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# THE LIEN UNDER THE NEW CIVIL CODE'S REGULATION

## -ABSTRACT-

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Guaranteeing the performance of obligations will always remain a matter of interest, since without conferring the creditor the prerogatives of a right of guaranty the principle of *pacta sunt servanda* can become an illusion. For this reason, a thorough study of these rights from the point of view of their object and their legal regime is particularly important for the current legal research orientations.

In this paper, our attention turned to a right of lien of controversial status from several points of view, which led to the reference to it as to a *sui generis* mechanism.

Such a view on the right of lien is determined by several aspects, starting with its field of application and ending not only with the effects produced but also with the way in which it is actually exercised.

The interest for this legal institution has been constantly manifested, precisely because of its increased effectiveness compared to the rudimentary exercise manner. The very way in which this guarantee is created makes it a tool that will not be refuted by the creditor, which, through it, obtains the power to take the law into its own hand. Thus, it is absolutely natural that, in a society where relations between individuals are subject to rules, be they of the provision type, a means of private justice have a special importance. It is no wonder that a guarantee instrument with so old origins and a everyday foundation is still considered with keen interest in contemporary legal systems, where guaranteeing obligations through the most effective and varied means is a priority.

Of course, in addition to the *ipso iure* birth of the right of lien, the reason why it remains an actual legal figure is the energetic effect obtained with a minimal effort on the part of the creditor, which is limited to the consequences that the lack of use of the encumbered asset produces on the debtor's psyche, causing it to perform its obligation. Therefore, the comminatory effect produced is the key to achieving the claim by exercising such a guarantee mechanism where the appeal to the court has a pure ascertaining role.

Through the above we have tried to explain that the juridical institution that we approached in this scientific demarche has enjoyed constant attention of the doctrine due to its particular practical utility which determined the necessity of drafting a general theory with its turning into a general principle based on the argument of analogy and the imperative of equity, which was missing in the French-inspired legal systems.

The analogy of the legal texts acknowledging this right in favour of certain creditors has led to the emergence of the notion of "debitum cum re iunctum" increasingly interpreted in contemporary times. The meaning of this phrase, which designates the link between the guaranteed debt and the encumbered asset established as guarantee, influences field of application of the legal institution in question. The positive side of this influence is the frequent occurrence, in practice, of the refusal to hand over an asset under the right of lien, but the more complicated part of the *link* is related to the constant concern to achieve a firm delimitation of this means of guarantee towards another legal institution which indirectly fulfils a guarantee function and has the dual quality of debtor and creditor of the parties as a premise.

In the context in which the right of lien, as a stand-alone legal institution, is the creation of specialized literature and jurisprudence, it was with the adoption of a new codification of the private law that the legislator had responsibility whether or not to recognize that legal figure by regulating it generally at the level of positive law.

Of course, the lack of a framework regulation of the right of lien could not find a valid justification, as the new Civil Code sought to fill any existing regulatory vacuum in the field of private law. Consequently, the establishment of a chapter for the *in abstracto* regulation of this guarantee, traditionally qualified as an imperfect guarantee, was inevitable.

It is precisely the general regulation of the right of lien that has led us to choose this research topic, considering that it is important to carefully observe the rules by which the legal regime is outlined to conclude if they bring any additional benefit to the creditor, or legal force is simply given to those that have acquired a constant character for judicial practice and literature. We believe that careful consideration of legal regulation is important, since the correct application of these rules to solving all the legal problems arising in practice is indispensably related to their correct interpretation. Thus, the main purpose of this paper structured in six chapters is to observe to what extent the long-awaited regulation responds or not to the classic questions regarding the matter of this legal institution.

The first five chapters deal with the principle regulation of the right of lien, to which we have given proper attention, by structuring the paper so as to capture both the evolution over time of this general theory and the legislator's perspective differences. On the other hand, in the last chapter we made brief references to the main applications of this right of lien, for the same purpose of highlighting the impact of the regulations adopted with the new Civil Code.

The first chapter is entitled "The Historical Evolution of the Lien Right". After the first section, in which the main conclusion was that the rules of the new Civil Code tend to demonstrate a unitary conception of the legislator on the right of lien, we turned our attention to one of the most disputed legal issues related to this means of guarantee. Thus, in this first chapter, we addressed the subject matter of the application of the guarantee in question precisely because of the evolution over time of the concept related to this question.

In this second subdivision of the initial chapter, we included the evolution of the doctrinal views on the area of creditors that could claim a right of lien. If, in the first stage, the law texts expressly regulating a right of lien were interpreted restrictively on the grounds that they gave the creditor a cause of preference, then a diametrically opposed point of view was reached, according to which the argument of analogy, and the imperative of fairness, would be sufficient for the *ex dispari causa* application of this subjective right. Later on, to the detriment of this overly permissive concept, it was argued that it clearly violated the principle of equality between creditors. For this reason, the necessity of a concrete criterion for limiting the application of this legal institution whose exercise takes the form of a discretionary power over another person's property, exercised without the appeal of any state body, became evident. This limitation came with the emergence of debitum

cum re iunctum that designates the connection between the guaranteed debt (i.e. the debt to be extinguished) and the asset withheld as a guarantee (the object of the guarantee).

Going beyond the consensus on the imperative of the existence of a connection that legitimizes the refusal to hand over or return, which otherwise would be an illicit act, the views continued to be divided over the meaning of *debitum cum re iunctum*. Modern and contemporary doctrine has come to be convergent in accepting a broad meaning of this concept, which encompasses both classical material connectedness and legal connectedness.

Referring to the traditional, material form of connectedness, we have highlighted its features, showing that the right of claim invoked by the creditor involves an expense made by it for the benefit of the asset during the period in which the object of retention was in the material possession of the latter. In other words, the object of the right of claim to be guaranteed is the compensation due to the creditor, whether through unjust enrichment or tort liability, in the event that the asset itself causes damage. Inasmuch as it is mainly about unjust enrichment as the source of the secured claim, the expenditure whose repayment is claimed must have been of a necessary and useful nature, enhancing the debtor's patrimony. This type of link between the asset meant to secure the claim and the guaranteed right itself is also known as objective connectedness precisely because it has a specific character, a causal relationship being established between the two elements, meaning that the creditor's impoverishment has a direct relationship with the encumbered asset, either by increasing its value or by causing damage.

We then referred to the justification of the objective connectedness as the basis of the right of lien, agreeing that the guaranteed obligation is born in consideration of the asset that, for reasons of fairness, will be materially directed to the extinction of the latter, being the object of this comminatory mechanism. However, we appreciated that the attempt of the French doctrine[1] to base this form of the right of lien on the idea of a natural privilege is inconsistent with the view of the Romanian legislator, which, besides regulating a veritable privilege for the lienor mobile assets, establishes the inopposability of the right of lien towards the creditors pursuing the asset.

