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THE ROMAN LAW OF BANKRUPTCY

By Roland Obenchain

The law of bankruptcy, as we know it today, did not spring, like Athena, full statured and full clad from the aching brain of some modern legal Zeus; but, like most of our legislation, it is the result of centuries upon centuries of growth and development. In attempting its evolution, we are led, as is so often the case in juridical subjects, back through our mother country, England, and through mediaeval Europe to the codification of the illustrious Justinian. But even there we do not find the beginning, and we are led onward through the reigns of the Caesars, to the very dawn of the vigorous Roman Republic. Starting with this early period, we shall follow the Roman Law of Bankruptcy as it slowly evolved during the Republic and early Empire, and, then, we shall examine it as it was finally written down in the "Corpus Juris Civilis".

ANTE-JUSTINIAN LAW

A. Measures Directed Against the Person of the Debtor

Measures against debtors are of two general classes: those directed against the person of the debtor who will not or can not meet his legal obligations; and those directed against his property. We shall discuss these classes in the order of their development in Roman Law, and, therefore, we must turn our attention, in the beginning, to measures directed against the debtor's person. These we shall examine, first, as they existed prior to the Twelve Tables; then, as they were affected by the Twelve Tables, and by the Lex Poetelia Papiria; and, lastly, as they existed during the late Republic and under the earlier emperors.
1. Antecedent to the Twelve Tables.

The cruelty and harshness of the early law of debt, among the Romans, were exceedingly great. The historians tell us that the abuses of that law were, at Rome, the most frequent cause of tumult and sedition. What, then, was this early law of creditor and debtor? To understand it more fully, let us look, for a little while, at the economic and political conditions of Rome during the first half-century of the Republic.¹

Wars were being almost continually carried on by Rome against her neighbors. The Roman citizen-soldier was liable to military service at any moment. While away from his little farm, he could not care for his crops; his fields became wasted; his stores, exhausted. He had to maintain himself in the ranks, supplying his own food, equipment and arms. His taxes had to be paid, and interest on loans had to be met. The end of each campaign found him deeper in debt; but still more loans were required to enable him to get a new start. When all that he had, had to be given as security, the only means left him for obtaining what he needed was the pledging of his own body to his creditors as security for the repayment on a fixed day of the loan.²

The contract by which the debtor so pledged himself was called "nexum". If the day of payment passed with the debt unpaid the creditor had a right to seize the debtor and carry him into "de facto" servitude. The creditor, too often, instead of permitting the "nexus", i.e., the debtor seized by right under "nexum", to work off the debt, flogged, starved, imprisoned him in horrible dungeons, and subjected him to the most degrading indignities.³

At that early day there were many thousands of these prisoners for debt; and the saying was almost justified that every patrician’s dwelling had come to be a private prison-house.⁴ Muirhead in speaking of these unfortunates says: "They were no fraudulent bankrupts⁵ or reckless speculators, those miserable objects, who appeared, from time to time in the market place,
with lacerated shoulders, tattered garments, and famished countenances, to relate the story of their wrongs, but brave citizens who had been reduced to insolvency by a vicious system which required them at a day's notice to leave their fields unsown or unreaped in order to fight the battles of the commonwealth and that (till the year 348 B.C.) at their own cost. Walton says that it was safer for a plebeian to face the enemy in war than his own countrymen in time of peace.

Great discontent and disorder sprang out of these conditions. Livy says that the sight of a wretched "nexus" and his tale of suffering was the immediate incitement to the first secession of the plebeians, 494 B.C. Livy puts that tale of woe in these words: "He told them how he had been obliged to borrow money, because, when he had been away fighting the Sabines, his farm had remained uncropped, his house had been burned, his cattle driven off, everything plundered, and at the same time, unhappily for him, a tribute imposed; how first his ancestral lands had gone, then his other property, and at last, like a wasting disease, it had come to his body; how his creditors instead of putting him to work 'in servitium', had thrown him into a dungeon and a torture-chamber."

As a result of the first secession debts were cancelled and all prisoners for debt were set free, but the law of debt was not changed and we pass now to a more minute investigation of it. Debtors who were liable to imprisonment for debt were either nexal or judgment debtors. A nexal debtor was one who had given his creditor the right, by the formal contract, "nexum", to apprehend him, on his failure to fulfill his obligation of repayment, and, without any process of law, carry him home and detain him and employ his services as a "de facto" slave. The arrest was an entirely private matter to which the debtor had agreed when the "nexum" was contracted. Indeed self help was the usual means of enforcing rights at that time. The "nexum" was a form of the old contract of mancipation, "alienatio per aes et libram" entered into in the presence of five witnesses and discharged by another formality of equal solemnity.

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6 Muirhead 90.
7 Walton 197.
8 Livy ii. 23; Muirhead 90.
With such notoriety it is natural that no judicial investigation was considered necessary.9

The nexal debtor became a “nexus” when the day of payment passed without a discharge and he was taken into custody by his creditor and he remained a “nexus” until the obligation was finally paid when he became a “solutus”. There is much difference of opinion among the authorities as to the loss of liberty on the status of rights of the “nexus”. Some think that the creditor became the universal successor of the debtor and as such took all his property and his household. Hunter says that the debtor’s past and future were swept away by “nexum”.10 Some think that the summary purpose of this personal execution was to punish the debtor by allowing the creditor to attach the personality of the debtor with everything as pertaining to it. The reason for this is that the non-fulfillment of a valid legal obligation was regarded as an offense deserving of punishment.11

Other authorities have a wholly different and much more reasonable notion of the effects of “nexum”. These writers say that the debtor did not actually sell himself as a slave to his creditor, but that the debtor pledged his body as security for the debt. He suffered no loss of status; at any rate he did not become a slave “de jure”. Slaves were never used as soldiers; while, in time of war, the creditors were required to release the “nexi”, from their bondage to serve in the ranks. However, at the close of the fighting the creditors were allowed to reclaim their “nexi”. There is no distinct authority for the statement that a “nexus” could be killed or sold. If a house-father, he retained his “manus” over his wife and his “potestas” over his children. They did not share his quasi-servitude. This is shown by records of sons giving themselves up in respect of money borrowed by a deceased father. Here the heir was fulfilling, as the law compelled him to do, the obligations of his predecessor. Had the son been in servitude with his father there would have been no occasion for their surrender of himself to his father’s creditor after the father’s death. The “nexus” was nowhere given in the enumeration of persons in “mancipio”. He

9 Clark 106; Ortolan 582; Mackelday sec. 518; Hunter 1035; Mulrhead 148.
10 Hunter 1036; Ortolan 582; Caius 3.78; Sohm 286; Colquhoun sec. 1419.
11 Sohm 286.
could contract with his creditor for liberation. His property did not go to his creditor and, even during his confinement in the creditor’s prisonhouse, he might have means of his own. How else could he be expected to pay? This imprisonment and servitude was a method of compelling a man to pay his debts. There was yet no means or procedure for attaching the debtor’s goods in substantial reparation for the loss caused by his breach of contract. “De jure”, then, a “nexus” was a free man but “de facto” detained in captivity, for the purpose of being coerced into meeting his lawful obligations.18

The proceedings under “nexum”, as above described, were purely extra-judicial. In the absence of “nexum” the ancient executory action “actio per manus injectionem” was employed. In this method of execution the creditor was obliged to have recourse to obtain a judgment; then it was necessary for him to bring the judgment debtor before a magistrate who, without discretion, assigned the latter over, “addicere”, to the former. From this procedure, these judgment debtors were called “addicti”.18 Their situation was, in fact, very similar to that of the “nexi”. Ortolan says that, while the “nexi” were slaves in fact and law to their creditors and free men in fact and law to the state, the “addicti” were slaves in fact but not in law to their creditors and to the state.14 “De jure”, an “addictus” retained his status, if he were kept a prisoner in Rome, as did the “nexus”;15 but he was one judicially condemned to be the property of his creditor until his debt was paid. The “addicti”, when imprisoned at Rome, were often subjected by their creditors to the grossest indignities.16

2. The Twelve Tables

The laws of the Twelve Tables, promulgated by the Decemvirs in the year 450 B.C. were, as regards the law of debtor and creditor, largely declaratory of the unwritten common law which preceded them. Table iii states the laws in which we are at present interested. For convenience they are written in full at this place:

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18 Walton 198-201; Muirhead 89, 149, 151, 152.
19 Ortolan 92; Amos 191; Morey 415.
14 Ortolan 583.
15 See this copy. Muirhead 151.
16 Muirhead 152.
Table iii. Execution.

