His responsibility is more delictual than contractual: he will be punished as he violated the rule on prohibition to sell the thing of which he was not the owner (res aliena). The Interpretatio is clearer but there is no mention of the auctoritas. Int. ‘Si quis rem alienam vendiderit et petium acceperit, ad redhibitionem duplæ pecuniae manebit obnoxius.’ The next Sentence is treated as a classical improvement about the utilization of the actio empti in case of eviction if the merx was transferred to the buyer ‘simpliciter’ by traditio, without mancipatio (See, F. De Zulueta, The Roman Law of Sale, Oxford, 1945, p. 44, n. 1; P. Ourliac, J. De Malafosse, Droit Romain et Ancien droit, Les Obligations, Paris, 1957, p. 261). Brev. PS. 2, 17, 2: ‘Si res simpliciter traditae evincantur, tanto venditor emtori condemnandus est, quanto, si stipulatone pro evictione cavisset.’ Int. ‘Si quicunque rem simpliciter, id est, sine poenae interpositione, emtori tradiderit, et de eadem re emtor fuerit superatus, in tantum et venditor manebit obnoxius, velut si evictionis poenam, id est, duplum se redditurum pretium in venditione promiserit.’ According to the interpreters the part ‘simpliciter traditae’ means ‘simpliciter, id est, sine poenae interpositione’ = ‘evictionis poenam, id est, duplum. Regarding a sanction in duplum one can find a connection with
Brev. PS. 1, 13, 4 (=PS.): 'Si id quod emtum est, neque tradatur, neque mancipetur, venditor cogi potest, ut tradat aut mancipet.'

This Sentence we could interpret in classical sense. The part 'id quod emtum est' means 'the thing about which the contract of sale was made'. After the contract has been concluded the vendor is obliged to transfer the thing (traditio), and if it is res mancipi to mancipate it.

The Interpretatio changes the meaning of the Sentence entirely.

Int. 'Si eam rem, quam aliquis accepto pretio facta venditione distraxit, tradere distulerit, ad traditionem rei, quam vendidit, omnibus modis compellendus est.'

The part 'eam rem, quam aliquis accepto pretio facta venditione distraxit' does not mean any more a consensual sale, but a real (the so-called cash-sale) whereby the vendor receiving the price from the buyer have sold the thing and lost the ownership on it, as a consequence of which he must deliver the thing to the buyer. On 'traditionem rei' he should be forced 'omnibus modis'. On the other hand, mancipatio is not mentioned any more, maybe because the transfer of the right was completed (mancipatio = written document). In interpretations of the other Sentences mancipatio was also eliminated or changed by traditio.

One explanation of these changes could be, that mancipatio was no longer utilized, however mancipatio is evidenced in constitutions from 319 to 355 (Cth. 8, 12, 4; 5; 7), and it is present besides Pauli Sententiae in Epitome Gaii as well.

the rules of stipulatio Aquiliana /Brev. PS. 1, 1, 3/ and lex Aquilia/. Therefore if the punishment in duplum was not stipulated it succeed on the bases of lex Aquilia/ About the standpoint that the contractual and delictual liability was not strictly separated in post-classical times, see, E. Levy, Weströmisches Vulgarrecht, Das Obligationenerecht, Weimar, 1956, p. 131 – 134; Gy. Diösdi, Contract in Roman Law, from the Twelve Tables to the Glossators, Budapest, 1981, p. 202. The next not interpretated Sententia could not be classical because the responsibility of the vendor for auctoritas followed even when the thing was transferred by simple traditio. Brev. PS. 2, 17, 3: 'Res emta, mancipatione et traditione perfecta, si evincantur, auctoritatis venditor duplo tenus obligatur.' The term auctoritas in the Breviary we can understand as an obligation of the vendor to repay the double value (price) as a punishment because he frauded the buyer. Levy (op.cit. p. 215) states that the responsibility of the vendor is in this case delictual, as it was also on the bases of actio auctoritatis in early Roman times. The development lead to actio empti of the classical period by which the buyer could ask for the compensation 'quanti interest rem evictam non esse.' The Visigothic law has prescribed a similar rule to this classical Roman (C. E. 289; Levy, p. 221), and one can find the rule on recompensation of the thing’s value with the cost of amelioration in the CTh. 13, 6, 6. This rules were not inserted in the Breviary.

46 In the same sense: Isid. Etym. 5, 25, 34: 'Pretium vocatum eo quod prius eum damus, ut pro eius vice rem, quam adpetimus, possidere debeamus.'