Turning our attention to the legal or intellectual connectedness, which is so named because it follows from the fact that the obligations of the parties involved in this mechanism are not only reciprocal but also share the same legal relationship as ground. This type of connectedness has raised an increased interest for doctrinaires on the grounds that it has the consequence of expanding the application of the right of lien in question, and at the same time provoking them to delimit it from the exception of non-performance, a sanction specific to the non-performance of synallagmatic contracts.

As a starting point, we have referred to the circumstances in which an intellectual connectedness can arise, i.e. to the situations where there are synallagmatic legal relations between the creditor and the debtor, the only ones capable of giving rise to obligations, not only reciprocal obligations, but also

[1] See: Augustin AYNÈS, Le droit de rétention.Unitè ou pluralitè, Editura Economica, Paris, 2005, p. 196.

interdependent obligations between them. Starting with bilateral agreements, under the current view that the framework contract allows the exercise of a right of lien to guarantee any of the services rendered pursuant to it, but also the non-contractual sources of such relationships.

Subsequently, we conducted a comprehensive analysis of the arguments of the doctrine, brought either in the meaning that the right of lien based on a legal connectedness enjoys autonomy, or in the meaning that it is only an application of the exception of non-performance for the assumption that the obligation whose performance is suspended consists in handing over or returning a certain asset. It should be noted that the starting point of the assimilation theory is the denial of the causal basis of the exception of non-performance and the finding of this basis precisely in the unity of origin of the obligations assumed by the parties. According to the majority opinion[2], we are in the presence of two distinct institutions, and the most convincing distinction between them concerns the opposability of the guarantee mechanism towards third parties. More specifically, the fact that the right of lien is opposed *erga omnes*, while the exception, by virtue of its contractual nature, is only opposed to the parties to the binding legal relationship. On the other hand, the two institutions were also put in antithesis, starting from the indivisibility specific to the lien in relation to the proportionality required to invoke the exception.

Our main objective in the first chapter was to interpret the legal norms governing the two legal institutions in order to conclude whether or not the legislator agrees with the assimilation theory of French inspiration. From our point of view, the fact that article 2495, which is intended to be a definition of the right of lien, refers to the legal connectedness in the case where, according to the assimilation theory there is a part versus whole relationship between the two, the only manner in which it can be interpreted is that, according to the legislator's view, the two institutions are distinctly categorised. Otherwise, as the primary effect of both mechanisms is the suspension of the obligation of the creditor, we do not see why the principle regulation of the non-performance exception would not be sufficient and equally applicable to the obligation of hand over or return.

Another aspect resulting from article 1556 concerns the legislator's will to allow the non-performance exception to be proportionally invoked if the occurring non-performance is sufficiently important, but not total. In other words, it is permissible to invoke this exception in case of partial non-performance, which is in contradiction with the indivisibility of the right of lien. It is also more than obvious that the regulation of the non-performance exception lingers its exclusive application in the field of perfect synallagmatic contracts, whereas the right of lien stemming from the legal connectedness has a much wider traditional *scope* including the licit legal acts, not only contracts characterized through an imperfect synallagmatism. In addition to the obvious differences in what regards the application field, the clear expression of article 1556 removes the main argument of those who see the lien as an application of the exception of non-performance, namely that relating to the

[2] See: Vlad Dan ZLĂTESCU, *Garanțiile creditorului*, Editura Academiei, București, 1970, p.5; Michel CABRILLAC, Christian MOULY, Droit des sûretés, Editura Litec, Paris, 2002, p.552.

common ground of the two, since the causal basis of the latter is visible in the formulation of the legal text.

In addition to all these, it must be added that it is easy to notice, from the legal *regime* of the two institutions in question, that the exception of non-performance is not, unlike lien, a civil subjective right conferring any prerogative on the one invoking it, but only a means of preserving the contractual balance by maintaining the contracting parties in the initial state obtained with the suspension of its effects. This difference is all the more visible in the matter of movable assets, where the lienor also benefits from a cause of preference for the realization of its claim through the capitalization of the retained asset.

Following our analysis, we can say that the provisions of the new Civil Code reveal an unequivocal distinction between the two guarantee mechanisms, with the right of lien applied if the creditor cannot claim the exception of non-performance for its benefit. More specifically, within any synallagmatic relationship, except for those stemming from perfect bilateral contracts, but also where the non-performance of the debtor is not sufficiently significant to invoke the contractual remedy.

The second chapter is centred on the conditions that are required for the birth of the right of lien in the creditor's patrimony, but the first section is dedicated to the definition that the new codification places on this guarantee and inevitably to the transitional law provisions. Also in this chapter we addressed the issue of the validity and utility of a conventional lien right and the consequences of the specificity of lien on the level of procedural law.

Regarding the legal definition we can say that it represents a takeover of those stated in literature, which are given the power of law. The merit of the legal text is that it unequivocally expresses the existence of the right of lien when *debitum cum re iunctum* has an intellectual nature.

The section entitled "Requirements for the Birth and Exercise of the Right of Lien" is a very broad one, divided into several subsections, so as to cover all aspects of the doctrine by constantly reporting to the legal provisions, highlighting the novelty elements. We first considered the secured claim, then the subject of the guarantee, and finally some issues related to the law subjects, parts of the legal relationship from which the secured claim originates.

As to the originally guaranteed right, we addressed the issue of its subject matter and the conditions under which a right of claim can be guaranteed by legitimately invoking a right of lien. On the subject of the secured claim and the moment of its occurrence, we believe that by legally seeling the legal connectedness, as the basis of the right of lien, the classical lingering regarding the monetary object of the secured obligation can be removed. The argument in this regard relates to the variety of the content of the bilateral legal relations born between the parties. On the other hand, the same argument can be used to argue that the birth of the secured claim must not be either posterior or concomitant with the entry of the asset into the detention of the lienor, since the only relevant circumstance is that the right invoked by it and its return obligation shall be born at the same time and enter the content of the same legal relationship.

Of course, the most important condition for exercising the right of lien, which is considered to be the very foundation of this legal institution, is that the right of claim raised by the creditor must be born in close connection with the asset under its control. In summary, the claim is to be a *debitum cum re iunctum*, namely to be in intimate connection with the withheld asset. This connectedness may be a material one, when the impoverishment of the creditor is actually caused by the withheld asset or only an intellectual one, if it is reduced to the unit of origin of the parties' obligations. It is important to note that the definition given to this right of guarantee clearly shows that the asset in the detention of the creditor can be withheld to guarantee a claim arising from the tort liability for the deed of the asset in general, but also that for the animals or the ruin of the edifice.

The requirement of connectedness between the object of the guarantee and the right of claim to be pursued by the creditor is imperative since it has been consistently seen a limit beyond which the lien of the good becomes abusive violating the principle of equality between creditors, as it adversely affects the debtor's right of ownership. Therefore, as without a *debitum cum re iunctum*, the creditor is not in the exercise of a subjective right recognized by law, refusing to return the good will entail its tort liability.