1. In the case of an admitted debt or of awards made by judgment, thirty days shall be allowed for payment.

2. In default of payment, after these thirty days of grace have elapsed, the debtor may be arrested, or proceeded against by the action of manus injectio, and brought before the magistrate.

3. Unless the debtor discharge the debt, or some one come forward in court to guarantee payment, the creditor may take the debtor away with him, and bind him with thongs or with fetters, the weight of which shall not be more, but, if the creditor chooses, may be less, than fifteen pounds.

4. The debtor may, if he chooses, live on his own means. Otherwise the creditor that has him in bonds shall give him a pound of bread a day, or if he chooses, more.

5. In default of settlement of the claim, the debtor may be kept in bonds for sixty days. In the course of this period he shall be brought before the praetor in the comitium on three successive days, and the amount of the debt shall be publicly declared. After the third market day the debtor may be punished with death or sold beyond the Tiber.

6. After the third market day the creditors may cut their several portions of his body; and any one that cuts more or less than his just share shall be held guiltless.\(^\text{17}\)

These laws did change to some extent both the extra-judicial and the judicial procedure of the earlier law. Thirty days grace were allowed to both the nexal, spoken of in rule (1) as the one who has admitted his liability, and the judgment-debtors before the creditor could lay his hand upon them in the institution of the “legis actio per manus injectionem”. No longer could the nexal creditor, even after the expiration of the days of grace, take his debtor extra-judicially into private imprisonment. He was now compelled to bring the debtor before a magistrate and obtain, from that official, authority for the imprisonment. The magistrate had no discretion in the matter but an opportunity was given for the debtor to call the five witnesses who had been present at the formal liberation from the nexal contract. If there

\(^{17}\) Hunter 18.
had been no such release from that bond, or if he could not present the witnesses to prove it, then the formal order of the magistrate gave him at once to the creditor to be held until the debt was in some manner paid. Nothing more in the Tables applied to the "nexi". Muirhead says that there is no distinct authority for the statement that "nexi" could be killed or sold.18

The whole of the laws, in Table iii, applied however to judgment-debtors. The thirty days of grace, the arrest, "manus injectio", by the creditor from the procedure before the magistrate were in no manner different from the procedure against the nexal debtor.

But at this hearing before the magistrate the similarity ceased. Here the judgment creditor obtained authority to hold the debtor provisionally in custody.

The proceedings could be stopped at this point, and the temporary incarceratio avoided in two ways: by instant payment; or by the intervention of a "vindex" who questioned the legality of the judgment on the strength of which this arrest had been made. The "vindex" was not the same as a surety. He challenged the validity of the arrest and cried "hands off" to the creditor. The question of the validity of the original judgment had, then, to be tried separately before a "judex" and if the judgment was found to be valid the "vindex" was compelled to pay the creditor's claim against the debtor and a penalty equal to that claim.19

If these means of avoidance failed him, the judgment debtor was taken, by order of the magistrate, into a sixty-day confinement during which he could live, if he choose, on his own means; but if not, the creditor was obliged to give him, at least, a pound of bread a day. He could be bound with chains not to exceed fifteen pounds in weight. On three market days, at least nine days apart, during this period he was exposed in a public place and the amount of his liability proclaimed. If none of his friends or countrymen took compassion upon him and paid his debt, or if he, having sufficient means, obstinately refused to pay, then, after the third market-day and on the last day of his temporary incarceration, the magistrate gave the formal "addictio", or de-
cree, awarding the debtor to his creditor. If only creditor was interested, he could, according to the words of the Tables, kill the "addictus" or sell him into slavery beyond the borders of Rome; if a plurality of creditors, they could cut the debtor's body into proportionate parts and each take his share.²⁰

The authorities are in great confusion as to the proper interpretation of the severer portions of the laws in Table iii. Some believe that the words are to be taken figuratively and that the "partes secanto" (dividing into parts) means the division of the price received from the sale of the debtor "trans Tiberim".²¹ Muirhead, after an examination of the authorities and of the Latin texts, says, in reference to the punishment with death: "'Capite poenas dabat', therefore cannot have meant death. But it is just as impossible that it cannot have meant slavery". His reasons for this statement are that exists abundant evidence that the "addictus" was still "de jure" free, that he had lost no rights as a citizen or as the head of his family, and that any property, he still had, remained his own. "The only other explanation is that 'he paid the penalty (made amends) with his person' in contradistinction to 'his means'. 'Caput' is used in opposition to 'bona'."²²

The literal interpretation is followed by Gibbons who rests upon the authority of the express statements of the old writers: Quintilian, Caecilius, Favonius, and Tertullian.²³ After a long and thorough consideration of the authorities, Walton comes to the conclusion that the literal interpretation is the proper one. He says: "There is nothing more astonishing in a creditor being allowed to kill his debtor than in a father being allowed to kill his son".²⁴ The same writer thinks that the rights of the creditors, to kill and divide the body of their "addictus", were mere vestiges of a more primitive age than that of the Twelve Tables and that no creditor ever ventured to take "his pound of flesh".²⁵ There is no record of an "addictus" ever being subjected to this

²⁰ Muirhead 195; Mackeldey sec. 518; Gibbons iv. 372; Walton 194, 195; Amos 191; Mackenzie 335; Sohm 51; Leapingwell 175.
²¹ Bynkershoek, Obs. jur. rom. 11; Leapingwell 176.
²² Muirhead 197.
²³ Gibbons iv. 372.
²⁴ Walton 195.
²⁵ Walton 196.
awful death. The ordinary practice, where there was but one creditor was, probably, to let the “addictus” work off the debt in prison; and where there was a plurality of creditors, the “addictus” was probably sold abroad and the price divided.

3. Lex Poetelia Papiria.

“As the manners of Rome were insensibly polished, the criminal code of the Decemvirs was abolished by the humanity of accusers, witnesses, and judges. . . . and the obsolete statutes of blood were artfully, and perhaps truly, ascribed to the spirit, not of partisan, but of regal, authority”. Although public opinion had, in its effective way, practically repealed the most harsh of the provisions of Table iii of the Twelve Tables, yet it was not until over a century had passed that any effective legislation action was taken for the purpose of making more tolerable the law of debtor and creditor. In the year 326 B.C. was passed the Lex Poetelia Papiria which did give some relief to the debtor class. All the provisions of that law are not now known; but three have been fairly well preserved.

These probably were: first, that fetters and neck, arm, and footblocks should, thereafter, be used only on prisoners for crime or delict; second, that no one should ever again be the “nexus” of his creditor in respect of borrowed money; and third, that all existing “nexi qui bonam copiam jurarunt” should be immediately released from bondage. Sohm says that the right to sell or kill a debtor was also abolished by this statute.

