The 'generalis hypotheca' and the sale of pledged assets in Roman law

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Summary

A Roman debtor and his creditor could tailor their contract of pledge to fit their needs. If the parties specified the pledged asset in the contract, they wanted to restrict the debtor's right to dispose of the pledged asset. The debtor would transfer pledged assets subject to pledge if he acted without permission of the creditor. The creditor could recover the pledged asset from any third-party possessor. If the parties pledged all of the debtor's present and future assets, they wanted to enable the debtor to dispose of pledged assets in his ordinary course of business.

Keywords

General pledge – *pignus* – *hypotheca* – *actio Serviana* – security rights – *corpus ex distantibus*

1 Introduction

According to Gaius, it was standard practice for Roman debtors to pledge all of their present and future assets¹. This so-called general pledge or *hypotheca* (*generalis hypotheca*) was distinguished from a *specialis hypotheca*. A debtor

1 D. 20.1.15.1 (Gaius *formula hypothecaria*). The parties granting (pledgor) and accepting (pledgee) the pledge will mostly simply be referred to as 'debtor' and (secured) 'creditor' respectively. In this paper, the terms 'pignus' and 'pledge' will be used as the generic term for possessory and non-possessory pledges. I will focus primarily on expressly created pledges.

created a pledge *specialiter*² if he specified the encumbered asset in the contract (non-possessory pledge) or handed over the asset to the creditor (possessory pledge). A debtor would sometimes specifically pledge a certain asset and generally pledge the remainder of his assets (*cetera bona*) 'as if especially hypothecated'³.

Both the general and special pledge gave a secured creditor preference over other creditors in the distribution of the proceeds of the sale of the encumbered assets. It is the prevailing opinion that a secured creditor could institute an *actio Serviana* to recover pledged assets from a third-party possessor, regardless of whether the assets were charged with a special or general pledge⁴.

In this article I will argue that a secured creditor could use an *actio Serviana* to recover generally pledged assets, except for those assets which were alienated by the debtor in his ordinary course of business⁵. A debtor who created a general pledge could freely dispose of his assets⁶.

2 D. 20,1,6 (Ulpianus 73 *ad edictum*); D. 20,1,15,1 (Gaius *formula hypothecaria*); D. 20,2,6 (Ulpianus 73 *ad edictum*); D. 20,4,7,1 (Ulpianus 3 *disputationum*); D. 20,4,8 (Ulpianus 7 *disputationum*); D. 20,4,11,2 (Gaius *formula hypothecaria*); D. 20,6,4,2 (Ulpianus 8 *disputationum*); D. 20,6,8,7 (Marcianus *ad formulam hypothecariam*); C. 4,10,6 (Imp. Diocletianus and Maximianus in 293); C. 8,16(17),9pr. and 1 (Imp. Justinianus in 528).

3 D. 20,1,15,1 (Gaius *formula hypothecaria*).

4 Among others Bartolus a Saxoferrato, *In secundam Partem Digesti veteris*, Basilea 1588, ad D. 20,1,15,1 (*Quod dicitur*), p. 426; A. Negusantius, *De pignoribus et hypothecis*, Lyon 1549, pars VIII, membrum III, nr. 8 and 11; F.C. Gesterding, *Die Lehre vom Pfandrecht, nach Grundsätzen des Römischen Rechts*, Greifswald 1816, p. 332; A.F.J. Thibaut, *Ueber die unbestimmte Verbindung eines General-Pfandes mit einem Special-Pfandes, und umgekehrt*, in: *Archiv für die civilistische Praxis*, deel 17,1 (1834), p. 29; H. Dernburg, *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts*, Leipzig 1860, Band I, p. 510; M. Kaser, *In bonis esse*, ZSS RA 78 (1961), p. 207; H. Wagner, *Voraussetzungen, Vorstufen und Anfänge der römischen Generalverpfändung*, Marburg 1968, p. 104; R. Mentxaka, *La pignoracion de colectividades en el derecho romano clasico*, Bilbao 1986, p. 352; D. Schanbacher, *Die Konvaleszenz von Pfandrechten im klassischen römischen Recht*, Berlin 1987, p. 89, n. 436; G.H. Potjewijd, *Beschikingsbevoegdheid, bekrachtiging en convalescentie* (diss. Leiden), Deventer 1998, p. 112.

5 In my monograph I discussed various points of view on third-party effects of a general pledge. In this article, I will focus on and elaborate on the specific situation where a debtor sells generally pledged assets in his ordinary course of business. Cf. V.J.M. van Hoof, *Generale zekerheidsrechten in rechtshistorisch perspectief*, [Serie Onderneming & Recht, 86], Deventer 2015, p. 49-50 and 69.

6 The general pledge was remarkably similar to the present English floating charge, which is vested only on the assets which from time to time are part of the debtor's estate. See R. Goode, *The case for the abolition of the floating charge*, in: J. Getzler and J. Payne, *Company charges*, Oxford 2006, p. 12; W.J. Zwolve and A.J.B. Sirks, *Grundzüge der Europäischen Privatrechtsgeschichte*, Wien – Köln 2008, p. 509; H.L.E. Verhagen, *The evolution of pignus in classical Roman law*, *Tijdschrift voor Rechtsgeschiedenis*, 81 (2013), p. 63.

Firstly, I will make clear which pledges were regarded as general pledges by Roman jurists (§2). Secondly, I will discuss the requirements for the *actio Serviana* in relation to the pledge of future assets (§3–§6). Thirdly, I will examine various texts in which a creditor (supposedly) uses an *actio Serviana* to recover generally pledged assets (§7–§9)⁷. Finally, I will give some explanations as to why there is no direct evidence that the secured creditor could recover generally pledged assets from someone who had bought it from the debtor (§10).

