

## PART II: HISTORICAL SURVEY

### Chapter 2: Roman Law

#### 2.1 Introduction

In this chapter the development of legal redress in the Roman Law of civil procedure is considered, bearing in mind that South Africa's modern insolvency laws have their roots in Roman Law.<sup>1</sup> The objective is to investigate the manner in which assets of debtors in Roman Law may have been affected by the relevant legal process that was followed when enforcing individual rights and how the property of debtors was dealt with in such process. This leads to the further question whether these Roman Law roots of the modern system of insolvency law were sufficiently developed to distinguish between different types of property that may have been the subject of a disputed right and whether the concept of excluded or exempt property was known in respect of debts owed by one person to another.

The earliest documented evidence of Roman civilisation and Roman law appears to date from approximately 450 BC.<sup>2</sup> The development of Roman law then occurred over hundreds of years that were categorised as different periods, namely the period of the Kings (753 – 509 BC), the Republican period (509 – 27 BC), the Principate (27 BC – AD 284), the Dominate (AD 284 – 527) and the period of Justinian (AD 527 – 565). The second century AD and the first half of the third century were considered the classical period in the development of Roman law, while the post-classical period stretched from this period until Justinian's rule in 527.<sup>3</sup>

Initially, the procedure by which rights or obligations were enforced was of primary importance and this led to difficulties in the classification of ancient bodies of law.<sup>4</sup> In this

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<sup>1</sup>Wenger L *Institutes of the Roman law of civil procedure* (translated OH Fisk 1955) (1940) at 8 (hereafter Wenger *Institutes*); Countryman V "Bankruptcy and the individual debtor – a modest proposal to return to the seventeenth century" (1983) *Catholic University Law Review* at 809; Dalhuisen JH *Dalhuisen on international insolvency and bankruptcy* vol 1 (1986) at 1-1 (hereafter Dalhuisen *International insolvency*). In this chapter the following abbreviations will be used in various parts of the text: C is the Code of Justinian, D is Digest or Pandects and J is for Institutes of Justinian.

<sup>2</sup>Van Zyl DH *Geskiedenis en beginsels van die Romeinse privaatreë* (1977) at 1 (hereafter Van Zyl DH *Geskiedenis en beginsels*).

<sup>3</sup>Van Zyl DH *Geskiedenis en beginsels* at 2-7.

<sup>4</sup>Hunter *Introduction to Roman law* (1885) at 122 (hereafter Hunter).

respect, Hunter refers to one of the oldest bodies of Hindu law as set out by Narada,<sup>5</sup> who assumed that men do quarrel, and he explains how their quarrels were adjudicated upon and settled without bloodshed or violence. Hunter states that Narada's emphasis is not on a law or a right or a sanction or between persons and things, but a court of justice. The important point is that there was no alternative to private reprisals. Narada commences by describing the court and its procedure. He then proceeds to describe law by the subject matter of the quarrel, according to the relations between human beings. He considers debt, among other things, as a matter about which men did quarrel, but the rights and liabilities (as they are now called) to which debt gave rise were regarded simply as guides for determining the court's judgment.<sup>6</sup> Roman jurists later attempted a logical classification of the law, with Gaius and Justinian identifying three branches of the law, namely persons, things and actions.<sup>7</sup> The interesting feature at this point is that actions, which closely correspond with the law of procedure come last, while in the Twelve Tables, as in Narada, they stood first.<sup>8</sup> Thus by the time of the classical jurists substantive law had taken precedence over adjective law. Gaius already recognised that procedure was only a means to an end, so that the primary object to consider in a legal treatise was the vindication of rights and the enforcement of duties, and not the form of action.<sup>9</sup> But Hunter says that although Gaius's arrangement is an arrangement of rights and duties, it was open to objections, which Gaius could not have avoided because although right and duty formed the crux of the classification, this fact was "too much obscured to be readily appreciated even by the jurists themselves".<sup>10</sup> Hunter says that from one point of view the explanation for this may lie in the defects of their technical language, because they knew the idea of *obligatio* as an equivalent of legal duty, but they were not familiar with the corresponding idea of legal right. Initially, the legal remedy is thus the only conception of importance.<sup>11</sup> At first the word *jus* was the nearest equivalent to the conception of a right, but this was confined to an insignificant class of rights of property and did not refer to ownership.<sup>12</sup>

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<sup>5</sup>Narada, translated by Dr Jolly, at 6 as cited by Hunter at 122 note 1.

<sup>6</sup>Hunter at 123.

<sup>7</sup>Hunter at 123.

<sup>8</sup>Hunter at 124.

<sup>9</sup>Hunter at 124.

<sup>10</sup>Hunter at 124.

<sup>11</sup>Hunter 125.

<sup>12</sup>Hunter 125.

It would therefore appear that this difficulty in classifying the law had a very real effect on the idea of insolvency law, and more specifically, the concept of an insolvent estate and assets belonging to, or excluded from, that estate. At first it was all about the procedure that was followed in dealing with the debtor, with the emphasis on the person of the debtor that would be punished.

## 2.2 Legal redress in the Roman law of civil procedure

### 2.2.1 The emergence of insolvency laws

The judicial procedures used by Romans to enforce their rights has a long history. In respect of the primary assertion of rights three stages of legal redress developed, namely, the procedure *legis actiones*, the *formula* procedure and the *cognitio* procedure.<sup>13</sup> These procedures will be discussed in more detail below.<sup>14</sup>

Initially, in a tribal community with little economic activity, there was no need for insolvency laws other than incidental sanctions against the person of the debtor who defaulted. Where the right of one party may have been infringed by another, redress was obtained by measures of self-help.<sup>15</sup> However, it became obvious that this “might is right” attitude would result in grave injustice.<sup>16</sup> As groups of people came to recognise various rights generally they also realised the efficacy of referring their disputes to a special arbiter, which role was later, as the idea of the state developed, performed by some chieftain, lord, king or ruler, and eventually by a special magistrate.<sup>17</sup> The emergence of insolvency laws, that developed alongside the gradual development of a more advanced economy,<sup>18</sup> was achieved in Rome shortly before the period of the Emperor Augustus (63 BC – AD 14).<sup>19</sup>

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<sup>13</sup>Jolowicz HF and Nicholas B *Historical introduction to the study of Roman law* (1972) at 175 (hereafter Jolowicz and Nicholas); Thomas JAC *Textbook of Roman* (1976) at 71 (hereafter Thomas *Textbook*); Van Zyl DH *History and principles of Roman private law* (1983) at 368 (hereafter Van Zyl *History and principles*).

<sup>14</sup>See para 2.3 and further below.

<sup>15</sup>Burdick WL *The principles of Roman law and their relation to modern law* (1938) at 626 (hereafter Burdick *Principles*).

<sup>16</sup>Van Warmelo P *An introduction to the principles of Roman civil law* (1976) at 271 (hereafter Van Warmelo *Introduction*).

<sup>17</sup>Burdick *Principles* at 626.

<sup>18</sup>Burdick *Principles* at 626; Van Warmelo P *Die oorsprong en betekenis van die Romeinse reg* (1978) at 229 (hereafter Van Warmelo *Oorsprong*).

<sup>19</sup>Kaser M *Roman private law* (1965) translated by R Dannenbring at 330 (hereafter Kaser *Roman private law*); Dalhuisen *International insolvency* at 1 - 2.

The more advanced economic activities and contractual arrangements which had developed by then required more advanced insolvency rules.

Proceedings consequently developed towards the idea of the creditor's satisfaction of his rights out of a debtor's estate under a uniform set of laws. Private remedies against the person of the debtor were abolished.<sup>20</sup> Although imprisonment for debt continued to exist, actual insolvency proceedings increasingly prevailed.<sup>21</sup> The first procedure that provided recourse to a debtor's estate was *venditio bonorum*. This procedure applied to both solvent and insolvent debtors whereby all the debtor's assets were sold to one buyer as there was no auction. That buyer became the legal successor of the debtor who would pay the creditors a percentage of the debts as part of a speculation.<sup>22</sup> Because of the cumbersome nature of the *venditio bonorum*, a less severe procedure, the *cessio bonorum*, developed. This was the assignment for the benefit of creditors, but was available in only limited circumstances. By post-classical times *venditio bonorum* was replaced with individual remedies (*pignus in causa iudicati captum*) for solvent debtors and for insolvent debtors, by *missio in bona* followed by the *distractio in bonorum*, which was a liquidation procedure.<sup>23</sup> This procedure could be initiated only by a plurality of creditors.

## 2.3 Procedures of execution

### 2.3.1 General

For the purpose of this thesis, relating as it does specifically to certain assets of the insolvent estate as it is known today, this investigation of the Roman law system lies primarily in the objects of execution that were of interest to the Roman creditor, namely the person and the property of the debtor. It is appropriate to consider the distinction that was made between the person of the debtor and the property of the debtor as objects of execution and the extent to which the development in Roman law influenced modern-day insolvency law.

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<sup>20</sup>Dalhuisen *International insolvency* 1-2.

<sup>21</sup>Dalhuisen *International insolvency* 1-2.

<sup>22</sup>Dalhuisen *International insolvency* 1-2.

<sup>23</sup>Dalhuisen *International insolvency* 1-2.

In discussing the material right to execution, namely the person and property (the objects) that a creditor could seize to satisfy his claim, the different formal proceedings in execution that developed in Roman Law must also be described. In other words, the formalities regarding the manner in which the debtor was compelled with state and private force to satisfy the creditor must also be considered when looking at the objects of execution in Roman law.

### **2.3.2 Proceedings in execution**

The Roman law of procedure is generally distinguished by three stages of development, namely the period of the *legis actiones* procedure, the period of the *formula* procedure and the *cognitio* procedure.<sup>24</sup> These three proceedings will now be discussed.

#### **2.3.2.1 Legis actiones**

The *legis actiones* is considered the earliest form of Roman legal procedure that evolved at least during the period of the kings.<sup>25</sup> Roman law scholars differ in opinion regarding the details of these procedures. This is because of the paucity of definite information on the subject. However, these procedures preceded the Twelve Tables and what is known of them comes from fragments of the Twelve Tables and from an incomplete account of them given by Gaius.<sup>26</sup>

These proceedings were characterised by the enunciation of prescribed formal words and formal ritual acts.<sup>27</sup> Gaius listed five *legis actiones*,<sup>28</sup> of which three were applied for the solution of a dispute (litigation), and only the *legis actio per manus iniectioem* and the *legis actio per pignoris capionem* were used for the

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<sup>24</sup>Van Zyl *History and principles* at 364; Bauer *The Bankrupt's estate: A study of individual and collective rights of creditors under Roman and early English bankruptcy laws* (Master's Thesis (1980) Southern Methodist University School of Law) at 3 (hereafter *Bauer Thesis*).

<sup>25</sup> Van Warmelo *Introduction* at 272.

<sup>26</sup>See generally De Zulueta F *The institutes of Gaius Part II Commentary* (1953) at 244 - 245 (hereafter De Zulueta).

<sup>27</sup>Van Warmelo *Introduction* at 272.

<sup>28</sup>These were *legis actiones sacramentum, iudicis arbitrive postulatio, condictio, manus iniectio* and *pignoris capio* – see Thomas *Textbook* at 73.

execution of judgments.<sup>29</sup> Consequently, only these two *legis actiones* will be considered as methods by which a creditor's claim, which at this stage would already have been shown to exist, could be satisfied.

### **2.3.2.1.1 *Legis actio per manus iniectioem***

This may have been the oldest form of redress, being the seizure of a person against whom one had a claim.<sup>30</sup> Gaius identified three forms of *manus iniectio*, namely *manus iniectio iudicati*, *manus iniectio pro iudicati* and *manus iniectio pura*.<sup>31</sup>

#### *(i) Manus iniectio iudicati*

This form of execution was characterised by the fact that it was directed not at the estate of the debtor, but at his person. *Manus iniectio* could be utilised 30 days after the debtor had been condemned or admitted the right of his creditor, or, if without judgment, his liability was incontestable.<sup>32</sup> The debtor was brought before the *praetor* and the creditor would put his hand on the debtor and utter specific words.<sup>33</sup> The debtor could not defend himself. He could only free himself from the creditor through the intervention of a third person, a *vindex*, who would dispute the creditor's right of seizure.<sup>34</sup> The *vindex* took the debtor's place and his intervention resulted in the release of the debtor.<sup>35</sup> But if he was unsuccessful, he was liable for double the original amount.<sup>36</sup> As a ground of defence, the *vindex* could not question the merits of the preceding decision.<sup>37</sup> He was limited to disputing the actual judgment, for example, by showing that the judgment had been honoured, that there had been no judgment, that the judge had been bribed or that the debtor and creditor had settled the dispute.<sup>38</sup>

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<sup>29</sup>Kaser *Roman private law* at 335; Thomas *Textbook* at 73; Van Warmelo *Introduction* at 273; Van Zyl *History and principles* at 369.

<sup>30</sup>Thomas *Textbook* at 78.

<sup>31</sup>G.IV. 21-25.

<sup>32</sup>Twelve Tables 3.1; Hunter *Roman law* (1885) at 1034.

<sup>33</sup>Eg: "*Quando tu mihi iudicatus (vel damnatus) es decem milia, quando non solvisti, ob eam rem ego tibi decem milia iudicati manum inieci*" (Since you were adjudged (or condemned) to me in a sum of ten thousand and since you have not paid, on that account I lay hands on you for the judgment of ten thousand) see Thomas *Textbook* at 78.

<sup>34</sup>Kaser *Roman private law* at 338.

<sup>35</sup>G.IV.21.

<sup>36</sup>Kaser *Roman private law* at 338.

<sup>37</sup>Thomas *Textbook* at 79.

<sup>38</sup>Kaser *Roman private law* at 338; Thomas *Textbook* at 79.



In the absence of a *vindex*, the magistrate “addicted” (*addictio*) the debtor or, if the *vindex* was unsuccessful, the *vindex*, to the creditor, who could take him to a private prison and keep him for 60 days.<sup>39</sup> The Twelve Tables provided that the debtor could be held in bonds for 60 days.<sup>40</sup> During this time the creditor produced his prisoner on three successive market days and publicly declared the amount of the debt, probably hoping that someone might settle the debt and release the debtor. Failing this, the debtor could either be put to death, or he could be sold into foreign slavery.<sup>41</sup> Where there was more than one creditor who had secured *manus iniectio*, they were permitted to cut the debtor to pieces, each taking his rightful share. It is, however, probable that this practice was never followed. Burdick finds it more probable that the debtor was sold as a slave and that the proceeds of the sale were divided among the creditors.<sup>42</sup> De Zulueta thought it probable that initially the debtor was entirely at the mercy of the creditor, but that later on the public interest and the creditor’s own interest rendered this extreme penalty obsolete in practice.<sup>43</sup> Be that as it may, this severe method of execution shows that at this point the law concerning debt was regarded as part of the law of delict in that a creditor suffered a wrong if he was not paid by the debtor.<sup>44</sup> Later, however, it developed into the procedure to enforce, primarily, execution of judgment against a debtor.<sup>45</sup>

The position of the debtor, however, improved when a *lex poetilia*<sup>46</sup> abolished the fettering, imprisonment and putting to death of the debtor, and *manus iniectio* became a way in which the debtor had to work off his debt as a debt slave of his

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<sup>39</sup>Thomas *Textbook* 79; Van Zyl *History and principles* at 370.

<sup>40</sup>Table III.

<sup>41</sup>Burdick *Principles* at 632; Kaser *Roman private law* at 338; Thomas *Textbook* at 79; Van Zyl *History and principles* at 370.

<sup>42</sup>Burdick *Principles* at 633-634; Van Warmelo *Oorsprong* at 251; Countryman (1983) *Catholic University Law Review* 809 at 810 and notes 4 and 5 at 810, however, cites Radin when saying, “There were also ‘abundant traces in Rome, as in Europe until recent times, of an ancient custom of seizing the corpse of a defaulting debtor as a means of enforcing payment from his heirs’— which may explain why there are still statutes on the books of some of our states specifically forbidding that practice”.

<sup>43</sup>De Zulueta at 245.

<sup>44</sup>Jolowicz and Nicholas at 189; Van Warmelo *Oorsprong* at 249.

<sup>45</sup>Van Warmelo *Oorsprong* at 249.

<sup>46</sup>Of approximately 325-326 BC. Hunter in *Roman law* at 1035 comments that it is certain that during the later Republic a debtor could not be taken as a slave to satisfy a judgment debt. Public imprisonment of the debtor took the place of his slavery; C.7, 72, 7.

creditor.<sup>47</sup> It probably also authorised detention of the debtor beyond the 60 days allowed by the Twelve Tables precisely to provide for the creditor to use the labour of the debtor to work off his debt, because if the creditor were obliged to free the debtor, he would have lost any effective means of execution.<sup>48</sup>

(ii) *Manus iniectio pro iudicato*

This was the *manus iniectio iudicati* procedure extended to cases where there may have been no litigation in circumstances where a judgment may have been given. The scope of the *manus iniectio* as a punitive measure against certain conduct was extended by various *leges*. For example, the *lex pubilia*<sup>49</sup> provided the *manus iniectio* to a *sponsor*, guarantor, who paid a debt against the principal debtor, if the latter had not reimbursed him within 6 months.<sup>50</sup>

(iii) *Manus iniectio pura*

This process was a substitute for, rather than a form of *manus iniectio*. It was introduced by legislation after the *lex poetilia* had stripped the true *manus iniectio* of its severity.<sup>51</sup> Here the defendant could defend himself without the need for a *vindex*, but failing in his defence, he was liable in double the amount. An example of this *manus iniectio* is the liability of usurers for taking excessive interest under the *lex Marcia*.<sup>52</sup>

Thomas states that a *lex Vallia*<sup>53</sup> made all *manus iniectio pura*, “except that in consequence of a judgment or under the *leges pubilia* and *furia de sponsu*”.<sup>54</sup> As a consequence, cases that were previously redressed by personal seizure were now replaced with actions in which the unsuccessful defendant would be liable for double damages. This discouraged baseless defences. However, where the *lex*

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<sup>47</sup>Kaser *Roman private law* at 338; Thomas *Textbook* at 79. Constantine (AD 320) abolished imprisonment for debt, unless the debtor was stubborn – Hunter *Roman law* at 1036.