Notwithstanding the fact that the Poetelian law did not expressly abolish “nexum”, yet, by depriving it of its advantages in execution, it was robbed of its desirability and soon fell into desuetude. From the passage of this law, no longer did those, who had voluntarily bound themselves in “nexum”, become prisoners for debt; but only those against whom a judgment had been rendered—judgment-debtors. But a nexal debtor could be made a judgment-debtor and as such, on the warrant of a

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26 Gibbons iv. 372; Aulus Gellius xx. 1; Mackelday sec. 519.  
27 Mackelday sec. 519; Hunter 1034.  
28 Walton 196.  
29 Gibbons iv. 372.  
30 Muirhead 153; Amos 191; Walton 198; Oortlan 582.  
31 Sohm 2861; Walton 198.  
32 Muirhead 92; Mackelday sec. 519.  
33 Hunter 1035; Mackenzie 336; Walton 198; Oortlan 193.
magistrate, could be held in detention by his creditor until he had wiped off, with his labor, the sum of his indebtedness.\textsuperscript{34} In fact, the nexal debtor instead of becoming a "nexus" became an "addictus" and "addictus, donec solverit, serviat" \textsuperscript{35} The first-named provision of the Lex Poetelia did not relieve the prisoners for debt of all bonds; only of certain specified ones. The third provision did not release the "nexi" from their debts; but only from confinement. And, in all probability, only the really insolvent "nexi" were released from their incarceration; those who could pay, but stubbornly refused so to do, were surely not set free.\textsuperscript{36}

4. Late Republic and Early Empire.

The poorer plebeians still continued, however, in a condition of indebtedness which was a constant source of discontent and from which sprang the third secession. During the period, from the passage of the Lex Poetelia Papiria to the close of the Republic, many laws were passed for the purpose of alleviating and ameliorating the lot of the debtor class. Some of these increased the nominal value of the currency; others wiped out the debts to the extent of a half or three-fourths. The first measure, which enabled an honest insolvent debtor to avoid imprisonment, was the "Lex Julia", which is discussed under "Cessio Bonorum",\textsuperscript{37} and which was promulgated by either Julius or Augustus Caesar.\textsuperscript{38}

During the early Empire some changes took place in regard to the imprisonment of a judgment-debtor. "Nexum" existed only nominally at the time of Gaius 150 A. D.\textsuperscript{39} "Manus injectio", as a means of private arrest in execution against the person disappeared some time after 41 B. C.,\textsuperscript{40} but execution against the person for debt continued. A judgment-debtor could, on the application of a complaining creditor to a magistrate, be officially assigned to the creditor who might hold him, and, perhaps, require his labor to pay off the indebtedness.\textsuperscript{41} Constantine, A. D.

\textsuperscript{34} Muirhead 92.
\textsuperscript{35} Muirhead 154.
\textsuperscript{36} Muirhead 155; Mackeldey sec. 519.
\textsuperscript{37} See Cessio Bonorum, part two, this article.
\textsuperscript{38} Muirhead 93.
\textsuperscript{39} Gaius 3. 172.
\textsuperscript{40} Muirhead 201; Mackeldey sec. 519.
\textsuperscript{41} Theo. Code 9.11; Mackeldey sec. 519; Sobr 286; Muirhead 201.
320, it seems, abolished incarceration for debt, for such debtors as were not contumacious; but the imprisonment of a judgment-debtor still remained competent.

B. Measures Directed Against the Property of the Debtor.

In the early law of Rome there was, as has before been stated, no machinery or procedure by which the creditor could directly reach the debtor's property. As we have seen, the only available remedy was to attach the debtor's person and coerce him, by imprisonment and harsh treatment, into meeting his lawful obligations. And even after measures directed against the debtor's property became available to creditors, the right to attach his person was not cast aside; but was continued as an alternative remedy, most probably, used only against a solvent judgment-debtor who stubbornly refused to settle his indebtedness. We turn now to an examination of the measures directed at the property of a debtor who could not or would not pay his just debts. These measures are of two kinds: those directed against a part only of the debtor's property; and those directed against the whole of it.

1. Against Parts of the Debtor's Property.

In the execution of judgments, the practice began, at the time of the emperor, Antoninus Pius, of seizing and selling, by authority of a magistrate sufficient portions of the debtor's property to pay the judgment debt. Once introduced this became the regular way of levying execution for debt when the debtor was not suspected of insolvency. But it was not a proceeding in bankruptcy and is, therefore, beyond the scope of this investigation.

2. Against the Whole of the Debtor's Property.

Of the remedies available to creditors, in Ante-Justinian law, against the whole property of a debtor, whether solvent or insolvent, we shall discuss, in turn, the Rutilian Procedure, the "Cession Bonorum" of the "Lex Julia", and the later "Distractio Bonorum".

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42 C. 10. 19. 2. 43 Muirhead 153; D.42.1.34; C. 7. 71. 1. 44 See point two, supra. 45 Roby 435. 46 Buckland 390. 47 Sohm 289; Mackeldy sec. 520; Buckland 394; Hunter 1034; Morey 413; D. 42. 1. 6. 2; D. 42. 1. 31. 48 Hunter 1043; Roby 439; C.7.53.9.
(1) The Rutilian Procedure.

Under the old law, the creditor's only hold on the debtor was on his person. If the debtor could avoid arrest at the hands of his creditors, they were helpless. To supply this deficiency in the law, the Rutilian procedure of possession and sale was introduced as a supplementary process to be used against the debtor who fraudulently concealed himself from his creditors. This procedure, later greatly extended, was first made a matter of general regulation by an edict of Publius Rufus who was Praetor in 105 B. C.\textsuperscript{49} The purpose of this edict was to preserve the hidden debtor's estate and regulate its division among his creditors. There is no reason for doubting but that the Praetor long before 105 B. C. may have interfered in the same direction in regard to each case as it arose.\textsuperscript{50}

The Praetor found a model for this proceeding in the "sectio bonorum" in which the estate sold the whole property of a person, indebted to it or proscribed, to a purchaser, "sector", who acquired a Quiritarian title and became the universal successor of the person sold up.\textsuperscript{51} The Rutilian process was beyond the power of the municipal magistrate and was only exercised by the executive authority of the Praetor or provincial governor.\textsuperscript{52}

The Rutilian procedure is best discussed in its natural divisions; first, the putting the creditors into possession of the debtor's property (missio in possessionem) and, then, the sale of that property (venditio bonorum).

I. Missio in Possessionem.

The "missio in possessionem" was at first, as has been said, granted to petitioning creditors only as against the property of a hiding fraudulent debtor for whom no representative appeared who was prepared to assume his defense. The concealment had to be from the petitioning creditor and needed not to be from all.\textsuperscript{53} Later, however, the putting into possession for the purposes of sale was extended to many other cases: 1. Where a debtor died without heirs or other legal successors or the heir

\textsuperscript{49} Moroy 413; Hunter 1037, 1043; Gaius 3.78; Gaius 4.35; Muirhead 153, 201; Roby 433.

\textsuperscript{50} Muirhead 153.

\textsuperscript{51} Kelke 146; Hunter 1036; Mackeldoy sec. 521; Greene 151; Amos 191.

\textsuperscript{52} Roby 439.

\textsuperscript{53} D.42.4.7.1-8; D.42.4.7.13 ad fin; D.42.5.36.
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did not enter,54 or there was doubt as to a condition being fulfilled by which a slave was to be instituted heir.55 However in this case the taking of possession could be prevented by any one who would give security and as heir defend the actions pending against the deceased's estate.56 If the Praetor considered it inexpedient to permit a pupil to reclaim an inheritance, he could allow possession and sale of the deceased's property and if there was any surplus of assets over debts, the pupil was permitted to take it.57 Any act, that the pupil had done before the Praetor's restraint was put upon him, was valid unless done in bad faith.58

2. Where one in "potestas" (power of another) was not protected by the possessior of it against the debts which the former, as a "homo sui juris" had contracted by conventions or other similar transactions. In this the object of the award of possession and sale was that estate which would have belonged to the debtor if he had remained "sui juris" and his "capitis diminutio" was treated as non-existent.59

3. Where one in "manu" or in "mancipio" was not protected against his debts, even when they were contracted while in the "potestas".60

4. Where the defendant failed to appear on a certain day "in jure", as he had promised and had given security therefor.61