2 The terminology of a general pledge

In the Digest, jurists used the adverb *generaliter* to refer to the manner of creation of a general pledge and the nouns *res* (*suae*) or *bona* (*sua*) to describe the collateral⁸. They sometimes left out the word *generaliter* and put the adjectives *omnes*, *omnia*, *universae* or *universa* before *bona*⁹. As the aforementioned Gaius' text shows, some debtors combined a special pledge with a pledge of the remainder of his assets (*cetera bona*). In his monograph on general pledges, Wagner argues that Roman jurists did not regard the pledge of *cetera bona* as a general pledge, because they did not use the word *generalis*¹⁰. I believe he overestimates the legal terminology used by the parties. Firstly, it follows from D. 20,5,1 (Papinianus 26 *quaestionum*) that the pledge of *bona debitoris* had the same effects as the pledge of *cetera bona*¹¹. Secondly, the word *generalis* is superfluous if the intention of parties is clear. See, for example, Papinian in D. 20,4,2:

D. 20,4,2 (Papinianus 3 *responsorum*):

Qui generaliter bona debitoris pignori accepit eo potior est, cui postea praedium ex his bonis datur, quamvis ex ceteris pecuniam suam redigere possit. Quod si ea conventio prioris fuit, ut ita demum cetera bona pignori

7 200 years ago, G.P. von Bülow conducted a similar study of the third-party effects of the general pledge. Even though he used different texts, he came to the same conclusion as to the effects of a general pledge. G.P. von Bülow, *Die Generalhypothek in Beziehung auf den dritten Besitzer*, in: G.P. von Bülow, *Abhandlungen über einzelne Materien des römischen bürgerlichen Rechts*, Braunschweig 1817, p. 128.

8 '*bonorum*' in D. 20,1,1pr. (Papinianus 11 *responsorum*); '*generali rerum*' in D. 20,1,6 (Ulpianus 73 *ad edictum*); '*generali obligatione*' in D. 20,1,8 (Ulpianus 73 *ad edictum*); '*bona debitoris*' in D. 20,4,2 (Papinianus 3 *responsorum*).

9 '*omnia bona*' in D. 20,1,29,3 (Paulus 5 *responsorum*); '*omnia bona sua*' in D. 20,4,21pr. (Scaevola 27 *digestorum*).

10 Wagner, *Voraussetzungen* (*supra*, n. 4), p. 68.

11 Cf. Van Hoof, *Generale zekerheidsrechten* (*supra*, n. 5), p. 26.

haberentur, si pecunia de his, quae generaliter accepit, servari non potuisset, deficiente secunda conventione secundus creditor in pignore postea dato non tam potior quam solus invenietur.

Someone who accepts a general pledge over a debtor's assets has a stronger position than he who subsequently is given specified land in pledge from those assets, even if he (the older creditor, VvH) can recover his debt from other assets. But if the agreement with the first creditor was that the remaining assets were pledged only if the money could not be recovered from assets [not] generally pledged, on default under the second agreement the second creditor is the sole rather than the prior pledgee¹².

Papinian adds the word *generaliter* to *bona debitoris*, but not to *cetera bona*. A plausible explanation for this distinction is that *cetera bona* clearly means all of the debtor's remaining assets, whereas *bona debitoris* does not. Without the addition *generaliter* to *bona debitoris*, it is conceivable that the debtor pledged some, but not all of his assets.

Terminology was not the only factor to determine whether the debtor had created a general or a special pledge. Emperor Justinian decreed in 528 AD that judges should take the parties' intention into account¹³. He added the following interpretation rule:

C. 8,16(17),9,1:

Super qua generali hypotheca illud quoque ad conservandam contrahentium voluntatem sancimus, ut et, si 'res suas' supponere debitor dixerit, non adiecto 'tam praesentes quam futuras', ius tamen generalis hypothecae etiam ad futuras res producat.

In order to conserve the parties' intentions, we decree with respect to this general pledge as follows: even if the debtor has stated that he pledged 'his assets' without the addition 'both present and future', should the general pledge cover future assets too.

This rule does not necessarily imply that every pledge of *res suas* in the Digest was a general pledge, because the texts do not always contain *verbatim* reproductions of the contract. For example, I will argue in paragraph 8 that *res suas*

12 For the translation of Digest texts, I have used Alan Watson (ed.), *The Digest of Justinian*, Philadelphia 1998.

13 C. 8,16(17),9pr. (Imp. Justinianus).

in D. 20,1,10 (Ulpianus 73 *ad edictum*) could mean some (and not necessarily all) of the debtor's assets.

3 The requirement of *in bonis*

Jurists often noted that a general pledge covered future assets, whereas a special pledge could only encumber assets that belonged to the debtor at the time the contract of pledge was concluded¹⁴. This difference ensued from the *formula* of the *actio Serviana*, as Marcianus pointed out¹⁵:

D. 22,3,23 (Marcianus *ad formulam hypothecariam*):

Ante omnia probandum est, quod inter agentem et debitorem convenit, ut pignori hypotheca eve sit: sed et si hoc probet actor, illud quoque implere debet rem pertinere ad debitorem eo tempore quo convenit de pignore, aut cuius voluntate hypotheca data sit.

First of all, the agreement between plaintiff and debtor for a hypothec or pledge must be proved. If the plaintiff proves this, he must also show that the asset was the debtor's at the time of agreement or belonged to the person who authorized the hypothec.