On this occasion, we consider it important to note that in our opinion the second paragraph of article 2495 is to be interpreted as meaning that an extensive interpretation of *debitum as re iunctum*, which may be expressly regulated if this is considered appropriate, is still permitted. Of course, the possibility of a connectedness that does not fall within the letter of the law defining this guarantee is considered, but for reasons of fairness it justifies the birth of a right of lien.

In addition, although the right of lien has a specific exercise mechanism close to that of a means of preserving the claim, the traditional doctrine assumes that only a certain, liquid and exigible claim justifies the birth and valid exercise of the right of lien because of the comminatory effect it produces, which makes it a forced execution even in the absence of such a procedure. However, the fact that the most often the realization of the claim takes place outside the procedure of forced pursuit of the asset has determined, in the French legal system, a permissive interpretation of these features of the claimed claim.

To a large extent, the native doctrine[3] is also expressed in terms of permissive interpretation, as the provisions of the Civil Procedure Code defining these features are too rigid to adapt to this *sui generis* mechanism. This approach is somehow contradicted by the regulation of a special movable privilege for the benefit of the lienor, and it is obvious that at the time the privilege is invoked, the claim must be liquid. So, taking this into account, we believe that in the light of the new provisions of substantive law, the assessment of the certain, liquid and exigible nature of the claim must reconcile both the idea of private justice and the rigors of forced execution.

[3] See: Stelian Ioan VIDU, *Dreptul de retenţie în raporturile juridice civile*, Editura Universul Juridic, Bucureşti, 2010, p. 49 and the following.

As for the assets that can be encumbered with a right of lien and thus become the subject of this guarantee, we note that the legislator does not make much reference to them, leaving everything for interpretation. Consequently, as article 2496 removes only intangible assets outside the scope of application, we can say that the object of the right of lien can also be movable assets, even immovable, tangible or intangible even amounts of money. Thus, the provisions of the Code firmly state that assets outside the civil circuit cannot be encumbered by a right of lien, because immunity from seizure is always doubled by the inalienability of the asset that can have a legal or conventional source.

It is important to note that from our point of view assets of intrinsic value can still be affected by a right of lien, despite the fact that the legislator regulates a privilege in favour of the lienor and the fact that can not be pursuited goods are excluded from the area of the guarantee application. Our arguments are that the privilege of the lienor is not a *preference* it enjoys under the right of lien, as well as the fact that immunity from seizure does not refer to the impossibility of capitalizing the asset, but to the existence of a general or particular interest, preferably to the creditor's one, which is protected by preventing the capitalization of the asset.

The effect of coercion of the debtor, obtained by refusing to hand over the asset as the principal prerogative of the right of lien, requires acceptance of the notion that assets without intrinsic value may be the subject of such a guarantee, since depriving the debtor of such assets produces the comminatory effect pursued outside any procedure of forced capitalization of the asset. However, public order in its various forms has always been a limit to the exercise of any civil subjective right.

As far as the subject matter of the security right that we are dealing with in this research, the most disputed issue concerns the possibility of it being exercised over the intangible assets. The interest in this subject is explained by the growing weight of these assets in the current civil circuit as well as by their variety.

Traditionally, the fact that the refusal to surrender is the only prerogative of the lienor has made the exercise of such a right indissolubly linked to a material detention of the asset. Thus, for a long time, even contemporary doctrine[4] has seen, in detention, a *sine qua non* condition for the exercise of the right of lien, and the natural consequence was the limitation of its object only to the area of tangible assets.

Relatively recently, the notion of blocking power has been used in the French legal system to designate the prerogative of the lienor over the withheld asset. Within this expanded concept, the material detention of the asset is only an approach specific to tangible assets. This concept has as its starting point an abstract conception of detention described as a legal power over the encumbered asset and not a material one. Thus, the foreclosure power exercised by the creditor lies in its ability to paralyze the exercise of the debtor's prerogatives over the intangible asset. In other words, the comminatory effect on the debtor occurs when the exercise of its rights over the retained asset is prevented.[5] As expected, this new prospect of possessing the

[4] See: Stelian Ioan VIDU, *op. cit*., p. 54; Jaques MESTRE, Emmanuel PUTMAN, Marc BILLIAU, Traité de droit civil. Droit commun des sûretés réelles, sous la direction de Jacques GHESTIN, Editura LGDJ., Paris, 1996, p. 54.

[5] See: Augustin AYNÈS, *op. cit*., p.51; Laetitia BOUGEROL-PRUD'HOMME, *Exclusivité et garanties de paiement*, Editura LGDJ, Paris, 2012, p.111.

asset has allowed the removal of classical barriers to the retention of intangible assets.

In addition to this, the French legislator regulated the notion of fictitious holding as a basis for a fictitious right of lien recognized under special legal rules, justified by the risks to which the creditor was exposed. Moreover, with the express regulation of the right of lien, a fictitious right of lien is recognized for the benefit of all holders of a pledge without dispossession.

Regarding the adaptation of native regulation to this doctrinal stream, we believe that the new Civil Code is permissive in this regard by not expressly excluding intangible assets from area of application of lien, and in the definition given to this legal institution it refers to assets in general. For this reason, we believe that such a possibility should not be *de plano* ruled out, insofar as another way of obtaining the characteristic comminatory effect is identified. All this, not without observing the legislator's attachment to the material possession of the asset or the difficulty of identifying a concrete form of blocking power.

At the same time, we note that the exercise of a fictitious right of lien is of no interest in the domestic system, since, according to the new legal regulation, the real estate security without dispossession is classified as a mortgage, irrespective of the asset over which it occurs.

Even though in contemporary doctrine the material possession of the good has lost its fundamental role for the valid constitution of the right of lien, the traits of detention capable of legitimizing the refusal to surrender are still regarded with interest. The fact that a legitimate asset detention has consistently played an important role in this matter is reflected in the legal regulation of exceptions to the general application of the right of lien in the presence of a *debitum cum re iunctum*.

Before discussing the hypotheses that the detention of the good is illegitimate, with the consequence that the refusal to surrender is not the effect of a subjective right but an illicit deed, we have made some necessary clarifications. The first relates to the fact that the material holding of the good does not necessarily have to be doubled by an *animus sibi habendi*, and the second concerns the fact that it can be exercised through a third party.

About the "vices" of the holding that make it unfit to legitimize the exercise of a right of lien, we can speak starting from article 2496 paragraph (1) of the new Civil Code with the marginal name "Exceptions". According to its provisions, the holding arising from an unlawful act, whether abusive or illegal, prevents the exercise of the right of lien, but even from the first comments of the legal texts it was pointed out that an illegitimate detention blocks the very birth of the right of lien in the creditor's patrimony.

