

## CHAPTER 2

### HISTORICAL OVERVIEW

*O quid solutis est beatius curis,  
cum mens onus reponit ac peregrine  
labore fessi venimus larem ad nostrum  
desideratoque acquiscimus lecto.*  
– Catullus

"What happiness to shed anxieties, when the mind puts off its burden and worn with the labours of the world we come back to hearth and home and sink to rest on the pillow of our dreams!"

#### 2.1 Introduction

The South African legal system is described as a "mixed" system. This is because its roots are found in Roman and Roman-Dutch law, it was influenced by English law, especially in the area of commercial law, including insolvency law, during the nineteenth and early twentieth centuries, and some aspects of its origins lie in indigenous law.<sup>1</sup> In each of the Roman, the Roman-Dutch, and the English legal systems, initially, substantive and procedural rules relating to debt enforcement permitted execution only against a debtor's person. Thereafter, the law developed to provide for execution against a debtor's property. Collective debt enforcement, or insolvency, rules and procedures evolved as did principles pertaining to mortgage and a creditor's real security rights. Certain types of assets came to be regarded as exempt from execution in the individual and collective debt enforcement processes but there was no formal exemption of the home of a debtor. However, it is submitted that scrutiny of the relevant legal principles and procedures, as they were applied in their respective historical and socio-economic context, reveals a discernible, albeit indirect and subtle, effect of providing protective measures in relation to debtors' homes.

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<sup>1</sup>See Du Bois *et al Wille's principles* 33ff; Zimmerman "Good faith and equity" 217.

This chapter provides a brief historical overview of the Roman and Roman-Dutch legal principles and procedures which were applicable to debt enforcement and execution against a debtor's immovable property, including where such property was mortgaged in favour of the creditor. It also highlights certain aspects of Roman law and societal values and structures which may be regarded as factors which effectively caused a debtor and his family to remain in their home or at least to continue to have access to one. English law influences on the historical development of South African law operated at a time before a debtor's home received any protection against creditors' claims in English law. A brief overview of historical developments in England will be included in comparative analysis, in Chapter 7, which deals, *inter alia*, with the current position in England and Wales.

## **2.2 Roman law**

### *2.2.1 General background*

Roman history may be divided into three main periods: the Monarchy (753 to 510 BC); the Republican period (510 to 27 BC); and the Empire (from 27 BC onwards).<sup>2</sup> There were three successive kinds, or stages in the development, of legal redress, known as the *legis actiones*, the *formula* procedure, and the *cognitio* procedure, which coincided roughly with these historical periods. Significant for Roman law were the years from 367 BC onwards, with praetorian influences in the application and supplementation of the civil law,<sup>3</sup> and when Justinian, as the Emperor of the East from 527 to 565 AD, carried out a comprehensive compilation of the laws and brought about a number of important reforms.

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<sup>2</sup>The Empire is generally divided into the Principate (27 BC –284 AD) and the Dominate (from 284 AD onwards). For an historical sketch, see Bordowski *Textbook* 1-23. See also Hunter *Roman Law* 1-121; Van Zyl *Roman Private Law* 1-9; Van Warmelo *Roman Civil Law* 1-29.

<sup>3</sup>See Thomas *Textbook* 15.

### 2.2.2 Individual debt enforcement

In the primitive society of ancient Rome, debt enforcement occurred in the form of "self-help" against the person of the debtor.<sup>4</sup> Written laws, the earliest of which were contained in Table III of the Twelve Tables,<sup>5</sup> as well as legal structures and procedural mechanisms regulated this.<sup>6</sup>

In the *legis actio* procedure if a judgment debt had not been paid within 30 days the creditor could arrest and bring the debtor before the praetor.<sup>7</sup> If the debt remained unpaid,<sup>8</sup> the praetor "addicted" the debtor to the creditor who could hold him in chains in a private prison<sup>9</sup> for 60 days during which time they might reach a compromise.<sup>10</sup> At this stage the debtor was still free, as opposed to being a slave, he was still the owner of his property and capable of contracting.<sup>11</sup> On the last three market days of these 60 days, the creditor was obliged again to bring the debtor before the praetor into the "meeting place" and the amount for which he had been judged liable was declared publicly. This was done in the hope that someone might come forward to pay the debt and release the debtor.<sup>12</sup>

If the debt remained unpaid, the creditor was entitled to sell the judgment debtor as a

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<sup>4</sup>Van Warmelo *Roman Civil Law* 271.

<sup>5</sup>Promulgated in 451 BC; Table III dealt with execution of judgments.

<sup>6</sup>Kaser *Roman Private Law* 330 refers to the written laws as "state-restricted and supervised self-redress." Examples of procedural mechanisms are the *legis actiones*, the *formula* procedure and the *cognitio* procedure, mentioned at 2.2.1, above. See Hunter *Roman Law* 122-142; 967ff.

<sup>7</sup>This was called *manus iniectio*, the laying of hands on a person; see Hunter *Roman Law* 1030-1031. See also Stander 1996 *TSAR* 371; Calitz *Reformatory Approach* 19; Calitz 2010 *Fundamina* 16(2)1 5ff.

<sup>8</sup>A debtor could arrange for a substitute, called a *vindex*, to answer for the debt. However, if the *vindex* lost the case, he was liable for double damages. See Table III 3; Sohm *Institutes* 235; Buckland *Text-Book* 619 n 7; Thomas *Textbook* 79; Lee *Elements* 427. Crook *Law and Life* 92 states that this legal procedure "weighted the scales of litigation heavily in favour of the rich against the poor". As to who might opt to come to the debtor's rescue by paying the debt on his behalf or by acting as *vindex*, see 2.2.6, below.

<sup>9</sup>Table III 3-4; Lee *Elements* 427-428, with reference to Gellius *Noctes Atticae* 20.1.46; Kaser *Roman Private Law* 338. Cf Mousourakis *Historical and Institutional Context* 137-138; Jolowicz and Nicholas *Roman Law* 188.

<sup>10</sup>Table III 5; Burdick *Principles* 633, 671; Buckland *Text-Book* 619.

<sup>11</sup>See Buckland *Text-Book* 619; Jolowicz and Nicholas *Historical Introduction* 188, 190. Cf Wenger *Institutes* 227; Kaser *Roman Private Law* 338; Sohm *Institutes* 235. The latter sources refer to such a debtor as being a "debt-slave" or "*ipso iure* in the position of a slave".

<sup>12</sup>Table III 5. See Buckland *Text-Book* 619; Thomas *Textbook* 79; Gellius *Noctes Atticae* 20.1.48.

foreign slave.<sup>13</sup> It is uncertain whether, at this stage, the debtor's property "went with his person to the creditor"<sup>14</sup> although, according to Sohm:<sup>15</sup>

When the person of the debtor (whom execution placed in the position of a slave in regard to his creditor) passed into the power of the creditor, the same fate befell his whole estate and probably also his whole family, i.e., the aggregate of those who were subject to his *potestas* [*sic*]. Thus every personal execution involved necessarily — though only indirectly — an execution against the debtor's property, because it went, in all cases, against the debtor's entire person and estate, quite regardless of the actual amount due.

Where there was more than one creditor, they were entitled to "cut shares".<sup>16</sup> Some commentators regard this as meaning cutting the debtor's body into pieces<sup>17</sup> while others believe it meant that creditors shared the proceeds of the debtor's sale into foreign slavery.<sup>18</sup> The primary purpose of this harsh procedure was to bring pressure to bear on the debtor to pay.<sup>19</sup> A debtor who had no assets, who was without access to credit and who did not have anyone to pay the debt on his behalf, would, in most cases, save his "life and freedom" by entering into a transaction of *nexum* in terms of which he would submit to working off his obligation to the creditor.<sup>20</sup>

In the formulary process, if a judgment debt was not paid within 30 days the creditor could take the debtor again before the praetor and, if the debtor challenged the claim

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<sup>13</sup>Table III 5; see Buckland *Text-Book* 620; Wenger *Institutes* 225.

<sup>14</sup>Jolowicz and Nicholas *Historical Introduction* 190.

<sup>15</sup>Sohm *Institutes* 287.

<sup>16</sup>Table III 6.

<sup>17</sup>Thomas *Textbook* 79. Cf Bordowski *Textbook* 65; Kaser *Roman Private Law* 338.

<sup>18</sup>Wenger *Institutes* 224-225; Buckland *Text-Book* 620, with reference to Gellius *Noctes Atticae* 20.1.48; Burdick *Principles* 633-634, 671; Johnston *Roman Law* 108-109; Thomas *Textbook* 79; Wessels *History* 661. Buckland *Roman Law of Slavery* 402 states, with reference to Gellius *Noctes Atticae* 20.1.47, that, while a judgment debtor might ultimately be sold into slavery, his position in early law is to some extent obscure and the provisions were, very early on, obsolete.

<sup>19</sup>Van Warmelo *Roman Civil Law* 274; Wenger *Institutes* 230. Cf Wessels *History* 661 who states that there is "[s]ome doubt whether the debtor was sold as a slave ... [and h]e may have been held as a pledge compellable to redeem the debt by the services of himself and his family."

<sup>20</sup>Wenger *Institutes* 222, 226 n 12; Kaser *Roman Private Law* 338; Jolowicz and Nicholas *Historical Introduction* 164-166, 189-190. Although reference is often made to a debtor who surrendered himself to his creditor in *nexum* as a "debt-slave", he did not lose his status as a free person: see Thomas *Textbook* 217. In relation to *nexum*, see Calitz *Reformatory Approach* 19; Calitz 2010 *Fundamina* 16(2) 5; Dalhuisen *International Insolvency and Bankruptcy* par 1.02[1] 1-4-1-5. Also, on slavery and debt servitude, see Rajak "Culture of Bankruptcy" 8-11.

but lost, he would be liable for double the original amount of the debt.<sup>21</sup> The *lex Poetelia*,<sup>22</sup> introduced to improve the judgment debtor's position, prohibited his sale into slavery and his being put to death.<sup>23</sup> However, the creditor could still, with the praetor's permission, take the debtor into confinement<sup>24</sup> to work off the debt<sup>25</sup> in which case the debtor retained rights of property and disposition, as would a person who had pledged himself in a transaction of *nexum*.<sup>26</sup> Wenger explains the position thus:<sup>27</sup>

Then it would be comprehensible, if a person, in order to save his little home for himself and his family, incurred a *manus iniectio* in order to wipe out the debt with the work of his hands.... Indeed this *manus iniectio* now meant temporary quasi-slavery ... and in truth even beyond the sixty days, especially when the danger of death no longer threatened. Since personal execution also ... befell just the poor man who had no property, we understand its continued existence until far beyond the formulary procedure.

In 320 AD, Constantine abolished imprisonment for debt unless the debtor "contumaciously refused to pay."<sup>28</sup> Nevertheless, persons often sold themselves into, or stayed in, slavery as an easier alternative.<sup>29</sup> Others hired out themselves or their children as a way of working off a debt, often in transactions which were apparently

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<sup>21</sup>See Hunter *Roman Law* 1031ff; Thomas *Textbook* 109; Buckland *Text-Book* 642; Burdick *Principles* 671; Garnsey *Social Status* 204 n 1. The authors refer to Gaius IV 9. Garnsey *Social Status* 138 points out how it was the poorer section of the population who suffered considerable hardship, being "forced through debt to sell their meagre possessions, take out credit at unfavourable rates, and ultimately fall victim to the savage debt laws and forfeit their freedom".

<sup>22</sup>Also referred to as *lex Poetilia*. It was promulgated in 325 or 326 BC or, according to Sohm *Institutes* 287, in 313 BC.

<sup>23</sup>Controversy surrounds its exact provisions. See Hunter *Roman Law* 1035; Burdick *Principles* 634; Jolowicz and Nicholas *Historical Introduction* 164, 190; Sohm *Institutes* 287; Wenger *Institutes* 225, 230-231; Buckland *Text-Book* 620; Van Warmelo *Roman Civil Law* 274; Thomas *Textbook* 79. Bertelsmann *et al Mars* 6 refer to Kunkel *Roman Legal and Constitutional History* 31 and the contrary view expressed in Kaser *Das römische Privatrecht* I 154 n 36.

<sup>24</sup>During the later Republic, slavery had been replaced by imprisonment in a public prison for debtors who were unable to pay their debts: see Hunter *Roman Law* 1035-1036, with reference to C 7.71.1 and D 42.1.34; Buckland *Text-Book* 622.