The words *in bonis* often meant 'belonging to' and covered both civil and bonitary ownership¹⁶. The creditor was probably exempted from proving the asset belonged to the debtor at the time the contract of pledge was concluded, if he brought an action against the debtor¹⁷. It would go against the principle of *venire contra factum proprium* if the debtor could successfully avail himself of the defence that the asset had not belonged to him.

14 D. 20,1,1pr. (Papinianus 11 *responsorum*); D. 20,1,6 (Ulpianus 73 *ad edictum*); D. 20,4,21pr. (Scaevola 27 *digestorum*); D. 22,3,23 (Marcianus 4 *regularum*); C. 8,16(17),9,1 (Imp. Justinianus in 528).

15 Also: D. 20,4,9,3 (Africanus 8 *quaestionum*); C. 8,15(16),5 and 6 (Imp. Diocletianus and Maximianus in 286 and 293); C. 8,16(17),6 (Imp. Diocletianus and Maximianus in 293).

16 See: H.L.E. Verhagen, *The (lack of) protection of bona fide pledgees in classical roman law*, in: R. van den Bergh a.o. (red.), *Meditationes de iure et historia*, Essays in honour of Laurens Winkel, Fundamina 2014, p. 984.

17 D. 20,1,21,1 (Ulpianus 73 *ad edictum*). Cf. Verhagen, *The (lack of) protection* (*supra*, n. 16), p. 984; Van Hoof, *Generale zekerheidsrechten* (*supra*, n. 5), p. 30.

4 Exception: the pledge of *res debita*

A debtor who was not the owner of the pledged asset was liable for breach of contract, since he failed to create a right *in rem*¹⁸. The creditor could not institute the *actio Serviana* against a third party, because he could not prove that the asset belonged to the debtor at the time the contract of pledge was concluded.

However, an invalid pledge was sometimes remedied if the debtor acquired ownership afterwards (convalescence)¹⁹.

D. 20,1,1^{pr.} (Papinianus 11 *responsorum*):

(...) in speciem autem alienae rei collata conventionione, si non fuit ei qui pignus dabat debita, postea debitori dominio quaesito difficilior creditori, qui non ignoravit alienum, utilis actio dabitur (...)

(...) But if the agreement covers a specific asset of another person not then owed to the debtor but later acquired by him, the creditor who knew that it was not his is not so easily given a *utilis actio* for it (...)

Papinianus was reluctant to give an *actio Serviana utilis* to a creditor who knew that the debtor was not the owner of the pledged asset²⁰. Apparently, a *bona fide* creditor was awarded with this action to recover the pledged asset from a third party²¹.

Papinianus emphasized the fact that the pledged asset was not owed to the debtor at the time the contract of pledge was concluded. This justifies the presumption that Papinianus had no objection to the convalescence of the pledge of a *res debita*, even if the creditor knew it was owed to the debtor:

C. 8,15(16),5 (Imp. Diocletianus and Maximianus in 286):

Cum res, quae necdum in bonis debitoris est, pignori data ab eo postea in bonis eius esse incipiat, ordinariam quidem actionem super pignore non

18 Moreover, he committed *stellionatus*. See D. 13,7,36,1 (Ulpianus 11 *ad edictum*).

19 E.g. D. 20,4,3,1 (Papinianus 11 *responsorum*).

20 I will not discuss the requirement of good faith. See: Verhagen, *The (lack of) protection* (*supra*, n. 16), p. 990.

21 This *actio Serviana utilis* had to be an *actio in rem*, because a creditor could use the normal *actio Serviana* against the debtor, even if the debtor was not the owner of the pledged asset.

competere manifestum est, sed tamen aequitatem facere, ut facile utilis persecutio exemplo pignoraticiae daretur.

If the debtor pledged an asset which had not yet belonged to him was acquired by him afterwards, it is clear that the ordinary pledge action is not available; Nevertheless, equity implies that a *utilis actio* is easily given by analogy with the pledge action.

The granting of the *actio Serviana utilis* should be regarded as an exception to the rule that the debtor had to be the owner of the pledged asset. Certain circumstances, such as good faith or *res debita*, justified the exception.

5 Exception: the conditional pledge

An exception to the requirement of *in bonis* was that a debtor could pledge future assets on the suspensive condition that he would acquire it afterwards. Marcianus discussed this exception in D. 20,1,16,7 and Ulpianus in D. 20,4,7,1:

D. 20,1,16,7 (Marcianus *ad formulam hypothecariam*):

Aliena res utiliter potest obligari sub condicione, si debitoris facta fuerit.

A debtor can validly charge another's asset conditionally on its becoming his.

D. 20,4,7,1 (Ulpianus 3 *disputationum*):

Si tibi quae habiturus sum obligaverim et Titio specialiter fundum, si in dominium meum pervenerit, mox dominium eius adquisiero (...)

I charge in your favour my future assets and also specially charge certain land, should it become mine, in favour of Titius. I then acquire the land (...)

An *actio Serviana utilis* was awarded to the secured creditor from the moment the debtor acquired the asset²². This enabled the creditor to (re)claim the pledged asset from a third-party possessor. At first glance, there is little differ-

22 Dernburg, *Das Pfandrecht* (*supra*, n. 4), I, p. 238-240; M. Kaser, Review of: Tondo, *Convalida del pegno e concorso di pegni successivi*; Miquel, *El rango hipotecario en el derecho romano clásico*, ZSS RA 78 (1961), p. 466; A. Wacke, *Die Konvaleszenz von Pfandrechten nach*

ence between this conditionally created pledge and a general pledge. They both covered future assets. Why then did Roman jurist emphasize that a general pledge was suited for encumbering future assets? I am of the opinion that a general pledge encumbered future assets without any limitation, whereas a conditional pledge only encumbered a future asset if the asset was owed (*res debita*) to the debtor at the time the contract of pledge was concluded²³.