<sup>48</sup>Jolowicz and Nicholas at 190.

<sup>49</sup>Approximately 200 BC.

<sup>50</sup>Thomas *Textbook* at 79; Van Warmelo *Oorsprong* at 252.

<sup>51</sup>Thomas *Textbook* at 80; Van Warmelo *Oorsprong* at 252.

<sup>52</sup>Approximately 104 BC.; Thomas *Textbook* at 80; Van Warmelo *Oorsprong* at 253.

<sup>53</sup>Possibly of approximately 170 BC.

<sup>54</sup>Thomas *Textbook* at 80.



*vallia* did not apply, personal seizure was retained and personal execution continued in Roman law long after the passing of the *leges actiones*.<sup>55</sup>

### **2.3.2.1.2 *Legis actio per pignoris capionem***

This *legis actio*, the last to be mentioned by Gaius,<sup>56</sup> was also a procedure for execution. This *legis actio* differed from the *manus iniectio* in that it was aimed at execution of the property of the debtor and not against his person.<sup>57</sup> It entailed the seizure of a debtor's property to persuade him to comply with his obligation. The seizure was accompanied by the uttering of *certa verba*, a solemn form of words.<sup>58</sup> This did not, however, have to occur in the presence of a magistrate or the other party. This "taking of a pledge"<sup>59</sup> allowed the creditor only to retain it, returning it when the debtor paid his debt. The creditor could not sell it. Some authors think that the "pledge property" could be destroyed if the debtor remained impenitent,<sup>60</sup> while others think that the holder of the pledge could become owner thereof after the passing of a period of time.<sup>61</sup> *Pignoris capio* could be utilised in a limited number of cases, partly by custom and partly by law.<sup>62</sup> It was authorised by custom where a soldier used it against his paymaster in respect of his wages, and by a cavalryman against the person who was liable for the purchase price of his horse and its fodder. *Pignoris capio* appears to have been primarily a state privilege, allowed to individuals only when it was recognised that their claims were of peculiar public or religious importance.<sup>63</sup> So, for example, it was also available to tax collectors who could take this pledge to ensure payment of taxes by the taxpayer.<sup>64</sup>

This was therefore an early procedure of execution in respect of the property, in the sense that it was not the person of the debtor that was "attached", thus a

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<sup>55</sup>Thomas *Textbook* at 80.

<sup>56</sup>Gaius Inst 4.26-29.

<sup>57</sup>Van Warmelo *Oorsprong* at 253.

<sup>58</sup>Jolowicz and Nicholas at 190; Thomas *Textbook* at 80.

<sup>59</sup>Jolowicz and Nicholas at 190.

<sup>60</sup>Jolowicz and Nicholas at 190.

<sup>61</sup>Van Warmelo *Oorsprong* at 254.

<sup>62</sup>That is, by the Twelve Tables; see Jolowicz and Nicholas at 190 and Thomas *Textbook* at 80.

<sup>63</sup>Jolowicz and Nicholas at 190.

<sup>64</sup>Tax collectors were authorised by the state, against payment to the state, to collect taxes for themselves.

development in the direction of the attachment of the debtor's assets as a means of satisfying the claims of creditors. But it was available to limited classes of creditors and always in respect of state or religious interests. Further, as mentioned above, personal execution remained a possibility in Roman law long after the passing of the *leges actiones*.

### 2.3.2.2 The formulary process

#### 2.3.2.2.1 General

After a long period of survival of the *leges actiones*, changes in society and commerce slowly resulted in the establishment of a new system of procedure, the *formula* system.<sup>65</sup> In the execution of judgments it was still possible under the *formula* procedure to act against the person of the debtor,<sup>66</sup> but this system developed an alternative means of execution against the debtor's property.<sup>67</sup> This procedure is named after the *formula*, a written exposition of the dispute between the litigants which differed from the almost ritual formal words required by the *leges actiones*.<sup>68</sup>

Execution under the formulary system of procedure, the creation of praetorian law, commenced with the seizure of the debtor's property, known as *missio in bona*. Usually it comprised the seizure of all the property of the debtor, which was then realised for the benefit of all his creditors by uniform proceedings.<sup>69</sup> Kaser thus points out that ordinary execution against the property, even during the classical period,<sup>70</sup> was always a procedure in insolvency and thus general execution. Together with this, he says, a "special execution" against particular pieces of property which favoured certain persons deserving protection was recognised only in exceptional cases.<sup>71</sup>

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<sup>65</sup>Burdick *Principles* at 636; Wenger *Institutes* at 228; Thomas *Textbook* at 83; Kaser *Roman private law* at 339 and 355; Van Warmelo *Introduction* at 275; Van Zyl *History and Principles* at 372.

<sup>66</sup>As under the *legis actio* procedure, aimed at the debtor becoming a debt slave. See also De Zulueta at 135.

<sup>67</sup>Kaser *Roman private law* at 355; Thomas *Textbook* at 109.

<sup>68</sup>Van Zyl *History and principles* at 372.

<sup>69</sup>Kaser *Roman private law* at 355.

<sup>70</sup>See para 2.1 above.

<sup>71</sup>Kaser *Roman private law* at 355.

### **2.3.2.2.2 Execution against the person and against property in the formulary system**

Execution against the person of the debtor was normal throughout the classical period, but by the last century of the republic<sup>72</sup> execution against property was also possible.<sup>73</sup> A further important reform is that one could no longer proceed straight to execution after a requisite number of days. The judgment creditor now first had to institute another action, an action on the judgment, the *actio iudicati*.<sup>74</sup> Normally there would be no *litis contestatio* in this action, and the debtor would either pay, or if he could not, he would admit liability and execution would commence. The debtor could not dispute the judgment on its merits, but he could plead on its validity.<sup>75</sup> This would result in *litis contestatio* and a trial in the usual way. Vexatious litigation was discouraged by requiring the defendant to furnish security and the threat of liability of double the original judgment if he lost the case. This was therefore similar to the procedure of *manus iniectio iudicati* where a *vindex* was required for a trial and the threat of double liability also existed.<sup>76</sup>

Failure by the defendant to defend or to pay resulted in the magistrate authorising the plaintiff to take the debtor into custody (*duci iubet*). He was thus in the same situation he would have been in under *manus iniectio* after abolishing the creditors' right to kill or sell his debtor.

Buckland<sup>77</sup> points out that it is disputed whether an *actio iudicati* was always a requirement, but he appears to be of the opinion that it probably was a requirement; one of the reasons being to prevent a creditor who had not yet been granted judgment, to proceed directly to execution. This reasoning looks like a progression towards leniency for the debtor.<sup>78</sup> It would appear that this may also

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<sup>72</sup>See para 2.1 above.

<sup>73</sup>De Zulueta at 135; Jolowicz and Nicholas at 216; Thomas *Textbook* at 109.

<sup>74</sup>Kaser *Roman private law* at 355; Jolowicz and Nicholas at 216.

<sup>75</sup>Eg, on lack of jurisdiction or that it has already been satisfied.

<sup>76</sup>See para 2.3.2.1.1 (i) above.

<sup>77</sup>Buckland WW *Elementary principles of the Roman private law* at 389.

<sup>78</sup>See M Roestoff 'n *Kritiese evaluasie van skuldverligtingsmaatreels vir individue in die Suid-Afrikaanse insolvensiereg* LLD Thesis University of Pretoria at 21 note 50 (hereafter Roestoff *Thesis*).

have been a further development of the idea of the *concursum creditorum* and the resulting *paritas creditorum* in bankruptcy.

The important innovation, however, was the introduction of the execution against the property of the debtor. In this respect a magistrate issued a decree that the judgment creditor take possession of all the debtor's property (*missio in bona*). The creditor would then advertise the attachment of the property as notification to other creditors to identify their claims.<sup>79</sup> After 30 days the creditors came together to elect a *magister* from the body of creditors and to proceed with the sale of the assets. The *magister* then prepared an inventory of the property and of the debts, thereafter selling the property to the highest bidder (*bonorum venditio*), being the person who offered the creditors the highest percentage on their debts. For example, a buyer offering a quarter was given the right to the debtor's assets, but he would then have to pay every creditor a quarter of what the debtor owed that creditor. The successful creditor had an interdict to recover property in the possession of third parties and he could bring a *Rutilian* action against the judgment debtor's debtors.<sup>80</sup>

Nicholas points out that this was in effect bankruptcy; at this period in Roman law the creditor had to make his debtor bankrupt in order to enforce the smallest sum that the debtor would not pay voluntarily. The creditor could not simply seize one piece of property that could satisfy his debt and sell it.<sup>81</sup> This clearly created greater hardship for the debtor than was necessary, but it is also clear that the interests of the debtor were of little importance. The object of this execution procedure was not that the state should assist the creditor by standing in for the debtor, but rather that the state should help the creditor to pressurise and punish the debtor if he did not pay his debts.<sup>82</sup> This was normally achieved by imprisonment of the debtor, but it could now also be accomplished by taking away his property. Nicholas further points out that the relationship between the two forms of execution is uncertain as it is not known whether *missio in bona* always

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<sup>79</sup>Kaser *Roman private law* at 355 and further; Jolowicz and Nicholas at 217

<sup>80</sup>Jolowicz and Nicholas at 217.

<sup>81</sup>Jolowicz and Nicholas at 217.

<sup>82</sup>Jolowicz and Nicholas at 217.

accompanied the authorisation to imprison the debtor, or whether the debtor could be imprisoned without execution against his property, but usually the two went together.<sup>83</sup> Wenger, however, states that the creditor could waive his right to imprisonment and rely on *missio* alone.<sup>84</sup>

Thus, probably from the time of Augustus,<sup>85</sup> there was a method that allowed the debtor in many cases to avoid execution against his person. This was accomplished by the debtor making a voluntary surrender of his property (*cessio bonorum*) to his creditor or creditors. This could probably be regarded as a root of what is known today as the voluntary surrender of a debtor's estate in South African insolvency law.<sup>86</sup> *Cessio bonorum* replaced the forcible putting in possession by the magistrate and also led to *venditio bonorum*, but it had big advantages for the debtor. The debtor escaped the *infamia* flowing from an enforced sale and was completely absolved from the danger of imprisonment for debt. If creditors did not receive full payment and the debtor later acquired enough assets to make it worthwhile, the creditors could bring a further action leading to another sale.<sup>87</sup> However, in such action the debtor had the *beneficium competentiae* limiting the condemnation to *id quod facere potest*, that is, what the defendant had. He could therefore always pay the amount of the judgment and need not suffer personal execution.<sup>88</sup> The debtor whose property had been forcibly taken also had the *beneficium competentiae*, but only for a year, while the debtor who had made *cessio* had it forever.<sup>89</sup> This leniency, however, was not available to all debtors. It was probably not at the disposal of debtors whose insolvency was due to their own fault, or to those who had insufficient property to hand over to their creditors.

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<sup>83</sup>Jolowicz and Nicholas at 217.

<sup>84</sup>Wenger *Institutes* at 232.

<sup>85</sup>Referred to as *cessio ex lege Iulia* (eg Gaius 3.78), probably meaning Augustus' law on procedure of 17 BC – see Jolowicz and Nicholas at 217 note 3; Kaser *Roman private law* at 357.

<sup>86</sup>See s 3 of the Insolvency Act 24 of 1936.

<sup>87</sup>De Zulueta at 134.

<sup>88</sup>Jolowicz and Nicholas at 218 note 4.

<sup>89</sup>In the law of the period of Justinian the *beneficium* allowed the debtor to retain the necessities of life – Jolowicz and Nicholas at 218 note 4. This appears to be the first indication of the concept of exempt property.

### 2.3.2.3 *Cognitio* procedure

Already in the period of the Principate<sup>90</sup> steps were being taken to replace the *formula* procedure with other procedures and by the middle of the fourth century AD it was abolished.<sup>91</sup> It was replaced with a procedure known as the *cognitio extra ordinem* or *cognitio extraordinaria*.<sup>92</sup> The development of this procedure was encouraged by the creation of an extensive bureaucracy during post-classical times. The state increasingly intervened in the legal sphere, with the result that legal disputes were no longer based on an arrangement between the parties to bring the dispute before a judge. Instead, the power now vested in the authorities to place a dispute before its officials, to hear and decide upon the issue before them, and then to have such decision executed.<sup>93</sup> The most significant characteristic of the *cognitio* procedure was that the entire procedure took place before one official only, who was appointed by the state and was often a trained jurist. Thus the two phases, *in iure* and *apud iudicem*, were abolished. Consequently, litigation was simpler and more convenient, and the administrative and juridical activities of the state fell to a large extent under a central authority.<sup>94</sup> An important innovation of this procedure was the institution of the possibility of an appeal. An appeal, of course, would postpone the execution of the judgment.<sup>95</sup>

#### 2.3.2.3.1 *Execution*

This execution procedure under *cognitio* differed from the *formula* procedure in that execution of a judgment was the business of the authorities, with the plaintiff having to do less.<sup>96</sup> Execution under this procedure was also, as in the *formula* procedure, initiated by the *actio iudicati*.<sup>97</sup> Execution could proceed against the person or the property of the *iudicatus*.<sup>98</sup> Bauer points out that although debtors theoretically remained liable to imprisonment for debt, execution against property was the norm.<sup>99</sup> After two

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<sup>90</sup>See para 2.1 above.

<sup>91</sup>Kaser *Roman private law* at 355; Van Zyl *History and principles* at 384.

<sup>92</sup>Van Zyl *History and principles* at 384.

<sup>93</sup>Wenger *Institutes* at 311; Kaser *Roman private law* at 359; Jolowicz and Nicholas at 397; Van Zyl *History and principles* at 384; Van Warmelo *Introduction* at 280; Thomas *Textbook* at 119.

<sup>94</sup>Van Zyl *History and principles* at 384.

<sup>95</sup>Kaser *Roman private law* at 363; Van Warmelo *Oorsprong* at 330.

<sup>96</sup>Van Warmelo *Oorsprong* at 333.

<sup>97</sup>Wenger *Institutes* at 311.

<sup>98</sup>Wenger *Institutes* at 312; Jolowicz and Nicholas at 401.

<sup>99</sup>Bauer *Thesis* at 54; Buckland W W *A manual of Roman private law* (2<sup>nd</sup> ed) (1947) at 392.



months had expired an *executor* (official) could proceed with the actual execution against the defendant, if necessary, by the use of force. If the defendant was obliged to pay a sum of money, and he was solvent, he could be pressurised to pay by taking (seizing) a pledge from him (*pignus in causa iudicati captum*). First, movable things would be seized, then lands and also rights.<sup>100</sup> If he still failed to pay the pledge would be sold after two months and the plaintiff would be paid out of the proceeds.<sup>101</sup>

If the defendant was insolvent, as with the *formula* procedure, his property could be attached. Property execution by way of a general execution became limited to its proper field by the special execution that had become possible, arising only where there were a number of creditors and the debtor's property was insufficient to satisfy the creditors' claims.<sup>102</sup> So, if this property was insufficient to satisfy the creditors' claims, a further attachment of the entire estate occurred in order to be sold so that the creditors' claims could at least be partially satisfied. Apart from this, *cessio bonorum* could also be offered by the defendant. This would free him of *infamia* and afford him the *beneficium competentiae*.

If *cessio* did not occur, *missio in bona* would apply with the creditors being placed in possession of the debtor's property *bonorum servandorum causa* with a *curator bonorum* having actual custody and control. Within two to four years the creditors could enforce their claims, including those creditors who did not join in from the start. Once that time had lapsed, creditors not announcing themselves had only a claim against the debtor, while the seized property remained reserved for those who had announced themselves in time.<sup>103</sup> Thereafter, the property was sold by the appropriate officer.<sup>104</sup> But this was no longer *venditio bonorum*, being a sale *en bloc*. It was a *distractio bonorum* because the separate assets were sold separately, piece by piece to the highest bidder.<sup>105</sup> The proceeds were then

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<sup>100</sup>Wenger *Institutes* at 312.

<sup>101</sup>See generally Wenger *Institutes* at 311 and further, and Thomas *Textbook* at 119 and further.

<sup>102</sup>Wenger *Institutes* at 314.

<sup>103</sup>Wenger *Institutes* at 315.

<sup>104</sup>Van Warmelo *Oorsprong* at 334.