<sup>25</sup>Thomas *Textbook* 109; Lee *Elements* 454; Wenger *Institutes* 230-231. Buckland *Text-Book* 643 states that "[t]he confinement put pressure on the debtor: perhaps it was used mainly for solvent debtors." Kaser *Roman Private Law* 338 submits that the *lex Poetelia* "regulated in detail rather than introduced" the debtor being able to work off his debt as a debt-slave of the pursuer. See also Johnston *Roman Law in Context* 109; Crook *Law and Life* 173; Schiller *Roman Law Mechanisms* 209.

<sup>26</sup>Wenger *Institutes* 230.

<sup>27</sup>Wenger *Institutes* 231. See also Jolowicz and Nicholas *Historical Introduction* 190.

<sup>28</sup>See Bertelsmann *et al Mars* 6; Hunter *Roman Law* 1036, with reference to C 10.19.2. However, Mousourakis *Historical and Institutional Context* 373 states, with reference to C TH 9.11.1; C 9.5.2 (Justinian), that in practice powerful landowners continued to confine their debtors in private prisons.

<sup>29</sup>Crook *Law and Life* 59.

service contracts in terms of which the servant was bound for life or for a number of years.<sup>30</sup> In Justinian's time, a defaulting debtor could be put to work for four months.<sup>31</sup>

Execution against a debtor's property was a praetorian innovation in the formulary process.<sup>32</sup> The praetor could grant to a creditor *missio in bona* which was an order giving a claimant possession of the entire property of a debtor who was in hiding or who had left the country to evade arrest, imprisonment or slavery.<sup>33</sup> Thereafter, the creditor could sell the debtor's property and apply the proceeds to satisfy his claims.<sup>34</sup>

In terms of the *cognitio* procedure execution could occur against the person<sup>35</sup> or the property of the debtor, the latter being the norm.<sup>36</sup> A later development allowed a court officer to proceed with the execution, where judgment was for payment of a sum of money, by seizing part of the judgment debtor's property to be kept as a pledge.<sup>37</sup> If the debtor did not pay within two months after judgment, the property could be sold by auction.<sup>38</sup> If the sale yielded insufficient proceeds to satisfy the claim more property could be seized for the same purpose.<sup>39</sup> Slaves, oxen and agricultural implements were exempt from seizure and sale<sup>40</sup> and movable property was to be exhausted before land could be seized.<sup>41</sup> This became the norm, during the later Empire, where the debtor was not suspected of being insolvent. This state of affairs has been regarded as an

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<sup>30</sup>Grubbs *Law and Family* 1995 270; Crook *Law and Life* 61.

<sup>31</sup>Kaser *Roman Private Law* 366.

<sup>32</sup>Wenger *Institutes* 233; Kaser *Roman Private Law* 339, 342.

<sup>33</sup>Mousourakis *Historical and Institutional Context* 219; Garnsey *Social Status* 193; Hunter *Roman Law* 1037; Buckland *Text-Book* 631, 644; Thomas *Textbook* 110.

<sup>34</sup>Kaser *Roman Private Law* 355; Crook *Law and Life* 172.

<sup>35</sup>This was still, as in the formulary process, initiated by the *actio iudicati*. Buckland *Text-Book* 672 and Thomas *Textbook* 122 state that a judgment debtor could be confined in a public prison. Lee *Elements* 458 states that private imprisonment continued in spite of attempts to suppress it.

<sup>36</sup>Evans *Critical Analysis* 30.

<sup>37</sup>The *pignus ex iudicati causa captum*. See Nicholas *Roman Law* xiv; Lee *Elements* 458; Wenger *Institutes* 313-314; Buckland *Text-Book* 672; Mousourakis *Historical and Institutional Context* 373.

<sup>38</sup>Thomas *Textbook* 121 refers to D 42.1.31, and mentions that, in Justinian's time, this had been extended to four months; C 7.54.2. See also Bordowski *Textbook* 74-75.

<sup>39</sup>Buckland *Text-Book* 672; Thomas *Textbook* 122.

<sup>40</sup>Hunter *Roman Law* 1043 and Burdick *Principles* 672 both refer to C 8.17.7.

<sup>41</sup>Wenger *Institutes* 314; Hunter *Roman Law* 1043 and Burdick *Principles* 672 both refer to Digest 42.1.15.8. See also Mousourakis *Historical and Institutional Context* 373.

indication of the balancing of the interests of the creditor and the judgment debtor.<sup>42</sup>

### 2.2.3 *Collective debt enforcement*

As mentioned above, where there was more than one creditor, they could "cut shares" or at least share in the proceeds of the debtor's sale into foreign slavery.<sup>43</sup> A praetorian innovation, in the late second century BC,<sup>44</sup> permitted creditors, alternatively or in addition to personal execution, to levy execution directly against a debtor's property.<sup>45</sup> Through this process, the debtor was rendered *infamis* and was deemed bankrupt. His property was sold *en masse* to the highest bidder, that is, the person who offered the creditors the highest dividend on their claims.<sup>46</sup> The purchaser succeeded to the entire estate and the proceeds were divided amongst creditors according to a fixed order of preference.<sup>47</sup> This was in effect the Roman equivalent of bankruptcy proceedings.<sup>48</sup>

This process was rarely resorted to against members of the upper class with the result that it probably affected only debtors of lower social standing.<sup>49</sup> Where the proceeds of the sale did not satisfy the creditors' claims in full they could bring proceedings to execute against any assets which the debtor acquired subsequently.<sup>50</sup> However, this was subject to the *beneficium competentiae* which afforded the debtor a period of

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<sup>42</sup>See Hunter *Roman Law* 1043; Buckland *Text-Book* 608; Thomas *Textbook* 122; Burdick *Principles* 672, with reference to Digest 46.1.6.2; 42.1.31; Sohm *Institutes* 289; Wenger *Institutes* 239-240, 314 where he states that it "threaten[ed] ... the existence of the debtor no more than ... [was] necessary in the interest of the creditor". Crook *Law and Life* 178 refers to it as "the intelligent solution".

<sup>43</sup>See 2.2.2, above.

<sup>44</sup>The *actio Rutiliana*. See Bertelsmann *et al Mars* 6 with reference to authorities cited by Roestoff 'n *Kritiese Evaluasie* 16ff; Roestoff 2004 *Fundamina* 113 118ff; Calitz 2010 *Fundamina* 16(2) 7-8.

<sup>45</sup>This entailed the issue of three decrees: *missio in possessionem*; *proscriptio bonorum*; and *venditio bonorum* (also referred to as *emptio bonorum*; see Gaius *Institutes* III 78-79). See Thomas *Textbook* 109 who refers to Gaius IV 35; Hunter *Roman Law* 1037; Buckland *Text-Book* 643ff; Kaser *Roman Private Law* 356-357; Sohm *Institutes* 287ff. A *missio in possessionem* was an authorisation by the praetor to take possession either of a particular thing or the whole of a person's property; see Jolowicz and Nicholas *Historical Introduction* 228. Wenger *Institutes* 236 refers to this as *missio in bona* which was an order giving a claimant possession of the whole of a person's property: see Mousourakis *Historical and Institutional Context* 219. Apparently, there was some overlap between these two concepts.

<sup>46</sup>Wenger *Institutes* 237; Buckland *Text-Book* 644; Johnston *Roman Law in Context* 109.

<sup>47</sup>Smith *Law of Insolvency* 5 cites Wessels *History* 662; Bertelsmann *et al Mars* 6-7.

<sup>48</sup>Wenger *Institutes* 233; Sohm *Institutes* 288; Johnston *Roman Law in Context* 109 refers to Kaser *Römische Privatrecht* 405.

<sup>49</sup>Crook *Law and Life* 174.

<sup>50</sup>Buckland *Text-Book* 403, 644; Wenger *Institutes* 237; Crook *Law and Life* 174.

recovery of one year after the sale during which time he was rendered safe from execution against his person and "articles of necessity", including necessary food, clothing, and movables necessary for agriculture and trade, were exempt from execution.<sup>51</sup> This has been regarded as signifying a shift in policy, to some extent, towards a more humanitarian conception or recognition of a debtor's rights.<sup>52</sup>

A *senatusconsultum*<sup>53</sup> provided that where debtors were *clarae personae*, particularly those of senatorial rank, a curator<sup>54</sup> could be appointed who, subject to the praetor's sanction, sold the debtor's assets, not *en masse*, but in lots. This was known as *distractio bonorum*.<sup>55</sup> This process did not render the debtor *infamis* nor dispossess him of all of his assets. Only assets sufficient to satisfy the creditors' claims were sold and the debtor retained the rest of his estate.<sup>56</sup> With the passing of time, and certainly by the *cognitio* period, *distractio bonorum* became the general mode for realisation of a debtor's assets.<sup>57</sup>

A significant development, presumably in the interests of severely over-indebted nobles, was the introduction of *cessio bonorum*<sup>58</sup> which allowed a debtor, probably where insolvency was not due to his fault,<sup>59</sup> voluntarily to surrender his property. Transfer of his property to his creditors would exempt a debtor from *infamia*<sup>60</sup> and personal seizure for any debts which remained unpaid.<sup>61</sup> After *cessio bonorum*, *venditio bonorum* took

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<sup>51</sup>Buckland *Text-Book* 693-694; Kaser *Roman Private Law* 357.

<sup>52</sup>See Wenger *Institutes* 238 n 39.

<sup>53</sup>The date of which is unknown: see Buckland *Text-Book* 645. Garnsey *Social Status* 186 states that this occurred in the early Empire or Principate.

<sup>54</sup>Instead of a *magister*.

<sup>55</sup>Buckland *Text-Book* 645; Johnston *Roman Law in Context* 110 refers to Kaser *Römische Privatrecht* 404-405. Kaser *Roman Private Law* 355, 357; Wenger *Institutes* 238-239; Crook *Law and Life* 177-178; Roestoff 'n *Kritiese Evaluasie* 29; Roestoff 2004 *Fundamina* 127; Calitz 2010 *Fundamina* 16(2) 9.

<sup>56</sup>Buckland *Text-Book* 645; Thomas *Textbook* 110; Wenger *Institutes* 239; Bertelsmann *et al Mars* 7.

<sup>57</sup>Buckland *Text-Book* 672-673; Thomas *Textbook* 122; Bertelsmann *et al Mars* 7.

<sup>58</sup>With the passing of the *lex Julia*, possibly in 17 BC, but it is uncertain whether this occurred in the time of Julius Caesar or of Augustus; see Hunter *Roman Law* 1039; Burdick *Principles* 671; Sohm *Institutes* 288. See also Garnsey *Social Status* 186-187 and Frederiksen 1966 *J Rom Studs* 128-141.

<sup>59</sup>Buckland *Text-Book* 645; Johnston *Roman Law in Context* 110; Crook *Law and Life* 174; Kaser *Roman Private Law* 357.

<sup>60</sup>C 2.11.11. See Sohm *Institutes* 289.

<sup>61</sup>Thus excluding the creditor's choice between executing against the debtor's person, at civil law, or against the debtor's property under praetorian law. See Sohm *Institutes* 288; Wenger *Institutes* 235; Buckland *Text-Book* 645 refers to G 3.78 and C 7.71.1.



place and the debtor could rely on the *beneficium competentiae* for all time and not merely for a year.<sup>62</sup>

In the *cognitio* procedure execution against all of the property of the debtor, that is, bankruptcy proceedings, occurred only where the debtor was insolvent.<sup>63</sup> On application by the creditors, the judge appointed a *curator bonorum* to manage the bankrupt property.<sup>64</sup> Creditors had to join the proceedings within two to four years.<sup>65</sup> In all instances, *distractio bonorum* took place.<sup>66</sup> The claim of a creditor who was a pledgee was first paid out of the proceeds of the thing pledged to him. Any surplus would then go to the other creditors, with certain claims receiving preference, after which other creditors would receive their respective percentages of the proceeds.<sup>67</sup>

In the time of Justinian, a majority vote by creditors could result in a moratorium being granted to the debtor.<sup>68</sup> It was also possible for the debtor to approach the Emperor for a moratorium "in the face of an impending execution."<sup>69</sup>

#### 2.2.4 Debt relief measures available in Roman law

Apart from *cessio bonorum*, and the benefits which it offered, the Roman law of contract presented some alternatives for a debtor unable to meet his obligations timeously.

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<sup>62</sup>There is some dispute about this. See Smith *Law of Insolvency* 5 with reference to Johnson, Coleman-Norton & Bourne *Ancient Roman Statutes* 201 n 151 and the Digest or Pandects (Book XL II Title 3 4). See Buckland *Text-Book* 645, 693-694; Sohm *Institutes* 289; Thomas *Textbook* 110; Lee *Elements* 455; Bertelsmann *et al Mars* 7. Cf Wessels *History* 663; Burdick *Principles* 671-672; Wenger *Institutes* 235, 237-238, 316.

<sup>63</sup>Wenger *Institutes* 314; Kaser *Roman Private Law* 366.