Regarding these features, it can be seen that they were not defined by the legislator, but they are part of the idea of the regularity of the entry into possession of French law, which made it a guarantee for the observance of the principle that no one can take the law into his own hand.

Trying to define the shortcomings of detention exercised by the creditor, we must say that the illicit aspect in this matter must be interpreted in the sense of civil

law and not in the sense of committing an offense in order to gain possession of the asset. However, we do not believe that the meaning of the illicit deed must be one that is so wide as to affect the traditional area of this guarantee. It is natural for abusive detention to be interpreted by reference to the definition of abusive exercise of rights. For this reason, the abuse intention of the creditor is a matter of fact left to the sovereign judgment of the court. It is important to say that in our opinion the enumeration of abusive holding in the content of article 2496 eliminates in part the problem of abuse of law in this matter, since it prevents the very birth of subjective right. An example of abusive detention may be the apparent disparity between the value of the asset retained and the amount of the secured claim. However, we may be in the presence of an abusive practice if the creditor uses the detained asset during the exercise of the right of lien in its interest.

We note that the wording of the legal text also clearly shows the intention of the legislator to distinguish between detention arising from an unlawful deed and unlawful detention. In our opinion, unlawful detention concerns the situation where the detention of the good is itself not permitted by law, not just its way of getting into the creditor's possession. This can be about assets outside the civil circuit or with a circulation regime subject to mandatory rules. Likewise, we considered that the situation in which the creditor uses the asset in its detention for its own benefit immediately after the maturity of the restitution obligation could be interpreted as an unlawful detention. Our argument is related to the fact that it is just a temporary holder that lacks the legal basis for exercising a right to use it.

At the end of our considerations on the conditions that are required for the birth of the right of lien, we left the issues with some subjective character related to the subjective quality or attitude of the parties involved.

As far as the debtor of the secured claim is concerned, we can say that we agree with the lack of relevance of its title to the good. In other words, it must not be the owner of the asset retained, but only the creditor of the restitution obligation, as otherwise the comminatory effect essential to the guarantee mechanism would not occur.

There has been much talk about the place of good faith among the conditions for establishing the right of lien, even since the beginning of drafting a general theory. The consensus has been reached in the modern doctrine[6] according to which the imperative of equity is sufficient for the holder of a *debitum cum re iunctum* to be endowed with a right of lien independent of its subjective attitude, all the more so since the good faith belief in this matter was not considered to be unambiguous.

Through the provisions of paragraph (2) of article 2496, the Code deals with this problem in the sense that it maintains the matters stated by the doctrine, not transforming good faith into a condition for the birth of the right of lien. However, it makes the creditor's bad faith an opportunity to restrict the general application of the right of lien, stating that a holder that knows the defects of its title will be recognized such a guarantee only if it is specifically provided for in a certain matter.

[6] See: Stelian Ioan VIDU, *op. cit.*, p. 47 and the following.

We believe that the reason for this interpretation can be found in the legislator's intention of sanctioning the bad faith owner for its attitude and creating an advantage for the other, in the desire to demonstrate the importance of good faith in legal relations, while also protecting it.

We have also noticed that since the legislator itself refers, in the legal text, to the bad-faith holder, the meaning given to this notion will be the specific one in the matter of possession, in spite of the counter-arguments existing in doctrine. In addition, it should be noted that, in the matter of the lease contract, bad faith is assessed from a contractual point of view.

Besides the right of lien with a legal basis born in the presence of a *debitum cum re iunctum*, the doctrine was constantly concerned with the validity of a convention giving rise to a right of lien. An affirmative answer to this question was based on the autonomy of will and the binding force of the legal conventions made. Recognition of a conventional right of lien, therefore, assumes the creation of an artificial link between the claim and the asset affected by the guarantee, which allows the lienor to retain the asset even in the absence of a connectedness, as it derives from the law.

In the domestic legal system, legal literature raises serious arguments that oppose the validity of such a contract to which we agree, because we consider that the *debitum cum re iunctum*, which gives it the character of an substantive law exception results, opposes the recognition of a conventional right of lien, which would clearly be deprived of the reason for which the law recognizes it for the benefit of the creditor and would have a purely contractual nature.

Moreover, in our opinion, the framework regulation of the right of lien and that of the guarantee system in general does not encourage the right of conventional lien too much. This, since, from our point of view, much of the arguments put forward by the French doctrine in support of its usefulness are easily demountable.

Thus, the regulation of a special privilege may awaken the creditor's interest in the foreclosure of the retained asset. Equally, immune to seisure goods are expressly exempted from the right of lien, despite the fact that this guarantee essentially remains a passive expression, so that neither the will of the parties can encumber them with such a right.

Similarly, if we accept that the right of lien over a movable asset is a real movable guarantee, the only aspect that distinguishes it from pledge, under the new regulation, is the legal nature itself.

On the other hand, the most important argument starts from the way in which article 2480 regulates the formation of pledge. As provided in the second sentence, this guarantee may also be constituted by the preservation of the asset by the creditor, with the consent of the debtor, for the purpose of securing the claim. This is clearly the situation in which the asset was in the hands of the creditor prior to contracting, but without the existence of any connectedness that would give rise to an *ipso iure* right of lien.

However, if we consider that the right of preference is not an effect of lien, but of the privilege joining it, this may be an argument in favour of exercising the right of

lien on goods that have no market value, despite the provisions of article 2339 (1) (b). Thus, since it is very difficult to remove assets without intrinsic value (such as documents) outside the scope of the right of lien, taking into account the constant jurisprudence before the Code and even the provisions of some special laws, it is preferable to accept that such goods may be the object of a conventional right of lien.

As regards conventional lien that has a real estate as object, we consider that it would be difficult to imagine, given the prerogatives which it it confers together with the fact that it involves the dispossession of the debtor.

In view of the above, we appreciate that due to the new approach of the legislator, it can be argued in favor of an almost complete uselessness of the conventional lien right. Moreover, we consider that the overall regulation of the other securities seems to demonstrate the exclusive legal nature of the right of lien.

We also considered it appropriate to refer to the relevant aspects of procedural law at the end of the second chapter, structuring the section devoted to this subject in two subsections, the first dedicated to procedural means of invocation, and the second to the procedural framework in which it can be invoked.

Thus, we conclude that the specificity and the legal nature translates it into an exception to substantive law that may be invoked at any moment in the trial, in which the substance of the case may be called into question, or even in an action opposing enforcement, if the guaranteed right has been established as being certain, liquid and exigible by the substantive decision. Besides, its exceptional invocation or finding action, thanks to its legal source, does not defeat the principle of willingness

Chapter three deals with the lien right features to which we have paid due attention as they summarize its legal status and the functioning mechanism of the guarantee enjoyed by the creditor of a *debitum cum re iunctum.*

The first section is devoted to the legal nature of lien, where we concluded that the *ope legis* birth of lien is of particular importance for how this means of pressure turns into a guarantee for the creditor. This, while only a legal basis could explain the fact that we are faced with a means of private justice which can be invoked without the necessary existence of a judicial decision to sanction its birth.

