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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 paper[2] 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?

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[1] Рад је посвећен пројекту *Право Србије у европској перспективи* бр. 149042 који финансира Министарство за науку и технолошки развој Републике Србије.

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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 perche i suoi due elementi (reale e obbligatorio) erano collegati e resi inseparabili dall' identita del loro obiecto.`

[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.[8] 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.[9] 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*;

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nisi per hanc solemnitatem abalienari non poterat. Sui iuris autem caeterae res nec mancipi uocabantur, eaedem uero etiam in iure cedebantur. Cessio uero tali fiebat modo ut secundo [1095C] commentario idem Caius exposuit. In iure autem cessio fit hoc modo: apud magistratum populi Romani, uel apud praetorem, uel apud praesidem prouinciae, is cui res in iure ceditur rem tenens ita uindicat: Hunc ego hominem ex iure Quiritium meum esse aio. Deinde postquam hic uindicauerit, praetor interrogat eum qui cedit an contrauindicet; quo negante, aut tacente, tunc ei qui uindicauerit, eam rem addicit, idque legis actio uocabatur.`

[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.

[9] 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 szerződései, Budapest, 1972.

[13] According to E. Weiss (Peregrinische 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 *solum 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 `commercium`, 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 *libripens* and *antestatus* are missing. The other reason of vanishing *mancipatio* according to him is that these documents testifiy about both the sale and *mancipatio.*

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 F*ormula Baetica*[17] 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 Magnae*[20] (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]

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[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 Iatlicum*. 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

F*iducia* 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 *fiduciar* 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 potentiori fundum mancipet, ut ei cum tempus quod suspectum 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.[27] 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.

ery of the thing transferred on the other person only temporary *(ad tempus)*. It is expressed *in fine*: *haec mancipatio fiduciaria nominatur, idcirco quod restituendi fides interponitur.*

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 solemnitatem. 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 quaedam uenditio, quod ipsum ius proprium Romanorum est ciuium, eaque res ita agitur, adhibitis non minus quam quinque testibus Romanis ciuibus 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 sollemnitas* 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 EIUS 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 Etymologies[28] 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]

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[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* folllows: 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, conprehendere 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.`[33]

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*.[34]

For example according to the document n. 116 (540): *`...Quia in vestro est territurio 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 sicuti supra legi tutor idem comparatori Actoribusque eius designari praecipiatis ut omnia a praesenti tertiam indictionem 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).*

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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 surposed 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 dicis et instrumentis esse firmatum…`*, however, we cannot accept this text as an exact poof 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.*,[35] 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.[36]

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.[37] 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 poves it as well: `*ut omnia a praesenti 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.
[36] A. Pezzana, op.cit. p. 666 – 668.
[37] Ibid. p. 668.

persons – non owners, for the property alienated already for a long time beforehand by their ascendants (fathers or grandfathers).[38] 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,[39] 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).[40] 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): `*...prospicimus, ut gestis municipalibus immobilium rerum contractus constet initus…* ` `[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 sollemnitas 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.

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[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!

[39] V. A.-Ruiz, Istituzioni, p. 206; La compravendita in diritto romano, part I, 2nd edition, Napoli,1978, p. 86 – 87.

[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 municipial 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 sollemnitas… donatio inter extraneos minus firma iudicetur, si iure mancipatio et traditio non fuerit impleta.*`

According to this constitution of Constantius and Constans the `*traditionis sollemnitas*` (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 oportet, 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 ministraverit, scientibus plurimis perscribatur. 2 Et corporalis traditio subsequatur ad excludendam vim atque irreptionem advocata vicinitate, omnibusque arbitris adhibitis, quorum postea fide probabitur, donatam rem, si est mobilis, ex voluntate traditam donatoris, vel, si immobilis, abscessu donantis novo domino patefactam, actis etiam annectendis, quae apud iudicem vel magistratus conficienda sunt.`[43]

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 immovable; 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 registration 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 witnesses could be observed as *mancipatio*.[44]

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[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 mancipiis sive in quibuslibet rebus atque corporibus, nominatim in donatione conscribendae sunt, non occulte, sed publice, non privatim vel secrete, 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 ipsam donationem gestorum solennitas et corporalis traditio subsequatur, ita ut, si mobilia donantur, 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 sibi de his rebus usumfructum 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 elements from its decadent 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*[45] as well. The texts in *Pauli Senetentiae* containing *mancipatio* and *traditio* are about the sale.