Firstly, this would explain why Ulpian wrote that the fulfilment of the condition, the acquisition soon (*mox*) followed the conclusion of the pledge agreement. The debtor probably had a claim to the asset at the time the contract of pledge was concluded.

Secondly, it is unlikely that the requirements for convalescence, *res debita* or *bona fides*, could have been circumvented by pledging future assets conditionally. Otherwise, a secured creditor to whom a future asset was pledged unconditionally could argue in court that it was pledged conditionally. Perhaps the debtor was willing to support the creditor's claim to disadvantage others.

Lastly, we will see that a debtor had to be the owner of the fruit bearing property in order to successfully pledge future fruits. In other words, the debtor needed to have some sort of property expectation.

6 Exception: the pledge of future fruits

A debtor could pledge future fruits under the suspensive condition of their inception, because they did not belong to the debtor at the time of the pledge's creation. According to Gaius, Roman law required the debtor to be the owner of the fruit bearing asset at the time the contract of pledge was concluded:

D. 20,1,15pr. (Gaius *formula hypothecaria*):

Et quae nondum sunt, futura tamen sunt, hypothecae dari possunt, ut fructus pendentes, partus ancillae, fetus pecorum et ea quae nascuntur sint hypothecae obligata (...).

Future assets can be pledged, for example, unharvested crops, offspring of a female slave, and the young of animals once born (...).

römischem Recht, ZSS RA 115 (1998), p. 453. According to Schanbacher, the creditor had a normal *actio Serviana*. See Schanbacher, *Die Konvaleszenz* (*supra*, n. 4) 1987, p. 90 n. 441.

23 Cf. Van Hoof, *Generale zekerheidsrechten* (*supra*, n. 5), p. 35.

D. 20,4,11,3 (Gaius *formula hypothecaria*):

Si de futura re convenerit, ut hypothecae sit, sicuti est de partu, hoc quaeritur, an ancilla conventionis tempore in bonis fuit debitoris: et in fructibus, si convenit ut sint pignori, aequè quaeritur, an fundus vel ius utendi fruendi conventionis tempore fuerit debitoris.

If there is an agreement to pledge future assets, such as a slave's offspring, we must inquire whether the slave mother formed part of the debtor's estate at the time of the agreement. If fruits are pledged, again, was the farm or the usufruct the debtor's at the time of the agreement?

It follows from D. 20,1,1,2 (Papinianus 11 *responsorum*) that a creditor with a pledge of fruit bearing land could bring an *actio Serviana utilis* against a third-party possessor of reaped fruits. According to Papinian, the debtor still had to be the owner of the land at the time of the reaping.

The possibility to pledge future assets was limited. An *actio Serviana utilis* only ensued from the pledge of future assets if the debtor had some sort of property expectation²⁴. If the debtor pledged other future assets than *res debita* or fruits stemming from pledged assets, the secured creditor could only bring an action against the debtor and not against a third-party possessor. Because of these limitations, Roman jurists stressed that a general pledge covered future assets.

7 The general pledge and *in bonis*

According to Gaius, a creditor who had a general pledge did not have to prove that the debtor was the owner of the assets at the time the contract of pledge was concluded:

D. 20,1,15,1 (Gaius *formula hypothecaria*):

Quod dicitur creditorem probare debere, cum conveniebat, rem in bonis debitoris fuisse, ad eam conventionem pertinet, quae specialiter facta est, non ad illam, quae cottidie inseri solet cautionibus, ut specialiter rebus hypothecae nomine datis cetera etiam bona teneantur debitoris, quae nunc habet et quae postea adquisierit, perinde atque si specialiter hae res fuissent obligatae.

24 Cf. Van Hoof, *Generale zekerheidsrechten* (supra, n. 5), p. 37.

When it is said that the debtor creditor should verify, when he makes the agreement, that the thing is in the debtor's estate, this applies to a special pledge, not to the clause commonly inserted in deeds that besides the assets specially pledged, the debtor's remaining assets, present and future, are bound as if especially charged.

Why was a creditor who had a general pledge exempted from the said proof? The first interpretation is that the debtor could transfer generally pledged assets free of pledge so that no *actio Serviana* was available to the creditor²⁵. The creditor could only institute an *actio Serviana* against the debtor and did – in line with what we have already discussed – not have to prove the assets belonged to the debtor. The second interpretation is that the creditor could only bring an *actio Serviana* against a third-party possessor if the claimed assets belonged to the debtor at the time the contract of pledge was concluded²⁶. This would mean every single asset the debtor had at that moment in time could be recovered with an *actio Serviana*²⁷. After-acquired assets would have been pledged automatically, but could only be recovered from the debtor and not from a third-party possessor²⁸. The creditor could obviously not prove that after-acquired assets belonged to the debtor at the time the contract of pledge was concluded. The third and prevailing interpretation is that the creditor could bring an *actio Serviana* against a third-party possessor and was required to prove that the assets had belonged to the debtor at a moment in time after the contract of pledge was concluded²⁹. The underlying idea here is that an *actio Serviana* resulted from a special pledge and that the assets (*cetera bona*) were pledged 'as if especially charged'. According to Gaius, a pledge which cannot be recovered, is not a pledge at all³⁰. However, there is no proof for a differ-

25 Bülow, *Die Generalhypothek* (*supra*, n. 7), p. 128; F.B.J. Wubbe, *Res aliena pignori data* (diss. Leiden), Leiden 1960, p. 226; F.B.J. Wubbe, *Review: Herbert Wagner, Voraussetzungen, Vorstufen und Anfänge der römischen Generalverpfändung*, ZSS RA 89 (1972), p. 433; H.L.E. Verhagen, *The evolution of pignus* (*supra*, n. 6), p. 65.