In addition to opening an extrajudicial way of invoking the right of lien, its legal nature also implies that the main or incidental claim by which it is invoked by the lienor has an ascertaining nature. Only an *ope legis* formation of the law of this subjective right justifies the complete lack of involvement of the court in the assessment of its validity from the perspective of the appropriateness to recognize such a right.

Referring to the real nature of the security right analyzed, we have emphasized the manner in which its general regulation confirms the thesis of its reality, starting from article 551 in which an enumeration of real rights is made. We appreciate that as long as it bears an asset and has a constraining effect that makes it a guarantee for the creditor, it can certainly fall under the category of real estate security rights.

Secondly, the most powerful argument put forward by the legislator to support the real nature of lien is its opposability to third parties without any publication formalities. As long as the opposability of the right of lien extends beyond the legal

relationship between the lienor and its debtor, it is an absolute opposition specific to the real rights. What undoubtedly demonstrates the real nature of the right of lien is its opposability to the owner of the retained asset, who is a third party, as long as the binding relation under which the lienor becomes a creditor is wholly alien to the latter.

Surprisingly, with the legal regulation, the legislator chooses to make a notable change in the matter of the opposability of the right of lien. Thus, the provisions of article 2498 paragraph (2) provide that the lienor cannot block the forced pursuit of the encumbered asset by refusing to surrender it. However, we consider that this option only aims to safeguard equality between creditors, without assuming the denial of the real nature of the right of lien.

To contradict the thesis of the real nature of the right of lien, it has also been argued that the lienor has the quality of a mere temporary holder of the retained asset. We appreciate, however, that the lack of an *animus sibi habendi* cannot be a sufficient argument in the sense that the lienor does not exercise a material, direct and in self-interest possession over the asset, since the purpose of the refusal to surrender or return it is to compel the debtor to execute the obligation to which it is bound, and hence to realize the right to claim of the lienor.

We also believe that, including the granting of the status of administrator of the asset of another, empowered with simple administration, to the lienor, under article 2497, demonstrates that the detention of the asset by the latter does not imply a purely passive attitude; on the contrary, it will exercise the attribute of the use of the asset in the name of the owner, the law imposing certain obligations in this regard. Regarding the indivisibility of the right of lien, as an argument for its real character, we believe it is a consequence of the accessory relationship in which it is with the secured claim, and these characteristics are reflected in the provisions of article 2499 paragraph (1) which provide that the right of lien shall cease only if the person concerned consigns the entire amount claimed.

The accessory and indivisible nature of the security right in question has been dealt with in the same section, thanks to the fact that indivisibility is precisely a consequence of the accessory nature of the guarantee towards the principal guaranteed right. These features are specific to any security claim that cannot reasonably have a stand-alone existence, subsisting until the total amount of the secured claim has been extinguished. However, indivisibility has a special significance in the mechanism described by the right of lien, since it is virtually the only instrument at the disposal of the lienor for the total extinction of the claim, in its capacity as the holder of an imperfect passive security.

Chapter four deals with the content of the right of lien, namely with its effects between parties and towards third parties, focusing most of our research objectives. The structure of the chapter first of all seeks to capture the impact of the new regulation on the prerogatives of the lienor and the limits to which they may be opposed to third parties, but not without referring to the legal regime that preceded the codification, precisely to see to what extent the regulation benefits the lienor, removing or not the traditional qualification of this security right.

The first section treats the issue of the legal position of the lienor in relation to the retained asset. In connection with this, we pointed out that, given the specificity of this security means, the title of the lienor over the asset can only be a precarious one. Thus, the situation of the temporary holder is totally irreconcilable with the conduct of acts with intent to behave as the holder of a real right. Even the guarantee mechanism requires that the lienor have the position of a temporary holder towards the object of its security, since it is aware that he has on his charge an obligation to return or hand over the asset whose execution it suspends, in order to constrain its creditor, which is also its debtor

The status of temporary holder of the lienor has, of course, consequences over its prerogatives in relation to the asset, which are very limited in comparison to those of the possessor. Naturally, the lienor cannot use the material possession exercised over the asset to adversely possess it, as it cannot use the object of the warranty for its own benefit. However, due to the fact that the asset holding is based on a civil subjective right, it cannot attract any responsibility for the damage caused to the owner due to the lack of use. The most important dispute arising out of the temporary title over the asset is related to the right of the lienor to harvest its fruit. The Civil Code, through its provisions, confirms that the lienor collects the fruit to extend the security right over them. However, harvesting fruit is not a right, but an obligation resulting from the assimilation of the lienor with an administrator of the assets of another, being required to take all precautions to conserve and administer the asset in order to avoid damage to the owner.

In view of the above, we find that the letter of the law maintains the same quality of material possessor of the asset whose ability of enjoying the good which is object of the security for its own benefit is still denied.

Then, in our attempt to analyze the effects of the right of lien, we referred to the right of the lienor to legitimately refuse the remission or return of the asset, starting from the vision of the doctrine which has consistently emphasized the fact that the right of lien is an essentially passive security, as the prerogatives of the lienor are limited to this refusal, namely an inaction that makes the security a negative one.

If we consider the quality of the lienor as debtor of an obligation to return the property in its detention, the refusal of restitution presupposes precisely the suspension of this obligation, to which it is bound, with the purpose of pressuring the owner of the asset for which the lack of its use can cause damage. So, in other words, the guarantee mechanism that the right of lien makes available to the creditor is based on the pressure on the debtor generated by the utility that the asset has for it and its will to recover it from the hands of the lienor can only be achieved by completely extinguishing its debt to the latter.

Of course, the fact that the main attribute of the lienor is one that does not involve an active attitude on the part of the lienor, has important consequences over the guarantee mechanism that it benefits from. The inconvenience related to the impossibility of clearly establishing the legal nature of this mechanism is counterbalanced by the extremely vigorous effect and the possibility of exercising this right through extrajudicial channels. Thus, the full efficacy specific to the right of

lien and the justification for which the law itself recognizes it as belonging to the creditor is the constraining effect of this simple refusal to surrender and its consequences on the debtor's psyche.

After noticing the *sui generis* nature which the refusal of surrender imposes the security right which the lienor enjoys, we referred to the consequences of this passive nature, which can be summed up by the lack of any prerogative to directly act on the good for the realization of the right of claim. In short, in the classical view, the lienor does not enjoy any of the prerogatives of a genuine real right, namely the right of pursuit or the right of preference or the right to pursue the asset outside a forced execution procedure.