47 According to , mancipatio was going out of practice in the post-classical period. Kaser, RPR, II, 1959, p. 197.
Concerning gifts between children and parents according to the constitution of Constantine (CTh. 8, 12, 4) gifts shall be valid even though the formal words of *mancipatio* have not been spoken and delivery has not followed (*licet neque mancipatio dicatur neque traditio subsecuta*). However, later in the same constitution we can read: 'It shall obtain its proper validity, whether the formality of mancipation has been executed or at any rate the property is proved to have been delivered.' (*obtinere propriam firmitatem, sive mancipationis decursa fuerit sollemnitas vel certe res tradita doceatur.*) The constitution is not clear what kind of delivery is recognized because the expressed and proved will about donation is important. Nevertheless we can notice that it was not an obstacle for the validity of *mancipatio* if the solemn words of *mancipatio* were not pronounced.

The *traditionis solleemnitas* (written document) seems to embraces both *mancipatio* and *traditio*.

In the documents about the sale saved on Tablettes Albertini^48^ besides the proof of the paid price instead of *traditio* there is a clause in sense of *translatio iuris*. For example in the document XXVI:

'Ex hac die in no emtores suos omnem ius transtuli ut habeant teneant possideant in perpetuo.'

According to Pezzana, the expression *translatio iuris* is one form of *traditio* in sense of the clause of a stile or as a formal element of the document.^49^

In these documents we can find a confirmation of the theses on the translative effect of the sale. The simple *traditio corporalis* lost its role as *modus acquirendi*. When cheap ordinary things were be sold the contract of sale transferred the ownership at the moment when the price was paid. In case when things of a higher value were be sold a written document on the executed sale transferred the ownership. If the sale was about a land more formalities were needed, in first place witnesses and some other formalities (similar to *mancipatio*), some solemn act confirmed by written document.

1. 2. 3. Which formalities of *mancipatio* remained?

One opinion is that *mancipatio* is giving the thing by hand, which means a factual act.^50^


---


^49^ A. Pezzana, op. cit. p. 671.

^50^ Kaser, RPR II, 1959, p. 197. n. 5.
Following Isidore from Seville we will notice that the sale is nothing else than ‘rerum commutatio’.\(^{51}\)

Isid. Etym. 5, 24, 23: ‘Emptio et venditio est rerum commutatio atque contractus ex convenientia veniens.’

Analyzing the part of Pauli Sententiae, Brev. PS. 2, 17, 3: ‘Res emta, mancipatione et traditione perfecta’ we can notice that the sale was not only contracted but it was also realized (cash – sale). However, we do not know what mancipatio and traditio means in this Sentence. Having in mind the conception of Isidore from Seville that the sale is ‘rerum commutatio’: mancipatio could relate to merx and traditio to pretium, or maybe vice versa, because, according to him, the pretium could be in things as well (permutatio).\(^{52}\) If it is permutation we do not know what is given as merx and what as pretium. But Isidore in other text gives us the information that in case of permutation - sale the pretium is that which was given firstly.

Isid. Etym. 5, 25, 34: ‘Pretium vocatum eo quod prius eum damus, ut pro eius vice rem, quam adpetimus, possidere debeamus.’

Consequently, mancipatio could relate to that what is handed over firstly: money or something else what we can hold in our hand, or a sales document in case of immobile.

Considering the fact that what is handed over firstly can be a sum of money, from the classical point of view is nonsense. Nevertheless, it is acceptable if we are thinking as a postclassical lawyer: In common cases (if it is not the sale of land or other things of higher value) by paying the price, or giving the thing as a price (mancipatio) the buyer became the owner of the purchased thing. Mancipatio is manu capere which signify the contract (transaction) has been made with real or obligatory effect. In the post-classical (“vulgar law”) the real or personal effect of negotium was not distinguished any more in the classical sense.

1. 2. 4. Is mancipatio only a simple manu traditio?

The Epitome Gaii explains mancipatio similarly to Boethius (Cic. Top. 5, 28) as immaginaria venditio. The text in the Epitome is about mancipatio emancipationis causa.

Brev. EG. 1, 6, § 3: “Emancipatio autem, hoc est manu traditio, quaedam similitudo venditionis est: quia in emancipationibus pater illum, hoc est certum
patrem, alius pater adhibetur, qui fiduciari nominatur. Ergo ipse naturalis pa-
ter filium suum fiduciario patri mancipat, hoc est manu tradit: a quo fiduciario
pater naturalis pater unum aut duos nummos quasi in similitudinem pretii ac-
cipit, et iterum eum acceptis nummis fiduciario patri tradit. Hoc secundo et
tertio fit, et tertio cum fiduciario patri mancipat et tradit, et sic de patris potes-
tate exit...”

The text speaks about the formalities of emancipatio of which one of the
elements is mancipatio. We can notice that mancipatio is: ‘manu traditio’ and
emancipatio is ‘manu traditio’ for ‘unum aut duos nummos’ (immaginaria venditio) = ‘similitudo venditionis est’ connected with the manumission made
by fiduciarius pater.