26 This would be contrary to what Gaius said in D. 20,1,15,1, because he stated that this was exactly the thing the creditor did not need to prove.

27 Cf. Wubbe, *Res aliena* (*supra*, n. 25), p. 224-225.

28 Ulpianus and Papinianus distinguished between present and after-acquired assets in respect of fiscal priority over a creditor who had an older general pledge. See Ulpianus in D. 49,14,28 (Ulpianus 3 *disputationum*).

29 See *supra*, n. 4. Wagner argues that there was no burden of proof, since Gaius did not mention one. See Wagner, *Voraussetzungen* (*supra*, n. 4), p. 102.

30 D. 9,4,27pr. Cf. J.J. Bachofen, *Römisches Pfandrecht*, Basel 1847, p. 82.

ent wording of the *formula* for a general pledge³¹. Moreover, the word *perinde* does not necessarily mean that a general pledge had *exactly* the same effects as a special pledge. More differences existed between the two types of pledge, as I will discuss below. Besides, what could be the sense of distinguishing between special pledges and general pledges if they had the same effects³²?

We will now look more closely at the various texts that prove the availability of the *actio Serviana* to a creditor who had a general pledge. A distinction will be made between situations in which assets that were charged with a general pledge were sold by other secured creditors (§8) or sold by the debtor (§9).

8 Transfer by a lower ranking secured creditor

A creditor who had a special or general pledge could not recover pledged assets from a third party if they had been sold by a higher ranking secured creditor³³. The sale by execution lead to the release of lower ranking pledges.

However, a creditor who had a general pledge could recover pledged assets from a third party purchaser, if they were sold by a lower ranking secured creditor:

D. 20,5,1 (Papinianus 26 *quaestionum*):

Creditor qui praedia pignori accepit et post alium creditorem, qui pignorum conventionem ad bona debitoris contulit, ipse quoque simile pactum bonorum ob alium aut eundem contractum interposuit, ante secundum creditorem dimissum nullo iure cetera bona titulo pignoris vendidit. Sed ob eam rem in personam actio contra eum creditori, qui pignora sua requirit, non competit nec utilis danda est: nec furti rerum mobilium gratia recte convenietur, quia propriam causam ordinis errore ductus persecutus videtur, praesertim cum alter creditor furto possessionem, quae non fuit apud eum, non amiserit. Ad exhibendum quoque frustra litem excipiet, quia neque possidet neque dolo fecit, ut desineret possidere. Sequitur ut secundus creditor possessores interpellare debeat.

31 Cf. *supra*, n. 15. However, exceptions seem to have been made for general legal pledges. See: D. 49,14,47pr.; C. 5,9,8, 4(5); C. 10,2,1. Moreover, Marcianus mentioned an exception to the requirement of *in bonis debitoris* by stating that it was sufficient to prove the assets belonged to someone else who authorized the creation of the pledge. See D. 22,3,23 (Marcianus *ad formulam hypothecariam*).

32 Bülow, *Die Generalhypothek* (*supra*, n. 7), p. 74; Wubbe, *Res aliena* (*supra*, n. 25), p. 225.

33 C. 8,19(20),1,1 (Imp. Alexander Severus in 230); C. 4,10,6 (Imp. Diocletianus and Maximianus in 293). Cf. Van Hoof, *Generale zekerheidsrechten* (*supra*, n. 5), p. 40.

A creditor took land on pledge and, after another creditor had made an agreement for the pledge of the debtor's goods, himself made a similar agreement as regards the goods, for the original or another debt. Before the second creditor was paid and without right, he then sold the goods as being pledged to him. The second creditor has no personal action against the first for his security on that account, nor should an *actio utilis* be given. Since the first pursued his own interest under a mistake as to priority he cannot be sued for theft of movables; anyhow the second creditor did not lose possession by the theft, since he did not have it. Nor is the first liable in an action for production, since he neither possesses the goods nor lost them dishonestly. In the upshot, the second creditor must claim against those who now possess the goods.

First, the debtor specifically pledged some tracts of land to creditor A. After this, he (generally) pledged all of his assets to creditor B. Subsequently, he pledged the remainder of his assets to A as well. Finally, creditor A sells, not only the specially pledged assets by execution, but also the remainder of the assets. However, A was not entitled to sell the remainder of the estate, as only the highest ranking secured creditor, B, was³⁴. Papinian stated that B could not hold A, who acted *bona fide*, liable and that B should recover the pledged assets from the third-party purchaser. A could not transfer ownership to the purchaser, since A was not entitled to sell the remaining assets. Therefore, the pledged assets still belonged to the debtor³⁵. A different interpretation is that A could only have transferred the assets without prejudice to B's general pledge³⁶.

Emperors Diocletian and Maximian also ruled that generally pledged assets could be recovered from a third-party purchaser if the seller was an unsecured creditor:

C. 8,27(28),17:

Rei creditor obligatae generali sive speciali conventionione per creditorem alium, cui non fuerat nexa, venumdatae non amittit persecutionem.