In the third section of the chapter dealing with the prerogatives of the lienor, we conducted an analysis of the legal norms in an attempt to demonstrate that the improvement of the legal position of the lienor with the adoption of the new Code is only apparent, and as such it is not given the status of a creditor benefiting from a real estate warranty. For this, we first addressed the issue of a possible right of pursuit, and then the right preference granted to the lienor by the civil Code.

The right of pursuit which the lienor enjoys under the new Civil Code is based on the provisions of article 2499 paragraph (2), according to which the involuntary dispossession of the asset does not extinguish the right of lien, the holder of this right being able to request the return of the asset. Although the right of the lienor to request the restitution of the asset exists, it can be noticed that its exercise depends, on the one hand, on the observance of the rules applicable to the statute of limitation of the main action, and on the other, is hindered by the acquisition of the movable assets by the good faith possenor.

As can be seen, the action placed at the reach of the lienor, whose object is the restitution of the asset, cannot be admitted in any event, which implies that his right to pursue does not place him in the same position as the mortgagee.

Firstly, if we consider that the exercise of a real action is conditional on compliance with the rules governing the limitation period of the main action, it means that the action of the lienor will be rejected whenever the main action is limited. Even if, in accordance with article 2505 N.C.C., the statute of limitation of the main action does not preclude the exercise of the right of lien if the action term was not past at the time when that right could have been denied, we consider that an action seeking the return of the asset lackes of interest once the constaining of the debtor to pay the claim is impossible there is no longer any right to be guaranteed, and the possession exercised by the lienor would, moreover, remain groundless. We could even say that the provisions of article 2505 would be irrelevant as regards the exercise of an action for restitution, as they concern the survival of the right to lien after the right to reclaim the debt has ceased to exist, article 2499 being sufficiently clear that the action cannot be promoted after the prescription of the substantive right to action on the secured claim.

With respect to the third party acquirer, the good faith owner of a movable asset, the rejection of the action against it has the explanation that the possession of good faith acquired under the conditions of article 937 N.C.C. generates a

presumption of *de iuris et de iura* property. Or, if the fact that a third party becomes the owner leads to the rejection of the action for restitution, we can see that the lienor does not enjoy a right to pursue the asset in the possession of any person, even in the possession of the new owner, as long as its right to claim subsists.

Another aspect that is relevant in terms of the existence of a right of pursuit in the benefit of the lienor is to know whether the action by which it seeks the return of the good is a petition or possession type of action. This, given that only if the action is a petition, discussing the very existence and realization of the real right, we could speak of a right of pursuit for the lienor.

In our opinion, the action for the recovery of possession of the lienor does not seem to call into question the existence of any real right of it, seeking only the regaining of the material possession of the asset whose exercise is enforceable to third parties, whatever the basis in which it is exercised.

Another argument in favor of the possession nature of this action is related to the active procedural quality recognized by the temporary holder in such an action, which is not the case in the action for the recovery of possession. Therefore from our point of wiew the basis of the action of the lienor is the asset holding as a de facto situation, legally protected against any involuntary dispossession, whether or not it corresponds to a right and, consequently, its action is a possession action.

In connection with this action, we consider that for its dismissal as prescribed, its petition nature must be admitted, since the extinction of the substantive right to action in respect of the exercise of the principal right results in the extinction of the substantive right to an action regarding the secondary right, that is to say the right of lien. A petitionary nature of this action would also mean that the limitation period should begin to run from the moment of the birth of the right of lien which overlaps with the moment when the claim is certain and exigible, from which we can see that the limitation period would flow simultaneously, both for the action for capitalization of the claim and for the action for restitution. Or, it is more normal for the limitation period to run from the date when the lienor was disposed of the asset, as is the case with the possession actions. Besides, the conditioning of its involuntary dispossession reveals the qualities of an *actio reintegranda*.

We also appreciate that once the action of the lienor is dismissed when directed against a bona fide possessor, its possessive nature is demonstrated, since the action for the recovery of movable possession will always be settled in the sense of its admission when the claimant involuntarily loses the possession of the asset.

At the same time, it should be noted that the exercise of this action has the effect of bringing the asset back into the possession of the lienor and not the exercise of the guarantee over it as long as it is in the patrimony of a third party. As a matter of fact, the main prerogative of the lienor does not allow its guarantee to be exercised in any other way including by *corpore alieno* possession of the asset.

On the other hand, from our point of view, the regulation of a special movable privilege for the benefit of the lienor is not such as to lead to the conclusion that the right of lien is a genuine real estate security, as long as the right of preference granted to the lienor is not an effect of this security.

A first argument would be the manner in which the Code defines the privilege as the preference given by law to a creditor in considering its claim, while providing for the claim of the person exercising the right of lien to be privileged. Considering these aspects, we believe that the reason for which the legislator grants a privilege to the lienor is the nature of its claim, which is in close connection with the asset over which it enjoys the privilege. Therefore, what justifies granting the preference is the nature of its claim, and therefore the preference does not derive from the quality of the lienor materialized in the control it exercises over the asset.

The fact that the privilege ceases with the extinction of the right of lien proves that we are in the presence of two distinct benefits that the legislator recognizes to the creditor of a *debitum cum re iunctum*. Therefore, preference is not an attribute of the right of lien, but only its complement in movableassets domain by attaching a privilege that becomes an accessory. Another argument in this respect could be the wording of the law, which states that it is the claim of the party exercising a right of lien. So if the right of preference would find its basis in the exercise of the right of lien, then the legal rule contained in article 2339 paragraph (1) (b) would be useless.

Another consideration concerns the different manner in which the two rights granted to the creditor are enforceable to third parties. In the first case, article 2498 establishes the right of lien against third parties without the fulfillment of any publication formalities and the fact that the lienor cannot stop the forced execution of other creditors. On the other hand, things are different in the case of the special movable privilege, which, as stipulated in article 2342 paragraph (2), in order to give the creditor a preference right against a mortgagee, must be entered in the Archives before the mortgage becomes perfect.

Thus, we believe that since the enforceability of the right of lien is achieved without the fulfillment of any publication formalities, the inscription of the privilege of the lienor in the Archives is made solely to take advantage of the cause of preference with the mortgagee. In addition, if the right of lien itself would be opposed to the mortgagee, the lienor could block the foreclosure of the asset by refusing to surrender it, but, as we have seen, enforceability is reduced to the privilege, and thus to the rank of preference from which the lienor benefits and makes it preferable to all creditors, except to the unpaid vendor.

At the same time, as a third argument that could demonstrate that the preference right the lienor a movable asset is not a prerogative conferred by the right of lien, being the effect of regulating a privilege, we can also invoke the fact that the latter is extinguished with the alienation of the encumbered asset. The provision contained in the wording of article 2340, according to which the special privilege is extinguished by the alienation of the asset, proves that the privilege can be extinguished independently, hence primarily of the right of lien, which is opposable to the particular successor of the debtor.