5. Where the defendant was absent without having secreted himself fraudulently and was not represented62 except where he was a pupil or absent "bona fide" on business of state.63 The defendant was considered absent when he could not be found where he was sought, even though he had been captured by bandits; on the contrary, if he had been made captive by enemies in war, immediate possession was not granted but his property was put under the control of a curator for an indefinite period because, perchance, he might return.64

54 Gaius 3.78; D.42.4.5.9.  
55 D.42.5.4.pr.  
56 D.42.5.4.1.  
57 D.42.5.6.pr.  
58 D.42.5.6.3.  
59 Gaius 3.84; Gaius 4.38; Gaius 4.80.  
60 Gaius 4.80.  
61 D.42.4.2; D.2.8.5.1.  
62 D.5.5.1; D.4.6.21; D.50.16.199.  
63 D.42.5.35; D.42.4.6.1.  
64 D.42.4.6.2; D.50.16.199; D.42.5.39.1.
6. Where a corporation was sued and no representative for it appeared.65
7. Where a physical person was sued who was unable to represent himself and no one appeared to represent him.66 In the case of a pupil an abatement would be allowed as a provision for his maintenance.67
8. Where a person was an exile and no representative appeared.68
9. Where a debtor was adjudged such or admitted the claim and did not pay within the time set.69
10. Where one made a voluntary assignment of his entire property under the "lex Julia". See the discussion of "Cessio Bonorum."70

The sending into possession, "missio in possessionem", was in the nature of an arrest or attachment of the debtor's entire estate. It had for its purpose the protection of the estate and was of a temporary and provisional character, giving away eventually to the results of a new arrangement between the debtor and his creditors or to a sale for the satisfaction of their claims.71

To justify a creditor demanding of the Praetor a decree awarding him the "missio in possessionem" the debt must have been absolute and actually due and for which he was entitled to press for a sale.72 When the Praetor granted the requested decree, the petitioning creditor, or creditors, was entitled to possession. This however was only a joint possession,73 the debtor could not be ejected.74 As soon as possession was obtained the creditors had to give public notice of the seizure.75

The creditor, sent into possession, could leave it when he chose; but while in possession he was bound to manage properly, to let or sell the fruits, to let out the services of slaves or beasts and to feed the household. He was not responsible for mere fault but was for fraud.

65 D.3.4.1.2-3.
66 D.42.4.3-6; D.42.4.10-12; D.42.5.5.
67 D.42.5.33.pr; D.42.5.39.pr.
68 D.42.4.13.
69 Gaius 3.78; D.42.2.1.
70 See Sessio Donorum, Part two this article.
71 Roby 452.
72 Roby 452.
73 D.41.2.3.23; D.41.17.3.3.; D.41.2.10.1.
74 D.36.4.5.pr; Bluckland 391.
75 Galus 3.79; Mackeldoy sec. 521.
He could recover his expenses. He could be sued by or could sue the other creditors, or, if the sale was avoided, the debtor himself. The creditor, in possession, had a right to control the property to the exclusion of the debtor. He could grant receipts to the debtors of the estate and could inspect documents but was not permitted to take copies. He was liable to account for all the income that he actually obtained or ought to have obtained; and if he had taken any of the debtor's property for his own use he could be compelled to make restitution.

Other creditors than those who had petitioned were entitled to join in the possession, if they disagreed the Praetor decided the dispute. For the conduct of a suit on their behalf, a curator could be appointed, with the consent of the majority of the creditors, either from among the creditors or not. When there was more than one person placed in control of the debtor's estate, on account of the size or distribution of it, any one of them could be sued.

This temporary attachment continued until the debtor found security to contest the creditors' claims, or until he, or someone for him, settled those claims, or until he and the creditors made some other arrangement.

II. Venditio Bonorum.

At the end of thirty days' possession, provided nothing had been done to end the attachment, if the debtor was alive, or, if dead, at the end of fifteen days, the creditors secured from the Praetor the appointment of one of their number as "magister bonorum vendendorum". With the election of the "magister" the debtor ceased to have any rights in his existing property, or in debts due him. It was the duty of this "magister", liquidator, to take an inventory of the property, to make a list of debts owing, to advertise the proposed sale and to find and make arrangements with a prospective purchaser, "emptor". Ten days, if the debtor was alive, or if dead, five days, were allowed the "magister" in which to arrange the terms of sale with the "emp-

76 Roby 434; D.42.5.8.1-4; D.42.5.9.
77 D.42.5.8.1.
78 D.50.15.66.
79 D.42.5.15.
80 D.42.5.9.6.; D.42.5.14.1.
81 D.42.5.3.4; D.42.5.14.15.pr; D.42.7.2.3; Roby 434.
82 D.42.5.3.3.1.
83 Buckland 392.
The Praetor then, after approval of the terms, would authorize the transfer of the property to the "emptor" at the end of another period of thirty or fifteen days according as the debtor were alive or dead. During this period the transfer could still be prevented by payment by the debtor or by the action of certain privileged persons. By privileged persons are meant, first the largest creditor, then the other creditors and then the relatives of the bankrupt. These, in the order named, were privileged bidders and could take the property at the price offered and thus avoid the sale. The successful bidder was he who offered the highest dividend to the creditors.

The "magister" was merely the agent of the particular creditors who had elected him and in no sense a public officer entrusted, by the Praetor, with the conduct of the bankrupt debtor's affairs. If, after his appointment and before the sale, another creditor obtained a "missio in possessionem", this other creditor, who, of course, had taken no part in electing the "magister", ranked independently side by side with him and had the same rights.

If the transfer was not avoided in the ways above named, it was made at the end of the stated period and the "bonorum emptor" took title by a praetorian universal succession. Buckland says that the emptor's title was purely a praetorian one and not an universal succession at all, for the debtor had not even suffered a "minima capitis deminutio". This bonitary title could only become a full Quiritarian ownership by usucaption. The "bonorum emptor" was entitled to maintain the right to the property of the debtor by "utiles" actions and exceptions and he could employ an interdict called "adpiscendae possessionis". Leage states the emptor's rights of action as follows: "The 'emptor', being regarded as a quasi-heir, could sue for debts, owing to the estate, by a formula based on such fiction ('actio Serviana'), or, if he wished, by the formula 'Rutiliana', where the

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84 Hunter 1038; Greene 151; Buckland 391; Galus 3.79; Gaius 4.102; D.42.5.3; D.42.5.16; D.2.14.60; Roby 436.
85 D.42.5.16; D.2.14.60; Roby 436.
86 Buckland 390; Mackenzie 336.
87 Sohm notes 237.
88 Galus 2.98; Gaius 3.77,80.
89 Buckland 122.
90 Buckland 73; Baius 3.80; Greene 151.
91 Galus 4.38.
92 Galus 4.144-147.
‘intentio’ was in the name of the person whose estate he had purchased, the ‘condemnatio’ in his own; conversely creditors of the estate could sue him by the like fiction, i.e. of heirship.”

The “emptor” was left quite free in framing his “actio”. Gaius says: “By the edict again, a ‘bonorum emptor’ is ordered to make a deduction before bringing his action, so that his opponent shall be condemned to pay only the balance after deducting what the ‘bonorum emptor’ owes him in turn, on account of the insolvent. . . . . . a deduction is put down in the condemnation and there no risk is incurred by him who claims too much, and especially as the ‘bonorum emptor’ when he brings his action, although, he brings it for a determinate sum of money, yet frames his condemnation for an indeterminate sum”.

As regards goods pledged, the “emptor” stood in the same position as the bankrupt and could only claim for the surplus. He was liable to the creditors of the estate for the percentage which he had promised them. They arranged among themselves as to how they would share the proceeds. But only those creditors who had been put in possession could share in the proceeds of the sale; others were excluded.