(*completio* and *absolutio)*: 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.

[45] 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 responsability 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 responsabilty 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 duplae 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 stipulatione pro evictione cavisset.` Int. `Si quicunque rem simpliciter, id est, sine poenae interpositione, emtori tradiderit, et de eadem re emtor fuerit superatus, in tantum ei 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, neqe 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.[46] 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*.[47]

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.

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the rules of *stipulatio Aquiliana* /Brev. PS. 1, 1, 3/ and *lex Aqulia* /. Therefore if the punishment *in duplum* was not stipulated it succeded 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, Westrrömisches Vulgarrecht, Das Obligationenerecht, Weimar, 1956, p. 131 – 134; Gy. Diósdi, 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 Visigotic 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 sollemnitas* (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]

In Isidor. Etym. 5, 25, 31: *`Mancipatio dicta est quia manu res capitur. Unde oportet eum, qui mancipio accipit, conprehendere id ipsum, quod ei mancipio datur.`*

[48] Tablettes Albertini, Actes Privés de l'Époque Vandale, édités et commentés par C. Courtois, L. Leschi, C. Perrat et C. Saumagne, Paris, 1952.

[49] A. Pezzana, op. cit. p. 671.

[50] Kaser, RPR II, 1959, p. 197. n. 5.

Following Isidor 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 Isidor 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 Isidor 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*

[51] Other confirmations of it: Brev. E. G. IX (XVI s. XVII) par. 14, absent is the part of the Gai Inst. 3, 141 that the price must be in money; Kaser. RPR. II, 1959, p. 199. not. 18; Nov. Val. 32, 4 = Brev. Nov. Val. 10, 4: *`...seu emtione, seu commutatione, quae instar obtinet emtionis…`*.

[52] Isid. Etym. 5, 24, 24: *`Emptio autem dicta, quod a me tibi sit: venditio quasi venundatio, id est a nundinis.`*

patrem, alius pater adhibetur, qui fiduciari nominatur. Ergo ipse naturalis pater filium suum fiduciario patri mancipat, hoc est manu tradit: a quo fiduciario patre naturalis pater unum aut duos nummos quasi in similitudinem pretii accipit, 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 potestate 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)[53] are described in case when emancipation was made *`ante praesidem, 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.[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 analyzed text. As a formal requirement of emancipation the *`certum pater `(= naturalis pater)* is selling fictively *(mancipatio nummo uno)* his son to the person whom he trusts *(fiduciario patre)*.[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, filiis ex ea genitis, etiamsi talis occasus avo vivente contingat, intacta pro solido successio deferatur, neque ulla defunctae patri matrique concedatur intestatae successionis hereditas, quum satis superque sufficiat adversus omnes legitimo*

[53], In the documents about *mancipatio* the number of witnesses is also seven, E. Pólay, op.cit. p. 133 and 149.

[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.`

[55] The Institutiones of Gaius related to emancipation (Gaius, Inst. 1, 132) instead `*fiduciario patre*` utilized `alicui`; eidem vel alii (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, incolumes ac superstites optabili sorte genitoris, successio liberorum.`

Pharr explaines the part *`fiduciae nomen`* (and according to *Interpretatio: `fiduciatam 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 exeunt potestate et sui iuris efficiantur. Et hi ipsi, quamlibet una mancipatione de patris vela vi potestate exeant, nisi a patre fiduciario remancipati fuerint et a naturali patre manumissi, succedere eis naturalis pater non potest, nisi fiduciarius, 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 doughters 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 mancipated *(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 *fiduciar* 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 Constantin`s prohibition of contracting *lex commissoria* (320), from 395. A.D. expressly regognized 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`*.[58] *Mancipatio* of the post-classical West could be only some kind of *iuris*

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will be the children. CJ. 6, 57, 4: *`Quotiens de emancipati filii filiaeve successione tractatur, filiis ex his genitis deferatur intacta pro solido successio...`;* However, we must notice that in his Novell edited few years later he also annulled the different status of libertines (*Nov. Just*. LXXVIII, pr. from 539. A. C.) and recognized only libertins in status of *civium Romanum*.