It should also be borne in mind that when the subject of the right of lien is immovable property, the law does not give any right preference to the lienor, which remains a simple creditor.

In the fourth section we dealt with the question of the opposability of the right of lien to third parties, also from a dual perspective, that of the doctrine and that of the legislator.

We have noticed that, through its content, article 2498 of the new Civil Code, on the one hand establishes the *erga omnes* opposabilty of the right of lien without publication formalities, but, on the other hand, seriously undermines the effectiveness of that security by making it unenforceable to the creditors pursuing the asset.

It is also important to note that, in the light of the legal regulation, the only third parties to whom the right of lien is opposed are the debtors' particular successors and *verus dominus*. Two things have to be said in relation to them: the first is that law texts do not provide grounds for differentiating the opposability of the right of lien by reference to the connectedness which justifies it, and the second is the fact that they cannot be determined to extinguish the secured obligation neither *in personam* nor *propter rem*.

As far as creditors are concerned, the new Civil Code has managed to surprise in this regard, contradicting doctrinal opinions. The surprise is a major one as long as the legal regulation of lien essentially contradicts the doctrine's perception concerning the enforceability of the right of lien as far as other creditors are concerned. Although the Code speaks of absolute opposability of the right of lien, being a grammatical interpretation of the legal norm, the text of paragraph 2 of article 2498 provides, as an exception, that the lienor cannot oppose the forced pursuit commenced by another creditor, but has the right to participate in the distribution of the price under the law.

Although we may say that the right of lien is opposed to the creditors of the same debtor as long as they do not trigger the forced pursuit of the asset, the fact that the lienor cannot prevent the commencement of proceedings over the object of its security, it undoubtedly equals the unenforceability of its right towards the pursuing creditors. This, since it is expected that no creditor which benefits from all the advantages of a real estate security will not remain in passivity, but it will go to forced execution of its claim by capitalizing the asset. Furthermore, in the absence of an express provision regarding creditors towards which the right of the lienor to refuse to surrender the asset is unenforceable, it can be said that it comes to any other creditors of its debtor, whether or not they benefit from a real estate security. This is a hard-to-accept regress that weakens the effectiveness of this legal institution.

Therefore, the lienor is obliged to surrender the detained asset to be capitalized in forced execution proceedings initiated by other creditors, but has the right to participate in the distribution of the price of the asset. Like any other creditor, the lienor is entitled to participate in the distribution of the price in accordance with the legal provisions. The right of the lienor to participate in the distribution of the price obtained from the sale proves that, for the legislator, its creditor quality is a priority and that it refuses to create the lienor a preferential situation which finds its foundation in a state of fact.

The legislator's choice as to the opposability of the right of lien to the debtor's creditors is in contradiction with what has been consistently shown in the literature and judicial practice, which made it a pillar of lien effectiveness. Such a drastic

restriction of opposability is the result of the need to protect other creditors which have enforceable rights of absolute material power that the lienor exercises over the good. Thus, even if it is in the possession of the asset, the lienor is not allowed to prejudice the equal right of other creditors to pursue the good for the fulfillment of their claims, because such a ruling cannot authorize the lienor to breach the principle of equality between creditors.

Regarding the obligations incurred by the lienor with its assimilation with an administrator of the assets of another party, we have found that these are no different from those revealed in literature, resulting from the temporary holder quality of the lienor, determined to ensure the normal exploitation of the asset, including harvesting the fruits, to avoid damage to the owner.

At the end of the chapter we considered it appropriate to refer to the legal nature of the right of lien in the vision of the new Civil Code.

As can be easily observed, the chapter which regulates the right of lien in general is found in Title XI on privileges and tangible securities, which, through a systematic interpretation, would accredit the idea that the legislator sees lien as having the legal nature of a real estate security, which therefore confers its holder the specific prerogatives of the latter. However, the legal regime outlined in the legal provisions is not one that unequivocally pleads the legal nature of a genuine real estate security of the right of lien, being incapable of removing the traditional qualification given to this guarantee mechanism.

The fifth chapter deals with the issues of termination of the right of lien and is structured in two subsections grouping extinguishing manners as they are or not the effect of the extinction of the secured claim. Thus, just like all security rights, extinction of the right of lien occurs either on a primary or an secondary basis. The question of the extinction of the right of lien has also prompted a lot of interest among the doctrinaires, because the manners in which it occurs are heavily influenced by the specificity of this security.

Under the new Civil Code, the legislator made these matters the subject of regulation of article 2499 with the marginal name "Extinction of the right of lien", the content of which does not clearly illustrate the will of the legislator in this matter. In addition to the above-mentioned law text, one of the novelty elements of the legal regulation is to solve the controversy over the effect of prescription on the right of lien.

About the most important way to principally extinguish we can say that it is the result of a *per a contrario* interpretation of the legal provision, according to which the right of lien is not extinguished by involuntary dispossession. Therefore, we note that the legislator consecrates the constant doctrinal rulings in the sense that, given the specific exercising manner, a voluntary dispossession can only have the meaning of a tacit renunciation to the security right. In domestic legal literature[7], it was said that including the triggering of the foreclosure by the lienor would amount to voluntary dispossession, but in the light of the new legal provisions, we cannot agree with that.

[7] See: Stelian Ioan VIDU, *op. cit.*, p.120.

As long as the right of lien cannot be opposed to the pursuing creditors, regardless of their rank, it is more than obvious that the commencement of this procedure, even at the initiative of third parties, anihilates the prerogatives of the lienor and brings forward its quality as a creditor and its rights over the value of the asset. In these circumstances, we believe that the triggering of the foreclosure of the asset by third parties presupposes only the ineffectiveness of the right of lien caused by its unenforceability on the initiator of the procedure and not its extinction. The legal provision according to which the privilege provided by articla 2339 (1) b) extinguishes at the seme time with the right of lien is an argument in this respect. Or, if forced execution would extinguish the right of lien, consequently the privilege would be extinguished, which is inconceivable since this right of preference gives the lienor the right to be satisfied with priority. The same arguments can also be invoked in case the foreclosure is started by the lienor.

If we refer to immovable estate obviously, at the time of the commencement of the property foreclosure procedure, the benefit created by the material possession and the particular way in which it can induce the debtor to execute disappears. Once that advantage has been lost, the lienor has to accept the risk of intervention by mortgagees in the forced execution procedure that it initiates, which will participate in the distribution of the price in the order gived by their rank of preference.

The disappearance of the encumbered asset has traditionally been seen as a cause for the extinction of the right of lien, especially in the native doctrine but also in the French one. This opinion is easy to explain if we consider the wey in wich this security right is exercised, almost indissoluble to the possession of the asset, namely the direct and material contact with the object of the guarantee, on which the very efficiency of this mechanism depends. In other words, once the object of the guarantee is lost, the creditor no longer has any means of obtaining the constraint effect on its debtor, which can be interpreted as equivalent to the extinction of the right of lien. Of course, in order to extinguish the the right to lien, we must be in the presence of a total destruction of the good, otherwise it may be maintained over on the remaining part of the asset.