The other requirements of mancipatio (libripens, five witnesses, with
addition of two more witnesses to reach the number seven)\textsuperscript{53} are described in
case when emancipation was made ‘ante praeisdem, modo ante curiam’ (public
form of emancipation). In this case, after the third mancipation the naturalis
pater can ask for the new remancipation of his son to be manumitted by him,
and this way, if the son dies he (the naturalis pater) and not the fiduciarius
pater became the son’s heir.\textsuperscript{54} This part is very interesting, because as we know
the person (fiduciarius pater) who takes part in the ceremony of emancipation
has not became patronus in earlier times. Here we see that the emancipated and
liberated person has been treated in practice somehow similarly as a libertinus
Latinus Iunianus.

In Breviary mancipatio is connected with fiducia only in the above ana-
lyzed text. As a formal requirement of emancipation the ‘certum pater ‘(= natu-
ralis pater) is selling fictively (mancipatio nummo uno) his son to the person
whom he trusts (fiduciario patre).\textsuperscript{55}

The connection of emancipation with fiducia is present in Brev. CTh. 5, 1,
3 (=CTh. 5, 1, 3 - Tit. I (=Brev. I) “De legitimus hereditatibus”:

Imppp. Gratianus, Valentinianus et Theodosius AAA. ad Hilarium Pf. P. (19
Feb 383 Mediolanum): ‘Quoties de emancipatae filiae successione tractatur, seu
eam fiduciae nomen obstrinxit, seu etiam nulla comitantur suffragia liberorum,
filii ex ea genitis, etiamsi talis occasus avo vivente contingat, intacta pro solo
successio deferatur, neque ulla defunctae patri matrice concedatur intestatae
successionis hereditas, quum satis superque sufficiat adversus omnes legitimo

\textsuperscript{53} In the documents about mancipatio the number of witnesses is also seven, E. Pólay,
op.cit. p. 133 and 149.
\textsuperscript{54} See also, Noordraven, op. cit. p. 114 sqq. However he takes this text only to prove that
‘Emanzipation eine familienrechtliche Anwendungsform der fiducia war.’
\textsuperscript{55} The Institutiones of Gaius related to emancipation (Gaius, Inst. 1, 132) instead ‘fiduciario
patre’ utilized ‘alicui’; eidem vel aliis (sed in usu est eidem mancipari) but on other place about
the coemptio fiduciae (Gaius, Inst. 1, 115) stays ‘tutor fiduciarius’. 
gradu ad successionem venientes in hereditatibus matrum, incolumnes ac superstites optabili sorte genitoris, successio liberorum.

Pharr explains the part ‘fiduciae nomen’ (and according to Interpretatio: ‘fiduciaturam nominare’) in sense that, by an emancipation executed under the fiduciary agreement (fiduciae nomen) that the child be remancipated to the father and manumitted by him, thus that the father has the patron’s right in the child’s estate, the emancipated daughter is under a fiduciary obligation as an object of a trust 56

The interpretation is in accordance with emancipation made ‘ante praesidem, modo ante curiam’ described in the EG. 1, 6, § 3. For the emancipation of a daughter only one mancipatio was needed and the father could ask for remancipatio to manumit the child himself in order to be the patron of the child. The text addressed the question of succession as well.

EG. 1, 6, § 3: ‘Femine vel nepotes masculi ex filio una emancipatione de patris vela vi exeat potestate et sui iuris efficiantur. Et hi ipsi, quamlibet una mancipatione de patris vela vi postestate exeant, nisi a patre fiduciario remancipati fuerint et a naturali patre manumissi, succedere eis naturalis pater non potest, nisi fiduciarus, a quo manumissi sunt. Nam si remancipatum sibi naturalis pater vel avus manumisserit, ipse eis in hereditate succedit.’

We can learn from Epitome that the problem concerned the hereditary right of the patron (the fiduciary pater who manumitted the child). If the naturalis pater intended to save the estate of the child for himself (and to the family) he could ask for remancipation from the fiduciary pater.

The constitution edited 383. A.D. seems to regulate the same problem and in case of emancipated daughter makes a step forward. To assure hereditary rights for the emancipated daughter’s children, the pater naturalis when emancipating her does not ask for remancipation, but he only makes a fiduciary agreement with the fiduciary father about remancipation. In this case the fiduciary father who manumitted the daughter will not be her patron, and according to the constitution, the father will also not become successor. Therefore, the emancipated daughter got under the fiduciary agreement some kind of independent status. After she dies intestatus her children will become her heirs.

The constitution was written after the text of Epitome has been made. The Interpretatio explains the above mentioned rule.

Int. “Filia, quam fiduciatam nominavit, hoc est emancipata, si intestata moriatur et relinquat superstitem patrem, matrem et filios, excluso patre et matre, etiamsi ius liberorum defuncta non habeat, filii soli in eius hereditate succedunt. Hic de iure addendum, quid sit fiducia.”57

56 Pharr, CTh. p. 104, n. 21.
57 Justinian inserting the constitution in his Code has erased the part about fiducia, and changed it as: if somebody of the sons or the daughters was emancipated his/her succesors
The addition *in fine: *‘Hic de iure addendum, quid sit fiducia.’ means, in our opinion: about the *fiducia* see (consult) the part of the Breviary related to *ius*. In this case the source of *ius* which one can consult is the *Epitome Gaii*.