The debtor had the right to question the validity of the sale in an action for trying out the question as to his solvency or insolvency. By the sale he lost his entire estate. “When the proceedings were over, the debtor was not released; for since ‘bonorum venditio’ was not one of the means of extinguishing obligations, the creditors could subsequently sue him and so attack his after-acquired property” which could be taken and sold for their benefit as long as their claims remained not wholly satisfied. Otherwise the debtor was not liable, after the sale, to any suit, or able to bring any suit, on matters preceding the sale. If the bankrupt was a member of a partnership, the “venditio bonorum” dissolved it “ipso facto”, but the members could, immediately after the sale, agree to continue and a new partnership would be begun.

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55 Leage 412.  
56 Gaius 4.68, 66-68.  
57 C.7.72.6.  
58 Gaius 3.81.  
59 Amos 193.  
60 Sohm 288.  
61 D.42.5.30; D.42.4.7.3; Mackeldey sec. 531.  
62 Leage 412  
63 Buckland 122; D.42.3.7; D.42.3.6.  
64 Roby 436; D.42.7.4; D.42.8.257.  
65 Hunter 523; Institutes 3.25.8; Gaius 3.154.
The most dreaded effect of this enforced sale was that by it the insolvent debtor incurred infamy, which attached to him, from the appointment of the "magister bonorum vendedorum". He was not allowed to defend any suit unless he could find sureties. No distinction was made between the fraudulent debtor and the honest and honorable insolvent; disgrace was accorded equally to each. Just what disabilities the bankrupt suffered are not very definitely known. However, at the close of the Republic, bankrupts were frequently excluded from honors by the censors. It is likely, too, that they were denied some political rights because they were considered as having failed in the performance of their civic duty.

The feelings of Roman citizens on the subject of infamy were best shown by the practice of instituting a slave as heir to a bankrupt estate, "damnosa hereditas", by the will of the testator who believed himself insolvent. A slave could not refuse the inheritance and so he was compelled to incur the infamy resulting from a "venditio bonorum"; and the memory of the testator in this manner, escaped the hated stain which it would have received had there been no heir. A slave so instituted as heir of an insolvent estate, although he became infamous as a bankrupt, yet received good compensation. This came to him as freedom and he was protected by the Praetor from the seizure, by the testator's creditors, of any property which he had acquired after the death of the testator. In other words the creditors could seize and sell only the testator's estate and not that of the instituted heir who had been a slave.

Another view of the Roman aversion for infamy is seen in the frequent refusal of testamentary heirs to accept inheritances which were thought to be insolvent. If the heir hesitated about accepting an inheritance, the creditors could agree with him for an abatement of their claims if he would accept. In this way, the inconveniences of the Rutilian procedure of possession and sale were avoided for the creditors; and infamy, for either the heir or the testator's memory. Naturally such compositions

104 Buckland 392; Mackeldy sec. 521; Gaius 2.154.
105 Gaius 4.102.
106 Leage 413.
107 Greenidge 135; Hunter 1043.
108 Gaius 2.154, 155; Greene 112; Hadley 271; Greenidge 136.
were much favored, and the rule arose that when the majority of the creditors agreed to a settlement of a certain percentage of their claims in consideration of heir's taking the inheritance, the minority had to accept the same percentage. The majority was counted, first, according to the amount of claims, and then, if these were equal, according to the number of creditors, and if still equal, the Praetor decided. Pawn and hypothecary creditors were not affected by the composition.  

The "missio in possessionem" and "venditio bonorum" occurred at the place where the owner ought to have been defended or where he had contracted. However, the place of the contract was considered to be the place where the money was to be paid. Possession and sale could be had even when the debtor had no property of which possession could be taken; and extended to all his property including usufructs. Concubines and natural children were never included in seizure and sale. If statutes had been set up in a public place in honor of him whose estate was being entered upon; they were exempt from the process and thereafter belonged to the municipality, if they were ornamental; if not, they remained the property of the honored insolvent. If possession and sale were obtained by fraud, or by one who was not a creditor, they were null and void.

(2) Cessio Bonorum.

The first measure, which enabled an honest, but unfortunate, debtor to avoid the horrors of imprisonment under personal execution, was the "Lex Julia", enacted either by Julius or Augustus Caesar, but more probably by Julius, in the year 45 B.C. When first promulgated, this law applied only to citizens in Italy; but before the time of Diocletian, it was extended to the provinces and, later, to all classes of persons. This beneficent law gave to Rome and to the modern posterity of Rome the "cessio bonorum", the voluntary assignment or surrender of the

109 D.2.14.7.17-19; D.2.14.8.9.10; D.17.1.58.1; D.40.4.54.1; Mackeldéy sec. 522; Roby 439.
110 D.42.5.1.2.3.
111 D.42.5.5.pr; D.42.5.13.
112 D.42.5.38.pr.
113 D.42.5.29.
114 D.42.4.8.3; D.42.5.12.
115 Muirhead 93; Galus 3.78.
116 Theo. Code 4.20; D.42.3; C.7.71.4.
117 Loveland 2; C.7.71.7.
whole of his property, by an insolvent, for the benefit of his creditors.\textsuperscript{118} Let us examine first the manner of making this assignment, “cessio”; the sale, “venditio”, under it; and then its effects upon the creditors and the bankrupt.

The surrender or assignment could be made in the presence of the Praetor, but that was not necessary.\textsuperscript{119} At first, certain formalities were required\textsuperscript{120}; but, in later times, it was sufficient if the debtor signified, in any manner, his wish to surrender his estate to his creditors; e. g. a letter or message.\textsuperscript{121} The act or surrender had to be accompanied or preceded by a distinct acknowledgment of debt, an admission of the claim in court, or by a judgment against him.\textsuperscript{122} The creditors did not acquire ownership by the cession\textsuperscript{123}; and, at any time before the sale occurred, the debtor could recall his property and defend himself in actions at law or he could prevent the sale by payment of his debts in full.\textsuperscript{124} The debtor was bound to make a complete surrender of his entire estate, excepting only his wearing apparel. He must not have secretly or fraudulently concealed or transferred any of his property, nor have dissipated it by luxurious living or by thoughtless extravagance, nor have contracted debts in view of the cession.\textsuperscript{125} Even if he had no goods at all he could make a cession.\textsuperscript{126}

The relations of the parties were nearly the same as under the “missio in possessionem”,\textsuperscript{127} and the sale of the estate was conducted in the manner already described under “venditio bonorum”.\textsuperscript{128}

The debtor was released from his debts only to the extent of the property ceded.\textsuperscript{129} Three advantages for the debtor sprang from the “cessio bonorum”. As has before been stated, he was exempt from imprisonment.\textsuperscript{130} He escaped infamy,\textsuperscript{131} and his future acquisitions were liable to be sold for the unpaid balance

\textsuperscript{118} Bouvier's Law Diet.; Merrick, Art. 2170.
\textsuperscript{119} D.42.3.9.
\textsuperscript{120} Theo. Code 4.20.
\textsuperscript{121} D.42.3.9; C.7.71.6.
\textsuperscript{122} D.42.3.8; Roby 438.
\textsuperscript{123} C.7.71.4.
\textsuperscript{124} D.42.3.3; D.42.3.5; Roby 438.
\textsuperscript{125} Mather v. Bush, 16 Johns. (N. Y. O. note 244.
\textsuperscript{126} Merrick, notes to Art. 2170; C.7.71.7.
\textsuperscript{127} See page 13; Galus 3.78,79,80,81,82,84; D.42.3.3,5.
\textsuperscript{128} See page 16.
\textsuperscript{129} D.42.3.7; C.7.71.1.
\textsuperscript{130} C.7.71.1.
\textsuperscript{131} C.2.12.11.
due his creditors only to the extent that those acquisitions exceeded what was necessary for his own sustenance. This was called the benefit of competence, “beneficium competentiae”\textsuperscript{135} A small allowance, made to the bankrupt for his maintenance, could not, therefore, be seized by his creditors.\textsuperscript{153} By the “beneficium competentiae” every new “bonorum venditio” was obstructed because of older debts.\textsuperscript{136} The amount necessary to the debtor’s sustenance—his “beneficium competentiae”—was judicially estimated without a fresh sale.\textsuperscript{135} This benefit of competence was highly personal and did not vest in the debtor’s heir nor in his sureties,\textsuperscript{156} who were not discharged from their liabilities by the cession.\textsuperscript{137} He did not have this right against creditors for debts contracted after the cession,\textsuperscript{139} nor against the state for taxes or fines or penalties for public offenses, nor against his own sureties.\textsuperscript{159}