The hypothesis of fortuitous destruction caused by a phenomenon of force majeure has led to an analysis by the doctrine meant to show to what extent the right of lien can be maintained over a possible insurance indemnity which is due to the debtor and which replaces the asset in its patrimony.

The Romanian legislator considered it appropriate to establish a privilege to accessorize the right of lien in movable matter, thus conferring a preference right to the lienor, which gives it a right over the value of the asset. This circumstance results in an interest regarding the application of the particular subrogation in the case of the disappearance of the detained asset. Even article 2330 of the new Civil Code regulates the transfer of the actual security on the insurance indemnity.

However, we consider that the disappearance of the encumbered asset must still be regarded as a cause of extinction of the right of lien in Romanian law, since the Romanian legislator did not provide for express rules of general applicability authorizing the retention of intangible assets. Thus, even if the Romanian doctrine is

no longer as reluctant to such a possibility, the formulation of legal texts reveals the same attachment to the detention of the asset for which its corporeality is indispensable. However, if we consider that the privilege cannot have a self-standing existence, even if it is a distinct legal figure, we should admit that for its survival it is also necessary to virtually keep the right of lien.

As regards the lienor real estate, the legislator chose to maintain its status as an simple creditor, so that in its case there is no question on falling under the provisions regarding the transfer of the security over the insurance indemnity, so that the extinction of the right of lien with the disappearance of the asset cannot be questioned.

With regard to the extinction of the right of lien with sanction nature following an abusive exercise, we can say that, from our point of view, when the creditor takes advantage of the asset immediately after the maturity of the restitution obligation (when it is contractual) or after the admission of the action for the recovery of possession, this amounts to an unlawful detention which prevents the birth of the right of lien. The argument in this regard is that in its capacity as a temporary holder, using the asset, the creditor has a conduct that is not allowed by law.

Another way of principally extinguishing the right of lien among the few novelty elements brought by the legislator aims to replace it with another sufficient security, the legal provision being of Germanic inspiration. Unfortunately, the expression of the legal text is lapidary, leaving all the details concerning the extinction of the right of lien in this manner to the doctrinal interpretation.

A first issue is the one referring to the type of security that can be given to the creditor lienor to replace the security it benefits from. As the text does not distinguish, limiting itself to pretend the requirement of the sufficient nature, we appreciate that the rule of interpretation where the law does not distinguish, nor we have to distinguish is fully applicable. Therefore, we believe it can be both a real security, or even a personal one, as long as there is no legal impediment to such an offer. In support of this idea, we also mention article 1487 which governs the obligation to provide a security under which the supplier of the security is the one called upon to decide its form or modality.

As we have seen, article 2499 does not nominate the supplier of this new security, but the phrase "the interested party" is used. Although such a wording allows others except for the debtor to fall under this category, we believe that interested third parties can only be those who are bound together with the debtor or a proxy of him. We do not believe that the other creditors could justify any interest in extinguishing the right of lien, as long as its exercise does not prevent them from capitalizing the asset, and applying foreclosure.

Another expression of the legal text which needs to be analyzed refers to the sufficiency of the security offered for the purpose of extinguishing the lien. The adjective 'sufficient' can only be interpreted as meaning that the new security is capable of covering the amount of the obligation whose indirect performance it assures. Given that we are in the private law area, it is natural that the will of the

parties should play a leading role in determining the conditions under which the security is replaced, conditioned by a valid consent.

However, by far the most important aspect requiring clarification concerns the fact that the legislator referred, in the legal provision provided under article 2499 paragraph (1), to a simple offer of setting up another security in the benefit of the creditor lienor. We believe that the right to lien cannot be terminated by the unilateral will of the debtor, without being replaced by another security, such replacement needing the acceptance of the beneficiary, even through the intervention of the court.

With regard to the accessory extinction of the right of lien, we considered the termination of this security right as a consequence of the principle of *accesorium sequitur principalem*, as a result of the extinction of the secured claim by any means provided by the law, even through a payment offer followed by deposit.

Also in this field, the legislator has the merit of having approached the issue of the effects of extinctive prescription on the right of lien as firmly as possible through the provisions of article 2505 of the Code. Through the provisions of this article the legislator chooses not to share any of the opinions of literature but to be firm about the effects of the extinction of the substantive right to action regarding the secured claim over lien.

With regard to the effects of such a prescription for exercising the action regarding the claim on the right of lien, the mentioned article states that the exercise of this right is not precluded by the limitation period in the main action if the latter was not over when the right of lien could have been opposed to the debtor.

Consequently, the legislator's option seemed to be that of leaving this subjective right outside the field of application of the extinctive prescription, as long as the limitation period for the recovery of the claim begins to run when the obligation is certain and exigible, and the right of lien is born at the same time, if the asset is in the power of the lienor.

The consequence of the fact that the limitation period for the recovery of the claim does not begin to run before the creditor can invoke its right of lien is a clear impossibility for that term to expire before the creditor is entitled to invoke the right of lien. The legislator itself does not refer to the *in concreto* invocation of the security but only to the creditor's ability to invoke it, more exact, the existence of this right in its patrimony.

Also thanks to this legal text, the controversy over the interruptive effect of exercising the right of lien on the prescription of the main claim is terminated, because through the grammatical interpretation of the legal norm one can easily observe the will of the legislator in the sense that the material right to proceedings for the recovery of the secured claim is extinguished by prescription, but this does not prevent the exercise of the right of lien. Accordingly, the limitation period of the main action is not altered in any way by the maner in which the right of lien is exercised.

In the last chapter entitled "In Concreto Applications of the Right of Lien", we have focused our attention on the main applications of the right of lien incident in judicial practice, which the legislator largely regulates in particular, precisely for this

reason. The main objective was to capture the reason why the legislator considered it appropriate to adopt special texts, especially those that limit the general application sanctioned in article 2495.

In order to highlight the fundamental role of connectedness, even in the will of the legislator to grant this legal benefit to the creditor, we structure these applications of lien according to the type of connectedness that justifies it. A first section considers the material and mixed connectedness, and the second concerns the more controversial legal connectedness.

From our point of view, the structure and content of this paper succeed in effectively capturing the evolution of the general theory of lien, but also emphasizes its positive regulation.

Likewise, we believe that our objectives have been achieved and that the legal regulation allows the removal of questions that still existed in doctrine, even if it is not sufficient to allow the qualification of this real estate security as a genuine one despite the legislator's intention.

At the same time, the usefulness of such research is obvious, since by being a means of private justice that allows the claim to be made through the mere constraint of the debtor, the right of lien will continue to enjoy the same attention of practice that must be answered by solutions that go beyond the letter of the law.

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