Accepting the advice of the interpreter we have consulted the *Epitome* and we can confirm that *fiducia* is ‘an agreement about the *remancipatio* of the emancipated (*immaginaria venditio*) daughter.

1. 2. 5. Can we apply this rule on the case of *fiducia cum creditore contracta*?

Unfortunately we have not found any description on the technical rules of *fiducia* neither in Breviary nor in other postclassical documents. Perhaps it was regulated by customary rules. The pledge in its customary form of *fiducia* probably created some relationship between *fiduciant* and *fiduciary* in which the thing charged got somehow an independent position (in sense that really it did not belong to the *fiduciant* nor to the *fiduciary*) similarly to the emancipated daughter under the fiduciary agreement. Does Constantine’s prohibition of the *lex commissoria* intended to abolish this kind of *fiducia*? The answer must be negative, since the constitution of Arcadius and Honorius issued after Constantine’s prohibition of contracting *lex commissoria* (320), from 395. A.D. expressly recognized the validity of *fiducia* (*CTh.*15.14.9): *‘Valeat omnis emancipatio tyrannicis facta temporibus... pignoris adque fiduciae obligatio perseveret...’*

In our opinion *mancipatio* in the quoted texts does not mean any more the instrument which transfers the ownership. It was only *mancipatio nummo uno = immaginaria venditio*. In the time when the Breviary was made, for the transfer of ownership the price really had to be paid, and not as *‘nummo uno’*. *Mancipatio* of the post-classical West could be only some kind of *iusris*...
solemnitas (including the element of 'manu tradere'; manu capere’) i. e. the customarily accepted act which connects the parts (nexum\(^59\); obligatio). Therefore, the ‘manu tradere’; ‘manu capere’ was only a formal requirement. The ownership and also the possession (detention) of fiducia usually must not be transferred to the fiduciary (mancipatar). In the post-classical, as in the classical period,\(^60\) the object of the pledge could only be charged by pledge without delivery as confirmed by the frequently utilized terms: obligatam,\(^61\) op-pignoratam\(^62\)

Does fiducia need some solemn formalities as a modified mancipatio or maybe a document about it? As we have seen in Epitome Gaii regarding mancipatio emancipationis casusa, fiducia is connected with mancipatio, but in the Breviary there are no traces about mancipatio fiduciae causa.

Why the Breviary could not inform us about the practical utilization of fiducia? The reason is evident: the Breviary was made as a compilation of classical and post-classical legislation to which the rules of the so called ius (the excerpts from the books of classical lawyers accommodated to the circumstances of post-classical times) have been added. Regarding the legal institutions as fiducia, the rules of the Breviary only point onto the rules of

\(^59\) nexu faciendo = mancipatio in Boethius, Cic. Top. 5, 28.
\(^60\) If the creditor gives back the pledged thing to the debtor in precarium or lease, see, C. Longo, Corso, p. 76 sqq. In these cases the creditor’s interest was not imperiled from the debtor’s side, because the debtor could not acquire the charged thing by usucapio or usureceptio. See also: Noordraven, p. 191.
\(^61\) Brev. IP. 2, 13, 2 (= 2, 13, 7) Si quis creditor praedium sibi fiducia obligatum...; Brev. PS. 5, 28, 4 (= PS. 5, 26, 4) 'Creditor chirographarius si sine iussu praesidis per vim debitoris sui pignora, cum non haberet obligata,...' Brev. P. S. 5, 7, 14 = P. S. 5, 6, 16: "Omnibus bonis, quae habet quaee habiturus est, obligatis, , nec concubina, nec filius naturalis, nec alumnus, nec ea, quae in usu quotidiano habet, obligantur..."; Int. ‘... nec ea, quae in usu quotidiano habet, obligata videri possunt.’
\(^62\) Brev. PS. 1, 9, 8 (= PS. 1, 9, 8) 'pignorum et fiduciaria... - IP. 'oppignoraverat vel fiduciae causa posuerat'; Brev. PS. 2, 12, 5 (= PS. 2, 13, 2) 'fiduciarium servum' - IP. 'oppignoratum ...servum'; Brev. PS. 2, 12, 6 (= PS. 2, 13, 3) 'vendere fiduciam' - IP. 'oppignoratam emere'; Brev. I. P. 5, 7, 14 = I. P. 5, 6, 16 'Si quis debitor creditor suo talem fecerit cautem, ut omnia ei, quae in bonis suis habet, vel quae habiturus est, oppignorasse videtur, ..."
fiducia which were retained from the earlier (classical) period accommodated to the interests of the Empire in postclassical times. The postclassical legislation focused onto controlling the practice with an aim to do nothing against the interest of the Empire (utilitas publica). The dogmatic rules of transactions related to ius remained unchanged if these rules were not against the interest of the Empire. In the limits of utilitas publica the formation of transactions in practice was not controlled and regulated by imperial legislation. In everyday life it was well known which formalities are needed for fiducia cum creditore contracta.