<sup>64</sup>Wenger *Institutes* 315.

<sup>65</sup>Two years if they lived in the same province and four years if they lived in a different province; see Wenger *Institutes* 315. Otherwise, creditors could not share in the proceeds of the seized property and they would be left with only a claim against the debtor.

<sup>66</sup>Wenger *Institutes* 315; Kaser *Roman Private Law* 366. See Roestoff 'n *Kritiese Evaluasie* 29 who agrees with the submission made by Swart *Rol van 'n Concurfus Creditorum* that *distractio bonorum* was the origin of the South African insolvency regime.

<sup>67</sup>Wenger *Institutes* 315-316.

<sup>68</sup>Wenger *Institutes* 316, n 23, refers to *Cod Iust* VII 71.8 (531-532 AD).

<sup>69</sup>Wessels *History* 663. Wenger *Institutes* 316-317 n 23<sup>a</sup> states, with reference to *Cod Iust*, I 19.4, that the law at the time of Justinian was that this would only occur if sufficient security was furnished by the debtor. He also mentions that Egyptian provincial law likewise allowed a moratorium for a period of five years. See also Roestoff 'n *Kritiese Evaluasie* 31.

These included: *solutio per aes et libram* and *acceptilatio*, by which a creditor formally released the debtor from liability; *pactum de non petendo*, an agreement not to sue or take action; and *transactio*, or compromise, which brought an obligation to an end. In Justinian's time, *datio in solutionem* entitled a debtor, who could not meet his obligation to the creditor, and who owned immovable property for which he could not find a buyer, instead of payment to transfer the immovable property to the creditor, even without the latter's consent.<sup>70</sup> Parties could also resort to *remissio*,<sup>71</sup> a partial release, and *dilatio*,<sup>72</sup> by which a moratorium was created if the majority of the creditors were in favour of it.

## 2.2.5 Real security

### 2.2.5.1 Forms of real security

Roman law recognised three forms of real security:<sup>73</sup> *fiducia* and, under praetorian law, *pignus* and *hypotheca*.<sup>74</sup> *Fiducia* entailed the transfer of ownership<sup>75</sup> of the debtor's property to the creditor who agreed to re-transfer the property to the debtor as soon as the debt was paid.<sup>76</sup> Parties usually also agreed, in a *pactum de vendendo*, on the circumstances in which the creditor could sell the property.<sup>77</sup> Where the seller sold the property either before the debt was due or contrary to their agreement, the sale was nevertheless valid and the purchaser received good title. This meant that the debtor

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<sup>70</sup> *Novellae* 4.3 and 120.6.2. See Roestoff 'n *Kritiese Evaluasie* 35-37.

<sup>71</sup> D 2 14 7 17; D 2 14 7 18; D 2 14 7 19; D 2 14 8; D 2 14 10; D 17 1 58 1 and D 42 9 23.

<sup>72</sup> See Roestoff 'n *Kritiese Evaluasie* 31.

<sup>73</sup> Real security entails the giving of a real right to a creditor as security for the performance of a debt, the effect being that the creditor has, in addition to the right to claim satisfaction of the debt from the debtor personally, a right to obtain satisfaction of his claim by selling the thing given as security. See Buckland *Text-Book* 473; Sohm *Institutes* 351-352.

<sup>74</sup> Hunter *Roman Law* 436ff refers to *pignus* as pledge and *hypotheca* as mortgage. Burdick *Principles* 382 explains that, in Roman law, both *pignus* and *hypotheca* were used for movables and immovables. These three forms co-existed until the time of Constantine. See also Buckland *Text-Book* 478; Thomas *Textbook* 330-333; Van Zyl *Roman Private Law* 197-198, particularly n 293.

<sup>75</sup> Either by *mancipatio* or *in iure cessio*.

<sup>76</sup> The agreement to re-transfer was known as *pactum fiduciae*. See Sohm *Institutes* 352; Thomas *Textbook* 329; Jolowicz and Nicholas *Historical Introduction* 301ff; Kaser *Roman Private Law* 127ff; Van Warmelo *Roman Civil Law* 113-114.

<sup>77</sup> This was required to release the creditor from his fiduciary obligation, arising from the *pactum fiduciae*, to re-transfer the property to the debtor, so that he could obtain satisfaction of his claim by selling the thing; see Sohm *Institutes* 352; Buckland *Text-Book* 474.

could not recover the property from the purchaser although he had a claim against the creditor for breach of the fiduciary obligation.<sup>78</sup>

*Pignus*<sup>79</sup> developed out of the praetorian protection of possession.<sup>80</sup> The debtor retained ownership but gave possession of the thing to the creditor who had to restore it to the debtor once the debt was paid.<sup>81</sup> The creditor did not have the right to dispose of the pledged property and, if he did sell it, the debtor as owner could recover it from anyone who had obtained possession of it. From the creditor's perspective, this was unsatisfactory, especially where the debtor was in default, and so the parties usually agreed, in a *pactum de vendendo*, that the creditor could sell the property if the debt was not paid by a certain date.<sup>82</sup>

*Hypotheca*, also referred to as "mortgage", occurred when the property remained with the debtor but, if the debtor failed to pay the debt, the creditor had a real right to obtain possession of the hypothecated property and, in terms of a *pactum de vendendo*, the right to sell the property in order to satisfy his claim. The debtor as owner could recover his property if a third party obtained possession of it. He could also enter into successive transactions of *hypotheca* with various creditors.<sup>83</sup> Thus *hypotheca* catered for both the debtor's and the creditor's interests and was "more in keeping with the capitalistic character of the time".<sup>84</sup>

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<sup>78</sup> Sohm *Institutes* 353; Buckland *Text-Book* 474. In the case of land provided as security, the creditor often left it in the hands of the debtor as a *precarium*; see Thomas *Textbook* 143, 329.

<sup>79</sup> Referred to as pledge; see Hunter *Roman Law* 436.

<sup>80</sup> A *pignus praetorium* granted a creditor "*missio in possessionem*" of the debtor's property by which the creditor gained control of a thing as security for his claim. A *pignus judiciale* arose in the seizure of a debtor's property in the course of a judicial execution; see Sohm *Institutes* 287, 353-356. See also Buckland *Text-Book* 475; Thomas *Textbook* 330; Jolowicz and Nicholas *Historical Introduction* 302; Van Warmelo *Roman Civil Law* 115-116. In relation to the order in which developments occurred, cf Kaser *Roman Private Law* 129.

<sup>81</sup> Transfer of possession occurred by *traditio*. The debtor could not use the thing unless by specific agreement with the creditor, that is, by *precario*. See Buckland *Text-Book* 476.

<sup>82</sup> Sohm *Institutes* 353-354; Thomas *Textbook* 331; Hunter *Roman Law* 437; Jolowicz and Nicholas *Historical Introduction* 302.

<sup>83</sup> Sohm *Institutes* 354, 356; Hunter *Roman Law* 436ff; Buckland *Text-Book* 475; Thomas *Textbook* 332-333; Van Zyl *Roman Private Law* 198; Kaser *Roman Private Law* 129; Jolowicz and Nicholas *Historical Introduction* 303; Van Warmelo *Roman Civil Law* 116-119.

<sup>84</sup> Sohm *Institutes* 354-355.

### 2.2.5.2 The creditor's rights

Essentially the effect of the creation of real security was that the creditor acquired the right:

- to obtain, if he was not already in, possession of the pledged or hypothecated property;
- to sell the property once the secured debt had become due and, in spite of notice or judgment against him, the debt had not been paid; and
- of foreclosure in which case the property was forfeited to the creditor.<sup>85</sup>

In later classical law, in the absence of a *pactum de vendendo*, the creditor's right to sell the property when the debt became due was implied unless it was expressly excluded.<sup>86</sup> In such a case, three successive notices to the debtor were required.<sup>87</sup> If the proceeds of the sale exceeded the amount of the debt, the surplus had to be paid to the debtor.<sup>88</sup> Although the creditor could not sell the property to himself,<sup>89</sup> the debtor could sell it to him.<sup>90</sup>

Justinian modified the position so that, even where the agreement expressly provided that the creditor could not sell the property, he could do so as long as he gave three successive notices to the debtor.<sup>91</sup> Another significant modification by Justinian was that, where parties agreed that the creditor could sell the property on the debtor's failure to pay the debt by a certain date, no sale could take place until two years after formal notice of his intention to the debtor.<sup>92</sup> If the creditor was not in possession of the

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<sup>85</sup>Sohm *Institutes* 356; Hunter *Roman Law* 436. Hunter *Roman Law* 437 describes *fiducia* as "essentially a self-acting foreclosure".

<sup>86</sup>Hunter *Roman Law* 437; Thomas *Textbook* 331; Kaser *Roman Private Law* 132; Buckland *Text-Book* 476-477.

<sup>87</sup>See Buckland *Text-Book* 477 n 1 and Thomas *Textbook* 331, with reference to G 2.64 and Paulus *Sententiae* 2.5.1 and C.8.27.14. See also Kaser *Roman Private Law* 132. Buckland *Text-Book* 477 states that the creditor did not have to obtain possession before the sale.

<sup>88</sup>Sohm *Institutes* 356; Hunter *Roman Law* 439.

<sup>89</sup>See, also, Kaser *Roman Private Law* 132-133.

<sup>90</sup>Buckland *Text-Book* 477; Kaser *Roman Private Law* 132-133; Hunter *Roman Law* 438.

<sup>91</sup>Cf Buckland *Text-Book* 477, referring to refers to D 13.7.4, who states that it might have been some later authority who brought about this modification.

<sup>92</sup>If the creditor was in possession of the pledged property; see Hunter *Roman Law* 437. See also Gane

property, he had first to obtain a judicial decree authorising it.<sup>93</sup>

Parties could also agree in a *lex commissoria*, or "forfeiture clause", that if the debt was not paid by a certain date the creditor would become the owner of the property.<sup>94</sup> This was known as foreclosure. However, this was disadvantageous to the debtor in circumstances where the value of the property exceeded the amount of the debt. In 230 AD, a new kind of foreclosure, called *impetratio dominii*,<sup>95</sup> was introduced whereby the creditor could apply to the court to have ownership granted to him. The property was valued and, upon notice to the debtor<sup>96</sup> and after the lapse of one year, the creditor became bonitary owner<sup>97</sup> of the pledged property. If the property was worth less than the amount of the debt, the debtor was discharged from liability but, if it was worth more, the creditor had to pay the difference to the debtor.<sup>98</sup> However, the debtor could pay the debt and the interest due and "redeem the pledge"<sup>99</sup> at any time before the creditor's *usucapio* became complete,<sup>100</sup> that is, within two years of uninterrupted possession, in respect of land and houses, and one year, in respect of movables.<sup>101</sup> After Constantine abolished the *lex commissoria*, in 320 AD,<sup>102</sup> *impetratio dominii* became the only means of foreclosure available to the creditor.<sup>103</sup>

Justinian permitted foreclosure only where no purchaser, for an adequate price, could

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(tr) *Selective Voet* Vol 3 Book XX title 5 s1: 615.

<sup>93</sup>C 8.34.3.1. See Buckland *Text-Book* 477; Thomas *Textbook* 331; Hunter *Roman Law* 437, with reference also to D 13.7.4 and D 13.7.5; Burdick *Principles* 381-382, with reference to Codex 8.28.5, 8.14.10, Inst 4.7.1, Digest 13.7.4, 47.2.73.

<sup>94</sup>Buckland *Text-Book* 477; Sohm *Institutes* 353-354 n 2; Thomas *Textbook* 331; Hunter *Roman Law* 438.

<sup>95</sup>Buckland 477; Thomas *Textbook* 331; Kaser *Roman Private Law* 133, referring to Alex. C 8.33.1; Van Warmelo *Roman Civil Law* 116; Hunter *Roman Law* 438.

<sup>96</sup>Hunter *Roman Law* 438 states that the public had to be notified of the *hypotheca* and there had to be a delay of a year.

<sup>97</sup>Buckland *Text-Book* 477 calls bonitary ownership "praetorian ownership". In relation to bonitary ownership, see Sohm *Institutes* 81ff, 311; Buckland 191ff; Hunter *Roman Law* 263ff.

<sup>98</sup>Buckland *Text-Book* 477; Sohm *Institutes* 356.

<sup>99</sup>Thomas *Textbook* 331. Cf Bordowski *Textbook* 290 who does not mention the required initial lapse of a year before approaching the court.

<sup>100</sup>In relation to *usucapio*, the acquisition of ownership by uninterrupted possession, see Sohm *Institutes* 318ff; Buckland *Text-Book* 241ff.

<sup>101</sup>Thomas *Textbook* 159; Hunter *Roman Law* 265. These periods were laid down in the Twelve Tables: see G 2.42.