<sup>105</sup>Kaser states that under the formulary procedure a creditor was satisfied in exceptional cases only by the execution against particular pieces of property, selling particular things of the debtor, until the debt was satisfied (*distractio bonorum*) – Kaser *Roman private law* at 357.

distributed among the creditors according to their ranking. Ranking occurred in the sense that a creditor who was a pledgee was first satisfied out of the proceeds of the item pledged. The surplus thereof was available to other creditors. In the distribution of proceeds, preferred creditors ranked after the pledgee, for their full amounts. Thereafter, general chirographic creditors were satisfied in percentages calculated upon their claims.<sup>106</sup> Things in the estate belonging to a third party could be recovered by a *vindicatio* without participating in the bankruptcy proceedings.<sup>107</sup>

The debtor became *infamis* and remained liable for that portion of creditors' claims that was not satisfied by the *distractio*, unless a *cessio bonorum* was made, which would exclude *infamia* and grant lasting *beneficium competentiae* for pre-bankruptcy debts, as described above.

## 2.4 Bankruptcy: The objects of execution in Roman Law

### 2.4.1 Execution against the person

What property was available to creditors for the satisfaction or enforcement of their claims against debtors? As described above, the only manner in which early Romans could satisfy a judgment debt was to seize the debtor as a slave. A simple procedure of seizing the debtors property and selling it was not a mode of execution used by the early Romans. The person of the debtor was the object of execution in the law of the Twelve Tables; his property being mentioned only incidentally.<sup>108</sup> Hunter finds this a strange anomaly that touching a person's property must have seemed unusually tyrannical or sacrilegious, but seizing his person and keeping him as a slave seemed the most natural thing in the world.<sup>109</sup> Wenger says "[o]f him who *si volet suo vivito* (Tab III, 4) it is assumed that he still has something and that he can dispose of it. Whether only during the sixty days after the *addictio* (Tab III, 5), or still longer, as long as he remains the subject of rights generally, may

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<sup>106</sup>Wenger *Institutes* at 316.

<sup>107</sup>Wenger *Institutes* at 315.

<sup>108</sup>Wenger *Institutes* at 230.

<sup>109</sup>Hunter *Roman law* at 1033. However, one wonders whether such harshness during the earliest known period occurred simply because the vast expanse of humanity probably possessed little or no property. Perhaps property increased in importance and could actually be acquired only when agricultural pursuits began to develop, resulting in the beginning of a system of trading.

be left uncertain”.<sup>110</sup> Here, Wenger says, there are psychological elements to be considered. So, while personal execution existed in full with its harsh consequences that could cost the debtor his life, freedom or home, few people held back until 60 days had lapsed with their property before releasing themselves. In reality therefore personal execution befell only a person without property. This changed when the harshest consequences of a *manus iniectio* (death or slavery) had ceased. Wenger is of the opinion that it would then be comprehensible if the debtor, to save his home for himself and his family, incurred a *manus iniectio* in order to eradicate his debt by working it off, provided, Wenger says, that separation of property execution from personal execution was at all possible. Thus, this *manus iniectio* resulted in temporary *quasi-slavery*. Because personal execution befell, chiefly, only the impecunious who had no property, its continued existence until far beyond the formulary procedure is understandable.<sup>111</sup>

The execution of judgments by seizing the person of the debtor may be compared to a slave, son or wife who had committed an injury to another. The master, father or husband respectively had to pay compensation, or give up the offender, who was surrendered by mancipation. The aggrieved party held the offender *in mancipio*. If the master himself had committed the injury, he faced the same alternative of either paying compensation or being taken as a slave. The reasoning was simply that if he would not pay, he must work. Free labour was not known in ancient society and the only type that the law could follow was slavery or *mancipium*.<sup>112</sup>

#### **2.4.2 Bankruptcy, or the sale of a debtor's universal succession**

Hunter<sup>113</sup> cites Festus who observed that a free man given *in mancipio* to another is *capite deminutus*, making his new master his universal successor. But universal succession distinguished between the dead and the living, the latter being of relevance here. The universal successor of a living person obtained everything up to the moment of succession, as well as everything that the person he succeeded

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<sup>110</sup>Wenger *Institutes* at 230.

<sup>111</sup>Wenger *Institutes* at 230.

<sup>112</sup>Hunter *Roman law* at 1034 -1035.

<sup>113</sup>At 1036.

could thereafter acquire. This was the result of succession by mancipation. A person given in mancipation not only lost all his existing rights, but was unable to acquire any new rights. But for a *debtor* there was the advantage that by making him a bankrupt or selling his universal succession, the past was taken away, but left him the future.<sup>114</sup> Here, apparently, all the property of the debtor was available for the satisfaction of the creditors' debts.

If a debtor departed from his jurisdiction or hid away to avoid execution of a judgment debt by arrest and enslavement, he was sold up and made bankrupt against his will.<sup>115</sup> The creditors could then enter onto his property (*missio in possessionem*), cutting him off from all right to enjoy his property,<sup>116</sup> and giving the creditors a right of control and management.<sup>117</sup> They acquired the right of mortgagees only, not of owners.<sup>118</sup>

In respect of the sale of the property, Hunter<sup>119</sup> cites Theophilus<sup>120</sup> who stated that

The first step taken by creditors was to get custody (*possessio*) of the debtor's goods. Next, after a delay of thirty days, they select one of their number, called a *magister* ... After his appointment, he causes a notice to be issued in these words: – "So and so, a debtor of ours, has committed an act of bankruptcy; we, his creditors, are selling his property; let anyone who wishes to buy come forward". After certain days a third application was made to the Praetor to authorise a sale and settle the dividend, the sale being in this form, that the purchaser offered the creditors a certain portion of these debts; as, for example, one half. After this authority was obtained, another delay was allowed, and finally the buyer was vested in the universal succession of the bankrupt by the adjudication of the Praetor.

The reason for the delays, or drawn-out process of the forced sale, Gaius said, is that for living men care must be taken that they should not readily suffer forced sales of their goods.<sup>121</sup> At this point the welfare of the debtor, it would appear, was also considered relevant. A further example of the interest of the debtor being given consideration is found in the following text of the Institutes of Justinian:

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<sup>114</sup>Hunter *Roman law* at 1036.

<sup>115</sup>G. 3, 78; Hunter *Roman law* at 1037.

<sup>116</sup>D. 42, 4, 7.

<sup>117</sup>D. 42, 5, 8, 1.]

<sup>118</sup>Hunter *Roman law* at 1037; D. 13, 7, 26, pr.

<sup>119</sup>Hunter *Roman law* at 1038.

<sup>120</sup>J. 3, 12, pr.

<sup>121</sup>G. 3, 79 as in Hunter *Roman law* at 1038.

The creditors may sue the debtor again for such an amount as he can pay, if, after making an assignment, he shall have subsequently acquired something sufficiently advantageous: for it would be inhuman that a man who had already been deprived of his property should be condemned to lose everything.<sup>122</sup>

Thus, debtors who made voluntary assignments of their property were granted the *beneficium competentiae*, meaning that debtors could retain enough after-acquired property sufficient for their support.<sup>123</sup> Roman law therefore developed to a point where the sale of the debtor's universal succession was avoided. This was when curators were appointed. They sold the debtor's property in lots, thus saving his legal character (*existimatio*).<sup>124</sup> From the beginning of the empire, a person who was willing to pay, but unable to, could make a voluntary surrender of his property, thereby escaping the stigma of infamy. This, however, gave him only a qualified discharge from his creditors.<sup>125</sup>

Roman law thus evolved to a point where judgment debts could be enforced by imprisonment and bankruptcy, which was practically sufficient, because if the debtor avoided his creditors and was, consequently, imprisoned, he could be made bankrupt. But in cases where the debtor was able to pay, imprisonment or bankruptcy were indirect methods of compulsion only. A simpler method was desired whereby the creditor could pass the person of his debtor and obtain payment out of his property. So, in the time of Emperor Antonius Pius judgment debts were enforced directly by seizure and sale of the debtor's property by public officials. This became the regular proceeding for the execution for debt when the debtor was not suspected of insolvency.<sup>126</sup>

Any of the debtor's property could be taken into execution. However, the idea of exempt property was recognised in Roman law. Slaves, oxen and agricultural implements could not be taken into execution.<sup>127</sup> There was also a ranking of the

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<sup>122</sup>J. 4, 6, 40 translation by Sherman CP *Epitome of Roman Law in a single book*(1937) (1991 reprint) at 117 (hereafter *Sherman Epitome*).

<sup>123</sup>*Sherman Epitome* at 117 note 246.

<sup>124</sup>Hunter *Roman law* at 1043.

<sup>125</sup>Hunter *Roman law* at 1043.

<sup>126</sup>C. 7, 53, 9; Hunter *Roman law* at 1043.

<sup>127</sup>C. 8, 17, 7; Hunter *Roman law* at 1043. These provisions are dealt with in the Digest and the Code of Justinian, both of which probably came into force on 30 December 529 (see Hunter at 92),

nature of the property that could be seized. Animals and moveables had to be taken and exhausted before recourse was had to the debtor's land<sup>128</sup> Money due to a debtor could be seized in execution<sup>129</sup> if it was undisputed, but not otherwise.<sup>130</sup> Creditors could either sell the debt or sue the debtor, as they deemed expedient.<sup>131</sup> Thus money in a bank, standing to the credit of the debtor, could be seized in payment of his debt.<sup>132</sup>

In respect of the surrender of property to bankruptcy, Ulpian, in the Digest, says that one who surrenders to bankruptcy is not deprived of his assets until they are sold, and if he intends making a defence, they will not be sold. Should he surrender to bankruptcy, but later make some acquisition, he can be sued only for what he can afford.<sup>133</sup> Further, Ulpian states that if a person who surrenders to bankruptcy later acquires some modest competence after the sale of his assets, there will be no second sale. In assessing the extent of such acquisition, Ulpian says the quantity thereof and not the quality is taken into account, provided that if something was left to him out of charity, for example, by way of monthly or annual sustenance, there should be no renewed sale of his assets on that account, for a man is not to be deprived of his daily bread. The same applies, according to Ulpian, if he is given some *usufruct* or legacy from which he derives no more than his maintenance.<sup>134</sup>

## 2.5 Conclusion

It would appear that the initial difficulty in classifying the law had a very real effect on the concept of insolvency law, and more specifically the concept of an insolvent estate and assets belonging to, or excluded from, that estate. At first it was all about the procedure that was followed in dealing with the debtor, with the

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so it is safe to say that they were already firmly entrenched in Roman law by this date.

<sup>128</sup>D. 42, 1, 15, 8; Mommsen T and P Krueger *The Digest of Justinian* (English translation edited by A Watson) vol IV at 537 (hereafter Mommsen); Hunter *Roman law* at 1043.

<sup>129</sup>C. 7, 53, 5; Hunter *Roman law* at 1043.

<sup>130</sup>D.42, 1, 15, 9 Mommsen at 538; Hunter *Roman law* at 1043.

<sup>131</sup>D. 42, 1, 15, 10 Mommsen at 538; Hunter *Roman law* at 1043.

<sup>132</sup>D.42, 1, 15, 11 Mommsen at 539; Hunter *Roman law* at 1043.

<sup>133</sup>D.42, 3, 3 Mommsen at 545.

<sup>134</sup>D. 42, 3, 6 Mommsen at 545.



emphasis on the person of the debtor who would be punished. This earliest development almost seems to have ignited the laxity of attitude towards the reform of insolvency law over the centuries generally, and specifically in South Africa, and specifically regarding the rights in respect of property in insolvent estates. The legal remedy that is being sought by the creditors in South African insolvency law, being the end-result, obscures the entire road that must be travelled before arriving at that remedy, thereby also obscuring rights of debtors in modern South Africa. But a slow reformation of particularly the concept of property in the estate is perhaps understandable in the light of the concept itself experiencing constant development and new categories of property coming into existence even today .

The earliest known execution process was against the person of the debtor. The reasons for creditors taking charge of the person of the debtor changed with the changing development of those early societies, but essentially the idea was that the debtor should repay his debts in the form of labouring for his creditor. Today, the ability of the debtor to earn a future salary that may be available to his creditors is arguably the most important asset in the insolvent estate. One may speculate that the inclusion of this “asset” in the insolvent estate finds its roots in earliest Roman law. As with most insolvent estates throughout history, and as it remains today, it is probable that the Roman debtor owned little or no property and the only means of recourse against the insolvent Roman debtor was probably the use of his labour.

As societies and economies developed, so too did the execution laws. Insolvency proceedings increasingly prevailed, gradually moving away from the concept of imprisonment for debt. The material right to execution, being the person and the property of the debtor, was linked to the procedure of execution, the procedure initially being at the forefront in the collection of debts. The *legis actiones* were originally very primitive with scant interest in the welfare of the debtor, who was entirely at the mercy of the creditor. But public opinion and creditor interests apparently slowly, and perhaps unintentionally, improved the fate of the debtor, resulting in the property of the debtor being more important or equally important

to the person of the debtor in the execution process. Further reform was achieved with the introduction of the formulary process which preferred execution against debtors' property and division of the proceeds thereof among the creditors. It would appear that the formulary system was perhaps the true origin of insolvency proceedings as they are known today. However, the object of this new execution procedure that developed was to allow the state to pressurise and punish the defaulting debtor, and its purpose was not to assist the debtor.

In this system something akin to the modern-day surrender also developed, bringing with it certain advantages for the debtor such as escape from *infamia*, completely absolving him from debt under certain circumstances and certain other benefits. Debtors with insufficient property were, however, denied these benefits, reminding one of the present-day voluntary surrender in South African law which excludes the debtor from the sequestration machinery if he has inadequate assets. But these first glimpses of leniency in Roman law look like the early foundations of the concept of exempt property, which then underwent further development during later periods.

In the *cognitio* procedure the state became a more important player, thereby doing away with disputes being based on an arrangement between parties who had to bring the dispute before a judge. Now the authorities had the power to place the dispute before their officials who were usually trained jurists. Execution also became the business of the authorities under the *cognitio* procedure; the plaintiff having to do less and execution against property becoming the norm. More emphasis was placed on execution against property by taking property as a pledge from solvent debtors, but if insolvent, property was attached. During this period the concept of placing the debtor's property with a curator *bonorum* also existed together with the idea that claims could be enforced over a period of two to four years. If assets were insufficient, the entire estate could be sold to satisfy claims at least partially. *Cessio bonorum* could also still be offered, which would free the debtor of *infamia* and allow him the benefit of *beneficium competentiae*. The idea of the release of the debtor was therefore now linked to existing assets that could be sold.

A further early concept of excluded property was that of property in the estate which, in fact, belonged to third parties. Such property could be vindicated by the third party without him joining the bankruptcy proceedings.

Regarding the objects of execution, execution of the person of the debtor eventually had as alternative execution against the property of the debtor, but the two existed simultaneously for a long period, particularly because the poorest debtors who owned nothing, befell personal execution. As society developed, the idea underlying personal execution was that the seized person could be released upon payment of compensation, failing which, he had to labour to redeem his debts.

Roman law gradually evolved to a point where judgment debts could be enforced by imprisonment and bankruptcy, which was practically sufficient, because if the debtor avoided his creditors and, consequently, imprisonment, he could be made bankrupt. But in cases where the debtor was able to pay, imprisonment or bankruptcy were indirect methods of compulsion only. A simpler method was wanted whereby the creditor could pass the person of his debtor and obtain payment out of his property. So, in the time of Emperor Antonius Pius judgment debts were enforced directly by seizure and sale of the debtor's property by public officials. This became the regular proceeding for the execution for debt when the debtor was not suspected of insolvency.<sup>135</sup> Any of the debtor's property could be taken into execution.

However, the idea of excluded or exempt property was recognised in Roman law. As the law developed, slaves, oxen and agricultural implements could not be taken into execution.<sup>136</sup> There was also a ranking of the nature of the property that could be seized. Animals and moveables had to be taken and exhausted before recourse was had to the debtor's land<sup>137</sup> Money due to a debtor could be seized

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<sup>135</sup>C. 7, 53, 9; Hunter *Roman law* at 1043.

<sup>136</sup>C. 8, 17, 7; Hunter *Roman law* at 1043. These provisions are dealt with in the Digest and the Code of Justinian, both of which probably came into force on 30 December 533 (see Hunter at 92), so it is safe to say that they were already firmly entrenched in Roman law by this date.

<sup>137</sup>D. 42, 1, 15, 8; Hunter *Roman law* at 1043; Mommsen at 537;

in execution<sup>138</sup> if it was undisputed, but not otherwise.<sup>139</sup> The creditors could either sell the debt or sue the debtor, as they deemed expedient.<sup>140</sup> Thus money in a bank, standing to the credit of the debtor, could be seized in payment of his debt.<sup>141</sup> In respect of the surrender of property to bankruptcy, Ulpian, in the Digest, says that one who surrenders to bankruptcy is not deprived of his assets until they are sold and if he intends making a defence, they will not be sold. Should he surrender to bankruptcy, but later make some acquisition, he can be sued only for what he can afford.<sup>142</sup> Further, Ulpian states that if a person who surrenders to bankruptcy later acquires some modest competence after the sale of his assets, there will be no second sale. In assessing the extent of such acquisition, Ulpian says the quantity thereof, and not the quality is taken into account, provided that if something was left to him out of charity, for example, by way of monthly or annual sustenance, there should be no renewed sale of his assets on that account, for a man is not to be deprived of his daily bread. The same applied if he is given some *usufruct* or legacy from which he derives no more than his maintenance.<sup>143</sup> So it is interesting to note that these exclusions or exemptions developed in Roman Law and eventually became settled in modern South African law<sup>144</sup> in a fashion very similar to this ancient Roman law.