About the practical utilization of fiducia we have found one document dated 445 – 446 A.D. from Ravenna.63 We can learn from this document that Tranquillus charged by fiducia the fundus Parilaticus.

`...fundo Partilatico, quem Tranquillus in temp[ore], [fil][us] [Gre]gori quondam, sub certa depectione fiduciae nexu oblighaverat iuxta[cautionem] quam tecum portaveras...`

The part of the text ‘fiduciae nexu obligaverat iuxta[cautionem]’ shows onto formalities utilized in case of fiducia. Does the part of the text nexu obligaverat means a modified mancipatio, having in mind that Boethius before describing the formalities of mancipatio, writes: ‘Caii libro primo institutionem de nexu faciendo, haec uerba sunt ...’? The quoted Ravennian text shows also onto the fact that the act of nexum (nexu faciendo) was confirmed by a written document (cautio).

Unfortunately we have not found more documents about the practical requirements of fiducia and we do not know exactly whether this nexum is a kind of mancipatio described by Boethius and does fiducia need always to be confirmed by cautio in sense of a written document on all formalities for its realization (‘fiduciae nexu obligaverat’). It is plausible that a written document was necessary in case of fiducia. However, can we exclude it in other cases of the pledge: pignus datum or conventum?64 Regarding the observed sources, we have no exact answer on this question.

It is remained to continue our research following the method of exclusion but must not forget to stay within the spirit of the time.

63 Location: Ravenna ChLA20,705 (The Duke Databank of Documentary Papyri, P.Ital.: Die nichtliterarischen lateinischen Papyri Italiens aus der Zeit 445-700)
64 According to Gaius (D. 20, 1, 4) ‘Contrahitur hypotheca per pactum conventum...’ However, in practice the written document was usual and in provinces primarily as a guarantee for public debts the pledge was registered (for example, Lex Malacitana c. 63, 64), only later (472) the emperor Leo (CJ. 8, 17, 11, 1) will give priority to hypothec made by public document (instrumentis publice confectis) or to the private document subscribed by three persons, which was considered equal to the public document.
2. FIDES AND FIDUCIA

Utilizing both the dogmatical and historical method, we can notice that our sources do not utilize the word *fiducia* in case of pledge in favor of the imperial treasury (*fiscus*), and we can suppose that *fiducia* was not a security if it was taken as a guaranty from the creditor. It remained to accept that in the Breviary *fiducia* is conceptualized as the creditor’s security offered by the debtor. The thing was given to the creditor in confidence (trust) that it will be saved and given back if the debtor fulfills his obligation, or it could be promised by *fides* of the debtor, i.e. charged by pledge in favor of the creditor on the bases of the debtor’s *fides*. Consequently, in the Breviary the main element of *fiducia* as a real security (and as we can suppose in the West part of the Empire in post-classical times) was the *fides* in its common sense: as fidelity (trustworthiness) and confidence. It is not questionable that *fides* was the main element of *fiducia*, from the beginning. As Biscardi observes: ‘Non dimentichiamo che l’istituto della fiducia e basato sul rigoroso concetto arcaico della fides, concetto prima etico-religioso che giuridico.’

2.1. *Fides* in a common sense - as a subjective measure of human behavior

While *fides* was an ancient Roman principle\(^6\) based on religion and moral, determined by *mos maiorum*\(^7\), which we can call *fides maiorum*,\(^8\) later *fides*

---

\(^6\) Biscardi, Appunti, p. 99.

\(^7\) Javier Paricio, Genesi e natura dei «bonae fidei iudicia, Rivista di Diritto Romano - I – 2001 Atti del Convegno .Processo civile e processo penale nell esperienza giuridica del mondo antico. http://www.ledonline.it/rivistadirittoromano/attipontignano.html p. 9-10). Since we accept his standpoint, we give the word to the autor: ‘A mio avviso, come, con motivazioni molto diverse fra di loro, sostengono alcuni autori, *actio fiduciae* non poteva essere stata che *in ius*, il che, come abbiamo visto, non costringe a pensare ad una protezione originaria tramite qualcuna tra le *legis actiones*. Questa azione, la più antica tra quelle in buona fede, la stessa che sarebbe servita da modello alle altre come testualmente afferma Alvaro d.Ors, non poteva aver avuto origine pretoria: affonda le proprie radici nell ambito consuetudinario del *mos maiorum* e il suo fondamento si trova nella *fides*... I giudizi di buona fede sono, dunque, sempre stati «civili» (metto finalmente fra virgolette il vocabolo per riguardo verso André Magdelain). Nella loro nascita ebbe ben poco a che fare la legislazione, mentre invece fu essenziale la *summa vis* (See about also, R. Cardilli, Bona fides tra storia e sistema, Torino, 2002, 34 sqq.) della *fides*; il ruolo del pretore consistette solo nel raccogliere qualcosa che era nel seno della comunità cittadina e ammesso dal *mos maiorum*. Le più antiche azioni di buona fede sono state l.*actio fiduciae* e (forse) L.*actio rei uxoriae*, nessuna delle quali presentava il tipico *oporete ex fide bona* nella sua *intentio*, ma invece parole equipollenti (*ut inter bonos bene agier oportet et sine fraudatione, melius aequius*) e di formulazione più arcaica... Nate in ambito cittadino e fondate sulle *fides*, niente impediva loro (almeno per quanto riguarda la maggior parte di esse) di estendersi ai peregrini, poiché i doveri ed obblighi imposti dalla *fides* sono esigibili da chiunque, indipendentemente dalla sua cittadinanza...”
became a juridical principle respected in internal and ‘international’ relations of the Romans.  