A creditor does not lose his right to recover generally or specially pledged assets if they were sold by another creditor to whom they were not pledged.

34 See D. 20,5,5pr. (Marcianus *ad formulam hypothecariam*).

35 Cf. Dernburg, *Das Pfandrecht* (*supra*, n. 4), II, p. 485.

36 Cf. art. 3:248 lid 3 BW (Dutch civil code).

9 Transfer by the debtor

The above-mentioned texts show that generally pledged assets could be recovered if they were sold by a person who could not transfer ownership of the assets. The jurists were silent as far as a transfer by the debtor is concerned³⁷.

Emperors Diocletian and Maximian stated in C. 8,25(26),¹⁰ that a debtor would only transfer pledged assets subject to pledge if he acted without permission of the secured creditor³⁸. It remains unclear if this rule applied to both special and general pledges³⁹. Other texts show that permission to sell pledged assets was only required for a special pledge⁴⁰.

Ulpian somewhat hesitantly stated that a debtor needed permission for the return of a generally pledged slave after the rescission of a contract of sale:

D. 20,6,4^{pr.} (Ulpianus 73 *ad edictum*):

Si debitor, cuius res pignori obligatae erant, servum quem emerat redhibuerit, an desinat servianae locus esse? Et magis est, ne desinat, nisi ex voluntate creditoris hoc factum est.

If a debtor whose assets were pledged lawfully returns a slave he has bought, can the Servian action be brought? It probably can, unless the creditor agreed to the return.

If the debtor acted without permission, the creditor could bring an *actio Serviana* against the third party to recover the slave. Some authors deduce from this

37 However, Wagner holds the following opinion: 'Schließlich bekräftigt const. 17 C. 8,27, die der Diokletianischen Zeit angehört, im Gegensatz zum Volkenrecht das Fortbestehen der Haftung eines Pfandes auch in den Händen eines Dritten, mag die generell oder speziell getroffen sein'. See Wagner, *Voraussetzungen* (*supra*, n. 4), p. 10.

38 C. 8,25(26),¹⁰ (Imp. Diocletianus and Maximianus in 293).

39 In C. 8,25(26),^{11pr.}, 1 and 2 (Imp. Justinianus in 532), Emperor Justinian referred to this imperial constitution to answer the following question. What were the creditor's rights if pledged assets were sold with the permission of the secured creditor and the assets later on became part of the debtor's estate again? Justinian wrote that some legal scholars were of the opinion that the pledge revived because of the clause 'future assets'. This does not imply that the asset in question was generally pledged before. The debtor could have charged some assets with a special pledge and the remainder of his assets (*cetera bona*) with a general pledge. Afterwards, he got permission to sell the specially pledged asset. Cf. Bülow, *Die Generalhypothek* (*supra*, n. 7), p. 108.

40 D. 20,6,4,2 (Ulpianus 73 *ad edictum*); D. 20,6,8,7 (Marcianus *ad formulam hypothecariam*). Cf. Bülow, *Die Generalhypothek* (*supra*, n. 7), p. 109.

text that a debtor needed permission from a creditor who had a general pledge to return the slave⁴¹. However, this text provides an insufficient basis for this assumption. It is arguable that Ulpian did not discuss a general pledge in this text⁴². Ulpian wrote *cuius res pignori obligatae erant* and did not mention the way the assets were pledged. The text originates from Ulpian's commentary on various remedies, like the *interdictum de migrando* and the *interdictum Salvianum*⁴³. This could imply that Ulpian discussed a so-called pledge of *invecta et illata*. A lessor automatically got a non-possessory pledge of the assets that the lessee brought with him into the leased property (*invecta et illata*) as security for the rent⁴⁴. The pledge of *illata* covered future assets just like a general pledge. The main difference was that the pledge of *illata* covered assets only when they were brought onto the leased property, whereas a general pledge covered assets when they were acquired by the debtor. Since agricultural leases were well-equipped the lessee only needed to bring his slaves and cattle to work the land and harvest the produce (*pecus et familia quae illic erit pigneri sunt*)⁴⁵. The lessor was granted the *actio Serviana* to recover these valuable assets. Without such an action the lessor would have had little security. This would explain why Ulpian stated that the lessee needed the lessor's permission to return a faulty slave to the seller.

A debtor probably did not need this permission of a creditor who had a general pledge, because the general pledge automatically covered the purchase price which was given back to the debtor after returning the slave⁴⁶.

The continuation of Ulpian's text supports the idea that he did not write about a general pledge. Ulpian compared the return of a faulty slave to the sale of pledged assets. He wrote: 'Many creditors tend to give permission subject to the preservation of pledge'⁴⁷. In other words, the debtor was permitted to transfer pledged assets, but the assets remained pledged. I believe that the permission subject to the preservation of pledge only made sense for a special

41 Dernburg, *Das Pfandrecht* (supra, n. 4), I, p. 511; Wagner, *Voraussetzungen* (supra, n. 4), p. 105; Schanbacher, *Die Konvaleszenz* (supra, n. 4), p. 206.

42 Wubbe suspected that this fragment was interpolated. See Wubbe, *Res aliena* (supra, n. 25), p. 234; Cf. Van Hoof, *Generale zekerheidsrechten* (supra, n. 5), p. 44.