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<sup>138</sup>C. 7, 53, 5; Hunter *Roman law* at 1043.

<sup>139</sup>D.42, 1, 15, 9; Hunter *Roman law* at 1043; Mommsen at 538;

<sup>140</sup>D. 42, 1, 15, 10; Hunter *Roman law* at 1043; Mommsen at 538;

<sup>141</sup>D.42, 1, 15, 11; Hunter *Roman law* at 1043; Mommsen at 539;

<sup>142</sup>D.42, 3, 3; Mommsen at 545.

<sup>143</sup>D. 42, 3, 6 – Mommsen at 545.

<sup>144</sup>See ch 9 below.

## Chapter 3: Roman-Dutch Law

### 3.1 Introduction

The aim of this chapter is to investigate the origins of some of the current insolvency law procedures and the earlier history of the manner in which assets are dealt with under South African insolvency law. More specifically, the aim is to investigate which assets of a debtor were included in an insolvent estate and which were excluded from the insolvent estate of the debtor. Considered first is the earliest insolvency procedure in the form of a type of voluntary surrender that was introduced to Holland in the fifteenth and sixteenth centuries. Also considered is the property that was included in a debtor's insolvent estate and property that the debtor was permitted to keep for his own use, and the condition upon which a debtor could be discharged from his debts after sequestration.

The procedure for insolvency under the Ordinance of Amsterdam of 1777 is briefly discussed, together with a form of exemption that the debtor was allowed if he complied with the provisions of the ordinance.

### 3.2 General

Insolvency law in South Africa is rooted to some extent in Roman-Dutch law, and partly in English law, with the foundations of both these systems in Roman law.<sup>1</sup> In the Netherlands there were originally no uniform rules in respect of an insolvency law system. As circumstances required, customs arose in various towns in Holland to provide for insolvent estates. In its development of insolvency law, Roman-Dutch law borrowed heavily from the principles of Roman law.<sup>2</sup>

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<sup>1</sup>Wessels JW *History of the Roman Dutch law* (1908) at 663 (hereafter Wessels). The principles of insolvency law in Roman law were discussed in ch 2 above.

<sup>2</sup>See also Burton WW *Observations on the insolvent law of the Colony* (1829) at 3 (hereafter Burton); Gane P *The selective Voet being the commentary on the Pandects* [Paris Edition of 1829] by Johannes Voet and the Supplement to that work by Johannes van der Linden, translated with explanatory notes and notes of all South African reported cases by Percival Gane vol 1(1957) at 362-363 (hereafter Gane); De Villiers *Die Ou-Hollandse insolvensiereg en die eerste vaste insolvensiereg van die Kaap de Goede Hoop* LLD Thesis (1923) Leiden at 7 (hereafter De Villiers).

During the fifteenth or sixteenth century the *cessio bonorum*, or the surrender of goods, appears to have been introduced in Holland together with the principle of *moratorium* or *respijt* (respite)<sup>3</sup> “attended indeed in several of the cities by the imposition of some humiliating condition or mark of degradation upon the debtor”.<sup>4</sup> Prior to this debts were apparently satisfied in Holland only by the attachment of the person of the debtor.<sup>5</sup> The *cessio bonorum* was a difficult and expensive procedure. The cause of the debtor’s insolvency had to be addressed to the Court of Holland in a petition, together with an inventory of all his assets.<sup>6</sup> This petition was then referred to the *burgomaster* and governing body where the insolvent was domiciled, for a report. After receiving this report, the court granted a writ (a rule *nisi*) calling on anyone to show cause why the provisional writ of *cessio bonorum* (*brieven van cessie*) should not be confirmed. The granting of the rule halted any future arrest of the petitioner, and its confirmation had the effect of staying any execution against his assets and put them in custody of a curator.<sup>7</sup>

The insolvent was, however, not discharged from his debts by the *cessio bonorum*, and after-acquired property could be claimed by the creditors. It only freed him from personal arrest and provided a stay of litigation against him.<sup>8</sup> The *cessio* was

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<sup>3</sup>The exact date of the introduction of the *cessio bonorum* is not known, but it appears to have been gradually introduced into Holland – see Burton at 3; Wessels at 664.

<sup>4</sup>Burton at 3-4. This procedure was similar to what is known in South African insolvency legislation as “voluntary surrender”, and was available to any debtor who was unable to fulfil his financial responsibilities. According to Gane, a procedure similar to what we know today as “compulsory sequestration” also existed in the common law of insolvency in the Netherlands, but was referred to as *missio in possessionem* or “entry into possession”. This was a procedure whereby creditors petitioned to be put into the possession of the estate of a debtor for safekeeping and sale in order to satisfy their claims against the debtor. See generally Gane vol 6 at 388 and further. De Villiers appears to interpret this debt collection procedure by creditors in Holland as an individual debt collection procedure only, and that no collective procedure by creditors existed – De Villiers at 3 and further. However, it would appear that the procedure of *missio in possessionem* similar to that procedure in Roman law did exist in Holland – see Gane vol 6 at 388 and further. For the purpose of this thesis what applies to *cessio bonorum* generally also applies to entry into possession, therefore no further discussion of this procedure will follow.

<sup>5</sup>Wessels at 664.

<sup>6</sup>Gane vol 6 at 370; Burton at 4.

<sup>7</sup>Van der Keesel DG *Select theses on the laws of Holland and Zeeland, Being a commentary on Hugo Grotius’ introduction to Dutch jurisprudence* (translated by CA Lorenz) (1855) at 884; Wessels at 664-665.

<sup>8</sup>Gane vol 6 at 373. Surrender of the debtor’s estate denied the debtor any rights of action that he had before the surrender, but it did not, however, deny him the right to sue for an apology regarding a wrong done to him prior to surrender, or to complete an action already started – Gane at 375. As will be shown below in para 3.5, at a later stage relief was granted to the debtor by granting him a



granted by the court only if the debtor's insolvency was a result of misfortune and it was basically a *voluntary surrender* of the insolvent's assets for the benefit of his creditors.<sup>9</sup> Fraud or dishonesty by the petitioner could result in the refusal of the petition and immediate imprisonment.<sup>10</sup> The insolvent could retain certain assets. His clothes, tools and property that could assist him in earning a living could be kept by him. The *brieven van cessie* included a clause stating that any assets obtained by the insolvent after petitioning successfully would be available for payment of his creditors in full.<sup>11</sup>

A Placaat of 1544<sup>12</sup> introduced a Roman law rule which allowed a debtor to enter into a composition with all his creditors if they all agreed to it.<sup>13</sup> However, where an heir refused to adiate if his creditors would not accept less than the debts due to them, the approval of the majority bound the minority.<sup>14</sup> Later a rule developed in certain areas allowing the majority of creditors to bind the minority to a composition if three quarters of them, being entitled to two thirds of the debt, agreed to it. Over time a practice developed that allowed the insolvent a discharge from all his debts if one half of all his creditors, to whom he owed half his debts, consented to it.<sup>15</sup>

During the seventeenth century commissioners from chambers for the administration of derelict estates began to administer insolvent estates of persons who had obtained *cessio bonorum*, instead of private persons. By the eighteenth century it was customary for all insolvent estates to be administered by boards called *Desolate Boedelkamers*. Included were the insolvent estates of so-called *bankroetiers* or *bankbreakers* (bankrupts). Unlike debtors who became insolvent

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discharge from all his debts owing at the time of sequestration, even if no composition had been entered into with his creditors, and he was given an allowance out of the proceeds of his estate if his creditors had certified that he had behaved honestly – Burton at 7.

<sup>9</sup>See, generally, Gane vol 6 at 362 and further. The person obtaining the writ had to serve it on the relevant officer and all his creditors, and had to prepare an inventory of his estate under oath, which included a preface explaining the misfortune that caused his need to obtain the benefit of cession – Burton at 5.

<sup>10</sup>Gane vol 6 at 367-368.

<sup>11</sup>Wessels at 666; De Villiers at 60.

<sup>12</sup>See para 3.3 below.

<sup>13</sup>Wessels at 666.

<sup>14</sup>Wessels at 666.

<sup>15</sup>Wessels at 666.

through misfortune and basically voluntarily handed over their estates; bankrupts were debtors who fled the country to escape their creditors or who acted fraudulently and were considered akin to thieves.<sup>16</sup> The law showed bankrupts and those who assisted them no mercy. Insolvency deprived the insolvent of his contractual capacity and his ability to appear in court as plaintiff or defendant while his estate was being administered by the Insolvency Chamber and prior to his rehabilitation. Bankrupts, however, could never be rehabilitated and therefore could never again enter into valid contracts or have *locus standi* to litigate in court.

### 3.3 Property of the estate

In the common law of the Netherlands relating to the surrender of goods, all the debtor's property had to be surrendered, except for cheap and everyday clothing, which was excluded and as Voet put it, "for the sake of his self respect must by no means be taken from him, inasmuch as it is not taken away even from those who have been condemned for crime".<sup>17</sup> But in Holland, under the Edict of Charles V of 1544, the person surrendering his assets was allowed to keep his bed and blankets, and various items of movable property of little value.<sup>18</sup>

The property of the estate included property at the date of the surrender, as well as property acquired in the future, provided it was already "acquired in prospect", such as debts due to the debtor under a condition.<sup>19</sup> Thus an annual payment to a debtor under contract, or to last for as long as he lived, was available to creditors.<sup>20</sup> Actions were also included under the description of "goods" equally as under the term "inheritance". Thus the surrender of goods also resulted in actions available to the debtor passing to his creditors together with the debtor's other

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<sup>16</sup>Wessels at 667.

<sup>17</sup>Gane vol 6 at 371.

<sup>18</sup>Edict of Charles V of 26<sup>th</sup> May 1544, Articles 36 and 37; *Groot Placaat-Boek*, vol 1 page 327, which refers to "one bed with its appurtenances, and of each item of movable property one, with the exception that they shall not be allowed to have either pewter or silver work" as cited by Gane vol 6 at 371 note 4.

<sup>19</sup>Gane vol 6 at 371-372.

<sup>20</sup>Gane vol 6 at 372. This was apparently first followed in South African case law in *Vicker's Trustees v Cloete & Others* 1914 CPD 575 at 583 where the trustees were in possession of money under a will which provided that that money should not be attachable, but without a gift over, or a discretion to, trustees to divert the inheritance in the event of insolvency.

assets.<sup>21</sup> Also profits from feuds, *usufruct*, quitrent tenure,<sup>22</sup> and property that had to be handed back to another under *fideicommissum* after his death, for the time that the person surrendering was able to reap them, formed part of the debtor's estate to be yielded to his creditors.<sup>23</sup>

Actual *fideicommissary* property and actual feuds were not, however, surrendered, unless by certain customs they could as a last resort be attached and sold in order to execute a judicial decision, without prejudice to the lord.<sup>24</sup> Assets belonging to emancipated children of the debtor, or goods of those under the debtor's power could not be surrendered to his creditors. The assets of emancipated children could not even be claimed by the Treasury, as the *peculium* of the son was kept apart for that son and could not be sold off for the debt to the Treasury along with the father's other assets.<sup>25</sup>

### 3.4 The Amsterdam Ordinance of 1777

Important for South African developments was the Ordinance of 1777 that was granted to the city of Amsterdam. This was the source of insolvency law at the Cape of Good Hope at the time of its annexation.<sup>26</sup>

The 1777 Ordinance provided for several commissioners whose duty it was to confirm or reject a debtor's offer of composition, or failing a composition, to adjudge the estate to be insolvent and to commence with its administration.<sup>27</sup> The first duty of the commissioners was to enter upon, and take possession of, the estate, make an inventory of all the movable property and to seal all property as required.<sup>28</sup> This amounted to sequestration, which halted all executions against the

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<sup>21</sup>Gane vol 6 at 396.

<sup>22</sup>"Quitrent tenure" was defined as a contract of the law of nations based on good faith and depending on consent. By this one obtained the enjoyment of landed property in perpetuity or for more than a moderate time. It was granted on condition of improvement of the property and the production of a yearly quitrent. In the Netherlands it was also referred to as *erfpacht*. See Gane vol 2 at 269.

<sup>23</sup>Gane vol 2 at 372.

<sup>24</sup>Gane vol 2 at 372.

<sup>25</sup>Gane vol 2 at 372.

<sup>26</sup>See ch 4 on South African History below.

<sup>27</sup>Art 3; Burton at 8. See De Villiers at 19 and further.

<sup>28</sup>Art 4.

estate, but did not prejudice the right of a creditor obtained by execution prior to the sequestration.<sup>29</sup> The ordinance declared all transfers, cessions and mortgages for securing a debt made within 28 days prior to the sequestration void.<sup>30</sup>

The primary object of the ordinance was to secure the property of the insolvent debtor.<sup>31</sup> Thereafter the debtor could enter into negotiations with his creditors in a meeting of creditors where provisional sequestrators were elected to take care of the estate and could be appointed as curators if the estate was adjudged to be insolvent.<sup>32</sup>

The sequestrators had the duty of preparing an inventory of the estate, or the completion of the inventory prepared by the commissioners, to take charge of the estate, to sell perishable items and generally to see to the administration thereof.<sup>33</sup> If the debtor within a month of his insolvency successfully entered into a composition that was confirmed by the chamber, the estate was released from sequestration. If no composition was achieved, the chamber declared the estate insolvent and the sequestrators were appointed to collect, liquidate and administer the estate.<sup>34</sup>

Upon this declaration of insolvency, the ordinance required the insolvent to appear before the commissioners to deliver to them an inventory confirmed under oath, of all his assets, money, effects and outstanding debts. He also had to declare that when he stopped payment of his debts he had no other assets, and he also had to deliver to them all his books and documentation.<sup>35</sup>

### 3.5 Exemptions under the Ordinance

If the insolvent debtor complied with all the provisions of the ordinance, surrendered all his assets in a *bona fide* manner and was not guilty of any fraudulent behaviour, a

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<sup>29</sup>Burton at 8.

<sup>30</sup>Burton at 8.

<sup>31</sup>Burton at 8

<sup>32</sup>Arts 5 and 6; Burton at 8-9.

<sup>33</sup>Burton at 9.

<sup>34</sup>De Villiers at 24; Burton at 9.

<sup>35</sup>Burton at 10.

certain percentage of his property could be returned to him as an allowance.<sup>36</sup> If the proceeds of his estate proved sufficient to pay 20 percent of the concurrent creditors' claims, an allowance of 3 percent of his estate was paid to the debtor by the commissioners. If concurrent creditors received 50 percent of their claims, the debtor was entitled to 6 percent, and if 75 percent of concurrent claims was paid, he could receive 10 percent. The proviso was that no such allowance could exceed 10 000 guilders.<sup>37</sup>

The debtor was also entitled to be discharged from all debts that were due prior to insolvency, upon obtaining a certificate from creditors and confirmation by the chamber.<sup>38</sup> Creditors who did not sign could oppose the certificate, whereupon the decision vested in the chamber.<sup>39</sup> The ordinance required the certificate to be signed by the majority of creditors, being half in value and six eighths in number, or *vice versa*. They had to declare therein that the insolvent had complied with the provisions of the ordinance and allow him the benefit thereof. The curators also had to sign the certificate, confirming that the insolvent had not acted fraudulently or in contravention of the ordinance, and that the creditor signatories are the majority in number and value.<sup>40</sup>

### 3.6 Conclusion

The development of insolvency law in the Netherlands appears to have progressed somewhat slowly from the relatively late period of the fifteenth century. The early *cessio bonorum* seems to have been a difficult and expensive procedure that deliberately worked against the debtor, and it did not discharge him from his debts. At an early stage the idea of excluded or exempt property was known, but a distinction between property being either exempt or excluded, was apparently not made. By allowing the debtor to keep certain clothing, tools and low-value items the debtor was actually being granted exempt property, similar to that same

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<sup>36</sup>Burton at 11.

<sup>37</sup>Burton at 11.

<sup>38</sup>Art 41.

<sup>39</sup>Burton at 11.

<sup>40</sup>Art 40 and art 42; De Villiers at 47-48; Burton at 11-12.

exemption that exists in South African insolvency law<sup>41</sup> today, and which is determined by the creditors.

But the exemptions in Roman-Dutch law at this point seemed to relate more to a debtor's dignity than to the idea of assisting the debtor with a fresh start. As Voet put it, the debtor could keep his cheap and everyday clothing to maintain his self-respect, as even condemned criminals were allowed to do so.<sup>42</sup> A discharge from debts did begin to develop as a result of provisions of the Placaat of 1544. The Ordinance of 1777 developed the idea of exempt property and a discharge from debts quite considerably, and whether or not property would be exempted or a discharge granted, was linked to the bona fide behaviour of the debtor. Approval for the exemption and the discharge, however, lay with the creditors and the officials.

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<sup>41</sup>See s 82(6) of the Insolvency Act 24 of 1936.

<sup>42</sup>See para 3.3 above.