However there are many explanations of *fides*, it has also a simple meaning, a behavior of the honest and correct man – fidelity and faithfulness, trust and trustworthiness. In this simple meaning *fides* was a fundamental principle of an expected behavior in everyday life, particularly concerning transactions. It was not only a Roman principle, but universal to all nations. As Pastori writes: ‘...la fides rappresenta un legame umano prossimo alla religione, idoneo a vincolare soggetti di diverse credenze religiose.’

---


68 M. Voight, *Das Ius naturale, aequum et bonum und ius gentium der Römer*, III, Leipzig, 1856 – 1871, p. 229; In early Roman times, the *fides Romana* based on *mos maiorum* was treated by Romans as a specific quality different from the *fides* of the other nations. Livius, 42, 47, 6: ‘haec romana esse, non versutiarum punicarum neque calliditatis Graeciae. See, also M. Horvat, *Bona fides u razvoju rimskog obveznog prava*, Zagreb, 1939, p. 27.


72 F. Pastori, *La genesi della stipulatio e la menzione della bona fides nella Lex de Gallia Cisalpina con riferimento all’actio ex stipulatu*, Studi Betti, vol. III, Milano, 1962, p. 582; also, P.
One can recognize fides as a phenomenon of 'naturalis ratio' that Gaius (Gaii. Inst. 1, 1) qualified as fundament of ius gentium: ‘...quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos pereaque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.’ Though, in classical period fides got the adjective ‘bona’ and became 'bona fides', as a standard of behavior expected from contractual parties, but this did not mean that for ordinary people fides lost its genuine meaning.

In the post-classical period when the standard of bona fidei behavior was assumed and replaced by aequitas the moral aspect of fides in its common sense was again emphasized.

Regarding post-classical times Kaser also observes that the pragmatical notion of bona fides was changed and it (fides) was once again conceptualized in ethical sense, opposite to the notions of malignitas, calliditas, malatia, machinatio, astutia, avaritia, dolus, vis. On the other hand, bona fides became a synonym to aequitas, i. e. ius aequum, contrary to ius strictum.

In sources these changes can be seen after the government of Emperor Diocletian. The sources from the time of Constantine, instead of bona fides...
utilize the expressions *iusto* and *aequo* and the term *fides* got different meanings. The term “*fides*” in postclassical sources we can find: in a religious sense as “*fide catolica*”; as the authenticity of the act or the document - *fides testium vel instrumentorum*; as a public authentification and verification - *fides publica*...  

We cannot agree with Kaser’s standpoint that in the postclassical period *bona fides* changed its meaning taking back the ethical mark of *fides*, only because the emperor became absolute monarch. It is evident by the sources that the emperor became the *solus conditor et interpres iuris* (C. J. 1, 14, 12, 5) and guided by *utilitas publica* it was he who decided what is *iustum et aequum*,...
but on the other side, the concept of *fides* as a religious and moral principle even without the utilization of the term *fides* we can explain by the influence of the Christian religion.\(^82\)

In our opinion, *fides* never lost its moral bases, not even when it became a scientifically elaborated standard of law as *bona fides*. The ethical principle defined by objective measures has to realize the subjective moral behavior of people as well, and not only to give the vision of morality.