It is in the “cessio bonorum” of the Roman Law that the germ of modern bankruptcy statutes is found.\textsuperscript{140} Indeed, our own law of bankruptcy in principle, goes just one step beyond the law of “cession”. Today a bankrupt is discharged from all his existing debts by the “bona fide” assignment to an assignee in bankruptcy and his future is left him for new and unhampered efforts to rebuild his fallen fortunes.\textsuperscript{141}

We have seen in the “missio in Possessionem” and in the “cessio bonorum” that by the “venditio bonorum” the entire estate of the debtor was sold “en bloc” by the “magister” under direction of the Praetor. This method of disposal by wholesale to an “emptor bonorum”, who took title by a praetorian universal succession, gradually fell into disuse and “venditio bonorum” disappeared with the “judicia ordinaria” about two hundred years before Justinian.\textsuperscript{142}

(3) Distractio Bonorum.

A new procedure had sprung up and had gradually displaced the disappearing “venditio bonorum”. This was the “distractio

\textsuperscript{133} D.42.3.4; D.42.3.6; C.7.72.3; Institutes 4.6.40.  
\textsuperscript{135} D.42.3.5; D.42.3.6; D.42.3.4.1.  
\textsuperscript{136} D.42.3.6.7.  
\textsuperscript{137} D.42.3.6.7; D.42.1.25; D.42.1.24.Pr; D.17.2.63.1.  
\textsuperscript{138} Institutes 4.14.4; D.42.1.25; D.42.1.24.Pr; D.17.2.63.1.  
\textsuperscript{139} Mather v. Bush, 16 Johns. (N. Y.) note 244; 1 Kent 247, 423.  
\textsuperscript{140} 5 Cyc. 239. B.  
\textsuperscript{141} Loveland 1.  
\textsuperscript{142} Greene 181; Greenidge 138.
bonorum" or sale of goods at retail by a "curator" appointed by the Praetor at Rome or by the governor in the provinces with the concurrence of a majority of the creditors. A "Senatus-Consultum" had prescribed this proceeding for a debtors of senatorial rank whenever either a "missio in possessionem" or a "cession bonorum" had been made with respect to their property. In the case of other persons, the creditors could resort, as they pleased, to either the old or the new method. After the abolition of the "judicia ordinaria" the "distractio bonorum" became general.

One who was unwilling could not be appointed "curator" except in a case of great urgency, and then by command of the Emperor; nor ought a creditor to be named. If, on account of the extent of dispersement of the bankrupt's estate, it was necessary, a plurality of curators could be named and in this case each could sue or be sued for all. After the appointment of the "curator" other creditors could appear and share in the proceeds of the estate. It was the duty of the "curator" to take an oath, give security, take possession of, and prudently manage the insolvent's estate, make an inventory, collect debts due the insolvent, annul fraudulent transactions, sell as much of the property at retail as was necessary to pay in full the creditors who had properly presented and proved their claims, and render an account of his administrations. If any residue remained after the complete satisfaction of all the creditors, it was to be returned to the debtor. The "curator" was held responsible for fraud, negligence, and the want of the diligence which he would have used in his own affairs; but he was allowed considerable discretion and wide powers of administration. He could buy and sell in so far as that was necessary for the protection of the estate. His sales were never "en bloc" but always in separate lots and were not required to be made in public. The "curator", however, seems never to have attained the position of a

143 D.42.7.2.pr; D.27.10.5.
144 D.27.10.5.
145 D.27.10.5.
146 Institutes 3.12.pr.
147 D.42.7.2.3.
148 D.42.7.2.4.
149 D.42.7.3; D.42.7.22; D.42.7.2.1.
150 D.42.7.5.
151 Amos 193; Merrick, notes under Art. 2170.
152 Buckland 393.
153 Sohm 287; Mackeldey sec. 525.
public officer charged with the conduct of a state-regulated pro-
cedure in bankruptcy, yet in him we can readily see a near re-
semblance to our own bankruptcy officials.

The “distractio bonorum” did not discharge the debts of the
insolvent. For the unpaid balance he remained liable just as he
did under the “Lex Julia” and if he had made a cession he had
the same benefits. The desirable feature about this procedure
was that, as it did not amount to a disposal of the debtor’s uni-
versal succession, he did not incur infamy either when the pro-
cedings were forced upon him by his creditors as before in
“missio in possessionem”, or when he voluntarily assigned his
estate as in “cessio bonorum”.

“The modern idea of bankruptcy procedure as a compulsory
procedure in execution, directed against the entire estate of the
debtor and operating in favor of the whole body of creditors, has
no place in the ‘venditio bonorum’, but is realized, to some ex-
tent, in the duties assigned to the ‘curator bonorum’. . . . .the
‘curator’, appointed by the Praetor, represented the principle of
the public interest which requires that bankruptcy proceedings
shall be conducted on a uniform plan and that, on the one hand,
all the creditors shall obtain an equitable satisfaction of their
claims, and on the other hand, no unnecessary damage shall be
inflicted on the debtor”.

(4) Alienation in Fraud of Creditors.

Let us turn now to the discussion of alienation in fraud of
creditors as it existed in the Ante-Justinian Roman Law. Any
act or omission of a debtor done for the purpose of defrauding
his creditors was unlawful. The act or omission of a slave,
or of a son in the debtor’s power, was considered as the act of the
debtor. The alienation or transaction had to be such that the
insolvent's estate was diminished; a mere forbearance, whereby
he failed to acquire a possible profit, was not sufficient. Dona-
tions; sales at low prices, or at counterfeit prices for which the
debtor gave an acquittance; discharges of debts due him; re-

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154 Sohm 287.
155 See notes 125-128 supra.
156 Hunter 1033,1043; Amos 193.
157 Sohm 287.
158 Institutes 3.6.6; D.42.8.1.pr.
159 D.42.8.10.10; D.42.8.12.
160 D.42.8.6.pr,1-5; D.50.101281pr; D.50.171134; C.7.75.2.3; D.42.8.3.2; D.42.
8.5.
161 D.42.8.17; D.42.8.7; D.42.8.2; D.42.8.1.3.
leases of pawns or mortgages which he held for security of debts due him;\textsuperscript{162} could be revoked and restitution demanded. Likewise, it was unlawful for the insolvent to extinguish a debt due himself by furnishing his debtor with false exceptions or by referring to the oath of his debtor a debt which he had evidence to prove;\textsuperscript{163} nor could he lawfully drop an action which he had commenced, or let a debt run beyond the statutory period of limitation.\textsuperscript{164} Neither could he permit a non-suit to be taken against himself by collusion; nor could he allow an adverse judgment to be rendered when he had good defenses;\textsuperscript{165} nor oblige himself for things he did not owe.\textsuperscript{166} Any contract, made after he had heard the creditors' intention to go into possession, was liable to be rescinded.\textsuperscript{167}

A refusal to accept an inheritance, the repudiation of a legacy, the failure to perform a condition or to make a contract, and the emancipation of the debtor were not considered diminutions of his estate and only the "fiscus" could attack them.\textsuperscript{168}

If one creditor was more vigilant than the others and obtained satisfaction of his claims by overtaking the appointed day, or if he secured a pledge for an old debt before the taking of possession, the transaction was good and valid as against all except the "fiscus"; but if after possession had been taken, the transaction could be annulled by the other creditors.\textsuperscript{169} However, if the creditor, collusively, had accepted payment before the debt was due, he was liable to restore interest on the sum from the time he received it until the time it was really due; and if he had received payment while a condition remained unfulfilled he was liable to return the whole sum.\textsuperscript{170}