43 See D. 43,32,1 (Ulpianus 73 *ad edictum*) and D. 43,33,2 (Ulpianus 73 *ad edictum*).

44 D. 20,2,7 (Pomponius 13 *ex variis lectionibus*). If the lessee defaulted, the lessor could refuse the lessee access to the leased property and seize the pledged assets. The *interdictum de migrando* enabled the lessee to lift the attachment.

45 Cato sums up the various types of equipment in: Cato, *De agricultura*, §10. In §149,2 and 150,2 he alludes to a pledge of *invecta et illata*.

46 D. 20,1,34,2 (Scaevola 27 *digestorum*).

47 'Nam solent multi salva causa pignoris sui consentire'.

pledge. Regardless of whether the creditor had given permission to sell the assets, specially pledged assets remained pledged when transferred to a third-party possessor. Why then would the debtor ask for permission to sell the pledge subject to the preservation of pledge? Well, he needed permission to avoid committing embezzlement (*furtum*) by selling specially pledged assets⁴⁸. Permission enabled the debtor to sell the assets and use the proceeds to pay the secured creditor. Permission subject to the preservation of pledge made no sense for a general pledge. Even if one believes generally pledged assets remained pledged when transferred, the assets would have remained pledged without the said permission. Unlike the sale of specially pledged assets, the sale of generally pledged assets did not qualify as embezzlement (*furtum*).

In D. 20,1,10, Ulpian discussed the *actio Serviana* that ensues from a pledge of *res suas*. The compilers of the Digest placed this text directly after the texts on the general pledge. According to Lenel, Ulpian placed this text directly after his texts on the general pledge⁴⁹. On the other hand, Ulpian subsequently discussed the *interdictum Salvianum* which concerns the pledge of *invecta et illata*.

Although it is arguable that the *res suas* were generally pledged, it is not certain. Roman jurists sometimes used these words to indicate a general pledge, but would add words like *generaliter*, *omnes* or *quas quis habuit habiturusve sit*⁵⁰. Moreover, Ulpian does not mention which assets were pledged, so it cannot be ruled out that the same assets were specially pledged more than once⁵¹.

Although there is no direct proof that generally pledged assets could be recovered from someone who bought the assets from the debtor, it is clear that the assets could be recovered from lower ranking pledgees. A lower ranking pledgee could defend himself against the *actio Serviana* of a creditor who had both a special pledge and a pledge of *cetera bona*⁵². This so-called *beneficium excussionis realis* prevented the older creditor from recovering generally pledged assets if the specially pledged assets would be sufficient to satisfy the secured debt. It remains unclear whether the secured creditor had to prove the

48 D. 47,2,19,6 (Ulpianus 40 *ad Sabinum*); D. 47,2,67(66)*pr.* (Paulus 7 *ad Plautium*); C. 7,26,6 (Imp. Philippus). See Van Hoof, *Generale zekerheidsrechten* (*supra*, n. 5), p. 51.

49 O. Lenel, *Palingenesia juris civilis* II, Leipzig 1889, col. 850, nr. 1628.

50 See *supra*, n. 7 and 8.

51 See also Wagner, *Voraussetzungen* (*supra*, n. 4), p. 72.

52 C. 8,13(14),2,1; C. 8,27(28),9 (Imp. Diocletianus and Maximianus in 287).

pledged assets had belonged to the debtor at the time the contract of pledge was concluded.

10 Explanations for a lack of evidence

What could explain the lack of texts that prove a creditor could recover generally pledged assets from someone who bought them from the debtor? The first explanation is that it is self-evident that he could. As Gaius stated, 'a pledge which cannot be recovered, is no pledge at all'⁵³.

The second explanation is that the formula of the *actio Serviana* was not suited for a general pledge. The *actio Serviana* was originally created by the praetor to protect a lessor who had a non-possessory pledge of the assets that the lessee had brought with him into or onto the leased property (*invecta et illata*)⁵⁴. In the time of Julianus (c. 100-169) at the latest, the action was awarded to creditors who had possessory or non-possessory pledges to recover the pledged assets from third parties⁵⁵. Without an *actio in rem*, a pledge of a specified asset offered little security. The *actio Serviana* would not have been necessary for the protection of a secured creditor who had a general pledge. The general pledge gave the creditor preference over other creditors in the distribution of the proceeds of the sale of the pledged assets, much the same as a special pledge would. Warnkoenig and Wieacker raised the question which creditor would have been willing to accept a pledge without an *actio Serviana*⁵⁶. In my opinion, they fail to recognize the function of security rights. A creditor wants to get satisfied. By enabling the debtor to conduct his ordinary course of business by selling pledged assets, the creditor increases the likelihood he gets satisfied. If the debtor sold a pledged asset to a third party, it was very likely that something else came in its stead, i.e. the purchase price. Since a general pledge covered future assets such as coins automatically, the substi-

53 D. 9,4,27pr. (Gaius 6 *ad edictum provinciale*): '(...) nullum enim pignus est, cuius persecutio negatur (...)'.
 54 Inst. 4,6,7.

55 D. 13,7,28pr. (Julianus 11 *digestorum*); D. 16,1,13,1 (Gaius 9 *ad edictum provinciale*). Cf. G. Krämer, *Das besitzlose Pfandrecht: Entwicklungen in der römischen Republik und im frühen Prinzipat*, Köln 2005, p. 39.