In the Breviary the moral component of required human behavior is emphasized. There was no need to utilize in every rule the term *fides* because the other expressions as *bonos mores* or *honestas* often covered the same meaning.\(^83\)

\[^82\] Isidorus Hispalensis, *Etymologiarum libri XX*, De ecclesia et sectis Caput II. De religione et fide [4] *Fides est qua veraciter credimus id quod nequaquam videre valemus. Nam credere iam non possimus quod videmus. Proprie autem nomen fidei inde est dictum, si omnino fiat quod dictum est aut promissum. Et inde fides vocata, ab eo quod fit illud quod inter utroque placitum est, quasi inter Deum et hominem; hinc et foedus.*

\[^83\] The utilization of synonyms probably more often than in the earlier period could be the consequence of the influence of different legal cultures. In the *Sentetiae* of Paul we can find one general rule on the nullity of the pacts which are contrary to the law and good customs. In our opinion it could be even classical PS. 1, 1, 4 /=Brev. PS. 1, 1, 2 (4)/: *Neque contra leges, neque contra bonos mores pacisci possimus.* The interpreters exactly emphasizing the moral element of the human behavior changed the *bonos mores* by the word *honestas*. I. P. *Si inter aliquos conventat aut de admitting crime, vel inferenda violentia, vel faciendo, quod lex aut honestas prohibit, aut de rebus alienis, aut de bonis viventis aliquid paciscantur, haec pacta valere non possunt.* The opinion of Goddard (J. A. Goddard, *Los pactos en las «Sentencias de Paulo»* (Analisis del titulo 1 del libro primero, www.bibliojuridica.org/libros/4/1855/7.pdf p. 19) is, that utilizing the word *honestas* the interpreters intended to show onto *un sentido de moralidad personal, quizá una moral común como podria ser entonces la moral cristiana.* See also, E. Levy, (1969) *Pauli sententiae, a palingenesia of the opening titles as a specimen of research in west Roman vulgar law*, South Hackensack, N.J., Rothman Reprints; In the Gaii Epitome (Brev. G. E. 2, 9, 18) we meet the expressions *bonos mores* and *honestas* to be synonyms. While Gai Inst. 3, 157. utilizes only the expressions *bonos mores* in Gaii Epitome (Brev. G. E. 2, 9, 18) the expressions *bonos mores* and *honestas* are synonyms: *Possumus enim aut nostra negotia aut aliena cuicumque agenda mandare: dummodo honestum aliquid agi mandemus. Nam si contra bonos mores aliquid mandare voluerimus, hoc est, si cuquam mandemus, ut aliqui furtum faciat, aut homicidium aut adulterium admittat, in his rebus mandati obligatio non contrahitur.* See also, Maria Isabel Domínguez Agudo, op. cit. *honestas*: CTh.2.10.4 (=Brev.2.10.1) honestorum coetu iudiciorumque conspicu iurisprudentiae conspexit segretarii praecipium.(326) Interpretatio. *honestorum vivorum et...*
Boethius expressly points onto the connection between \emph{fides} and \emph{fiducia}:
\begin{quote}
Boethius, ad Cic. Top. 10, 42: `… fidem praestare debet…qui fiduciam acceperit,…'; \footnote{84 Also Coll. 10, 2, 1, 2: `Sed in c`eteris quoque partibus iuris ista regula custoditur; sic enim et in fiduciae iudicium et in actionem rei uxoriae dolus et culpa deductur, quia utriusque contrahentis utilitas intervenit.'}
\end{quote}

Boethius, ad Cic. Top. 10, 42: \textit{Fiduciam uero accepit cuicumque res aliqua mancipatur, ut eam mancipanti remancipet, uelut si quis tempus dubium timens [1117A] amico potentiori fundum mancipet, ut ei cum tempus quod suspectum est praeterierit reddat; haec mancipatio fiduciaria nominatur, idcirco quod restituendi fides interponitur.'

\section*{Conclusion}

After a long search in the labyrinth of notions and institutions, modified due to the intercourse of different legal cultures on the territory of the Roman Empire and adjusted to the need to preserve the Empire in times of decadency \textit{(utilitas publica)}, we came to a very simple conclusion: \emph{fiducia} was kept in the sources and practice of the late Roman and early medieval times as a pledge based on mutual trust \textit{(fides)} of the parties.

Though dogmatic rules are the same for both \emph{fiducia} and \emph{pignus}, \emph{fiducia} does not occur as a synonym to \emph{pignus} in the sources of the so called West Roman vulgar law. In contrast to \emph{pignus} or a pledge in favor of the Roman treasury that is considered to be tacitly concluded \textit{(tacite contrahitur)}, this kind of pledge the debtor hands over to the creditor relaying on his \emph{fides} that the thing will be kept and thereafter given back or the creditor only charges the debtors thing with pledge counting on the debtors \emph{fides} that he will keep the pledged thing and place on the creditor’s disposal to fulfill his claim.