[58] According to E. Albertario (*Il momento del trasferimento della proprieta nella compravendita romana,* Studi di diritto romano, vol. III, 1936, p. 427 sqq), even in classical period *mancipacio* transfered the ownership only if the price was paid. Similary A. Ruiz (V. Arangio-Ruiz, *La compravendita in diritto romano*, vol. II, Napoli, 1963, p. 319) on the bases of Pauli Sententiae, P.S. 2, 17, 1 states that the buyer could utilize the *actio auctoritatis* only if he has paid the price. In our opinion, in the classical period the payment of the price (confirmed by the document) was needed for the acquisition of ownership on the things charged by taxes in the provinces without *ius Italicum*. Introducing the tax charge all over the empire from the time of Diocletian the privilegies of exemtion from taxes were abolished. Therefore, one can read in Justinian's Institutions that the provincial practice was applied on the whole territory of the Empire. Iust. Inst. 2, 1, 40: `*Itaque stipendiaria quoque et tributaria praedia eodem modo alienantur. Vocantur autem stipendiaria et tributaria praedia quae in provinciis sunt,*

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] *oppignoratam*[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

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inter quae nec non Italica praedia ex nostra constitutione nulla differentia est.`), Afterwards, the rule that the buyer will acquire the ownership only if he paid the price and the confirmed ownership of the vendor was documentated in the written document became the basic rule for the acquisition of ownership on the things charged by taxes. See, M. Sič, Uslovljavanje prenosa svojine isplatom cene kao sredstvo obezbeđenja po rimskom i našem savremenom pravu, Zbornik radova Pravnog fakulteta u Novom Sadu, Novi Sad,, 1/2oo6, p. 73-102 Posebna forma ugovora u antičkom Rimu - radi sigurnosti stranaka ili zaštite interesa države? Zbornik Pravnog fakulteta u Novom Sadu, Novi Sad, 2/2000, p. 59 – 71; "A modern telekkönyv megjelenésének előzményei", in the book–Ingatlan-nyilvántartás, Vajdasági Magyar Tudományos Társaság, Novi Sad, 2002, p.112 – 158.

[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 qaeque 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 fiduciarium`* – 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 creditori suo talem fecerit cautionem, 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]i[us] [Gre]gori quondam, sub certa depectione fiduciae nexu obligaverat 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.

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[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 exemple, 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.`[65]

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

While *fides* was an ancient Roman principle[66] based on religion and moral, determined by *mos maiorum*[67]*,* which we can call *fides maiorum,*[68] later *fides*

[65] Biscardi, Appunti, p. 99.

[66] *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 *oportere 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.[69]

However there are many explanations of *fides,*[70] 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.[71] As Pastori writes: `...la *fides* rappresenta un legame umano prossimo alla religione, idoneo a vincolare soggetti di diverse credenze religiose.`[72]

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[67] In our opinion *fides* meant even in these ancient times not only the obligation to realize what was said, promissed in the presense of the divinity and the people (L. Kofanov, *Il carattere religioso-giuridico della fides Romana nei secoli V – III A. C.: sull'interpretazione di Polibio 6, 56, 6 – 15,* in: Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea, Atti del Convegno internazionale di studi in onore di Alberto Burdese, vol. II, Milano, 2003, p. 335. and n. 11) but also a behavior required by the Roman community (i. e. *mos maiorum*). For example, the *professio censualis* of Servius Tullius was based on *fides* and sancioned from the Roman community. Livius writes (1, 42, 5): "*Censum – instituit, - classes centuriasque et – ordinem ex censu descripsit*." Dionisius (4, 15) added: "*incensis poenam constituit, bonis privari et virgis caesos venum dari"; See also,* M. J. Schermaier, *Bona fides in Roman contract law,* in R. Zimmermann – S. Whittaker, *Good Faith in European Contract Law,* Cambridge, 2000, p. 63 – 92; More about *mos maiorum* in Bernhard Linke, Michael Stemmler, Mos maiorum. Untersuchungen zu den Formen der Identitätsstiftung und Stabilisierung in der römischen Republik, Stuttgart, Steiner, 2000.;see also A, Földi, *A jóhiszeműség és tisztesség elve, Intézménytörténeti vázlat a római jogtól napjainkig,* Budapest, 2001, p. 9; The punishement of the dishonest behavior in the archaic period was sever (often capital). J. Zlinsky, *Ius publicum*, Budapest, 1998, p. 58 – 59 and 149 – 159; A. Gellius, 4, 20, 11; Livius, 25,3,10 – 15.

[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.