## Chapter 4: A brief historical overview of the South African insolvency law

### 4.1 Introduction

Insolvency law in South Africa has its roots in both Roman-Dutch law and in English law. The main principles of both these systems were borrowed from Roman law.<sup>1</sup> The foundation of insolvency law of both these legal systems, in turn, is found in Roman law.<sup>2</sup>

During the fifteenth or sixteenth century *cessio bonorum* was introduced to Holland as part of Roman-Dutch law.<sup>3</sup> Consequently, when the Cape was occupied by the Dutch in 1652, *cessio bonorum* was also introduced to the Cape,<sup>4</sup> and to a large extent prevailed as the only system of insolvency law until 1803.<sup>5</sup> In 1803 Commissioner-General De Mist issued instructions<sup>6</sup> that established a chamber for abandoned estates, the *Desolate Boedelkamer*, for the administration of, amongst others, the estates of all persons who were granted *cessio bonorum*.<sup>7</sup> These instructions were founded largely on the Amsterdam Ordinance of 1777 which regulated the *Amsterdamse Desolate Boedelkamer*.<sup>8</sup> In 1818 the *Desolate Boedelkamer* was replaced with a sequestrator, taking over the functions of the *Boedelkamer*.<sup>9</sup> This office was, however, a failure and was done away with in 1827. The estates that were formerly under the control of the sequestrator were taken over by a commissioner.<sup>10</sup>

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<sup>1</sup>Wessels JW *History of the Roman Dutch law* (1908) at 661 (hereafter Wessels) and see chs 2 and 3 above.

<sup>2</sup>See ch 2 above; Wessels at 661.

<sup>3</sup>De Villiers W *Die Ou-Hollandse insolvensiereg en die eerste vaste insolvensiereg van die Kaap de Goede Hoop* (LLD Thesis Rijksuniversiteit, Leiden 1923) at 62 (hereafter De Villiers).

<sup>4</sup>De Villiers at 62.

<sup>5</sup>De Villiers at 5 and 89 note 1. Mars WH *The law of insolvency in South Africa* (1924) at 4 (hereafter Mars (1924)) states that there seems to have been a dual form of relief at a debtor's disposal from the earliest period in the Cape Colony, namely an *order van preferentie en concurrentie*, and *cessio bonorum*, which was also noticed in the Roman Dutch practice.

<sup>6</sup>Commissioner De Mist *Provisioneele Instructie voor de Commissarissen van de Desolate Boedelkamer* (1803) (hereafter 1803 Instructions).

<sup>7</sup>De Villiers at 77; See also Burton WW *Observations on the insolvent law of the Colony* (1829) at 24-26 (hereafter Burton); De la Rey EM Mars *The law of insolvency in South Africa* (1988) at 4 (hereafter Mars (1988)) Smith CH *The law of insolvency* (1988) at 6 (hereafter Smith *The law of insolvency*); Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L and Steyn L Mars *The law of insolvency in South Africa* (ed C Nagel) (9<sup>th</sup> ed) (2008) at 6 and further (hereafter Mars (2008)).

<sup>8</sup>De Villiers at 8-9.

<sup>9</sup>Burton at 27; De Villiers at 105.

<sup>10</sup>Burton at 29.

Thereafter, Ordinance 64 of 1829 was introduced to regulate the administration of insolvent estates. This was really the foundation of the present South African system of insolvency law.<sup>11</sup> Various amendments followed before it was repealed and replaced with Ordinance 6 of 1843, which is considered to be an important landmark in South African insolvency law.<sup>12</sup>

The formation of the Union of South Africa led to the creation of the Insolvency Act 32 of 1916. This was a unified Act that applied to the entire Union.<sup>13</sup> It was modelled on the Transvaal *Insolventiewet* 13 of 1895, which, in turn, was modelled on the earlier Cape Ordinance.

For the purpose of this research Ordinance 64 of 1829, Ordinance 6 of 1843, The Transvaal Insolvency Act 13 of 1895 (*Insolventiewet*), the Insolvency Act 32 of 1916 and the Insolvency Amendment Act 29 of 1926 will be considered. The purpose of this chapter is to compare, with South Africa's present legislation, the manner in which certain assets in insolvent estates were dealt with in earlier legislation, and to investigate the policies, if any, that dictated the relevant principles that applied to the inclusion of assets in, or the exclusion of assets from, insolvent estates. In doing so it is hoped that some of the reasons for the existence of the various problem areas in respect of assets in the insolvent estates of individuals would be uncovered.

## 4.2 Ordinance 64 of 1829

This ordinance was passed to achieve the due collection, administration and distribution of insolvent estates. It made provision for the surrender of an estate

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<sup>11</sup>Wessels at 670.

<sup>12</sup>Wessels at 670; Mars (1988) at 5. The other colonies and Republics modelled their insolvency legislation on Ordinance 6 of 1843. In Natal it came into force as Ordinance 24 of 1847 which was later repealed by the Insolvency Law 47 of 1887. In the Transvaal, the Cape Ordinance was largely followed in Ordinance 21 of 1880 (later replaced with the *Insolventiewet* 13 of 1895), and in the Orange Free State as *Ordonantie* 9 of 1878, and later as *Hoofstuk 104 van het Wetboek van den Oranjevrystaat*. The latter became *Chapter 104 of The statute law of the Orange River Colony* when the Orange Free State became a colony. The latter was also substantially the same as the Cape legislation; see also Buchanan DM *Buchanan's decisions in insolvency* (1906) at 239 (hereafter Buchanan); Mars WH *The law of insolvency in South Africa* (1917) at 6 (hereafter Mars (1917)).

<sup>13</sup>Mars (1917) at 6; Smith at 7.

by a debtor himself, and it provided for the sequestration of an estate on the petition of one or more creditors against any person having committed an act of insolvency.<sup>14</sup>

The effect of the order for sequestration under this ordinance was to divest the insolvent of his estate, and all persons administering any part of his estate for him, and to vest it in the Master of the Supreme Court.<sup>15</sup> Included in this estate was all of the present and future estate, movable and immovable, personal and real, and every right, title, and interest in, and to, any property, movable or immovable, personal or real which belonged to or was due to the insolvent at the date on which the sequestration order was made.<sup>16</sup> Also included in the insolvent estate was property that came to the insolvent during the course of sequestration of his estate. This included property “purchased or acquired by, or may revert, descend, or be devised, or come to the insolvent, while the insolvent estate shall remain under sequestration in the hands of the master, wheresoever the same may be found or known, together with all deeds, vouchers, papers, or writings respecting the same”.<sup>17</sup>

A form of exemption of some of the property of the insolvent debtor was also provided for by this ordinance. Firstly, under section 59 it was presumed that by the third meeting of creditors the trustee would have enough knowledge of the insolvent’s affairs so as to advise the creditors on what further course should be taken regarding the estate. This would allow the creditors to determine, among other things, whether to allow the insolvent, or any other person, to continue in the temporary care or management of any property of the estate. For this labour the trustee would affix an amount of compensation, also to be approved by the creditors at this third meeting.<sup>18</sup> One can only assume, and it seems logical, that any property acquired with this compensation would be exempt from the assets in the insolvent estate of the debtor.

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<sup>14</sup>See ss 1 and 2 and Burton at 31 and 40.

<sup>15</sup>S 49.

<sup>16</sup>S 49.

<sup>17</sup>S 49 and see Burton at 37-38 and 60.

<sup>18</sup>S 59 and see Burton at 119.

Secondly, at this third general meeting, if it had not already been decided upon earlier, the creditors could determine what part of the insolvent's wearing apparel, bedding, household furniture, and tools of trade and that of his family they would allow him to retain for his own use. Such property could apparently include property over which an execution creditor or the insolvent's landlord had a right of preference, if these parties gave their consent.<sup>19</sup> In his discussion of privileged and preferent debts under this Ordinance, Burton<sup>20</sup> said that minors and others who were under guardianship or curatorship had a tacit mortgage over the estate of their tutors or curators, whether appointed generally or for a particular act as *ad litem*.

This applied also to that which the tutor or curator owed to them before taking that position. Furthermore, this right commenced with the guardianship and passed to the heirs of the minor or person under tutelage.<sup>21</sup> Burton further states that a similar right of tacit mortgage belonged to minors and others to the estate of a father-in-law (stepfather) to whom the mother and guardian had married in a second marriage. This also applied to the estate of a step-mother whom the father and guardian had married in community of property. However, where there was no community, the stepmother's estate was freed from this burden.<sup>22</sup> Furthermore a woman had a tacit mortgage on the estate of her husband for her dower or separate property secured for her by a duly registered ante-nuptial contract.<sup>23</sup>

#### **4.3 Ordinance 6 of 1843 (Cape Ordinance)**

This ordinance abolished the procedure of *cessio bonorum* and made provision for a debtor to apply for the voluntary surrender of his estate, and for the compulsory sequestration of a debtor's estate upon application by one or more creditors.<sup>24</sup>

Section 46 of this ordinance provided for the vesting of the insolvent estate in the Master of the Supreme Court after the sequestration order had been granted. It

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<sup>19</sup>S 74 and 75 and see at Burton at 120.

<sup>20</sup>At 139.

<sup>21</sup>Burton at 139.

<sup>22</sup>Burton at 139.

<sup>23</sup>Burton at 140.

<sup>24</sup>Ss 1, 2 and 5.

divested the insolvent debtor of his whole estate and vested it in the Master, including all the present and future estate movable and immovable, personal and real; every right, title and interest in, and to, any such property, and any right of reversion to such property.<sup>25</sup>

Under section 48 of this ordinance the sequestration of a debtor's estate had the effect upon the appointment of the trustee of divesting the Master or any provisional trustee of the estate and to vest it in the trustee. The estate included all the present and future estate, movable and immovable, personal or real, which belonged, or was due to the insolvent at the date of sequestration.<sup>26</sup> This included property to which there existed at that date any right of reversion or which may thereafter be purchased or acquired by or may revert, descend or be devised or come to the insolvent during the continuance of the sequestration and before the making of the order of the court confirming the account and plan of distribution.<sup>27</sup>

Section 49 of the ordinance, however, made provision for certain exempt property that was excluded from the insolvent estate. Thus the hire, wages or reward of the insolvent debtor's work and labour or that of any of his family was excluded from the control of his trustee.<sup>28</sup> So too, any damages claimable by reason of any personal wrong or injury done to the insolvent or any of his family was also considered to be exempt property. Any property purchased with money obtained from the aforementioned exempt property was also excluded from the trustee's control.<sup>29</sup> However, property acquired by an insolvent by his own work and labour after his sequestration and before rehabilitation of his estate was not protected from execution against him for a deficiency in the estate in respect of any of the insolvent's debt that was due and still owing.<sup>30</sup>

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<sup>25</sup>S 46.

<sup>26</sup>S 48(a).

<sup>27</sup>S 48(b). In the case of *In re: Hansen* 21 SC 625 22; SALJ (November 14<sup>th</sup> 1904) it was ruled that the right to a monthly pension granted to an insolvent before his insolvency vested in his trustee for the benefit of his creditors.

<sup>28</sup>S 49(d).

<sup>29</sup>S 49(d). In *De Villiers v Gadow* 17 SC Rep 295 the court stated that the date of the sequestration, being acceptance of surrender, must be taken as fixing the period when the insolvent was divested of his property. Here, the court ruled, a debt due to an insolvent doctor, for medical services, which accrued after preparation of schedules but before the acceptance of surrender, became vested in the trustee and was not recoverable by the insolvent.

<sup>30</sup>S 127 and *Bartholomew v Stableford* 17 SC Rep 84.

Section 98 of the ordinance specifically regulated the sale by the trustee of the insolvent estate and it expressly provided for exceptions from the sale of the property of certain items. So the wearing apparel, bedding, household furniture and the tools of trade of the insolvent and his family were exempted from sale “until the creditors shall determine thereon”.<sup>31</sup>

An interesting further provision of this legislation was the ability of the Master or any trustee, whether provisional or elected, to grant and to allow to the insolvent out of the assets of the insolvent estate a moderate allowance for indispensable support of the insolvent and his family pending the decision of the creditors in regard to such support.<sup>32</sup> It was also possible to commit the interim care of the insolvent estate to the insolvent until the estate was sold and the said Master or trustees could make a reasonable payment to the insolvent for being so employed in caring for the estate. This allowance, the extent or the continued payment thereof, whether for support or labour, if granted before the second meeting of creditors, had to be consented to by the creditors at a meeting held after the second meeting of creditors.<sup>33</sup> If a trustee made such an allowance to an insolvent without the consent of the creditors, he had to report the amount and grounds of such allowance to the Master. Any such allowance made without consent of the creditors was open to review by the Supreme Court upon application of the Master or any person interested in the due administration of the insolvent estate.<sup>34</sup>

Section 83 of the Cape Ordinance made provision for the voiding of *mala fide* and gratuitous alienating of assets when the insolvent’s liabilities exceeded his assets. Gifts were included among these alienations that could be declared null and void in terms of section 83. However, in respect of certain insurance policies, section 6 of Act 21 of 1875 provided a measure of protection. This Act made provision for the situation where an ante-nuptial contract had been entered into in terms of which one of the

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<sup>31</sup>Ss 25 and 98(a)-(c). Before selling household furniture allegedly belonging to the insolvent, the creditors’ directions to that effect, given at a duly convened meeting after the second meeting of creditors, was required. See *Bernstein v Bernstein’s Trustee* 14 SC Rep 161.

<sup>32</sup>S 59.

<sup>33</sup>S 59.

<sup>34</sup>S 59.



spouses had covenanted and agreed, for the benefit of the other spouse, or for the benefit of children or descendants, to effect a policy of assurance upon the life of either of the spouses, or to cede and assign over such a policy for the intended benefit, and in either case to pay the annual premiums due on such policy. If the estate of the spouse who had covenanted and agreed was then sequestrated, no payment of premiums made by the spouse were deemed or taken to fall under, or come within, sections 83 and 84<sup>35</sup> of Ordinance 6 of 1843.

The practical application, in a sense, of this protective provision appears to have occurred in *Thorpe's Executors v Thorpe's Tutor*.<sup>36</sup> Thorpe (T) and his wife were married out of community of property. In 1876 T insured his life for five hundred pounds. In 1879 he notified the insurance company that he had ceded the policy to his wife “for the benefit of herself and our children”, who were minors. The wife died in 1882. At the date of the cession T had been solvent, but he now suffered financial difficulties. Money was advanced by friend C, for payment of the premiums. Thereafter, with T's consent, C took the policy and paid the premiums on behalf of the minor children and to secure himself for his advances. T died in 1886. Without the policy his estate was insolvent. The court ruled that T's children were entitled, as against T's executors, to the amount of the policy, less the premiums paid by C, for which C had a lien on the policy.

#### **4.4 Transvaal Insolvency Act 13 of 1895**

To a large extent this Act was based on the Cape legislation of 1843. In *Kirkland v Romyn*<sup>37</sup> the court stated that “[t]he Transvaal Law of 1895 is in effect the old Cape Ordinance, but re-arranged, abridged, and in some instances amended”. As will be seen below, the Transvaal legislation contained substantial differences from the Cape legislation in respect of the assets of the insolvent estate.

As with the Cape legislation, this Act also provided for both the voluntary surrender and the compulsory sequestration of a debtor's estate.<sup>38</sup> Section 26 of this Act

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<sup>35</sup>As an undue preference.

<sup>36</sup>4 Juta 488.

<sup>37</sup>1915 AD 327 at 330.

<sup>38</sup>See ss 1 and 7 of Act 13 of 1895.

provided that the legal effect of the sequestration of a debtor's estate would be that the custody of the estate passed over, and legally vested in, the Master of the High Court, until the appointment of a provisional trustee or until the final election and confirmation of such trustee.

"Estate" in this legislation was defined as comprising all present and future property, whether movable or immovable, personal or real, and all rights of whatsoever description to such property, wherever they may be found to exist. It related to property belonging or due to the insolvent at the time of the granting of the order of sequestration or which subsequently, and any time before rehabilitation was acquired or became due to the insolvent. Included in the insolvent estate was any property belonging to the insolvent under attachment in the execution of judgment against the insolvent, or the proceeds thereof. This property had to be returned to the sequestrated estate.<sup>39</sup>

Provision was expressly made for exempt property, which was dealt with in section 28 of this legislation. Thus the insolvent was entitled to receive and sue for, in his own name, the wages or reward for his work and labour or that of any of his family. This included the right to any pension granted for work or services already performed. The court apparently had a discretion to decide on the amount of the aforementioned exempt property that the insolvent would receive.<sup>40</sup>

The insolvent was also entitled to a further exemption in the form of damages awarded by reason of any insult or any personal injury done to the insolvent or any member of his family. All such money received by the insolvent, and all goods purchased by him with such money were for his personal use and free from the control of his trustee or other lawful administrator of his estate.<sup>41</sup>

Provision was also made in this legislation for the protection of certain insurance policies. Any policy of life insurance by the insolvent *bona fide* effected for the

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<sup>39</sup>S 28 of Act 13 of 1895.

<sup>40</sup>S 28 of Act 13 of 1895.