Is \emph{fiducia} connected to \emph{mancipatio}? In the practice of the post-classical West a modified way of \emph{mancipatio} had been used: a certain solemn act \textit{(iuris solemnitas)} that includes the element of `\textit{manu tradere}; manu capere' the act accustomed in practice that connects the parties \textit{(nexu faciendo)}. This act was usually followed by a document \textit{(chartula)}. There are indications that \emph{fiducia} stayed connected to this changed \emph{mancipatio}. Based on such indications we can suppose that if the price payment of an immovable would be secured by \emph{fiducia}, \emph{fiducia} would have to be confirmed by a document due to the special form of a

\footnotesize{iudiciorum communione praecipimus segregari.}; CTh.2.17.1.1 (=Brev.2.17.1.1) morum honestas'; CTh.2.17.1.2 (=Brev.2.17.1.2) Ita ut senatores apud gravitatis tuae officium de suis moribus et honestate perdoceant.(CTh. 4, 6, 7): Naturalium his nomen sancimus inponi, quos sine honesta celebratione matrimonii ... (426 – 427).
sales contract of immovable property (CTh. 3, 1, 2 of 337), of which one of the main elements is that the price is paid or at least in some way secured (Nov. Val. 32 of 451). The confirmation of the price payment was needed because of truthfulness and continuity of the gained property, since the new owner was obliged to register himself in public records (publicis libris, censualibus paginis) as a tax payer.

Even though there are indications that fiducia could be connected to the modified mancipatio in this period, it does not mean that fiducia is a kid of pledge where the ownership over the pledged thing is transferred to the creditor. This conclusion is also confirmed by our research presented in the first part of the paper. On one hand mancipatio itself has changed, on the other the fiduciary agreement makes the object of the pledge somehow independent, in the sense of ownership rights of the debtor and ownership rights of the creditor (similarly to the emancipated daughter’s position under a fiduciary agreement of re-mancipation: she becomes independent both in relation to her natural father and in relation to her fiduciary father to whom she has been mancipated), which means, that the thing is charged with pledge only for a certain period of time (ad tempus) as Boethius writes:

Boethius, ad Cic. Top. 1117A: 'Fiduciam uero accepit cuicumque res aliquo mancipatur, ut eam mancipanti remancipet...haec mancipatio fiduciaria nominatur, idcirco quod restituendi fides interponitur.'

---

85 In Zbornik radova Pravnog fakulteta u Novom Sadu, Novi Sad, br.XLII 1-2/2008, ISSN 0550-2179, UDK 3, str. 475-498
Fiducia i pignus u izvorima postklasičnog rimskog prava – sinonimi ili termini korišćeni za različite vrste zaloge?

II deo

Rezime

Posle dugotrajnog traganja za odgovorom u lavirintu pojmova i instituta modifikovanih usled susreta različitih pravnih kultura na teritoriji Rimске impe- rije i prilagođenih potrebama očuvanja cartva u vreme dekadencije (utilitas pu- blica), naišli smo na veoma jednostavan odgovor: fiducia je zadržana kao vrsta zaloge u izvorima i u praksi poznog Rima i ranog srednjeg veka kao zaloga koja se zasniva na međusobnom poverenju (fides-u) stranaka.

Mada su dogmatska pravila oba instituta ista, fiducia se ne javlja kao sinonim pignusa-a u izvorima tzv. zapadno rimskog vulgarnog prava. Za razliku od pignusa ili zaloge u korist rimske blagajne koja se smatra prečutno zaključenom (tacite contrahitur), ovu vrstu zaloge dužnik predaje na poverenje (fides) poveriocu da će biti sačuvana i vraćena, ili se stvar samo opterećuje zalogom u korist poverioca računajući na dužnikovu fides da će sačuvati predmet zaloge i staviti poveriocu na raspolaganje da namiri svoje potraživanje.

Mada postoje indicije da je fiducija u ovom periodu mogla biti vezana za modifikovani oblik mancipacije to ne znači da je fiducija vrsta zaloge kod koje dolazi do prenosa svojine pretmeta zaloge na poverioca, što je potvrđeno i našim istraživanjem izloženim u prvom delu rada.86 S jedne strane, došlo je do promene same mancipacije, a s druge strane fiducijarni sporazum čini predmet zaloge na neki način nezavisnim kako u pogledu svojinskih ovlašćenja dužnika tako i u pogledu svojinskih ovlašćenja poverioca (слично положају emancipovane čerke pod fiducijarnim sporazumom o remanicipaciji: ona postaje nezavisna kako u odnosu na svog prirodnog oca tako i u odnosu fiducijarnog oca kome je mancipovana), što znači da je predmet opterećen zalogom samo na određeno vreme.

Imajući u vidu privremenu (ad tempus) opterećenost predmeta zalogom (fiducijom), kao i modifikovanu mancipaciju koja više nije način pribavljanja svojine, dolazi do izražaja nezavisan položaj predmeta zaloge u smislu da ne pripada nikome, jer je pod fiducijarnim sporazumom. U tom smislu možemo tu- mačiti i Becijeve reči o fiduciji zapisane u vreme nastanka Brevijara:

Boethius, ad Cic. Top. 1117A: ‘Fiduciam uero accepit cuicumque res aliqua mancipatur, ut eam mancipanti remancipet...haec mancipatio fiduciaria nominatur, idcirco quod restituyendi fides interponitur.’

86 U Zbornik radova Pravnog fakulteta u Novom Sadu, Novi Sad, br. XLII 1-2/2008, ISSN 0550-2179, UDK 3, str. 475-498