[69] S. Tafaro, *Brevi riflessioni su buona fede e contratti*, in: Zbornik radova Pravnog fakulteta u Novom Sadu, Novi Sad, 3/2006, p.74 – 75. M. Talamanca, *La bona fides nei giuristi romani "Leerformeln" e valori dell'ordinamento*, in Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea, Atti del Convegno internazionale di studi in onore di Alberto Burdese, vol. IV, Milano, 2003, p. 41: `...rapporti ispirati alla *fides* esistevano da sempre sia nell'ambito internazionale (basti pensare alla *deditio in fidem)* che in quello interno.`

[70] Valuable philological insights are offered by Eduard Fraenkel, 'Zur Geschichte des Wortes fides'. Rheinisches Museum für Philologie 71(1916) 187 ff. and Richard Heinze. 'Fides', Hermes: Zeitschrifl für klassische Philologie 1929, 140 ff. See also, M. J. Schermaier, str. 78 – 81.

[71] According to P. Frezza (*Fides bona*, in *Studi sulla buona fede*, Pub. fac.giur. Università di Pisa, 53, 1975, p. 1): `...La presenza della *fides* come valore normativo proprio dei rapporti internazionali è ampiamente documentata nei testi dei trattati a partire dal sesto secolo a.C. Le parti contraenti solevano affermare in un solenne giuramento la volontà di osservare i patti `fedelmente e senza dolo.`

[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`*[73] that Gaius (Gaii. Inst. 1, 1) qualified as fundament of *ius gentium*: *`…quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.`*[74] Though, in classical period *fides* got the adjective *`bona`* and became *`bona fides`,* as a standard of behavior expected from contractual parties,[75] 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*.[76]

In sources these changes can be seen after the government of Emperor Diocletian.[77] The sources from the time of Constantine, instead of *bona fides*[78]

Frezza, Fides bona, in Studi sulla buona fede, Pub. fac.giur. Università di Pisa, 53, 1975, p. 1; P. Catalano (Diritto e persone, I, Torino, 199o, p. 23 sqq) quots Livius: 9, 8, 6; cfr. 9,8, 14; 9,9, 3); *tam sponsiones quam foedera sancta esse apud eos homines apud quos iuxta divinas religiones fides humana colitur* (Livius, 9, 9, 4);

[73] M. Horvat, op.cit, (Bona fides), str. 53.

[74] There are different opinions about the influence of the Greek philosophy on the Roman law in the period of Republic. One of the representatives of this tesis is E. Pólay, A római jogászok gondolkodásmódja, Budapest, 1988, p. 44 - 47. and p.104 - 110. In our opinion in this case we can more speak about the convergence of the same principles of different nations (Greek and Roman) under the same social circumstances. However, we could not deny that the concepts as *aequitas, ius naturale, ius gentium* were elaborated by the Greek philosophy; G. Hamza, Jogösszehasonlitás és antikvitás, Budapest, 1985, p. 16; Arist. Ret. 1374 a, 2; 1375 a, 7; Platon, State, 330 d - 354 c; 362 d - 365 e; 434 d; 441 d - 444 e.

[75] It does not mean that the priciple of *bona fides* had no influence on delictual obligations. See about I. Molnár, *A preklasszikus jog felelősségi rendszere,* in Dr, Szilbereky Jenő emlékkönyv, Acta Univ. Seg. de Attila József nominatae, Acta jur. Et Pol. Tom. XXXVII, fasc. 1 – 22, Szeged, 1987, p. 189 – 207. About the question: why *fides* became *bona fides*, there are many opinions. In our opinion *bona fides* simply rised as a standard of behavior from everyday legal practice by the decisions based on on *fides*.

[76] M. Kaser, RPR, II, München, 1975, p. 61, 333, 422; also E. Albertario, Etica e diritto nel mondo classico latino, Studi di diritto romano, V, 1937, p. 1 sqq.

[77] In the post-classical sources coming from the time before Constantine one can find the wording: *mala fide factum; non bona fide facta; fides facta*: Cons. 1. 8: Imp. Alexander a. Dionysio. Ad locum: *pactum, quod mala fide factum est, irritum esse et cetera.*; Cons. 2. 7: *non bona fide facta* (286); Cons. 9. 11 *pactum mala fide factum* (222). This wording was taken ower and utilized later in the *Lex Salica (507/511) L. De fides factas.* § 1. *`Si quis ingenuus aut letus alteri fidem fecerit, tunc ille, cui fides facta est, in XL noctes aut quamodo placitum fecerit,*

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…*[79]

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.[80]. 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*, [81]