If the solvent, for the purpose of hurting his creditors, divorced his wife and returned to her the "dos" before the day named, the creditors could recover interest from the day of return to the proper day.\textsuperscript{171}

"Dos" given in fraud of creditors, could not be recovered if

\textsuperscript{162} D.42.8.2; D.42.8.18.  
\textsuperscript{163} D.42.8.3.pr; D.12.2.9.5.  
\textsuperscript{164} D.42.8.3.1.  
\textsuperscript{165} D.42.8.3.pr.  
\textsuperscript{166} D.42.8.3.pr.  
\textsuperscript{167} D.42.8.4.  
\textsuperscript{168} D.42.8.5.25.  
\textsuperscript{169} D.42.8.6.1-4.  
\textsuperscript{170} D.42.8.10.8; D.42.8.10.16. D.42.8.13. D.42.8.6.6.7. D.42.8.24; D.15.1.21.2; D.49.14.18.10; D.49.16.21. D.42.8.10.13; D.42.5.6.2; D.15.1.15; D.42.8.22.  
\textsuperscript{171} D.42.8.10.12.
the marriage had taken place and the husband was innocent of
the fraud;\textsuperscript{172} but, if he, too, had been involved in the scheme,
restitution had to be made.\textsuperscript{174}

The transaction must have been made with the fraudulent
intention of injuring creditors and must have actually injured
them.\textsuperscript{175} This fraudulent intent was generally presumed when
the debtor knew of his insolvency and nevertheless, knowingly
and purposely acted to injure the creditors. If a testator gave
liberty to a slave and made legacies in good faith and his estate
proved to be insolvent, the slave could keep his liberty but the
legacies could not be paid.\textsuperscript{176}

Only the creditors injured, or the "curator" for them, could
sue for the recission of the transaction or alienation; and for the
restitution of the property or damage thereof; those who became
creditors after the alienation could not complain. If the debtor
desired to defraud only one of the creditors nevertheless all
could bring the suit;\textsuperscript{177} or if only one had not yet been paid in
full, he could sue alone.\textsuperscript{178}

If the alienation was made for a valuable consideration to
one innocent of the fraudulent intent of the insolvent, it could
not be rescinded even though the creditors were injured.\textsuperscript{179} The
mere fact that the alienee knew that the insolvent had creditors
was not sufficient to render him liable; he must have known the
design to defraud.\textsuperscript{180}

An alienee, or donee, who took in bad faith, was liable to
make restitution of the entire property with all its fruits, whether
he had reaped them or not, and to restore it to its original con-
dition. If he could not do this, he had to pay full value and in-
terest less his expenses\textsuperscript{181} even though he had ceased to possess
the property\textsuperscript{182} and had paid a valuable consideration therefor.\textsuperscript{183}
He could not recover the reconsideration unless the money which
he had paid was still in the hands of the debtor.\textsuperscript{184} Even if he
were not in equal fault and had taken by a contract entered into before witnesses, he had to restore. 185

If the alienation had been made without valuable consideration to one, who took in good faith, it could be revoked and the defendant was obliged to restore the property, if he still possessed it, with such fruits as he had collected: but if he had ceased to possess it he was liable to the extent of his enrichment. 186

When the aliee's right depended on a condition, the restitution could be demanded when the condition was fulfilled, or before that occurred if a certain day had been named. 187

A "pater familias", even though ignorant or the facts, was liable to restore what had knowingly been brought to his home by his slave, or by one in his power, from an insolvent debtor. 188 Likewise legacies, paid by a necessary heir, when the estate was insolvent, were recoverable even though the legacees were innocent of any fraud or bad faith. 189

When a female slave had been alienated in fraud of creditors and she afterwards conceived and bore a child, she alone could be regained; but if she had conceived before the alienation, the child, too, could be restituted. 190

Against a third party possessor by a second alienation, a suit for restoration could not be brought when the new aliee had taken in good faith. 191 In this case however the "fiscus" could sue regardless of whether the alienation was or was not for a valuable consideration. 192

Any who knowingly had assisted in carrying out the fraud, although they had reaped no profit, were liable for the wrong done. 193 If a tutor or guardian had participated in the fraudulent scheme with the funds of his ward or charge, the tutor or guardian, was personally liable for the loss caused by his fraud; 194 and the ward or charge was liable to the extent of the enhancement of his estate. 195 The debtor himself could be sued as a

185 D.42.8.10.3.
186 D.42.8.6.11. C.7.75.5. D.42.8.17.1.
187 D.42.8.10.23.
188 D.42.8.6.12.
189 D.42.8.6.13.
190 D.42.8.25.5.
191 D.42.8.9.
193 D.42.8.14.
194 D.42.8.10.5. D.42.8.10.11.
195 D.4.3.1.1. D.42.8.6.10.
means of penalizing him for his wrong.\footnote{196}

The action available to set aside these transactions in fraud of creditors were the "Actio Pauliana", the "Actio Pauliana in factum", and the "Interdictum Fraudatorium". The first named action was the one used in most of the cases which have before been described; the second was instituted for the purpose of restoring obligations from which the bankrupt had fraudulently discharged his debtors.\footnote{197} Both these actions lay absolutely for one year from the date of the fraudulent assignment;\footnote{198} and after that, only to the extent of the defendant's enrichment, for thirty years.\footnote{199}

Not much is known about the "Interdictum Fraudatorium" and it is only casually mentioned in the "Corpus Juris".\footnote{200} Mackeldey says of it: "At the time of the procedure by interdicts, instead of the Pauliana action, one could also employ a restituting interdict which was termed 'fraudatorium'. But perhaps at that time the Pauliana action may have been generally preferred, and in the Justinian law the learning of the 'Interdictum Fraudatorium' had no longer practical value."

(5) Competition of Creditors.

The next subject deserving of our attention is that of the competition of creditors. Pledge and mortgage creditors always had precedence of all others to the amount of their security obtained before the period of bankruptcy as fixed by the Praetor's decree.\footnote{202} If their security was not sufficient to satisfy their claims, then they were permitted to compete with the other creditors for the unsatisfied balance; but otherwise the sale of the insolvent's estate, resulting from the "missio in posses-

\sloppy_footnotes\footnote{196}{D.42.8.25.7, D.42.8.1.} \footnote{197}{D.42.8.14, O.42.8.17, pr., D.42.8.10.22.} \footnote{198}{D.42.8.13.24.} \footnote{199}{D.36.1.67, D.46.3.96, D.46.8.5.} \footnote{200}{Mackeldey sec. 528.} \footnote{201}{Mackenzie 336; Amos 174; C.8.18.9, C.7.72.6, D.42.8.13; C.7.72.5.}
The privileged creditors were divided into different ranks and were allowed to participate accordingly.

The following is a list of the privileged debts in the order in which they were preferred at the time of the Antonines:

1. Claims for the funeral expenses of the debtor, if deceased or of another whom it was the duty of the debtor to bury.  
2. Debts due the "fiscus" for which it had no "hypothesca"; excepting, however, money penalties which did not rest upon a convention.
3. Debts due the cities.
4. Loans for the building, purchase, or fitting out of a ship.
5. The claims of a wife, actual or putative, or of a betrothed, for her "dos" except where she had a "curator" and had not given birth to a child.
6. Debts due from one, who had acted for a tutorless minor, to that minor and from a "curator" to a judicially declared spendthrift, or to a sick or infirm person, for which these persons had no statutory lien.
7. Loans for the repair of a building.
8. Claims for contribution on account of the improvement of a building which belonged to the debtor and to the claim and in common.
9. A sum of money deposited, without interest, with a banker had to be returned to the depositor before any claims of the other creditors were paid, provided that the identical money itself was found; if the actual money deposited could not be found, the depositor stood behind all the other preferred creditors.
10. Any one who had advanced money to pay a privileged creditor was subrogated to his rights and privileged.