<sup>102</sup>Hunter *Roman Law* 438 refers to C 8.34.1; Kaser *Roman Private Law* 132-133; Sohm *Institutes* 356; Van Warmelo *Roman Civil Law* 115.

<sup>103</sup>Buckland *Text-Book* 477; Thomas *Textbook* 331. Both refer to C 8.34.3. See, also Sohm *Institutes* 356.

be found.<sup>104</sup> If the debtor and creditor lived in the same province, the creditor was obliged to give formal notice to the debtor once two years had elapsed since the debt became due. If they lived in different provinces, the creditor had to apply to the provincial judge who would serve a notice on the debtor, setting a date for payment to occur.<sup>105</sup> Once that date passed without the debt having been paid, the creditor could obtain ownership on petition to the emperor.<sup>106</sup> A debtor who, within a subsequent period of two years, paid in full, including interest and costs, could nevertheless redeem the property. Failing this, the ownership of the creditor became irrevocable.<sup>107</sup> Further, if the property was sold the creditor had to transfer to the debtor any amount of the proceeds which exceeded that which the debtor had owed.<sup>108</sup> If the proceeds were less than the amount due the creditor could still claim the balance from the debtor.<sup>109</sup>

Thus significant measures were put in place which, through delaying foreclosure and requiring a judicial decree where the creditor was not in possession of the hypothecated property, effectively protected a defaulting debtor against loss of his immovable property and even enabled him to redeem it within a period of two years after foreclosure had occurred.

#### 2.2.6 Significance of the family home in the Roman social and historical context

Understanding the significance of family and the family home, in the Roman social and historical context, provides additional insights into the implications, for homeowners, of the debt enforcement laws. *Familia*, controlled by the *paterfamilias*,<sup>110</sup> was at "the centre

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<sup>104</sup>Hunter *Roman Law* 438; Buckland *Text-Book* 477; Sohm *Institutes* 356; Kaser *Roman Private Law* 133.

<sup>105</sup>Hunter *Roman Law* 438 refers to C 8.34.3.2. If the debtor could not be found, the court would order the debt to be paid by a certain date.

<sup>106</sup>Hunter *Roman Law* 438 refers to C 8.34.1.

<sup>107</sup>Buckland *Text-Book* 477; Thomas *Textbook* 331-332; Hunter *Roman Law* 438 refers to C 8.34.3.3.

<sup>108</sup>Thomas *Textbook* 332, with reference to C 8.33.3.

<sup>109</sup>Buckland *Text-Book* 477, with reference to C 8.33.3.

<sup>110</sup>Heichelheim, Yeo and Ward *Roman People* 35. *Familia* included every member of the household who was subject to the power of the *paterfamilias*: the children who were subject to his *potestas*, the wife who was in the position of a child, if they were married *in manus*, adopted members, slaves over whom he had *dominium* and former slaves who had been freed. See also Dupont *Daily Life in Ancient Rome* 103.

of the Roman community".<sup>111</sup> A number of *familiae*<sup>112</sup> formed a *gens*.<sup>113</sup> The word "*familia*" initially meant "dwelling-place or house"; later it came to mean "the house-community" and, "in a legal sense, the house-property."<sup>114</sup> The family home held great religious significance: it housed the spirits of deceased family members and the obligatory hereditary altar and ancestral tomb.<sup>115</sup> Dupont states that "family and house really were indissoluble" with the house consisting of a family and a single patriarchal head "joined together in veneration of the *lar familiaris*."<sup>116</sup> Generally, during all periods and in every social class, members of the *familia* all lived under the same roof<sup>117</sup> until the death of the *paterfamilias*.<sup>118</sup> All family property, movable and immovable, fell into the estate of the *paterfamilias*.<sup>119</sup> Roman marriages<sup>120</sup> were mostly strategically arranged in order to forge important ties and alliances between families. Slaves were important assets<sup>121</sup> who, if they were freed, continued to constitute invaluable support for their former master in a patron-client relationship.<sup>122</sup>

Clientage<sup>123</sup> was an important institution for economic, political, and social reasons and

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<sup>111</sup>Van Zyl *Roman Private Law* 9; Thomas *Textbook* 410ff.

<sup>112</sup>"... with a common progenitor (even if he was a legendary figure)" as stated by Tellegen-Couperus *Roman Law* 6.

<sup>113</sup>A clan.

<sup>114</sup>Heichelheim, Yeo and Ward *Roman People* 35.

<sup>115</sup>Dupont *Daily Life in Ancient Rome* 103.

<sup>116</sup>Dupont *Daily Life in Ancient Rome* 103. The household gods which played a fundamental role in the family's religious life included the *lares* and the *penates* (spirits who inhabited the pantry), Janus (the "spirit of the door", with whom family life began), and Vesta (the "spirit of the hearth" who was "the centre of family life and worship"); see Heichelheim, Yeo and Ward *Roman People* 42.

<sup>117</sup>Although, sometimes, members of the younger generations might take up lodgings elsewhere or even build or purchase other houses in which to reside. See Dupont *Daily Life in Ancient Rome* 103, 105; Heichelheim, Yeo and Ward *Roman People* 36; Thomas *Textbook* 414; Moore *Roman Commonwealth* 93.

<sup>118</sup>Upon this event, "the family would split into as many new families as there were men of the subsequent generation", according to Dupont *Daily Life in Ancient Rome* 103.

<sup>119</sup>Neither wives married *in manus* nor children could own property, subject to the legal principles regarding *peculium*: Thomas *Textbook* 416-417.

<sup>120</sup>Including marriages without *manus*: wives married without *manus* to the men in the family also lived in the house but were regarded as merely "passing through" in order to provide their husband with children" and remained subject to the power of their oldest agnatic relative and part of the latter's *familia*; see Dupont *Daily Life in Ancient Rome* 105.

<sup>121</sup>See Dupont *Daily Life in Ancient Rome* 58, 105.

<sup>122</sup>Forsythe *Early Rome* 221; Mousourakis *Historical and Institutional Context* 272; Thomas *Textbook* 404.

<sup>123</sup>The relationship between patron and client.

was fortified by the religious significance of the concept of *fides*.<sup>124</sup> In early Roman times, persons became clients<sup>125</sup> of the *gens*, as a whole, in a symbiotic relationship: the *gens* granted them land, political and financial support, protection in the courts and permission to share in its religion; clients pledged, *inter alia*, loyalty, military service and field work. Later, as the *gens* became less important, clients submitted to the patronage, and became the dependants, of rich and influential families who also established alliances, based largely on the concept of *amicitia*, meaning "friendship", amongst themselves. Crook explains it thus:<sup>126</sup>

The wheels of Roman society were oiled – even driven, perhaps – by two notions: mutual services of status-equals (I help you in your affairs; I then have a moral claim on your help in mine) and patronage of higher status to lower.... It was the patron who came to the legal rescue of his client, paid his money down for litigation, paid his debt to prevent him being haled off, stood as his representative; you might hesitate to 'lay the hand' on a humble plebeian with his patron standing by.

The significance of clientage may also be understood in the context of the two social and political classes of Roman citizens, the patricians and the plebeians.<sup>127</sup> The patricians were mostly wealthy aristocrats and noblemen<sup>128</sup> while the plebeians were mostly poor urban and rural persons.<sup>129</sup> Initially, wealthy persons had sumptuous homes in town and villas on country estates,<sup>130</sup> while subsistence farmers and pastoralists, with modest needs, lived comfortably in straw and mud huts on small plots.<sup>131</sup> However, with the expansion of the Roman Empire, continual war took its toll on the economy. In time,

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<sup>124</sup>Heichelheim, Yeo and Ward *Roman People* 38. Referred to as the "foundation of justice", *fides* embraced "being true to one's word, the paying of one's debts, the keeping of sworn oaths, and the performance of obligations assumed by agreement"; see Heichelheim, Yeo and Ward *Roman People* 46.

<sup>125</sup>Heichelheim, Yeo and Ward *Roman People* 38-39. In early times, clients included foreigners, either from conquered territories or who wished to live in Roman territory and become Roman citizens, freed slaves and Romans who were unable to make a living or protect themselves and their property.

<sup>126</sup>Crook *Law and Life* 93.

<sup>127</sup>The conflict continued from about 500 BC until 287 BC, with the passing of the *lex Hortensia*. See Heichelheim, Yeo and Ward *Roman People* 39; Forsythe *Early Rome* 157; Tellegen-Couperus *Roman Law* 7.

<sup>128</sup>Who monopolised the senate, held high positions and, as pontiffs, were the custodians and interpreters of the sacred laws in the early Republic: Heichelheim, Yeo and Ward *Roman People* 55.

<sup>129</sup>Although some became wealthy and powerful.

<sup>130</sup>Moore *Roman Commonwealth* 86, 87, 93; Dupont *Daily Life in Ancient Rome* 41ff.

<sup>131</sup>Heichelheim, Yeo and Ward *Roman People* 131-132; Dupont *Daily Life in Ancient Rome* 32ff; Moore *Roman Commonwealth* 93.



many of the wealthy, with their lavish lifestyles, became severely over-indebted<sup>132</sup> and poor farmers who had been forced to join the army often returned from war to find that their farms had been looted by the enemy or badly managed or even stolen by dishonest neighbours.<sup>133</sup> Those who borrowed money to pay taxes or to buy seed or implements suffered under the harsh debt enforcement laws, emerging as "the landless poor".<sup>134</sup> As a result, many returned to the army, sold or hired themselves out as gladiators or sold or hired out their children or moved to the city.<sup>135</sup>

The influx of the poor to the cities caused high-rise tenement blocks, called *insulae*, designed for letting, to be hastily constructed. Living conditions were overcrowded, unsanitary, and hazardous due to poor construction. Rentals, food prices and the rate of unemployment were high.<sup>136</sup> These tenants lived an unsettled existence, using the *insulae* as temporary accommodation without a household shrine and gods.<sup>137</sup> At the same time, overseas conquests created new markets which resulted in agricultural operations becoming large-scale and capital-intensive, with some of the wealthy generating even more wealth for themselves.<sup>138</sup> Poverty-stricken Roman citizens and foreigners became the clients of wealthy Roman patrons: urban clients were at their patrons' "beck and call" and were expected to give them political support in return for food, money, or clothes; rural clients, mostly peasants, were exploited in "humiliating servitude".<sup>139</sup>

Widespread discontent amongst the urban poor in the latter part of the second-century BC caused political upheaval and conflict with access to land being a main issue.<sup>140</sup> As

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<sup>132</sup> Heichelheim, Yeo and Ward *Roman People* 54; Dupont 41 refers to it as "opulent poverty".

<sup>133</sup> Heichelheim, Yeo and Ward *Roman People* 56.

<sup>134</sup> Dupont *Daily Life in Ancient Rome* 44-45; Heichelheim, Yeo and Ward *Roman People* 56.

<sup>135</sup> Crook *Law and Life* 61; Heichelheim, Yeo and Ward *Roman People* 65.

<sup>136</sup> Moore *Roman Commonwealth* 144-145, 150; Heichelheim, Yeo and Ward *Roman People* 134.

<sup>137</sup> Moore *Roman Commonwealth* 150.

<sup>138</sup> Heichelheim, Yeo and Ward *Roman People* 132-133.

<sup>139</sup> Mousourakis *Historical and Institutional Context* 271.

<sup>140</sup> See Heichelheim, Yeo and Ward *Roman People* 134-135 (for an account of the contributing factors), 155.

Dupont explains:<sup>141</sup>

... [for a peasant,] loss of his land spelled the loss of his house, his family, his household gods, the tombs of his ancestors, and his dignity...

... Tiberius Gracchus ... spoke on their behalf as follows:

'The wild beasts that roam over Italy have, every one of them, a cave or lair to shelter in; but the men who fight and die for Italy enjoy only the light and air that is common to all above their heads; having neither house nor any kind of home they must wander about with their wives and children... for not a man of them has a hereditary altar; not one of all these many Romans has an ancestral tomb... Though they are styled masters of the world, they have not a single clod of earth to call their own'.

This speech portrays the stark realities of poverty and homelessness and the socio-economic necessities of access to land, security of tenure and access to adequate housing and their direct connection with upholding human dignity. It is submitted that it is also strikingly reminiscent in a number of respects of issues which are relevant in the current South African socio-economic context.

## **2.3 Roman-Dutch law**

### *2.3.1 General background*

After the Frankish Empire dissolved in 900 AD, for many centuries, no general legislation was passed. The Counts of Holland issued local *handvesten* (privileges) in their towns which were, in many respects, at variance with one another. As a result, Roman law, regarded as "a system logical, coherent and complete",<sup>142</sup> was received in some of the provinces of the Dutch Netherlands. Ordinances passed by municipalities also formed part of the law. Charles V promulgated what have been referred to as "useful measures",<sup>143</sup> such as the *Placaat* of 10 May 1529, relating to the transfer and hypothecation of immovable property, and the Perpetual Edict of 4 October 1540.