<sup>41</sup>Ss 28 and 32 of Act 13 of 1895.

benefit of his wife and children was excluded from the insolvent estate, and except for lawful rights obtained thereto by third persons, reserved for the insolvent. It was a requirement that the policy must have been taken out at least two years before the granting of the sequestration order.<sup>42</sup>

The Transvaal legislation contained the same provisions<sup>43</sup> in respect of a necessary allowance that could be paid out of the insolvent estate, to the insolvent to support himself and his family, as payment for being employed to look after the insolvent estate, and the consent of the creditors for such payments, and the review by the court of the trustee's action regarding such payments without consent of the creditors, as was provided for in section 59 of the Cape Ordinance 6 of 1843.<sup>44</sup>

## **4.5 Insolvency Act 32 of 1916**

### **4.5.1 General**

This Act brought about a uniform law of insolvency throughout the Union of South Africa by repealing and replacing the existing statute law of insolvency in the various provinces. It was structured on the Transvaal Insolvency Act 13 of 1895, but, as stated above, the latter Act was modelled on the Cape Ordinance 6 of 1843. The Insolvency Act 32 of 1916<sup>45</sup> contained no general provision repealing repugnant laws, but if it was in conflict with the common law, it was taken to repeal that law. It was not, however, considered a complete statement of the common law of insolvency and therefore did not interfere with any common law right consistent with its provisions.<sup>46</sup>

This 1916 Act, like its predecessors, provided for both the voluntary surrender of a debtor's estate and for the application by creditors for the compulsory sequestration of a debtor's estate. Under this Act the sequestration order also had the effect of divesting the insolvent of his estate,<sup>47</sup> and in a compulsory

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<sup>42</sup>S 28 of Act 13 of 1895.

<sup>43</sup>In s 97.

<sup>44</sup>See para 4.3 above.

<sup>45</sup>Hereafter the 1916 Act.

<sup>46</sup>Mars (1917) at 6.

<sup>47</sup>S 19. See also Wille and Millin *Mercantile law of South Africa* (1917) at 257 (hereafter Wille) and Nathan M *South African insolvency law: A commentary on the Insolvency Acts No 32, 1916 and No 29, 1926* (1928) at 77 (hereafter Nathan).

sequestration the date of the granting of the provisional order was the date of such divesting.<sup>48</sup>

The estate vested first in the Master and ultimately, upon his appointment, in the trustee,<sup>49</sup> and the vesting occurred before attachment of the insolvent's assets by the sheriff of the court.<sup>50</sup> The estate remained so vested until the insolvent became reinvested with it after the acceptance of an offer of composition by creditors or until rehabilitation.<sup>51</sup>

Section 19(a) stated that the estate comprised all property, movable or immovable, including the proceeds of property in the hands of the sheriff or messenger under a writ of attachment, owned by the insolvent at the date of sequestration or acquired by him or accruing to him after the date of sequestration but before rehabilitation. "Movable property" included every kind of property and every right or interest that was not immovable property. "Immovable property" included land and every right or interest in land or minerals which was registrable in any registry within the Union.<sup>52</sup>

#### **4.5.2 Exempt property**

Some of the insolvent's property was specifically exempted from passing to his trustee. These exemptions included property of the insolvent at the date of sequestration and property acquired during sequestration.

In respect of property acquired at the date of sequestration, the following exemptions applied:

- The arms and accoutrements of a member of any defence force and one horse used by him in the ranks.<sup>53</sup>
- Damages recoverable for any damages or personal insult suffered by him.<sup>54</sup>
- The wearing apparel and bedding of the insolvent. Apparently the insolvent was

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<sup>48</sup>*Estate van Heerden v Glatt* 26 SC 592.

<sup>49</sup>S 19(a); but subject to certain exemptions as discussed hereafter.

<sup>50</sup>*Sagorsky's Trustee v Joffe* (1916) TPD 661.

<sup>51</sup>S 23.

<sup>52</sup>S 2; Nathan at 83.

<sup>53</sup>S 19(a)(2).

<sup>54</sup>S 21(4).

granted an absolute right to his wearing apparel and bedding. To gain the exemption of his household furniture and tools, however, he required his creditors' consent.<sup>55</sup>

- An insurance policy effected by an employer as protection against his liability to an employee under the Workmen's Compensation Act 25 of 1914 and apparently also the amount of compensation due under such Act to an employee.<sup>56</sup>
- Life insurance policies were exempt under certain circumstances. This exemption was limited to certain maximum amounts.<sup>57</sup>

"Policy of life insurance" under the 1916 Act included a contract for securing an insurance endowment, bonus, or annuity upon the death of the insured or on the expiration of any period or on the happening of any event, as well as a fully paid-up policy granted for the surrender or exchange of a policy of an equivalent value. But it did not include any other property acquired in consideration of the surrender, pledge or cession of a policy.<sup>58</sup>

The 1916 Act dealt only with the policies as defined above which had been effected by a husband in favour of, or ceded to, or for the benefit of, his wife or child or both. It provided that its provisions in respect of such policies were in substitution for the protection, upon the insolvency of the wife or husband, previously given to such policies by certain provincial statutes.<sup>59</sup> In respect of any other kinds of policies (not within the above definition), these provincial statutes still determined the extent of protection, if any, of such policies.<sup>60</sup> It would therefore appear that the 1916 Act did not apply to a policy of life insurance effected by a wife or to a policy of life insurance effected by a husband, but not in favour of, or ceded to, or for the benefit of, his wife or child or both.<sup>61</sup>

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<sup>55</sup>S 76(2) and see Mars 1917 at 85.

<sup>56</sup>Mars WH and Hockly HE *The law of insolvency in South Africa* (2<sup>nd</sup> ed) (1924) at 93 (hereafter Mars (1924)).

<sup>57</sup>S 26 of the Act.

<sup>58</sup>S 26(2)(c) of the Act; This term was not defined in previous provincial legislation.

<sup>59</sup>Namely, the Life Assurance Act 13 of 1891, of the Cape of Good Hope, the Life Assurance Protection Act 38 1908, of Natal, and Law no 12 of 1894 of the Orange Free State.

<sup>60</sup>S 26(3) of the Act; Mars (1917) at 86.

<sup>61</sup>Mars (1917) at 86.

The extent of protection of the policies in question was, however, limited. If a policy had been effected by a husband in favour of, or ceded to, his wife, married out of community of property, either before or during the marriage, on the sequestration of her estate, the policy was protected to an amount not exceeding two thousand pounds together with any bonus claimable in respect thereof.<sup>62</sup> Previously, under the Cape law, a policy of this nature passed absolutely to her trustee.<sup>63</sup> In terms of section 26 (2) of the Act of 1916, where the spouses were married in community of property and the policy was effected by the husband in good faith before or during the marriage in favour of, or ceded to, or for the benefit of, his wife or child or both, at a date exceeding two years prior to sequestration of the joint estate, a maximum of two thousand pounds, together with any bonus, was exempt from the trustee's control. However, such policy was entirely protected if it was so effected or ceded, in terms of a settlement in an ante-nuptial contract, more than two years before sequestration but within three months of the date of marriage.<sup>64</sup>

Policies still to be considered are those effected by a husband for his own benefit and not ceded by him and policies effected by a wife. The protection afforded to such policies, if any, would be determined by the aforementioned provincial statutes, which were not repealed by Act 32 of 1916. If, in the Cape Province, a person, whether married or unmarried, effected a policy on his own life, that policy was absolutely protected after the lapse of three years from the date of payment of the first premium, to the extent of three hundred pounds, and a further hundred pounds for each year or part of a year exceeding such three years, but not exceeding two thousand pounds.<sup>65</sup> If the insured was a woman married in community of property, the same protection applied against the trustee of the joint estate.<sup>66</sup> However, a policy ceded by a wife to her husband, to whom she was married out of community of property, was not protected against the trustee of the husband's insolvent estate.<sup>67</sup>

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<sup>62</sup>S 26(1).

<sup>63</sup>*Estate Ellis v Ellis* 18 CTR 574; Mars 1917 at 87.

<sup>64</sup>Ss 26(2) and 25.

<sup>65</sup>S 16, Act 13 of 1891 (Cape).

<sup>66</sup>S 17, Act 13 of 1891 (Cape).

<sup>67</sup>*Estate Ellis v Ellis* 18 CTR 574.



Similar statutes existed in the Orange Free State and Natal,<sup>68</sup> but the previous Transvaal statute<sup>69</sup> was repealed by Act 32 of 1916.

It is interesting to note that if a man effected a policy on his life and the policy was silent about his wife and children, and the sum assured was made payable to his executors, administrators or assigns, it was presumed that he intended to reserve to himself the right to decide who the ultimate beneficiary would be. If he intended to benefit his wife and children by means of the policy, there had to be some evidence that he had carried out that intention before they could claim the benefit.<sup>70</sup> In the absence of such evidence, a wife or child could not claim that the policy had been taken out in her or his favour or ceded to her or him.<sup>71</sup>

On 1 January 1924 a new Insurance Act came into operation.<sup>72</sup> It repealed the prior provincial statutes on the subject. On this development, Mars had the following to say:<sup>73</sup>

It is unfortunate, however, that the legislature, when enacting the recent insurance Act, did not repeal and re-enact to the extent desired, such provisions of Act 32 of 1916 as dealt with life insurance policies, because many acute difficulties of construing the relevant sections of the two statutes would probably thus have been avoided.

One example of such difficulties referred to by Mars was the fact that the definitions of a “life insurance policy” contained in the two Acts differed. “Policy of life insurance” in Act 32 of 1916 included a contract for securing an insurance endowment, bonus or annuity upon the death of the insured or on the expiration of any period or on the happening of any event, as well as a fully paid-up policy, granted for the surrender or exchange of a policy of an equivalent value, but did not include any other property acquired in consideration of the surrender, pledge or cession of a policy.<sup>74</sup> In the Insurance Act 37 of 1923, however, a “life policy”

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<sup>68</sup>Law 12 of 1894 (OFS) and Act 38 of 1908 (Natal).

<sup>69</sup>S 28 of Law 13 of 1895.

<sup>70</sup>Mars 1917 at 86.

<sup>71</sup>*Wallach's Trustee v Wallach* (1914) AD 202 and Mars 1917 at 86.

<sup>72</sup>37 of 1923.

<sup>73</sup>Mars (1924) at 93.

<sup>74</sup>S 26(2)(c) of Act 32 of 1916.

was defined as a policy insuring payment of money on death (except death by accident only) or the happening of any contingency dependent on human life and includes an instrument evidencing a contract that is subject to the payment of a premium or premiums for a return dependent upon human life or provides for the payment of an annuity for a term dependent on human life.<sup>75</sup>

A consequence of the different definitions adopted by the two Acts was that a particular policy could possibly fall within the operation of only one of them. But if the policy fell within the definition of both, it was governed by both Acts. But if the Insolvency Act was in any way in conflict with the Insurance Act, it apparently had to be considered impliedly repealed in respect of such conflict.<sup>76</sup> In some respects, however, the combined effect of the two Acts was a matter of conjecture.<sup>77</sup>

Act 32 of 1916 dealt only with policies falling within the above definition which had been effected by a husband in favour of, or ceded to, or for the benefit of, his wife or child or both.<sup>78</sup> Further, its provisions with reference to such policies were in substitution for the protection previously given to such policies by certain provincial statutes.<sup>79</sup> In respect of other policies, the Insurance Act of 1923 determined the extent of the protection, if any.<sup>80</sup> Thus, the Insolvency Act 32 of 1916 apparently had absolutely no application to a policy of life insurance effected by a wife or to a policy of life insurance effected by a husband, but not in favour of, or ceded to, or for the benefit of, his wife or child or both.<sup>81</sup>

Section 25 of the Insurance Act<sup>82</sup> provided that a policy of life insurance effected by a wife either before or after marriage on her own life or after marriage on her husband's life was her separate property, despite being married in community of

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<sup>75</sup>S 57 of Act 37 of 1923.

<sup>76</sup>Mars (1924) at 94-95.

<sup>77</sup>Mars (1924) at 94-95. This is an early example of the problems that can arise in respect of one piece of legislation conflicting with another, when different fields of law overlap with each other. See also Evans RG and Abrie W "The taxability of insolvent spouses who are married in community of property" (2006) *Stell Law Review* at 105.

<sup>78</sup>Mars (1924) at 94.

<sup>79</sup>Mars (1924) at 94.

<sup>80</sup>S 26(3) of Act 32 of 1916.

<sup>81</sup>Mars (1924) at 94.

<sup>82</sup>37 of 1923.

property. Such policy was protected as against her husband's creditors, if it existed for three years. But the maximum protection was for two thousand pounds, together with any bonus claimable thereunder. Sections 26 and 27 of that Act provided that a policy effected by a husband or intended husband on his life or his wife's life in favour of, or ceded to, his wife, would not be void as a gift between spouses. Furthermore, although the marriage was in community of property, as between husband and wife, it would be her sole property. As against creditors, it would apparently be an asset in the common estate if that estate was sequestrated, but protected to the extent of two thousand pounds plus bonuses, if it was effected in her favour or ceded to her more than two years before sequestration.<sup>83</sup>

A policy effected by an insolvent on his own life and which had been in existence for three years from payment of the first premium was protected to a maximum of two thousand pounds plus bonuses, provided it was not pledged. In respect of policies effected before or during marriage in favour of, or ceded to, or for the benefit of, a wife by the husband, it appeared that Act 37 of 1923 re-enacted the provisions of section 26 of Act 32 of 1916.<sup>84</sup>

Act 37 of 1923 included an interesting provision intended to counter fraud in respect of these policies. It stated that if proved that a policy was effected or the premiums thereunder paid with the intent to defraud creditors, the court could order a sum equal to the premiums paid plus interest thereon to be a charge on the policy and payable out of the proceeds.<sup>85</sup>

#### **4.5.3 After-acquired property**

Act 32 of 1916 made specific provision for the exemption from the insolvent estate of certain categories of property accruing to the insolvent or acquired by him after sequestration. The following property was so excluded from the control of the trustee:

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<sup>83</sup>S 28 of Act 37 of 1923 and s 26(2) of Act 32 of 1916 and see Mars (1924) at 96.

<sup>84</sup>See s 28(1) of Act 37 of 1923 and see Mars (1924) at 96.

<sup>85</sup>S 31 of Act 37 of 1923; Mars (1924) at 96.

- Wages or reward for work or labour or for professional or other services rendered by the insolvent or on his behalf. Included herein were profits from any trade conducted by him with the written consent of his trustee.<sup>86</sup> Property purchased with monies derived from any of these sources was also excluded from the insolvent estate.<sup>87</sup>
- Any pension to which the insolvent was entitled.<sup>88</sup>
- Damages recovered for any personal injury or insult and property acquired with monies received for damages for personal injury or insult.<sup>89</sup>

In respect of the insolvent's pension and profits made by him from his profession, occupation, service or trade, the Master had a discretion to claim part thereof if in his opinion they exceeded what was required by the insolvent for himself and his dependants.<sup>90</sup> The Master would issue a certificate to this effect, upon production of which the Registrar of the Court would issue a writ of execution against the insolvent for the relative amount.<sup>91</sup> Although the pension and profits themselves did not vest in the trustee, the 1916 Act specifically stated that the aforementioned surplus did so vest.<sup>92</sup> Further, any provision in the laws governing public or railway servants' pensions could not deprive the trustee of his right to such surplus.<sup>93</sup>

#### **4.5.4 Property included in the insolvent estate**

It was indicated above what the insolvent estate was comprised of and the exempt property expressly provided for by the Act of 1916 has been considered.<sup>94</sup> However, precisely what the insolvent estate was comprised of was stated in the Act in broad and general terms, as is done in the present Insolvency Act of 1936. It has therefore always been the task of the courts and academics, in most cases, to decide in detail what property did, in fact, pass to the trustee of an insolvent estate. As will be shown

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<sup>86</sup>Ss 21(2) and (5).

<sup>87</sup>Mars (1917) at 99.

<sup>88</sup>S 21(3). Prior to Act 32 of 1916 the insolvent's pension was not exempted from the insolvent estate and it passed to the trustee – see *In re: Hansen* 21 SC 625.

<sup>89</sup>S 21(4).

<sup>90</sup>S 21(2) and (3).

<sup>91</sup>S 21(7).

<sup>92</sup>S 21(2) and (3); Mars 1924 at 97.

<sup>93</sup>S 21(3).

<sup>94</sup>See para 4.5.1 to 4.5.3 above.

below, South African insolvency legislation has tended not to legislate expressly what property forms part of the insolvent estate, leaving the courts and academics to speculate on this issue. This situation has been continued in the 1936 Insolvency Act, thereby perpetuating the uncertainty in respect of certain assets of an insolvent debtor *vis-à-vis* the insolvent estate. Be that as it may, under the 1916 Act, the following property passed to the trustee of an insolvent estate:

- Title deeds of the insolvent and other muniments of title,<sup>95</sup> including his books of account.<sup>96</sup>
- Property apparently donated by the insolvent to his wife after the marriage.<sup>97</sup> It was, however, possible for a moderate gift to her not to have passed to the trustee.<sup>98</sup>
- Money saved by a wife out of her spouse's allowance to her for household expenses. This money was *prima facie* held by her as his agent.<sup>99</sup> However, if the saved amount was moderate, having regard to the spouse's income and occupation, it did not vest in the trustee.<sup>100</sup>
- Proceeds of an execution sale in the hands of an execution officer.<sup>101</sup>
- The goodwill of a business of the insolvent.<sup>102</sup>
- All debts due to the insolvent and claims, if the cause thereof arose before sequestration.<sup>103</sup>
- Where the insolvent, in his capacity as a *fiduciary* to property, made improvements to the property burdened with a *fideicommissum*, the improvements, or presumably their value, passed to the trustee.<sup>104</sup>
- Various leases.<sup>105</sup>
- A liquor licence in the insolvent's own name.<sup>106</sup>

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<sup>95</sup>*Matthew's Trustee v Stewart* (1868) Buch at 251; *Handley NO v Michaelson* (1913) TPD 449.