References:
- D.20.4.5. D.42.5.32. Mackelday sec. 523.
- D.17.2.52.10.
- D.16.3.7.2. D.42.5.24.2.
- D.42.5.24.3. D.42.5.24.2.
Roby says that (1) and (2) shared equally, regardless of the age of the debts;\(^{217}\) while Mackeldey and Amos place (1) above (2) in rank.\(^{218}\) All these writers agree that (1) and (2) were preferred above all others. Among (3), (4), (5), (6), (7), and (8) there was no preference and they shared "pro rata" without regard to dates.\(^{219}\) After all the preferred creditors had been paid in full, if any of the bankrupt's estate was left, this residue was divided pro rata among the simple or non-privileged creditors. And here too, no regard was paid to the age of the claims.\(^{220}\)

If an inheritance passing, on the death of the debtor, to his debtor heir, was insufficient, when added to the heir's estate, to pay the creditors of both decedent and heir, the creditors of the decedent could, if they thought it necessary for their protection, obtain a separation of the estates. The creditors of an heir, however, were denied this right of separation, and they could not prevent the heir from accepting an insolvent inheritance, even though their claims suffered greatly thereby. This separation of estates could not be obtained by the deceased's creditors if sought more then five years after the heir's acceptance; nor could it be obtained if the two estates had become inextricably confused; nor if the petitioning creditors had accepted the heir as their debtor by novation or by taking interest or pledges from him. Having obtained the separation, the decedent's creditors could not revoke it; they were bound to be satisfied out of his estate and could not then be allowed to claim anything from the heir. On the other hand, if any of the decedent's estate was left after the complete satisfaction of his debts and after the payment of his legacies, the heir's creditors could not claim that residue.\(^{221}\)

### JUSTINIAN'S LEGISLATURE

Few changes were made by Justinian in the law of Bankruptcy. The passages in the "Corpus Juris", dealing with that subject are largely declaratory of the Ante-Justinian law. We shall but briefly notice the likenesses between this and Justin-

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\(^{217}\) Roby 437.  
\(^{218}\) Mackeldey sec. 526; Amos 174.  
\(^{219}\) Roby 437; D.42.5.32.  
\(^{220}\) Mackeldey sec. 526; D.42.5.32.  
\(^{221}\) Roby 437, 438; D.42.6.1. 1,2,10,12,15,17; D.42.6.5; D.42.6.6.pr; C.7.72.2.
ian's legislation; while with the changes introduced by the latter we shall deal more at length.

"The imprisonment of a judgment-debtor was still competent under the legislation of Justinian", but the confinement was in the public prison and not in the creditor's dwelling.

The summary seizure and sale of a debtor's property, by an officer of court, was the ordinary method of execution of judgments when the debtor was solvent; and was not a proceeding in bankruptcy.

The methods of dealing with the whole estate of an insolvent's debtor for the benefit of his creditors were two: "Distractio Bonorum" and "Beneficium Quinquennalium".

The "distraction bonorum" of the "Corpus Juris" is a slightly modified form of the "distractio bonorum" as it existed in the Ante-Justinian Roman law. The creditors' grasp was still on the whole of the insolvent's estate as it was before under the "missio in possessionem" or "cessio bonorum." The "missio in possessionem" was used in the same cases as before and could be affected by one or more creditors. Other creditors residing in the same were permitted to join in the possession within two years; while those living in other provinces were allowed to enter at any time within four years with the same effect as if they had been placed in possession contemporaneously.

A "curator", appointed by a magistrate, managed and controlled the debtor's property during the possession and, as before, he conducted the sale after the expiration of the legal period of possession which probably was four years. His rights and duties were not otherwise changed. However, a legal record of the sale had to be made and the "curator" had to swear that he sold as advantageously as it was possible for him to do. The proceeds were distributed under the direction of the magistrate among those creditors whose claims had been recognized either

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222 See "Measures Directed Against Property of Debtor", supra.
223 See "Against Parts of Debtor's Property", etc., supra.
224 See "Distractio Bonorum", supra.
225 See "Missio in Possessionem", supra.
226 See "Cessio Bonorum", et seq., supra.
227 See notes 81 to 85, supra.
228 C.7.72.10.1.
229 C.7.72.10.1.2; C.7.72.9.
230 C.7.72.10.2.
231 See "Distractio Bonorum", supra.
232 C.7.72.10.2.
233 C.7.72.10.2.
by judgment or by admission of the debtor and had been properly proved. Any excess, of the proceeds above the proven claims of the creditors in possession, was deposited for those creditors who might yet claim.235

When “missio in possessionem” was used against the property of a deceased debtor, the rule, of compulsory abatement of the claims of a minority of the creditors to the percentage agreed upon by the majority and the hesitating heir235 still obtained regardless of the benefit of inventory inserted in the “Corpus Juris” by Justinian.235

And a slave, instituted heir by his master, while compelled to go into bankruptcy with the deceased testator’s estate, still retained the benefits of freedom and of the protection of the property which he acquired after the death of the testator.237

By a voluntary assignment of his property, “cessio bonorum”, for the benefit of his creditors, an insolvent still had the benefits conferred by the “Lex Julia”;238 freedom from personal execution; and the benefit of competence, “beneficium competentiae”.239 Justinian provided that, in making the assignment, the insolvent must hand in an inventory of his property and swear that he had withheld nothing but his wearing apparel.239

Infamy for involuntary bankrupts had disappeared with the sale of the debtor’s universal succession, “venditio bonorum”,241 two hundred years before Justinian; and nowhere in the “Corpus Juris”, is it attached to the bankrupt.242

The insolvent’s debts were discharged by bankruptcy proceedings, only to the extent that they were paid by the possession and sale; his future acquisitions were still liable for the unpaid balance except for the “beneficium competentiae” allowed to voluntary assignors under “cessio bonorum”.243

Creditors competed in the manner described,244 except that an actual wife, who was not a heretic, had a statutory lien, which

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235 C.7.72.10.2.
235 See notes 108 to 114 supra.
237 Mackelday sec. 522 (Institutes 2.19.6.)
237 Institutes 2.19.1.
238 See “Sessio Bonorum” paragraph 4et seqq, supra.
239 See “Sessio Bonorum” supra.
240 Leage 414; Colquhoun sec. 1419.
241 See “Distreetio Bonorum”, supra.
242 Greebigge 128.
243 D.42.8.14. D.42.8.17.pr. D.42.8,10,22.
placed her in the class of pawn or mortgage creditors\textsuperscript{246} for her "dos" \textsuperscript{246}

The "Actio Pauliana" was the remedial action for the recision of conveyance in fraud of creditors,\textsuperscript{247} the "Interdictum Fraudatorium"\textsuperscript{248} had long before fallen into disuse.\textsuperscript{249}

The Code of Justinian provided the "Beneficium Quinquennalium", a procedure more beneficial to the debtor in cases in which it could be used. If a debtor, in hard straits believed he could, if given more time, meet all his obligations he was permitted to make special application to the emperor. By the granting of this petition his creditors, including hypothecary creditors, were required to decide by vote, taken under the supervision of a magistrate, whether or not they would proceed at once to a surrender and sale of his property. If they decided to proceed at once to the sale then they had to be satisfied with the proceeds thereof. If they decided contrarily, then the debtor was given a period, not to exceed five years, during which his person and estate would be protected and after which he might be expected to pay their claims in full. The voting on the above question was first by the amount of debts; if these were equal, then, the magistrate was required to vote for the granting of the "beneficium quinquennalium".\textsuperscript{250}

\textsuperscript{245} D.24.3.22.13. D.42.5.17.1. C.7.74.
\textsuperscript{246} Nov. 109.1.
\textsuperscript{247} See "Competition of Creditors", supra.
\textsuperscript{248} Infra.
\textsuperscript{249} Mackeldy sec. 528.
\textsuperscript{250} Hunter 1040; Amos 194; C.7.71.8; C.1.19.2,3,4.