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<sup>141</sup>Dupont *Daily Life in Ancient Rome* 45, quoting Plutarch *Tiberius and Gaius Gracchus* 9. Tiberius Gracchus was a key politician in the campaign for access to land.

<sup>142</sup>Lee *Introduction* 3.

<sup>143</sup>Lee *Introduction* 6.

Another significant ordinance was the Ordinance on Civil Procedure of 1580.<sup>144</sup> By the end of the sixteenth century, the applicable law consisted of: ordinances; *handvesten*; the Roman-Dutch law, that is, "the ancient customs engrafted on the Roman law"; and the Roman law, as reflected in the *Corpus Juris* (as well as, in some cases, in the Canon law).<sup>145</sup> This law was introduced to the colonies including the Cape of Good Hope.<sup>146</sup>

### 2.3.2 *Individual debt enforcement*

According to Germanic custom, a debtor could be sold into slavery and, during the feudal regime, a debtor could be compelled to work for his creditor.<sup>147</sup> Old Dutch *handvesten* permitted a debtor who was unable to pay his creditor to be handed over to him until the debt was paid.<sup>148</sup> Apparently, before the introduction of *cessio bonorum*,<sup>149</sup> the law of Holland provided only for execution against the person.<sup>150</sup> The early "self-help" procedure received judicial sanction in situations where the defendant refused to appear in court, the rationale being that an obstinate defendant should be deprived of the protection of the law. However, partly because of the sanctity of personal freedom, the defendant was required to be called three times to appear before a judge, with considerable intervals in between, before he was regarded as being in default. Wessels states this "tenderness towards the defendant always formed a marked feature in the procedure of the Dutch courts ... [and] prevailed in the Cape Colony before our modern

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<sup>144</sup>See Erasmus "Interaction" 141 143. See, also, 2.4, below.

<sup>145</sup>Wessels *History* 206-207.

<sup>146</sup>Lee *Introduction* 7ff. See, also, 2.4, below.

<sup>147</sup>Wessels *History* 664 comments that later legal provisions for civil imprisonment were vestiges of this practice.

<sup>148</sup>See, for example, the *Handvest* of Alkmaar of 1254, mentioned by Wessels *History* 663, with reference to the *Rechtsgeleerde Observatiën* Volume 2 obs 100. See also Calitz 2010 *Fundamina* 16(2) 9ff.

<sup>149</sup>This was probably in the fifteenth century: see Wessels 663-664; Van der Keessel 3.51.2. Calitz *Reformatory Approach* 24 refers also to Wessels *History* 218. See also Calitz 2010 *Fundamina* 16(2) 10ff.

<sup>150</sup>Wessels *History* 664; Evans *Critical Analysis* 42. An additional debt enforcement procedure, based on the Roman law concept of *missio in possessionem*, referred to at 2.2.3, above, was apparently not often resorted to: see Voet 42.4, 42.5.1; Roestoff 'n *Kritiese Evaluasie* 51-52; Roestoff 2005 *Fundamina* 78 81ff; Bertelsmann *et al Mars* 8. Gane's translation Volume 6 quotes Voet 42.4.6 thus: "Nay again these placings in possession are but seldom employed by the customs of today". The reason given was that either judgment was obtained against the absconding debtor in his absence, as being "contumacious", or the plaintiff proceeded by attaching and selling the property of the defendant, a process which had developed by that time.

rules of court were promulgated."<sup>151</sup>

Later developments allowed execution against the debtor's property. Because litigation was complex, necessitating representation by attorneys and advocates,<sup>152</sup> and because it was expensive, a plaintiff had first to claim satisfaction from the defendant in a friendly manner<sup>153</sup> before he could institute action by serving summons.<sup>154</sup> In the high court, the parties were required first to appear before a commissioner in an attempt to reach a compromise before a summons could be issued. The process server, when serving the summons, had also to explain to him the "exigency" of it. If the defendant wished to defend the matter, the process server would appoint a convenient day, between 14 days and one month later, for him to appear.<sup>155</sup>

If the defendant did not appear on the return day, the plaintiff would "pray default". In an ordinary action, four defaults were required. After each default, the defendant was afforded the benefit of a subsequent writ or summons until, after the fourth default, the court would grant judgment against him.<sup>156</sup> In a defended matter, once the substantive and procedural requirements<sup>157</sup> had been complied with and a valid judgment had been granted<sup>158</sup> it had to be declared executable. In the lower courts, the judgment has to be placed in the hands of the messenger. In the high court, a writ of execution of the judgment had to be taken out at the registrar's office giving authority to the process server to execute it.<sup>159</sup> The process server or messenger had to deliver to the execution debtor a document, known as the *sommatie*, calling upon him to satisfy the judgment

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<sup>151</sup>Wessels *History* 175.

<sup>152</sup>Van der Linden *Institutes* 3.2.4.

<sup>153</sup>Either orally or in writing, or by notarial demand.

<sup>154</sup>Van der Linden *Institutes* 3.2.1. On service of summons, see Van der Linden *Institutes* 3.2.6.

<sup>155</sup>Van der Linden *Institutes* 3.2.9. On the return day, the plaintiff's attorney had to file a declaration setting out the claim; see Van der Linden *Institutes* 3.2.12.

<sup>156</sup>Van der Linden *Institutes* 3.2.13. If the defendant appeared on the second or third summons, he could apply to purge the defaults, but if he appeared only on the fourth summons, he was required to obtain a writ of relief.

<sup>157</sup>For a matter to be rendered "ripe for judgment", see Van der Linden *Institutes* 3.2.10ff, 3.3,3.8.

<sup>158</sup>It had to have been pronounced or delivered publicly; see Van der Linden *Institutes* 3.9.4.

<sup>159</sup>Van der Linden *Institutes* 3.9.5.

debt, together with costs, within 24 hours<sup>160</sup> failing which a *renovatie*,<sup>161</sup> or *alias writ*, was issued. Thereafter, if the judgment was still not satisfied the execution proceeded in different ways depending on the type of action.<sup>162</sup>

In real actions in which, in terms of the judgment, a person was obliged to vacate specific immovable property, the process server or messenger immediately removed the execution debtor from, and placed the execution creditor in, possession.<sup>163</sup> In personal actions in which, in terms of the judgment, a person was obliged to pay a sum of money, the process server or messenger, on serving the *renovatie*, would demand that property should be pointed out to him by the judgment debtor. It was the duty of the former to take movable property sufficient to satisfy the judgment debt.<sup>164</sup> On the other hand, if despite diligent enquiry the process server or messenger did not find sufficient movable property to satisfy the judgment debt, he had to levy execution upon the immovable property. However, he was not entitled to levy execution upon immovable property of great value for small debts unless it could not be divided.<sup>165</sup>

In the lower courts, after the immovable property was attached its sale had to be publicly announced on four Sundays and market days, in the towns, and on four Sundays and court days, in the country, with placards having to be posted in the nearest town. Once the sale had been held and the purchase price had been paid a deed of transfer was granted to the purchaser by the lower court.<sup>166</sup>

In the high court, execution against immovable property entailed a more complex process.<sup>167</sup> Once the immovable property was attached in the presence of the *schepenen*, notice was given both to the execution debtor and to the lower court. The

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<sup>160</sup>Van der Linden *Institutes* 3.9.6. In the high court, the *sommatie* set out what was required of the judgment debtor and a copy of the judgment and the writ of execution were also delivered to him.

<sup>161</sup>This was a repetition of the *sommatie*.

<sup>162</sup>Van der Linden *Institutes* 3.9.7.

<sup>163</sup>Van der Linden *Institutes* 3.9.8.

<sup>164</sup>Van der Linden *Institutes* 3.9.9-3.9.10.

<sup>165</sup>Van der Linden *Institutes* 3.9.11, with reference to *Reglem Art 22*.

<sup>166</sup>Van der Linden *Institutes* 3.9.11.

<sup>167</sup>Van der Linden *Institutes* 3.9.12.

process server publicised the sale by issuing proclamations on four Sundays and market days and, on the appointed day, he provisionally sold the property to the highest bidder. Thereafter, he had to summons all interested persons to the high court and to annex returns of service to the judgment and the writ of execution. On the appointed day, the execution creditor had to file his claim at the Rolls of the High Court for it to issue a decree of transfer which would confirm the sale after which nobody could oppose it.<sup>168</sup> A certificate, or deed of proclamation, was drawn up in the registrar's office calling on all persons to appear at the high court on a certain day if they wished to make a higher bid for the immovable property than that already received. The process server published the deed of proclamation by posting placards announcing the final sale. On the advertised day, the property was *de novo* publicly put up for sale at the Rolls of the High Court by the assistant registrar, or secretary in charge of the Rolls, and knocked down to the highest bidder. Thereafter, a ceremony took place in which the oldest commissioner of the Rolls held in his hand the deed of transfer with the court's seal attached to it. When there were no further bids for the property, he removed the court's seal thus signifying that the property had been adjudicated to the purchaser.<sup>169</sup> The proceeds of the sale of the immovable property had to be paid to the secretary of the lower court or to the registrar of the high court, as the case might be, and payment to the creditor was regulated from there.<sup>170</sup>

If the judgment debtor did not have property or had property insufficient to satisfy the judgment debt, the judgment creditor was permitted to proceed against his person.<sup>171</sup> A debtor could evade imprisonment by relying on the *beneficium competentiae* which entitled him to retain an amount adequate for his maintenance according to his craft and standing.<sup>172</sup>

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<sup>168</sup>There was a set procedure to be followed if anyone wished to oppose it, although it appears that this rarely occurred; see Van der Linden *Institutes* 3.9.7.

<sup>169</sup>Van der Linden *Institutes* 3.9.7.

<sup>170</sup>Van der Linden *Institutes* 3.9.8.

<sup>171</sup>Van der Linden *Institutes* 3.9.14.

<sup>172</sup>See Voet 42.1.46 with reference to Digest XLII 1.19.1; L 17.173 and XXV 3.5.7; Gane (tr) *Selective Voet* Vol 6 346-347. Interestingly, a nobleman was entitled to more than a common person and an old man was entitled to more than a youth because it was easier for the latter to obtain a livelihood. For discussion of the *beneficium competentiae* in Roman law, see 2.2.3, above. Voet 42.1.46 also mentions, as a way of evading imprisonment, *cessio bonorum*, for discussion of which see 2.2.3, above.

### 2.3.3 Collective debt enforcement

Originally, in the Netherlands there was no uniform insolvency system. Customs rooted in Roman law principles developed to deal with insolvent estates.<sup>173</sup> In many places, common law rules applied<sup>174</sup> while in some areas special ordinances were issued to deal with insolvent and other estates.<sup>175</sup>

*Cessio bonorum* was introduced into Holland in the fifteenth or sixteenth century.<sup>176</sup> It was not available as of right to a debtor<sup>177</sup> but was a privilege extended by the court, in its discretion, to a debtor whose insolvency arose because of misfortune.<sup>178</sup> Full disclosure of the position of the debtor's estate was required in what has been described as a complicated and expensive procedure, in a petition to court, with notice to creditors.<sup>179</sup> Once a report was received from the *burgomaster*<sup>180</sup> and governing authority of the place where the debtor was domiciled, the court would grant a rule *nisi* calling on persons to show cause why the provisional writ of *cessio bonorum*, known as *brieven van cessie*, should not be made final. The issue of the provisional writ prevented the arrest of the debtor and its confirmation effected a stay of execution against his assets which were placed in the custody of a curator.<sup>181</sup> The debtor was entitled to retain certain assets including his clothes, bedding, tools and other

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<sup>173</sup>Wessels *History* 661; Roestoff 'n *Kritiese Evaluasie* 48; Evans *Critical Analysis* 41; Dalhuisen *International Insolvency and Bankruptcy* 1-35.

<sup>174</sup>Van der Linden *Institutes* 3.10.

<sup>175</sup>Bertelsmann *et al Mars* 9.

<sup>176</sup>See Wessels *History* 663ff; Roestoff 2005 *Fundamina* 78; Calitz *Reformatory Approach* 24-25; Stander 1996 *TSAR* 374. Exactly when *cessio bonorum* was introduced is unclear: according to Bertelsmann *et al Mars* 8, Schörer n 532 states that, according to Van Leeuwen, *cessio bonorum* was not in use before 1288; Van der Keessel *Select Theses* 883 indicates that it was in use towards the end of the fifteenth century.