<sup>96</sup>S 77(1) of Act 32 of 1916.

<sup>97</sup>*Hall v Hall's Trustee and Another* 3 SC 3 but compare *Simons and Others v Board of Executors* (1915) CPD 479; Mars 1917 at 89; Mars 1924 at 98.

<sup>98</sup>*William's Estate v Williams* 7 NLR 93.

<sup>99</sup>Mars (1917) at 90.

<sup>100</sup>*Linde v Cohen NO* (1914) TPD 369.

<sup>101</sup>S 19(a)(i) of Act 32 of 1916; *Estate Roets v Ginsberg and Another* 25 SC 683.

<sup>102</sup>*Dowson v Hobkirk and Another* (1912) WLD 1.

<sup>103</sup>Mars (1917) at 90.

<sup>104</sup>*In re: Insolvent Estate Barnardo* 20 CTR 473; Mars 1917 at 90.

<sup>105</sup>*Hoosen v Mendelsohn and Others* 19 NLR 40.

<sup>106</sup>Mars (1917) at 90.

- Rights of inheritance.<sup>107</sup> To this day, this issue has apparently been a thorny one for both the courts and the judicial commentators. Looking at the long history of debate around this problematic and uncertain area of insolvency law, it is remarkable that the legislature has never thought it necessary to deal with it in any insolvency legislation. It is therefore discussed in more detail here.

Apparently, during this early period, only the Cape court appears to have considered whether an insolvent's interest under a will passed to his trustee.<sup>108</sup> Initially, it was inclined to hold that even a *spes successionis*, a mere expectancy that may never materialise, formed part of the insolvent estate.<sup>109</sup> However, the court ultimately ruled that under Ordinance 6 of 1843 only those interests under a will that were vested in the insolvent at the date of sequestration or became so vested before the final plan of distribution passed to the trustee.<sup>110</sup> Thus, where a *fideicommissum* was created, but the condition thereof had not yet been fulfilled, the fideicommissary's trustee could not sell the insolvent's chance of ultimately succeeding to the inheritance. The court relied on two considerations to justify this decision, namely the difference in the language of the Cape and English statutes and the provision in the Cape statute for the divesting of the insolvent estate. The insolvent could be divested only of vested rights.<sup>111</sup> Act 32 of 1916 used different phraseology to that of the old Cape Ordinance. The 1916 Act provided that the insolvent would be divested of all his property when sequestrated, as well as all property that he may acquire or that may accrue to him during sequestration.<sup>112</sup> Further, "property" was defined as including movable and immovable property within the Union and contingent interests in property.<sup>113</sup> At this point Mars<sup>114</sup> stated the following in respect of the wording of this legislation:<sup>115</sup>

It may fairly be urged that the use of the word *divest* lends colour to the view that, as under the old Cape Ordinance, only vested interests pass to a trustee in insolvency, but the definition of property strongly militates against this view, and it

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<sup>107</sup>See Nathan at 90.

<sup>108</sup>Mars (1917) at 90; Mars (1924) at 99.

<sup>109</sup>*Quin v Board of Executors* (1870) Buch at 78; Mars (1924) at 99.

<sup>110</sup>*Nortje v Nortje* 6 SC 9; *Van Breda v The Master* 7 SC 360; *Jones v Matthews* 14 SC 68; *Whitehead v Estate Whitehead* 25 SC 65; Mars (1924) at 99.

<sup>111</sup>*Jones v Matthews* 14 SC 68; Mars 1917 at 91; Mars 1924 at 99.

<sup>112</sup>S 19(a).

<sup>113</sup>S 2.

<sup>114</sup>Mars (1917) at 91.

<sup>115</sup>For the latter opinion Mars cites *Smit v Smit's Executrix* 14 SC 142.

seems that the intention of the statute was that not only vested rights but that any expectancy or possibility of succession should pass to the trustee. This, however, is clear – that if an insolvent consents to his trustee dealing with any interest or expectancy in his estate, he is precluded from afterwards claiming that his trustee had no right so to do, even as a fact his trustee would but for his consent have had no such right.

Mars then stated that if his suggested interpretation of Act 32 of 1916 were correct, the difficulty that previously existed in practice of determining whether a particular interest vested or not would fall away. Mars’s view is probably the interpretation that the legislature had hoped for, but history and the complexity of the meaning of the word “vest” and the definitions of “property” and “disposition” in modern-day legislation has proved Mars wrong.<sup>116</sup>

Citing, among others, *Van Schoor’s Trustees v Muller’s Executors*,<sup>117</sup> Mars stated,<sup>118</sup> without further consideration or explanation, that an heir’s right of adiation or repudiation continues, whatever his embarrassments may be up to the moment of sequestration of his estate, but thereupon passes to his trustee. As will be shown below,<sup>119</sup> over the years a lot more has been said about the repudiation of an inheritance. Presumably the question of a repudiated inheritance possibly being considered an impeachable disposition, or an act of insolvency and the nature of the rights attaching to an inheritance did not come to mind when Mars considered these issues. The 1916 Act, however, did make provision for acts of insolvency<sup>120</sup> and impeachable dispositions.<sup>121</sup>

- *Bequest to a woman married in community of property*: In *De Ville v Theunissen*<sup>122</sup> it was confirmed that unless there was a condition attached to the bequest to the contrary, any interest accruing to a woman married in community of property before the sequestration of her husband’s estate vested in his trustee. Here Mars stated, correctly, that because it was actually the joint estate of both spouses that was sequestrated in such a case, it seemed on principle

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<sup>116</sup>See the discussion thereof in ch 8 below.

<sup>117</sup>3 Searle 137.

<sup>118</sup>Mars (1917) at 92.

<sup>119</sup>See the discussion thereof in ch 8 below.

<sup>120</sup>See s 8 of the Act.

<sup>121</sup>See, eg, ss 24 to 29 and s 33 of the Act.

<sup>122</sup>(1878) Buch 171.



that the whole of any bequest accruing to her during sequestration must also vest in his trustee.<sup>123</sup> Mars, however, refers to direct authority for the view that in such event only one half of the interest passed to the trustee and the other half was preserved for the wife personally.<sup>124</sup> Mars gives no further opinion on this matter. Today, however, it is known that this decision was incorrect. No express provisions in the 1916 Act, or any legislation thereafter regulated this issue and since then, the matter has been clothed in uncertainty for decades, until the correct position was set out in *Badenhorst v Bekker NO en Andere*.<sup>125</sup>

- *Prohibition against attachment of bequest:* Whether a testator could bequeath property to a woman married in community of property in a manner that would prevent it passing to her husband's trustee in insolvency was already a debatable point in the early history of South African insolvency law.<sup>126</sup> Although there was an earlier decision<sup>127</sup> to the contrary, Mars considered it settled that a direction in a will merely that a bequest may not be attached by the beneficiary's creditors was of no effect in law. However, if a further direction existed that on the beneficiary's insolvency the bequest may not pass to the designated beneficiary, but must pass to another person or that the executors may in their absolute discretion divert the inheritance to some other person, then that bequest would not pass to the trustee of the insolvent estate. Mars pointed out that in marriages in community of property the rights of both spouses merged in the common estate and thus it seemed on principle that to keep a bequest to a wife out of the insolvent estate of her husband, a bequest of the property over to some third person would be necessary.<sup>128</sup> Apparently there was authority for the argument that even without such gift over, property could be bequeathed to a wife to the exclusion of her husband's trustee. To achieve this effect, the language of the testator apparently had to be clear and direct.<sup>129</sup>

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<sup>123</sup>Mars (1917) at 93.

<sup>124</sup>*In re: William Dynes Estate* 6 NLR 43; *Ex parte van der Merwe* (1913) TPD 372.

<sup>125</sup>See ch 10 below.

<sup>126</sup>See Mars (1917) at 94.

<sup>127</sup>*Blignaut's Trustee v Cilliers' Executors and Others* (1868) Buch 206.

<sup>128</sup>See Mars (1917) at 94.

<sup>129</sup>*Blignaut's Trustee v Cilliers' Executors and Others* (1868) Buch 206 and Voet 7, 1, 32; 23, 4, 45; 23, 2, 77 as cited in Mars (1917) at 94 note 49.

- *Property disposed of by the insolvent but not delivered:* Generally, one cannot part with one's *dominium* in property unless delivery has been effected. Prior to delivery the obligee has only a personal claim and no real right over the property. Thus any movable property sold by the insolvent, but not transferred, during the period of the 1916 Act passed to his trustee and the purchaser ranked as an ordinary concurrent creditor of the estate.<sup>130</sup> This rule applied even if the purchaser had paid the full purchase price and was in possession of the property.<sup>131</sup> This rule was set down in the early case of *Harris v Trustees of Buissine*.<sup>132</sup> So, where two persons jointly purchased a farm that was transferred into the name of one of them and his estate was sequestrated, the other had only a concurrent claim against the insolvent estate.<sup>133</sup> Mars pointed out that this rule worked great hardship in many cases and that the courts would not extend its operation unless compelled to do so.<sup>134</sup>
- *Property purchased by, but not delivered to, the insolvent:* Where property was purchased by an insolvent before sequestration, but not yet delivered to him, his trustee could not claim that property without tendering payment of the purchase price. This was so even if the sale was on credit and the date of payment agreed upon had not yet arrived.<sup>135</sup>
- *Property purchased by, and delivered to, the insolvent, but not paid for:* If the insolvent at the date of sequestration had failed to pay the purchase price of property delivered to him, that did not of itself entitle the seller to claim the property from the trustee.<sup>136</sup> If the sale was a cash sale,<sup>137</sup> the seller could claim return of the property if within ten days of delivery he notified the insolvent or the legal representative of the estate in writing that he was reclaiming the property.<sup>138</sup> If the trustee disputed the seller's right, the latter had to institute proceedings within seven days after the trustee's notification that he disputed the claim. Return of the property could not be enforced unless the seller

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<sup>130</sup>Mars (1924) at 103.

<sup>131</sup>Mars (1924) at 103.

<sup>132</sup>2 Menz 105.

<sup>133</sup>*Kleugden & Co v Rabies' Trustee* Foord 63 as cited in Mars (1917) at 95.

<sup>134</sup>See Mars (1917) at 96.

<sup>135</sup>Mars (1917) at 97.

<sup>136</sup>S 35(2) of Act 32 of 1916.

<sup>137</sup>Every sale was deemed to be for cash unless the seller expressly or tacitly agreed otherwise.

<sup>138</sup>S 35(1) of Act 32 of 1916. This right to reclaim was limited to movable property.

refunded any payments received by him.<sup>139</sup>

- *Property pledged or subject to a lien*: The trustee of the insolvent estate at common law had a right and duty to take possession of the insolvent's assets, even though they were pledged or otherwise encumbered, and to sell them to the best advantage.<sup>140</sup> The 1916 Act did not specifically repeal the common law, but stated that a creditor who was in possession of movable property at the date of sequestration, held as security for his claim, was entitled to retain such possession and to take over that property at the amount of the valuation placed thereon in his proof of debt. However, the trustee could, within six weeks of the proof of such debt, if directed by the creditors to do so, take over the same for the benefit of the estate at such valuation.<sup>141</sup>

These provisions applied only in respect of movable property and, in addition, only if the creditor in possession had proved his claim. Here Mars was of the opinion that as against a creditor in possession who had not proved a claim, the trustees common law right to claim delivery of the property held by the creditor still remained.<sup>142</sup>

#### **4.6 The Insolvency Act 1916 Amendment Act 29 of 1926**

This Act came into effect from 1 October 1926. It amended and made additions to the principal Act of 1916. Of importance to this thesis is section 10 of the 1926 Act which amended section 19 of the 1916 Act. It added subsections (2), (3), (4) and (5) to section 19, which provided for an additional effect of an order of sequestration, by vesting in the Master, and ultimately in the trustee, the estate of the solvent spouse of the insolvent. This is the section that preceded section 21 of the present Act. These provisions, which may be considered the most important alteration to the 1916 Act, will now be considered in more detail.

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<sup>139</sup>S 35(1) of Act 32 of 1916. The rationale behind this provision was that though a sale may be for cash, the seller had to claim his goods or the cash within reasonable time, or it would be implied that the contract was for credit – see *Seluka v Suskin and Another* (1912) TPD 269.

<sup>140</sup>Voet 42, 7, 7 as cited in Mars (1924) at 106.

<sup>141</sup>S 77(1), (2) and (3); Mars (1924) at 106.

<sup>142</sup>Mars (1924) at 106.

These subsections had the general effect of vesting the entire estate of the solvent spouse, married out of community of property, in the Master and ultimately in the trustee of the insolvent spouse, who would then deal with the solvent spouse's estate in accordance with these subsections. This applied where the insolvent was married, and not living apart from, the solvent spouse under a judicial order of separation or a notarial deed of separation. If the spouse was living apart from the insolvent spouse, but not so separated, the estate of the solvent spouse fell under the operation of these subsections.<sup>143</sup>

The trustee was obliged to release the following categories of property:<sup>144</sup>

- property that belonged to the solvent spouse separately immediately before the marriage;
- property acquired by the solvent spouse under a marriage settlement;
- property acquired during the marriage with a title valid as against the creditors of the insolvent spouse;
- insurance policies protected under the relevant legislation;
- property acquired by the solvent spouse with the income or proceeds of any of these categories of property.

Subsections (2)(a) and (b) could not be easily reconciled.<sup>145</sup> The trustee had a duty under subsection (2)(a) of releasing such property *as is shown* to be included in one of the above categories of property. It was not stated by whom this must be shown. It would, however, appear that the onus was on the solvent spouse to show that the property was his or her separate property.<sup>146</sup> Under subsection (2)(b), the trustee could realise any property that *ostensibly belonged to the solvent spouse*, with the leave of the court. If he had not obtained such leave, he could not realise it unless he had given six weeks' notice that he intended doing so.<sup>147</sup> Such notice had to be given to the solvent spouse or his or her agent. The notice also had to be published in the *Gazette* and in a local newspaper of the

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<sup>143</sup>S 19(2).

<sup>144</sup>S 19(2)(a)(i)-(v).

<sup>145</sup>Nathan at 97.

<sup>146</sup>Nathan at 97.

<sup>147</sup>Subsection (2)(b).

district or residence of the solvent spouse. The notice had to call on the separate creditors for value of the solvent spouse to prove their claims. Creditors *ex titulo lucrativo*, such as donees, was not provided for.<sup>148</sup> Subsection 2(b) therefore enabled the trustee to realise ostensible property of the solvent spouse, if that spouse had not obtained the release thereof. Ostensible property would include property mentioned in the categories in subsection 2(a)(i)-(v).<sup>149</sup>

The trustee could voluntarily release disputed property, but could later establish his title thereto.<sup>150</sup> If he established his title, the solvent spouse's creditors were not entitled to any rights in the property other than those they would possess apart from the Act. The words "his title" were therefore understood to be that the title to the property concerned was really that of the insolvent spouse.<sup>151</sup> If the trustee had realised property that actually belonged to the solvent spouse, that spouse could still claim the proceeds thereof by application to court.<sup>152</sup>

A proved creditor of a solvent spouse had no voting rights at meetings in the insolvent estate, but he could set aside any resolution that affected him adversely. He was also not liable to a contribution in the insolvent estate.<sup>153</sup>

The virtual effect of how the trustee was to deal with property of the solvent spouse which he had realised, was to make such property administrable and subject to proof by creditors as if it were also under sequestration.<sup>154</sup> This issue, which was regulated by subsection 2(d), was not easy to interpret. It will not be considered in further detail at this point, but suffice to say, that it was a precursor to some of the problems and litigation that would be experienced by these provisions regarding the solvent spouse's assets in this and later legislation.<sup>155</sup>

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<sup>148</sup>Nathan at 97.

<sup>149</sup>Nathan at 97.

<sup>150</sup>S 19(5).

<sup>151</sup>Nathan at 97-98.

<sup>152</sup>S 19(2)(c).

<sup>153</sup>S 19(2)(e).

<sup>154</sup>S 19(2)(d) and see Nathan at 98.

<sup>155</sup>This aspect is considered in some detail in ch 10 below under the discussion of s 21 of the Insolvency Act 24 of 1936.

One of the ways in which the interests of the solvent spouse were protected was to exclude his property from vesting in the trustee for a defined period, if he could, under certain circumstances, satisfy the court at sequestration or later that he was willing to make arrangements to protect the interests of the insolvent estate in the property of the solvent spouse.<sup>156</sup> The solvent spouse could prove his claim to such assets during this defined period, and the trustee had to notify the spouse in writing whether or not he would release the assets.

The solvent spouse enjoyed a further measure of protection under subsection (4), if, as a result of the assets vesting in the trustee, an application was made to sequester his estate by reason of an act of insolvency committed since such vesting. Then, if the court was satisfied that the act of insolvency was due to such vesting, it could postpone the order or make any necessary interim order, provided that it appeared that proceedings were being taken for the release of the property, or that it had been released and the solvent spouse could discharge his liabilities.<sup>157</sup>

#### **4.7 The Insolvency Act 24 of 1936**

This Act came into force throughout the Union of South Africa on 1 July 1936. It consolidated and amended the law of insolvency. Because this Act is essentially the same legislation that is still in force today, only that part of the Act that differs from the present Act, or in which important developments occurred regarding assets in insolvent estates will be considered here in detail. In this Act the vesting provisions, the definitions of movable and immovable property and the assets included in, or exempted from, the insolvent estate essentially remained unchanged, and where relevant, the common law applied.