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quando fidem fecit, ad damum illius, qui fidem fecit, cum testibus vel cum illis, qui pretium adpretiare debent, venire debet. Et si ei noluerit fidem factam solvere, mallobergo thalasciasco hoc est, DC denarios qui faciunt solidas XV culpabilis iudicetur super debitum vero, quod fidem fecerit.`

[78] In the post-classical codes we find 212 references about *`bona fidei`;* from this 7 are in the Institutions of Justinian, 31 in Codex Iustinianus and 170 in Justinians's Digest. In the Theodosian Code which contain the constitutions from Constantine up to Theodosius II there are only 4 places on the utilization of the expression *`bona fidei`*: in contract law CTh.3.4.1 (=Brev.3.4.1) from 386.; law of persons: CTh.4.8.7 (=Brev.4.8.3) from 331.; *possessio bonae fidei*: CTh.4.23.1 (=Brev.4.21.1) from 400.; *possessio malae fidei*: CTh IV 19,1 (= Brev 4, 17,1) from 380 and also in its Interpretatio.

[79] CTh.2.4.2 (=Brev.2.4.2): *`falsam fidem rebus non gestis affingat.`* (322); CTh.3.1.1 (=Brev.3.1.1): *`Venditionis atque emptionis fidem, nulla circumscriptionis violentia facta, rumpi minime decet…(*319), Pharr translated the term *`fides`* as `good faith`, since in this constitution the meaning of *fides* is `validity`; CTh.3.5.11.1 (=Brev.3.5.6.1): *`deinceps adventante tempore nuptiarum a fide absistens quadrupli fiat obnoxius.* Int. *fidem placiti mutare voluerint;* CTh.8.12.1.2 (=Brev.8.5.1.2) *Et corporalis traditio subsequatur ad excludendam vim atque irreptionem advocata vicinitate, omnibusque arbitris adhibitis, quorum postea fide* (Pharr – trustworthiness) *probabitur, donatam rem, si est mobilis, ex voluntate traditam donatoris, vel, si immobilis, abscessu donantis novo domino patefactam, actis etiam annectendis, quae apud iudicem vel magistratus conficienda sunt.;* CTh.8.1.10 *fides* (Pharr – loyality) *eorum et industria comprobetur.* (365 mai. 25); CTh.8.2.5 (=Brev.8.1.1); Int.: Interpretatio. *fides publica* (Prarr – public faith); CTh.16.1.0. *De fide catholica*; CTh.11.39.0. *De fide testium et instrumentorum*. Cons. 9.6: *fidem instrumenti …fide gestorum* (364). The term *fides* behind its other minings is present in ethical and religious sense even later in *Lex Visigothorum*. See about, E. Osaba, Fides y bona fides en la Lex Visigothorum, in Il ruolo della buona fede oggettiva, vol. II, p. 543 – 578.

[80] M. Kaser, ibid.

[81] CJ. 1, 14, 1: *`Inter aequitatem iusque interpositam interpretacionem nobis solis et oportet et licet inspicere`*. The behavior of the parts in the cases was not valued anymore horizontaly as in the classical period (*Gaio, Inst*. 4. 47: *`quidquid ob eam rem N. Negidium A. Agerio dare facere oportet ex fide bona, eius iudex N. Negidium A. Agerio condemnato...`),* but verticaly from the aspect of the emperor who represents the interests of the Empire in name of `Goth` *(Iust. Inst.* 4, 6, 30: *`In bonae fidei autem iudicis libera potestas permitti videtur iudici ex bono et aequo aestimandi, quantum actori restituti debeat...`)* The judge was entitled only to estimate the amount of the indebtment *ex bono et aequo* and not the whole case. The private transactions were even earlier subordinated to the public norms: Papinian (D. 2, 14, 38): *`ius publicum privatorum*

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]

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pactis mutari non potest`*; Diocletianus, C. 12, 62, 3: *`Utilitas publica praeferenda est privatorum contractibus.`* Theodosius, Nov. Th. 5, 3, pr.: *`In omnibus quidem rebus publicam convenit utilitatem privatis commodis anteponere.`; As Schulz (Geschichte der römischen Rechtswissenschaft, Weimar, 1961, p. 374); Pólay (A római jogászok gondolkodásmódja, Budapest, 1988, p. 187.) states, *ius* was opposed to *aequtas* for the first time in postclassical law under the influence of helenistic filosophy (Aristotle's nomos and epieikeia). Contrary, Pringsheim, *Ius aequum und ius strictum,* Ges. Abh. I, p. 131; About the relation of *ius, aequitas* and *bona fides* in the postclassical period, A. Carcaterra Intorno ai bonae fidei iudicia, Napoli, 1964, p. 112 – 118.