<sup>177</sup>As it had been under the Roman legal system; see 2.2.3, above.

<sup>178</sup>Wessels *History* 665.

<sup>179</sup>Grotius *Introduction to Dutch Jurisprudence* 3.41.2; Van der Linden *Institutes* 3.7.2; Wessels *History* 664.

<sup>180</sup>*Burgomaster* is the English translation of *burgemeester*, in the old Dutch, and *burgermeester*, in contemporary Afrikaans. See Wessels *History* 75, 163, 209 and 664 for an explanation of the term *burgomaster* and the official duties of the incumbent of such position.

<sup>181</sup>Van der Keessel *Select Theses* 884; Wessels *History* 664-665; Stander 1996 *TSAR* 371; Evans *Critical Analysis* 42; Calitz *Reformatory Approach* 25.

necessities of life such as items which might enable him to earn a living.<sup>182</sup> *Cessio bonorum* did not lead to a discharge from pre-sequestration debts<sup>183</sup> and creditors could claim after-acquired property in that, in terms of the *brieven van cessie*, if the debtor by good fortune were to acquire new assets he was obliged to pay his creditors in full.<sup>184</sup>

When the court granted *cessio bonorum*, the estate initially was administered by commissioners under the supervision of local magistrates.<sup>185</sup> By the eighteenth century, chambers, known as the *Desolate Boedelkamers*, administered insolvent estates of all debtors who had surrendered their estates by *cessio bonorum* and of all bankrupt persons, known as *bankroetiers* or *bankbreakers*, who had fled the country to evade their creditors or who had acted fraudulently.<sup>186</sup> Apart from *cessio bonorum* and the treatment of *bankroetiers*, there was no other formal insolvency process available and each creditor was obliged to use the individual debt enforcement procedures to try to execute against the debtor's assets. If the assets were insufficient to cover the debt, execution against the person of the debtor, by arresting him, was permitted.<sup>187</sup>

A form of the Roman law *missio in possessionem*<sup>188</sup> also applied in Holland<sup>189</sup> in terms of which a curator was appointed to distribute the proceeds of the debtor's assets proportionately amongst the creditors once the assets had been sold by public auction.<sup>190</sup> It was also possible, in regions where no specific ordinances applied, for sequestration of a debtor's estate to occur at the instance of creditors who showed that debts were legally due to them and that the debtor was undoubtedly insolvent. The process consisted in one or more persons being appointed as sequestrators or curators whose duty it was to go to the house of the debtor, to seal up the coffers, to place the

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<sup>182</sup>Voet 42.3.7; Wessels 665-666.

<sup>183</sup>Van der Keessel *Select Theses* 889.

<sup>184</sup>Wessels *History* 666; Evans *Critical Analysis* 43. See related comments by Van Heerden and Boraime 2006 *De Jure* 331, 352, discussed at 5.3.3, below.

<sup>185</sup>The *scout* and *schepenen*; see Bertelsmann *et al Mars* 8.

<sup>186</sup>Wessels *History* 667.

<sup>187</sup>Voet 42.1.45; Roestoff 'n *Kritiese Evaluasie* 52.

<sup>188</sup>Mentioned at 2.2.3, above.

<sup>189</sup>Voet 42.5.1; Bertelsmann *et al Mars* 8; Gane (tr) *Selective Voet* Vol 6 388ff; Evans *Critical Analysis* 42.

<sup>190</sup>Voet 42.5.2. Cf Roestoff 'n *Kritiese Evaluasie* 51 with reference to De Villiers *Ou-Hollandse insolvensiereg* 5-6, 70 who stated that this never became an insolvency process in Roman-Dutch law.



books and papers in safe custody and to appoint a person to look after the estate. If the debtor and his family had left their home, it was shut up by order of court.<sup>191</sup> The sequestrators or curators had to draw up an inventory of the estate, realise perishable assets, call in all debts owing to the debtor, and pay in to the court's secretary any money received.

A debtor whose estate had been placed under administration in this manner usually tried to reach a compromise with his creditors so that his estate would be returned to him. In terms of the common law, all of the creditors had to agree to the compromise in the absence of which only the sovereign could confirm the composition.<sup>192</sup> If no composition was reached, creditors had to be given notice, by newspaper advertisement, to lodge their claims with the secretary of the court. The property in the estate had to be sold and realised as soon as possible although immovable property had to be sold "at such times of the year as ...[were] suited for this purpose".<sup>193</sup> After the final liquidation had taken place, the sequestrator or curator had to draw up an account of his administration. The creditors had to be summonsed to court, the account had to be audited and passed in the presence of the court before which the creditors had to justify their claims. Thereafter, the proceeds were divided amongst them.<sup>194</sup>

In many places, the position was regulated by local ordinances. The most significant, as a source of South African insolvency law,<sup>195</sup> was the Amsterdam Ordinance of 1777.<sup>196</sup> It provided for any debtor who was obliged to stop payment of his debts, or for his creditors, to approach the commissioners of the *Desolate Boedelkamers* for an order to take control of the debtor's estate. Two commissioners were appointed to administer the estate. They had first to try to make an arrangement with the creditors. If this did not

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<sup>191</sup> See Van der Linden *Institutes* 3.10.2-3.10.3; Calitz *Reformatory Approach* 26; Calitz 2010 *Fundamina* 16(2) 11ff; Bertelsmann *et al Mars* 8.

<sup>192</sup> Van der Linden *Institutes* 3.10.4.

<sup>193</sup> Van der Linden *Institutes* 3.10.5.

<sup>194</sup> Van der Linden *Institutes* 3.10.6.

<sup>195</sup> *Fairlie v Raubenheimer* 1935 AD 135 146. See also Wessels *History* 667-668; Stander 1996 *TSAR* 376; Bertelsmann *et al Mars* 9; Roestoff 'n *Kritiese Evaluasie* 53ff; Roestoff 2005 *Fundamina* 82ff; Calitz *Reformatory Approach* 26-27; Calitz 2010 *Fundamina* 16(2) 11-12.

<sup>196</sup> *Nederlandsche Jaarboeken* 1777 291. See 2.4, below.

occur, they had to call a meeting of creditors, two or three of whom would be appointed as provisional sequestrators of the estate. The debtor would receive an amount out of the estate sufficient to maintain his household and he could keep in his possession tools of trade and assets necessary to earn a living.<sup>197</sup>

Sequestration prevented executions against the estate except for those which had already commenced.<sup>198</sup> The debtor had a month to try to reach a composition with his creditors through a prescribed process administered by the commissioners.<sup>199</sup> Once a composition was approved in writing, the estate was released from sequestration.<sup>200</sup> If a composition was reached but the debtor did not adhere to its terms, the estate was declared insolvent and he was prevented thereafter from entering into a composition with creditors even if all of them agreed to the terms. If a composition was not achieved within one month of the sequestration of the estate, the chamber declared it insolvent.<sup>201</sup> Once a debtor had been declared insolvent, any composition had to be reached with all, and not merely a majority, of the creditors who had proved claims.<sup>202</sup>

The commissioners appointed two of the sequestrators as curators<sup>203</sup> to oversee the sale of the assets of the insolvent estate. The insolvent, his wife and children were permitted to retain their everyday clothing and the insolvent's wife, if married to him by antenuptial contract, or his next of kin, could acquire the necessary household furniture at a reduced price.<sup>204</sup> An insolvent who was an artisan and who had conducted himself in good faith could, with the consent of the curators and the commissioners, retain his tools of trade and other tools with low value.<sup>205</sup> Once the estate assets had been liquidated, the proceeds were distributed amongst the creditors with preferent creditors

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<sup>197</sup>Wessels *History* 668ff.

<sup>198</sup>Article 12, referred to by Roestoff *'n Kritiese Evaluasie* 54.

<sup>199</sup>Articles 13, 14 and 15. Although the formation of a composition was encouraged, creditors could oppose it and, if successful, the estate had to be declared insolvent. See Article 16; Roestoff *'n Kritiese Evaluasie* 54; Wessels *History* 668.

<sup>200</sup>Articles 17 and 18; Wessels *History* 668; Evans *Critical Analysis* 46.

<sup>201</sup>Article 25; Evans *Critical Analysis* 46.

<sup>202</sup>Article 25; Roestoff *'n Kritiese Evaluasie* 55.

<sup>203</sup>Wessels *History* 668 refers to them as "trustees".

<sup>204</sup>Roestoff *'n Kritiese Evaluasie* 56.

<sup>205</sup>Article 29; Roestoff *'n Kritiese Evaluasie* 56.

being paid out first.<sup>206</sup> The Amsterdam Ordinance provided for a rehabilitation process in terms of which the commissioners returned to the insolvent a specific percentage of the assets and granted him a discharge from all pre-sequestration debt. The rehabilitated debtor regained his contractual capacity.<sup>207</sup> This was the predecessor of the South African insolvency law concept of rehabilitation.<sup>208</sup>

#### 2.3.4 *Real security*

Mortgage,<sup>209</sup> as defined by Grotius, is a "right over another's property which serves to secure an obligation".<sup>210</sup> The ancient form of German pledge was not an accessory agreement but more a kind of "alternative payment" whereby the debtor delivered to the creditor, as provisional payment, something different from the object promised and which he could "redeem" once he performed his obligation. The debtor could choose not to perform what he had promised but to allow the object to remain with the creditor as fulfilment of their agreement. Further, if the creditor sold the object to a third party the debtor could not reclaim it. These aspects indicate that the creditor was regarded as the owner of the thing "pledged" and that, in a sense, credit was in fact not granted.<sup>211</sup>

In time, the Roman law principles relating to *pignus* and *hypotheca* were adopted so that by the time of Grotius the law of Holland, in relation to pledge, was similar to the Roman law of Justinian's time.<sup>212</sup> Initially, when immovable property was pledged, the creditor became *dominus* with full usufruct of the land on the basis that he had promised to transfer the land back to the debtor once the debt was paid. If the debt was not paid within the stipulated time, the mortgagee remained the owner. However, in the

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<sup>206</sup> Article 47; Roestoff 'n *Kritiese Evaluasie* 56.

<sup>207</sup> Articles 40-42; Wessels *History* 669; Roestoff 'n *Kritiese Evaluasie* 57; Evans *Critical Analysis* 47.

<sup>208</sup> Wessels *History* 672-673.

<sup>209</sup> Note that Gane (tr) *Selective Voet* Vol 3 Book XX Title 1: 470 states that, although the term "mortgage" is used in relation to immovables, strictly speaking it was not used in the Dutch law, the proper term to be used being "hypothec". However, for the sake of convenience, Gane made reference to "mortgage", in this context.

<sup>210</sup> Lee *Introduction* 183, with reference to Grotius 2.48.1.

<sup>211</sup> This was based on the *vadium* contract; see Wessels *History* 569-571, 592-593 who describes it as a type of contract of exchange.

<sup>212</sup> Specific aspects, based on German custom, remained; see Wessels *History* 593.

thirteenth century the law was modified so that, if the mortgagor did not fulfil his obligation, the mortgagee could no longer treat the property as his own but he had to sell it by judicial sale. The debtor could recover the mortgaged property right up until the point when it was actually sold in execution by judicial decree.<sup>213</sup> The law of Holland, at the time of Grotius, did not recognise a *parate executie* stipulation which permitted the creditor to sell the mortgaged property without an order of court if the debtor did not pay timeously.<sup>214</sup>

By the fourteenth century, the general practice was for the mortgagor to retain possession of his property.<sup>215</sup> Thus, a deed of hypothecation became necessary and sufficient publicity for a mortgagee to be able to ascertain if property had already been mortgaged. To this end various *placaaten* were issued which effectively provided that a special mortgage of immovable property, including a *kustingbrief*,<sup>216</sup> was valid only if it was executed before the court and the required duty was paid.<sup>217</sup> The holder of a validly executed special mortgage had a preferent claim on the proceeds arising from the sale of the mortgaged property. Where more than one special mortgage had been executed upon the same property, they would rank according to the order in which each was executed.<sup>218</sup>

To obtain the court judgment which was required before a creditor could sell the mortgaged property, he had to have drawn up a confession of judgment by the

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<sup>213</sup>Wessels *History* 594-596.

<sup>214</sup>Wessels *History* 596; Lee *Introduction* 200-201, with reference to Voet 20.5.6, states that a *parate executie* agreement would not be enforced if the debtor afterwards objected, or if the private sale would be prejudicial to the other hypothecary creditors. Van der Keessel *Select Theses* 439 states that a pledgee could sell the thing delivered to him if that was originally agreed upon. It may be noted that the translator, Lorenz, has qualified this statement by pointing out, with reference to Digest 8.7.4, that it would be more accurate to translate the text as "where there has been no stipulation to the contrary." There is controversy as to whether the later law of Holland permitted *parate executie*.