The provisions of section 19 of the 1926 Act, which provided for the vesting of a solvent spouse's assets in the trustee of the insolvent spouse's estate, were re-stated in section 21 of the 1936 Act. On this point it is interesting to note that the legal uncertainty that has emanated from section 21 of the Act over many years

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<sup>156</sup>S 19(3).

<sup>157</sup>S 19(4) and Nathan at 99.

had already found root in 1936. For example, in his discussion of property vesting in the trustee and that which does not vest in the trustee, Hockly twice mistakenly seems to attempt to apply section 21 to spouses married *in community* of property. In his discussion of bequests to women married *in community* of property, and the possibility that they acquire such bequests to the exclusion of the trustee of the (joint) insolvent estate, he says:<sup>158</sup>

It must be remembered that now, on the insolvency of one spouse all the property of the other spouse automatically vests in the trustee of the insolvent spouse, [by virtue of section 21] and that the solvent spouse has to take steps to recover from the trustee her own separate property. The foregoing must accordingly be read subject to what is said in Chapter IX.

When reading this text it is difficult to decide whether Hockly was merely trying to emphasise the fact that all assets vested in the insolvent estate, irrespective of the marital regime that may have been entered into by the spouses. However, since then, others have often made the mistake of attempting to apply section 21 of the Act to marriages in community of property.<sup>159</sup> One is tempted to conclude that Hockly too was making the same mistake.

As will be shown below,<sup>160</sup> another problem child in respect of assets in insolvent estates has been the position of life insurance policies in insolvent estates. The 1936 Act made specific provisions in section 28 to regulate the position in respect of such policies. Both the Insolvency Act of 1936 and the Insurance Act<sup>161</sup> provided for the limited exemption of insurance policies under certain circumstances. These provisions were, however, virtually identical to the previous dispensation and the discussion<sup>162</sup> of such policies above also applies to policies under the 1936 Insolvency Act.

Section 28 of the Insolvency Act<sup>163</sup> has been repealed by section 78 of the

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<sup>158</sup>Hockly HE *Mars The law of insolvency in South Africa* (3<sup>rd</sup> ed) (1936) at 172 and 173 (hereafter Mars (1936)).

<sup>159</sup>See ch 10 below on the discussion of the position of the solvent spouse.

<sup>160</sup>See para 4.7.1 and further and ch 9 below.

<sup>161</sup>37 of 1923. This Act repealed earlier provincial statutes on the subject.

<sup>162</sup>See para 4.5.2 above.

<sup>163</sup>24 of 1936



Insurance Act,<sup>164</sup> and the Insurance Act, in turn, has been repealed and replaced with the Long-term Insurance Act.<sup>165</sup>

The Insurance Act, which repealed section 28 of the Insolvency Act, contained provisions similar to those of section 28 of the Insolvency Act. These provisions of the Insurance Act were found in sections 39 to 44. The relevant provisions of section 44 read as follows:<sup>166</sup>

(1) If the estate of a man who has ceded or effected a life policy in terms of section 42 or 43 has been sequestrated as insolvent, the policy or any money which has been paid or has become due .... shall be deemed to belong to that estate: Provided that, if the transaction in question was entered into in good faith [and within certain time periods or under certain conditions] ... only so much of the total value of all such policies ... as exceeds R30 000 shall be deemed to belong to the insolvent estate.

The effect of section 44 was that if a life insurance policy ceded to a woman, or effected in her favour, by her husband more than two years before the sequestration of her husband's estate, she would receive a maximum of R30 000 from the policy. Any amount exceeding the R30 000 was deemed, as against the creditors of the husband, to belong to the husband's insolvent estate. If it was ceded or effected less than two years from the date of sequestration, the wife would receive no benefit from the policy at all.<sup>167</sup>

#### **4.7.1 The purpose of section 44 of the Insurance Act**

Section 44 of the Insurance Act (and the repealed section 28 of the Insolvency Act 24 of 1936 and section 26(2) of the Insolvency Act 32 of 1916) had the dual purpose of protecting both the wife of the insolvent husband as well as his creditors. Firstly, in view of the common law rule prohibiting donations between spouses, section 44 provided a married woman with a benefit that would otherwise

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<sup>164</sup>27 of 1943 (hereafter referred to as the Insurance Act).

<sup>165</sup>52 of 1998 (hereafter referred to as the Long-term Insurance Act). See Smith A "The difficulties of simplicity" (2000) *JBL* 85; Smith A "The protection of insurance policies from insolvency under s 63 of the Long-Term Insurance Act 52 of 1998" (2000) *SA Merc LJ* 94.

<sup>166</sup>S 44(1)(a)-(b).

<sup>167</sup>See *Brink v Kitshoff* 1996 (4) SA 197 (CC) 211 F-I; the paragraphs that follow, discussing insurance legislation are included here so as to place them within their development in the historical context. A more comprehensive discussion follows in ch 9 below.

have been denied her.<sup>168</sup> Secondly, the interest of the creditors was protected from the possibility of collusion and fraud between the husband and wife.<sup>169</sup>

However, with the introduction of section 22 of the Matrimonial Property Act,<sup>170</sup> which allowed for donations between spouses, the first purpose above fell away and, in fact, turned to a burden on a married woman who may have been affected by section 44.<sup>171</sup> But for section 44, a policy envisaged in that section could in its entirety have amounted to a valid donation to the wife if the requirements of validity had been met and the suspicion of simulation had been removed. Furthermore, only a married woman was affected by the provisions of this section, not a married man in whose favour his wife had taken out a policy or ceded it to him. This situation inevitably led to the decision of the Constitutional Court in *Brink v Kitshoff*<sup>172</sup> whereby section 44(1) and (2) was declared unconstitutional and therefore invalid.

#### **4.7.2 Brink v Kitshoff 1996 (4) SA 197 (CC)**

In this case a life insurance policy valued at R2 million in respect of Mr Brink was taken out in 1989. Mr Brink was reflected as the owner in the policy, and in 1990 he ceded it to his wife, the applicant in this case. Mr Brink died in 1994 and his estate was found to be insolvent. It was dealt with in terms of section 34 of the Administration of Estates Act 66 of 1965. The executor demanded that the insurer, in terms of section 44 of the Insurance Act, pay into the estate all but R30 000 of the proceeds of this insurance policy. The insurer refused to do so and the matter eventually came before the Constitutional Court.

O'Regan J found that section 44(1) and (2) treated married women and married men differently, thereby disadvantaging married women but not married men.<sup>173</sup> Section 44(1) and (2) was therefore discriminatory against women on the grounds

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<sup>168</sup>The insurance policies under discussion can be regarded as donations between spouses. See *Brink v Kitshoff* 1996 (4) SA 197 (CC) 218 G-J.

<sup>169</sup>*Brink v Kitshoff* 1996 (4) SA 197 (CC) at 218 G-J.

<sup>170</sup>88 of 1984.

<sup>171</sup>*Brink v Kitshoff* 1996 (4) SA 197 (CC) at 218 G-J.

<sup>172</sup>*Brink v Kitshoff* 1996 (4) SA 197 (CC).

<sup>173</sup>At 217 F-G.

of both sex and marital status, thereby contravening section 8 of the interim Constitution.<sup>174</sup> The next question to be considered was therefore whether section 44(1) and (2) could be justified in terms of the limitation clause in the Constitution.<sup>175</sup> This would require this section to be shown to be reasonable and justifiable in an open and democratic society based on freedom and equality, and that it did not negate the essential content of section 8 of the interim Constitution. Consequently, one had to consider the purpose and effects of the infringing provision, and weigh them against the nature and extent of the infringement caused.<sup>176</sup>

O'Regan J held that the first purpose of section 44 of the Insurance Act, namely to provide married women with a benefit that they had been denied because of the common law prohibition of donations between spouses, had fallen away when the common law rule was abolished by section 22 of the Matrimonial Property Act.<sup>177</sup> Section 44 of the Insurance Act therefore had become disadvantageous to married women. The second purpose of protecting creditors of insolvent estates was still achieved. Although the court considered the protection of creditors to be a valuable and important public purpose, and that the close relationship between spouses could lead to collusion or fraud, it was not persuaded that the distinction between married men and married women could be said to be reasonable and justifiable.<sup>178</sup> No persuasive reasons were advanced to show why section 44 should apply only to transactions in which husbands effected or ceded policies in favour of their wives and not to similar transactions by wives in favour of their husbands. The court found that there seemed to be no reason why fraud or collusion did not occur when husbands, rather than wives, were the beneficiaries of insurance policies. Avoiding fraud or collusion, the court found, did not suggest a reason as to why a distinction should be drawn between married men and married women.<sup>179</sup> The court held that there were sufficient other legislative

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<sup>174</sup>Constitution of the Republic of South Africa Act 200 of 1993; s 9 of the present Constitution of the Republic of South Africa Act 108 of 1996.

<sup>175</sup>S 33 of the interim Constitution and s 36 of the present Constitution.

<sup>176</sup>At 218 F-H.

<sup>177</sup>88 of 1984.

<sup>178</sup>At 218 I-J.

<sup>179</sup>At 219 A-C.

provisions<sup>180</sup> that could reasonably serve the purpose of protecting the interests of creditors in a manner less invasive of constitutional rights. The discrimination caused by section 44(1) and (2) of the Insurance Act were therefore not considered to be reasonable or justifiable in the light of the purpose of the legislation and the court declared these provisions invalid.<sup>181</sup>

The effect of the *Brink* decision is that the benefits of policies effected in favour of, or ceded to, one spouse by another would ostensibly belong to the estate of the recipient spouse without any limitation, and irrespective of the insolvency of the other spouse. This, of course, is subject to the provisions of section 21 of the Insolvency Act.<sup>182</sup>

#### **4.7.3 The Long-term Insurance Act 52 of 1998**

Not long after the judgment in *Brink v Kitshoff*<sup>183</sup> the Long-term Insurance Act came into operation, repealing the Insurance Act. For purposes of insolvency law the only form of protection expressly offered by this new Act is found in section 63 thereof. This provision is similar to section 39 of the old Insurance Act. In summary, section 63 of the Long-term Insurance Act affords protection of policy benefits of certain long-term policies in terms of which such person or his or her spouse is the life insured, if the policy has been in force for at least three years.<sup>184</sup> During such person's lifetime, the policy benefits will not form part of his insolvent estate.<sup>185</sup> This protection of the policy benefits is, however, limited to a maximum amount of R50 000.<sup>186</sup> Any sum in excess thereof will form part of such person's insolvent estate.

No provisions similar to those of section 44 of the Insurance Act are included in the Long-term Insurance Act. Either of the spouses in a marriage will therefore be

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<sup>180</sup>Such as ss 26, 29, 30 and 31, for impeaching transactions, and s 21 for vesting the solvent spouse's assets in the trustee.

<sup>181</sup>At 219 F-H.

<sup>182</sup>24 of 1936.

<sup>183</sup>Cited in para 4.7.2.

<sup>184</sup>S 63(1).

<sup>185</sup>S 63(1)(a).

<sup>186</sup>S 63(2)(a).

entitled to take out, or cede a policy in favour of, the other without any limitations on the donee spouse if the donor spouse should be sequestrated. If the transaction is proved to be valid and *bona fide*, and cannot be impeached, then the entire policy benefit will remain the property of the solvent spouse in whose favour it had been effected. Conversely, if the donee spouse should be sequestrated, the total policy benefits received by that spouse will vest in his or her insolvent estate.<sup>187</sup>

#### 4.8 Conclusion

By 1829 insolvency legislation<sup>188</sup> dictated what the insolvent estate of a debtor would comprise. All the debtor's property at the date of sequestration and that acquired during sequestration formed part of his insolvent estate. Exempt property was also provided for, but this depended largely on the will of the creditors to grant such exemption. The exemption was limited to certain compensation earned by the debtor for his temporary care and management of property of the estate, and personal items of the insolvent and his family, including tools of his trade.

It is interesting to note that this early legislation made specific provision for the protection of minors and others under guardianship or curatorship, giving them a "tacit mortgage" over the curator or guardian's estate. This added a social bent to this early legislation, something that has been eroded over the years and is lacking in today's legislation.

As time passed there was little legislative change regarding the vesting of assets in insolvent estates, but provisions regarding exempt property were extended. For example, it was specifically legislated that compensation for work done by the debtor or that of his family was exempt from his insolvent estate. So too damages awarded for a personal wrong or injury to the insolvent or any member of his family excluded from insolvent estates. Wearing apparel, bedding, household furniture and tools of the trade could be excluded to the extent that the creditors allowed.

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<sup>187</sup>A more comprehensive discussion of insurance policies follows in ch 9 below.

<sup>188</sup>Ordinance 64 of 1829.

The Master or any trustee could grant the insolvent a moderate allowance out of the estate assets for the indispensable support of him and his family, pending further decision by the creditors. Towards the end of the nineteenth century insolvency legislation had also made provision for a measure of protection in insurance policies if included in an antenuptial contract.

The earliest Transvaal legislation was essentially the same as the 1843 Cape legislation that served as a model for most of the colonies or provinces, but it included the right to any pension for work done, as an exempt asset. Further, specific provision for the protection of insurance policies was included in this legislation.

The 1916 Insolvency Act unified the law of insolvency in the Union of South Africa. It also contained specific vesting provisions, defined the content of the insolvent estate and catered for exempt property. Exemptions were extended and certain life insurance policies, which were partially protected from the insolvent's creditors, were specifically regulated in this legislation. But together with the preceding legislation of the colonies, this Act of 1916 entrenched and perpetuated gender-based provisions, and a lack of clarity concerning particularly property excluded from insolvent estates, some of which still haunt insolvency law in South Africa at present. In 1923 new legislation<sup>189</sup> governing insurance policies sowed the seeds for further disharmony and confusion in insolvency law because the status of policy benefits in insolvent estates now had to be sought from the provisions of both the insurance legislation and the insolvency legislation. Had this issue been dealt with in only the insolvency legislation, many of the problems being grappled with today may have been avoided. This set the trend for the legislature to juggle insurance-related issues between insurance and insolvency legislation, thereby contributing to much uncertainty regarding its interpretation.

Exempt property, or what the legislature considered to be exempt property, was expressly dealt with, and to some extent extended. But no distinction was made

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<sup>189</sup>Act 37.

between excluded property and exempt property. An interesting provision, similar to present legislation, was that the Master could claim any surplus pension or profits made by the insolvent if they exceeded what the insolvent needed for himself and his dependants. A difference, though, was that while the pension and the profit did not vest in the trustee, the Act specifically stated that such surplus did so vest. While a provision of this kind may possibly have created confusion in identifying pension or profit from surplus, it did probably give clarity on the insolvent estate's right to such surplus. Failure to regulate surplus income in present legislation has created some problems in practice and this issue will be discussed in chapter 9.<sup>190</sup>

One can assume that any legislature intends legislating with the utmost clarity in order to avoid interpretational problems and legal uncertainty stemming from any legislation. With hindsight, it becomes known that legislation often fails for a multitude of reasons in this endeavour for perfection. In this respect, one is reminded of the following comment by Mars when a new Insurance Act came into operation on 1 January 1924,<sup>191</sup> repealing the prior provincial statutes on the subject:<sup>192</sup>

It is unfortunate, however, that the legislature, when enacting the recent insurance Act, did not repeal and re-enact to the extent desired, such provisions of Act 32 of 1916 as dealt with life insurance policies, because many acute difficulties of construing the relevant sections of the two statutes would probably thus have been avoided.

A considerable number of problem areas exist in respect of the status of property *vis-à-vis* insolvent estates, either because of a failure to legislate on these problem areas or due to sluggishly conceived legislation. The issue of an inheritance comes to mind in respect of a failure to legislate. Inheritance as an asset included or excluded from an insolvent estate has been a complex and thorny issue for decades, yet no insolvency legislation has ever dealt with this issue. So too the question whether an inheritance could be excluded from a community estate of spouses has been ignored by insolvency legislation for decades and one may

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<sup>190</sup>See para 9.2.4 below.

<sup>191</sup>37 of 1923.

<sup>192</sup>Mars (1924) at 93.



conclude that it has not yet been finally resolved by the courts. An example of sluggish legislation that directly created a problem area in respect of property in insolvent estates is the present section 21 of the Act, a section that has its roots in the 1926 Insolvency Amendment Act.

It is remarkable that so many problem areas concerning assets in insolvent estates, with foundations in the early history of South African legislative law, continue to persist. It is also remarkable that despite the courts and academic commentators having grappled with these issues since their inception, the legislature has been blind to the shortfalls in the insolvency legislation. The property that the insolvent estate comprises is the solid foundation upon which the entire sequestration regime rests, and one would have thought that by now the problem areas concerning estate assets would have been eradicated. These problems, all of which have a considerable history in South African law, will be considered further in following chapters of this thesis.

It should, however, be mentioned at this point that South Africa has embarked on a mission to review its insolvency law system.<sup>193</sup> This reform process has, however, paid scant attention to foreign insolvency systems. What follows in part III below is a survey of foreign insolvency systems from which local insolvency law can benefit.

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<sup>193</sup>See ch 12 below.