56 L.A. Warnkoenig, *Over het juist begrip en het regtsgeleerd gewigt van de zoogenaamde Universitas Rerum*, Bijdragen tot regtsgeleerdheid en wetgeving, III (1829), p. 550; F. Wieacker, *Zur Verpfändung fremder Sachen*, Tijdschrift voor Rechtsgeschiedenis, 30 (1962), p. 72, n. 44.

tution would be encumbered⁵⁷. Even if nothing took the place of the sold assets, the secured creditor could still take recourse in respect of the debtor's other assets. Moreover, if the sale was fraudulent, the creditor could sometimes annul the sale⁵⁸. Therefore, there was no need to make the *actio Serviana* available to the general pledge.

The third explanation is that the general pledge was a pledge of an ever changing *universitas* or a *corpus ex distantibus* like a herd (*grex*)⁵⁹. However, the general pledge was not regarded as such by jurists in the Digest⁶⁰. That does not mean that the notion of an ever changing object was irrelevant. Contractual freedom enabled parties to apply the effects of a *universitas* analogously to pledge⁶¹. Scaevola stated that a pledge of a *taberna* resulted in a pledge of all assets on the debtor's premises at the time of his death. This is very similar to the present floating charge, which is vested only on the assets which from time to time are part of the debtor's estate⁶². Wubbe and Verhagen refer to D. 20,1,34pr. to substantiate their argument that an *actio Serviana* was not available to a general pledge⁶³. However plausible Wubbe and Verhagen's theory may be, Scaevola does not give an opinion on whether sold assets were still encumbered by the pledge.

The most plausible explanation is that by opting for a general pledge it was the parties' intention to give the debtor the right to freely dispose of his generally pledged assets⁶⁴. This would make an all-encompassing security right workable in practice. Parties could opt for a special pledge just as easily as for

57 D. 20,1,34,2 (Scaevola 27 *digestorum*).

58 See: Wubbe, *Review* (*supra*, n. 25), p. 432. Cf. D. 42,8,1pr. (Ulpianus 66 *ad edictum*) and D. 42,8,10,1 (Ulpianus 73 *ad edictum*).

59 Cf. D. 7,1,70,3 (Ulpianus 17 *ad Sabinum*); D. 41,3,30pr. (Pomponius 30 *ad Sabinum*) and D. 20,1,13pr. (Marcianus *ad formulam hypothecariam*).

60 See Van Hoof, *Generale zekerheidsrechten* (*supra*, n. 5), p. 66.

61 Bülow, *Die Generalhypothek* (*supra*, n. 7), p. 128 and 136.

62 See *supra*, n. 5.

63 Wubbe, *Res aliena* (*supra*, n. 25), p. 236; Verhagen, *The evolution of pignus* (*supra*, n. 6), p. 65. Cf. H.L.E. Verhagen, *Ius honorarium, Equity and real security: parallel lines of legal development*, in: E. Koops and W.J. Zwolve (red.), *Law and Equity, Approaches in Roman law and Common law*, Leiden 2014, p. 137.

64 Bülow, *Die Generalhypothek* (*supra*, n. 7), p. 18 and 139; Th. Hagemann, *Practische Erörterungen*, Hannover 1818, Band 6, p. 391. Cf. D. 32,52,7 (Ulpianus 24 *ad Sabinum*). This would have been an exception to the rule that waiver of pledge needed to be given explicitly. See D. 20,6,9,15 (Marcianus *ad formulam hypothecariam*). In similar fashion, parties could agree that the secured creditor first had to sell specially pledged assets and secondly, if he still was not satisfied, generally pledged assets. See D. 20,4,2 (Papinianus 3 *responsorum*). Cf. C. 27(28),9 (Imp. Diocletianus and Maximianus in 287).

a general pledge. If parties intended assets to remain encumbered by a pledge and the creditor to be able to use the *actio Serviana*, they only needed to specify which assets were encumbered by a special pledge. There were no other requirements for the creation of non-possessory pledge than a valid contract and the debtor's title (power to dispose of the asset). This would explain why a debtor would sometimes charge some assets with a special pledge and the remainder of his assets with a general pledge.

The debtor's ability to freely dispose of generally pledged assets would have been in accordance with his power to set free generally pledged slaves. A debtor could not free generally pledged slaves, if he was insolvent and the liberation was harmful to his creditor⁶⁵. Emperors Septimius Severus and Antoninus Caracalla stated that specially pledged slaves could not be set free⁶⁶.

11 Concluding remarks

A Roman debtor and his creditor could tailor their contract of pledge to fit their needs. They created a pledge *specialiter* if they wanted to restrict the debtor's right to dispose of the pledged asset. The debtor would alienate pledged assets subject to pledge if he acted without permission of the creditor. The creditor could recover the pledged asset from any third-party possessor. A debtor and his creditor created a pledge *generaliter* if they wanted to enable the debtor to dispose of pledged assets in his ordinary course of business. Since a general pledge covered future assets automatically, the purchase price would have been pledged too. The secured creditor *could* recover generally pledged assets from third parties if they were alienated by creditors without (the highest ranking) security rights. Some debtors and creditors made optimum use of the pledge's flexibility by pledging a certain asset *specialiter* and the remainder of the debtor's assets *generaliter*. The Roman practice of secured credit meets modern requirements in many ways⁶⁷.

65 Fragmentum quod vulgo Dositheanum dicitur; D. 40,9,29 (Gaius 1 *de manumissionibus*); Inst. Gaius I,37; C. 7,8,3 (Imp. Septimius Severus and Antoninus Caracalla in 209).

66 C. 7,8,3 (Imp. Septimius Severus and Antoninus Caracalla in 209). See also D. 40,9,5,2 (Julianus 64 *digestorum*).

67 Cf. *UNCITRAL Legislative Guide on Secured Transactions* (2010), recommendations 50, 53, 57 and 64.