<sup>215</sup>Wessels *History* 594.

<sup>216</sup>A *kustingbrief* was a special mortgage of immovable property for the balance of its purchase price, the bond being passed at the time of transfer of the property; see Van der Linden *Institutes* 1.12.3.

<sup>217</sup>These included a *Placaat* of Charles V of 10 May 1529 and the *Politique Ordonantie* of 1580; see Wessels *History* 217-218, 595. The *Placaat der 40ste Penning* of 22 December 1598 made duty of 2.5 per cent payable; see Lee *Introduction* 185; Van der Keessel *Select Theses* 433.

<sup>218</sup>A special mortgage enjoyed a claim preferent to that in respect of a prior general mortgage: Van der Keessel *Select Theses* 436; Lee *Introduction* 198; Van der Linden *Institutes* 1.12.4.

debtor,<sup>219</sup> or he had to issue a summons against the debtor requiring him to pay the debt or to appear to hear the mortgaged property being declared bound and executable. Once the judgment was obtained, the special mortgage was executed in compliance with certain requirements.<sup>220</sup> Where mortgaged property was sold without the consent of the true owner, the latter could legally claim it from any person who was in possession of it without making restitution for the price paid by the latter. An exception to this rule was where goods were sold *bona fide* in the public market. In such a case, the price had to be restored.<sup>221</sup>

Mortgage was extinguished by decree of court or by judicial sale or sale in insolvency of the mortgaged property.<sup>222</sup> It could also be extinguished by prescription.<sup>223</sup>

### 2.3.5 Debt relief measures available in Roman-Dutch law

#### 2.3.5.1 Composition

The *Placaat* of Charles V of 1544 provided for a debtor to enter into a composition with his creditors as long they all agreed to it.<sup>224</sup> Thereafter, the position varied according to whether the particular city or province had issued a specific ordinance which provided for a composition in which a certain majority could bind the minority.<sup>225</sup> It appears that

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<sup>219</sup>Known as *willige condemnatie*. This was required in a case where the bond had been made subject to confession being signed.

<sup>220</sup>Lee *Introduction* 200 refers to 2 Maasdorp 307. Van der Linden *Institutes* 1.12.5 states that the formalities were those required in the case of an *onwillig Decreet* which was "a sale of immovable property that took place by way of execution upon the order of the court; or, in a more general sense, a sale of the debtor's property, commenced by the *Deurwaarder* upon a judgment, and afterwards consummated at the High Court."

<sup>221</sup> See Van der Keessel *Select Theses* 183 n 3, with reference to Van Leeuwen *Censura Forensis* part I book iv ch 7 § 17, 184. This rule applied in Holland, but not in Zeeland.

<sup>222</sup>Voet 20.5.10, with reference to Mattheus II *De Auctionibus Libri Duo, quorum prior Venditiones, posterior Locationes, quae sub hasta fiunt, exequatur: adjecto passim voluntarium auctionum jure* 1.14.11.

<sup>223</sup>Van der Keessel *Select Theses* 208.

<sup>224</sup>Van der Keessel *Select Theses* 829 states that this reflected the Roman law principles applicable in relation to *remissio*, mentioned at 2.2.4, above.

<sup>225</sup>In 1649, Zeeland adopted such an ordinance as did Amsterdam in 1659, Leyden in 1665 and Haarlem in 1708. See Van der Linden *Institutes* 3.10.4; Roestoff *'n Kritiese Evaluasie* 59. Amsterdam adopted a later ordinance in 1777, discussed at 2.3.3, above. In terms of some of these ordinances, three quarters of the creditors, entitled to two thirds of the debt, could bind the minority. Gradually a practice developed

the debtor received a partial discharge of his debt if *remissio* was granted to him and the creditors could not claim the balance out of after-acquired assets.<sup>226</sup>

### 2.3.5.2 Moratoria

General moratoria were extended as emergency measures in the Netherlands as a result of disasters, wars and revolution<sup>227</sup> and, in addition to *cessio bonorum*, there were four benefits, originally based on the Roman law *dilatio*, available to debtors:<sup>228</sup> *brieven van inductie*,<sup>229</sup> *brieven van respijt*,<sup>230</sup> *seureté du corps*<sup>231</sup> and *surchéance van betaalinge*.<sup>232</sup>

In terms of legislation issued in 1581, *brieven van inductie*<sup>233</sup> could be issued by the High Court of Holland upon application by the debtor if the majority of creditors, who could bind the minority, agreed to a postponement of payment and the debtor provided security for payment upon the expiry of such period.<sup>234</sup> This provided the debtor with a financial "recovery period" during which no creditor could sue him or execute against his property or his person. In terms of *placaaten* issued in 1531 and 1544, the *Hooge Overheid*, with the authority of the court concerned, and, after 1581, the *Hooge Raad*

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that allowed the insolvent a discharge from all of his debts if one half of his creditors, to whom he owed one half of his debts, agreed to it. In the latter respect, see Van der Keessel *Select Theses* 829; Wessels *History* 666; Evans *Critical Analysis* 43.

<sup>226</sup>Voet 2.14.28; Roestoff 'n *Kritiese Evaluasie* 60 refers to Dalhuisen *Compositions* 29.

<sup>227</sup>For example, the *Placaat van de Staten van Holland en Wes Friesland* of 26 December 1672 forbade creditors from claiming "*hypotheeken en kustingen*" during the year 1673 if the security provided had lost its value on account of the "*algemeene calamiteit*" (being the war against France and England and its consequences). It provided that the *recht van hypotheek* nevertheless remained intact and that interest was payable. See Roestoff 'n *Kritiese Evaluasie* 60 n 282; Henning 1991 *THRHR* 523; Henning 1992 *THRHR* 1.

<sup>228</sup>Van der Keessel *Select Theses* 889-895.

<sup>229</sup>Also known as *rescripta inductionis*. See Van der Linden *Institutes* 3.7.4.

<sup>230</sup>Also known as *rescripta moratoria*. *Respijt* was also referred to as *atterminatie*; see Van der Linden *Institutes* 3.7.3.

<sup>231</sup>Or benefit of safe conduct; see Van der Keessel *Select Theses* 894. This allowed a postponement of the obligation, and thus freedom from arrest, for a period of about three to four months, for a debtor, who was in hiding, to try to reach a compromise with creditors. The majority of creditors had to be in favour of it.

<sup>232</sup>Van der Keessel *Select Theses* 895.

<sup>233</sup>They were known as *brieven van inductie* on account of the creditors, who all had to be cited, having been induced to allow this indulgence; see Van der Keessel *Select Theses* 892.

<sup>234</sup>Van der Keessel *Select Theses* 890, 892.

could issue *brieven van respijt*. Contention exists as to whether agreement by creditors was required.<sup>235</sup> This relief was available only if the damage or loss which led to the debtor's inability to fulfil his obligations was not due to his fault and only once the debtor had provided security.<sup>236</sup> The effect of the grant of *brieven van respijt* was that the debtor's duty to pay his debts was postponed for a period of up to five years during which time no creditor could sue him or execute against his property or his person.

*Surchéance van betaalinge* was an indulgence granted by the state, without the requirement of agreement by creditors or the provision of security, which afforded a debtor the right to suspend payment of debts for the period of one year and which suspended all actions, arrest, attachments and executions against him.<sup>237</sup> *Surchéance van betaalinge* was first granted by the States of Holland during war against England from 1779 to 1784. It provided for a suspension of obligations in exceptional instances as well as where the debtor was, due to circumstances beyond his control, unable to fulfil all of his obligations. It was viewed as a means of avoiding sequestration and civil imprisonment and was preferred above *brieven van inductie* and *brieven van respijt*. The practice survived in modern Dutch law. It was applied in South Africa until it was abolished by the Cape Ordinance 6 of 1843. This ordinance, discussed below,<sup>238</sup> was based on English law and it is regarded as the basis of current South African insolvency law.<sup>239</sup>

### 2.3.5.3 Debt relief measures based on contract

The developed Roman-Dutch law of contract, having advanced beyond the formal categorisation of contracts in the Roman legal system, was based on the principle of sanctity of contract as expressed in the maxim *pacta sunt servanda*.<sup>240</sup> Contract was

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<sup>235</sup>The contrary views are set out by Van der Keessel *Select Theses* 891 who argues that the consent of the majority of the creditors was indeed required.

<sup>236</sup>Van der Keessel *Select Theses* 890.

<sup>237</sup>Van der Keessel *Select Theses* 895 regards this benefit as "one not a little opposed to equity and the principles of law."

<sup>238</sup>See 2.4, below.

<sup>239</sup>See *Newcombe v O'Brien* 20 EDC 292 296.

<sup>240</sup>See Visser 1981 *SALJ* 641 649ff, 654; Hutchison "Nature and Basis" 12. See, also 1.1, above.

essentially based on *consensus ad idem*.<sup>241</sup> Therefore, parties could terminate their obligation by mutual agreement in the form of either release (*acceptilatio*),<sup>242</sup> novation (*novatio*) or compromise (*transactio*). A partial release was also possible. A *pactum de non petendo*, an agreement not to enforce a right, or not to sue, was a type of release.<sup>243</sup> Novation occurred when parties with the requisite intention<sup>244</sup> agreed to replace the required performance with some other form of performance so that a new contractual obligation came into existence.<sup>245</sup> *Transactio* was an agreement between two or more parties which resolved a dispute between them. *Datio in solutionem*, by which a debtor who could not pay his debt and who owned immovable property could instead give such property to the creditor, even against the will of the latter, was no longer in use.

#### **2.4 Reception of Roman-Dutch law and English law in South Africa**

In 1652, the Dutch East India Company established a halfway refreshment station, including a vegetable garden and a hospital, for ships travelling between the Netherlands and the East Indies. The commander of the settlement was Jan van Riebeeck who established a rudimentary judicial system, at first administered by himself and his staff, applying the laws of the Province of Holland. These events led to the Cape Colony being established and the introduction of Roman-Dutch law into South Africa.<sup>246</sup> In 1656, a *Justitie ende Chrijghsraet* was created to deal with legal matters. Except for the introduction of civil courts, called the courts of *landdrosten* and *heemraden*, for more remote areas outside Cape Town and the substitution of the *Justitie ende Chrijghsraet* with the *Raad van Justitie*, this basic structure of the administration of justice remained until the end of the first period of Dutch occupation of the Cape in 1795.<sup>247</sup> Although the

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<sup>241</sup>Wessels *History* 571-577; Hutchison "Nature and Basis" 12.

<sup>242</sup>Van der Keessel *Select Theses* 828 states that this was "a present and absolute remission of debt". See also Lee *Introduction* 271.

<sup>243</sup>Van der Keessel *Select Theses* 828; Lee *Introduction* 271.

<sup>244</sup>See van der Keessel *Select Theses* 835.

<sup>245</sup>Lee *Introduction* 272.

<sup>246</sup>See Fagan "Roman-Dutch Law" 35ff; Calitz *Reformatory Approach* 37; Du Bois *Wille's principles* 64ff; De Vos *Regsgeskiedenis* 3ff, 18, 226ff.

<sup>247</sup>See Fagan "Roman-Dutch Law" 38; Erasmus "Interaction" 144-145 suggests that "the general organization of the administration of justice remained remarkably consistent" until 1827.



local government at the Cape issued *placaaten* these have all been repealed and Roman-Dutch law is generally regarded as the common law of South Africa.<sup>248</sup> No rules of procedure were promulgated specifically for the Cape and it appears that the *Raad van Justitie* applied the Ordinance on Civil Procedure of 1580.<sup>249</sup>

In 1795, the Cape became controlled by Britain. From 1803 to 1806, it was controlled again by Holland, or the Batavian Republic, as the Netherlands was then called.<sup>250</sup> In 1803, the Batavian Republic appointed Jacobus Abraham de Mist as Commissioner-General of the Cape. He brought about significant changes including the creation of a *Desolate Boedelkamer*, for the administration of insolvent estates. This was to ease the burden on the *Sequester*, who was a member of the *Raad van Justitie* and therefore part of the judiciary, and who, at that stage, had been responsible for the administration of all insolvent estates and the execution of civil sentences. The procedures for the *Desolate Boedelkamer* were issued in an ordinance, known as the *Provisionele Instruksie*, which has been acknowledged as "the first real and substantial insolvency law" in the Cape.<sup>251</sup> This ordinance was based largely on the Amsterdam Ordinance of 1777<sup>252</sup> although two differences were that creditors did not play a role in the administration of the insolvent estate and creditors could not apply for the sequestration of a debtor's estate. However, *cessio bonorum* and *missio in possessionem* were available to debtors in the Cape. This was certainly the position after 1803. In terms of the *Provisionele Instruksie*, curators, chosen by the creditors but acting under the supervision of the *Desolate Boedelkamer*, administered the insolvent estates.<sup>253</sup> It may be noted that, around 1805, in civil matters *landdrosten* "were required to use every

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<sup>248</sup>See Fagan "Roman-Dutch Law" 39, 41ff, with reference, *inter alia*, to Hahlo and Kahn *South African Legal System* 578. For a useful explanation of the reception of Roman-Dutch law in South Africa, see Glover *Duress in the Law of Contract* 38 n 3. See, also, generally, De Vos *Regsgeskiedenis*.