[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 possumus 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 utrosque 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 coultures. 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 possumus.`* The interpreters exactly emphasizing the moral element of the human behavior changed the *`bonos mores`* by the word *`honestas`*. I. P. *»Si inter aliquos conveniat aut de admittendo crimine, vel inferenda violentia, vel faciendo, quod lex aut honestas prohibet, 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 tilulo 1 del libro primero,* www.bibliojuridica.org/libros/4/1855/7.pdf p. 19) is, that utilizing the word `ho*nestas`* 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 meat the expressions *`bonos mores`* and *`honestas`* to be synonims. 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 synonims: *»Possumus enim aut nostra negotia aut aliena cuicunque agenda mandare: dummodo honestum aliquid agi mandemus. Nam si contra bonos mores aliquid mandare voluerimus, hoc est, si cuiquam mandemus, ut alicui furtum faciat, aut homicidium aut adulterium admittat, in his rebus mandati obligatio non contrahitur.`. See also,* María Isabel Domínguez Agudo, op. cit. *honestas*: CTh.2.10.4 (=Brev.2.10.1) *honestorum coetu iudiciorumque conspectu segregari praecipimus.*(326) Interpretatio. *honestorum virorum et*

Boethius expressly points onto the connection between *fides* and *fiducia*:

Boethius, ad Cic. Top. 10, 42: `… *fidem praestare debet...qui fiduciam acceperit*,…`; [84]

Boethius, ad Cic. Top. 10, 42: *`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.*** `

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 *(utilitas publica),* we came to a very simple conclusion: *fiducia* was kept in the sources and practice of the late Roman and early medieval times as a pledge based on mutual trust (*fides*) of the parties.

Though dogmatic rules are the same for both *fiducia* and *pignus, fiducia* does not occur as a synonym to *pignus* in the sources of the so called West Roman vulgar law. In contrast to *pignus* or a pledge in favor of the Roman treasury that is considered to be tacitly concluded *(tacite contrahitur),* this kind of pledge the debtor hands over to the creditor relaying on his *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 *fides* that he will keep the pledged thing and place on the creditor's disposal to fulfill his claim.

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

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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).

[84] Also Coll. 10, 2, 1, 2: `*Sed in c`eteris quoque partibus iuris ista regula custoditur; sic enim et in fiduciae iudiciu*m *et in actionem rei uxoriae dolus et culpa deducitur, quia utriusque contrahentis utilitas intervenit.*`

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.[85] 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 aliqua 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

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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 Rimske imperije i prilagođenih potrebama očuvanja cartva u vreme dekadencije *(utilitas publica),* 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 *pignus*-a u izvorima tzv. zapadno rimskog vulgarnog prava. Za razliku od pignusa ili zaloge u korist rimske blagajne koja se smatra prećutno 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.

Da li je fiducija vezana za mancipaciju? U praksi postklasičnog Zapada korišćen je modifikovan vid mancipacije: određena svečana radnja (*iuris solemnitas)* koji uključuje element *`manu tradere`; manu capere`* akt odomaćen u praksi koji vezuje strane u poslu *(nexu faciendo).* Ovaj akt je po pravilu bio praćen i ispravom *(chartula).* Postoje indicije da je fiducija ostala vezana za ovakvu promenjenu mancipaciju. Na osnovu takvih indicija možemo pretpostaviti da ako bi bilo reči o obezbeđenju isplate cene nepokretnosti putem fiducije, fiducija bi morala biti potvrđena ispravom zbog posebne forme propisane za kupoprodaju nepokretnosti (CTh. 3, 1, 2 iz 337. godine) čiji je jedan od bitnih elemenata da je cena plaćena ili barem na neki način obezbeđena (Nov. Val. 32 iz 451. godine). Posebna forma i potvrđena isplata (obezbeđenje) cene trebalo je da garantuje istinitost i trajnost stečene svojine radi evidencije novog vlasnika u javne knjige *(publicis libris, censualibus paginis)* kao novog poreskog obveznika.

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 (slično položaju emancipovane ćerke pod fiducijarnim sporazumom o remancipaciji: 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 tumačiti 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 restituendi fides interponitur.`*

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