<sup>249</sup>See Erasmus "Interaction" 143 n 15, 145. See 2.3.1, above.

<sup>250</sup>From 1795 to 1806, following its conquest by the French, the Netherlands was known as the Batavian Republic.

<sup>251</sup>Calitz *Reformatory Approach* 38-39, with reference to De Villiers *Die Ou-Hollandse insolvensiereg* 105-107.

<sup>252</sup>Referred to at 2.3.3, above. Smith *Law of Insolvency* 6 states, with reference to *Fairlie v Raubenheimer* 1935 AD 135 146, that this ordinance was the foundation of our insolvency law.

<sup>253</sup>Calitz *Reformatory Approach* 37-39.

endeavour to bring parties to amicable terms before proceeding to give judgment".<sup>254</sup> Also, three defaults by a defendant were required before default judgment could be granted. This rule did not exist in later South African law.<sup>255</sup>

In 1806, Britain re-occupied the Cape which became a British colony from 1815 until 1910 when the Union of South Africa was formed.<sup>256</sup> In 1806, when the British took control for the second time, they left de Mist's *Provisionele Instruksie* intact until 1818 when the *Desolate Boedelkamer* was abolished and replaced by a *Sequestrator*. In 1819, an Ordinance<sup>257</sup> was promulgated in terms of which the office of the *Sequestrator* would be responsible for the judicial administration of estates which were insolvent but not being administered or under curatorship. The *Sequestrator* would also be responsible for the execution of all civil sentences except those specially entrusted to the boards of *landdrost* and *heemraden*.<sup>258</sup>

The British were dissatisfied with the administration of justice at the Cape and, after a commission enquired into the matter, in 1827, a Charter of Justice was issued which reshaped the judicial system along English lines.<sup>259</sup> It provided, *inter alia*, for the replacement of the *Raad van Justitie* with an independent Supreme Court consisting of a Chief Justice and two puisne judges. This occurred in 1828. Full-time judges were imported from Britain. There was no Court of Chancery or Chancery jurisdiction and thus no separate courts of law and equity as there were in England.<sup>260</sup> The courts of *landdrost* and *heemraden* were replaced by resident magistrates as in the English system.<sup>261</sup> A second Charter of Justice, issued in 1832, came into effect in 1834. It provided for the retention of Roman-Dutch law as the law of the Cape Colony.<sup>262</sup> The Supreme Court was given extensive powers to make rules for the practice and pleading

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<sup>254</sup> See Wessels *History* 360.

<sup>255</sup> See Wessels *History* 361.

<sup>256</sup> See Fagan "Roman-Dutch Law" 46; De Vos *Regsgeskiedenis* 242ff.

<sup>257</sup> See Proclamation 2 of September 1819; referred to by Calitz *Reformatory Approach* 39.

<sup>258</sup> See Calitz *Reformatory Approach* 39-40.

<sup>259</sup> See Erasmus "Interaction" 146; Calitz *Reformatory Approach* 40; De Vos *Regsgeskiedenis* 244ff.

<sup>260</sup> See Erasmus "Interaction" 146; Zimmerman "Good faith and equity" 218-219.

<sup>261</sup> Fagan "Roman-Dutch Law" 51.

<sup>262</sup> See Erasmus "Interaction" 146; Girvin "Mixed Legal System" 95 96; Fagan "Roman-Dutch Law" 51.

in civil matters which "had to be framed 'so far as the circumstances of the ... Colony may permit, ... with reference to the corresponding rules and forms in use in ... [the] Courts of record at Westminster'".<sup>263</sup> This was significant for the development of South African civil procedure as a unique process in a mixed legal system.<sup>264</sup> Further, Ordinance 72 of 1830 stipulated that the English rules of civil procedure were to apply in the courts.<sup>265</sup> Erasmus points out that the English influences were introduced into the South African civil process before "the fundamental reform of the administration of civil justice in England during the nineteenth century." However, it is important to note that, despite the English law basis for the structures, several Roman-Dutch remedies and concepts were retained.<sup>266</sup>

The Charter of Justice also established the post of Master of the Supreme Court. The office of the *Sequestrator* was abolished. Ordinance 46 of 1828 provided that the Master of the Supreme Court would henceforth administer insolvent estates. The Cape Ordinance 64 of 1829, the first South African Insolvency Act, was essentially based on English law although some Roman-Dutch principles were also evident in the legislation.<sup>267</sup> This was repealed by a consolidating Ordinance 6 of 1843 which established a bankruptcy procedure for the whole of South Africa. In this process *cessio bonorum* and *surchéance van betaalinge* were abolished.<sup>268</sup> Thereafter, a number of ordinances, issued in Natal, the Orange Free State, and the Transvaal, largely adopted the provisions of the Cape Ordinance.<sup>269</sup> In 1916, the parliament of the Union of South Africa repealed all of the statutes which were applicable in the four provinces and enacted the Insolvency Act 32 of 1916. This was replaced by the present Insolvency Act 24 of 1936 which has been amended on a number of occasions.

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<sup>263</sup>See s 46 of the Charter of Justice, referred to by Erasmus "Interaction" 146-147; Fagan "Roman-Dutch Law" 51; De Vos *Regsgeskiedenis* 247-248.

<sup>264</sup>See Zimmerman "Good faith and equity" 217; De Vos *Regsgeskiedenis* 248-249; Erasmus 1991 *SALJ* 265.

<sup>265</sup>Eckard *Principles of Civil Procedure* 1ff.

<sup>266</sup>See Erasmus "Interaction" 148-149; Wessels *History* 386ff.

<sup>267</sup>See Smith *Law of Insolvency* 6; Wessels *History* 669-670; Stander 1996 *TSAR* 376.

<sup>268</sup>See 2.3.5.2, above. See, also, Calitz *Reformatory Approach* 42; Bertelsmann *et al Mars* 9-11.

<sup>269</sup>See Smith *Law of Insolvency* 6-7.

The South African Law Reform Commission for many years considered the reform of South African insolvency legislation. In 2000, it published a report on its review of the law of insolvency which contained a Draft Insolvency Bill and an explanatory memorandum.<sup>270</sup> The Draft Insolvency Bill was never enacted. The most recent insolvency law reform initiative in South Africa has led to the compilation of an unofficial working draft of a proposed Insolvency and Business Recovery Bill.<sup>271</sup> None of the proposals thus far has concerned reform of the treatment of a debtor's home in the insolvency process.

Certain procedural aspects of the Roman-Dutch law, identified above, which effectively provided a measure of protection for a debtor's home, are not necessarily evident in the South African position prior to introduction of the Bill of Rights. Consideration of the way in which Roman-Dutch and English legal principles, procedures and concepts were received into South African law and the timing of their various influences may lead one to understand the reasons for this.

## **2.5 Conclusion**

The harsh Roman debt enforcement laws originally provided for imprisonment, slavery, and possibly even death as consequences for debtors in default of their obligations. Later developments allowed for execution by a creditor against a debtor's property and, although with time certain assets were made exempt from execution by creditors, these never formally included the home of the debtor. Evidently, execution against the debtor's person was still possible.<sup>272</sup>

Debt relief measures available to Roman debtors included *cessio bonorum*, the surrender of assets which brought with it the *beneficium competentiae* which effectively

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<sup>270</sup>See the *Report on the Review of the Law of Insolvency* Project 63 February 2000 *Explanatory Memorandum* (Vol 1), hereafter referred to as "the Explanatory Memorandum", and *Draft Insolvency Bill* (Vol 2), hereafter referred to as "the Draft Insolvency Bill" [http://www.justice.gov.za/salrc/reports/r\\_prj63\\_insolv\\_2000apr.pdf](http://www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf) [date of use 15 March 2012].

<sup>271</sup>See 1.6, above.

<sup>272</sup>See 2.2.2 and 2.2.3, above.

provided immunity from action by creditors for unpaid debts.<sup>273</sup> In the time of Justinian, a majority vote by creditors could bring about the granting of a moratorium to a debtor and it was possible for a debtor to approach the emperor for a moratorium.<sup>274</sup> Further, forming part of the law of contract, *dilatatio* provided a means by which the majority of creditors could grant a moratorium to a debtor.<sup>275</sup>

A Roman person's home held religious as well as socio-economic significance.<sup>276</sup> It is apparent that, in terms of Roman law, a debtor could avoid the harsh personal and proprietary consequences of the debt enforcement laws and save his home by "working off the debt", often surrendering himself in *nexum*, or contractual bondage, to the creditor.<sup>277</sup> Sometimes, such an arrangement formed the basis of a patron-client relationship between the creditor and the debtor. It was also common for patron-client relationships to develop between third parties and debtors when the former came to the aid of the latter by paying their debts on their behalf thus forming an obligation, in a broader sense, between them. The concept of *amicitia*, between persons of equal status, might also have formed the basis of a third party paying the debt or intervening on the debtor's behalf. These relationships not only arose out of, but also contributed to, the complex but cohesive and, in a large measure, supportive fabric of Roman society.<sup>278</sup>

With the development of the legal concept of mortgage, Justinian put protective mechanisms in place to allow for the delay of foreclosure by a creditor for at least two years after judgment had been granted and, in appropriate cases, for foreclosure to occur only by judicial decree and, later, only by imperial decree. Further, a debtor could redeem the property within the two year-period succeeding the creditor having become owner of it, by paying the outstanding debt and other charges.<sup>279</sup> This, it is submitted, must have impacted on a debtor's ability to retain or to redeem his home.

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<sup>273</sup>See 2.2.3, above.

<sup>274</sup>See 2.2.3, above.

<sup>275</sup>See 2.2.4, above.

<sup>276</sup>See 2.2.6, above.

<sup>277</sup>See 2.2.2, above.

<sup>278</sup>See 2.2.6, above.

<sup>279</sup>See 2.2.5, above.

Under developed Roman-Dutch law, procedural rules protected a debtor as far as possible from execution against his immovable property. A process server was required specifically to explain the exigency of a summons to the defendant. Wessels regarded as "tenderness towards the defendant" the rule that where a debtor did not appear in court, four defaults and successive summonses were required to be issued, with substantial intervals between them, before default judgment could be granted.<sup>280</sup>

In the lower courts, a sale in execution of immovable property had to be publicised on four successive Sundays. A creditor was not entitled to levy execution upon immovable property of great value for small debts unless it was indivisible.<sup>281</sup> The complex high court process for execution against immovable property entailed, *inter alia*, ensuring that the highest price was obtained for it. In the collective debt enforcement process, a rule applied that, when a debtor's estate was placed under administration, immovable property had to be sold "at such times of the year as ...[were] suited for this purpose". This was presumably to obtain as favourable a price as possible in the interests of the debtor and the creditors. It is submitted that the effect of these rules would have been to provide at least some protection for a debtor whose home was sold in execution. Even if he did not manage to avoid its sale in execution, rules which promoted the highest possible price being obtained might well also have provided an excess which the debtor could have applied towards other accommodation.<sup>282</sup>

In the insolvency process, the debtor's home was not protected from sale. However, the first duty of the commissioner was to try to make an arrangement with creditors. Further, after the provisional writ was issued, a composition was encouraged.<sup>283</sup> Debt relief measures available in Roman-Dutch law included entering into a composition with creditors. Whether concurrence amongst all of the creditors was required, or whether the majority could bind the other creditors, depended on whether local ordinances

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<sup>280</sup> See 2.3.2, above.

<sup>281</sup> See 2.3.2, above.

<sup>282</sup> See 2.3.2, above.

<sup>283</sup> See 2.3.3, above.

regulated this. It appeared that *remissio* brought about a partial discharge of debt and creditors could not claim unpaid debts by executing against after-acquired assets.<sup>284</sup>

Roman-Dutch law was applied in the Cape from 1652 onwards. Specific aspects of the Roman-Dutch law may be regarded as effectively providing a measure of protection for a debtor's home. However, the judicial system was revised by the British, through the two Charters of Justice, in 1828 and 1834, to make it conform to English structures, mechanisms and procedures. The result is that, in the "mixed" South African legal system, the law in relation to mortgage is more in line with Roman-Dutch law, whereas procedural law, and the law of insolvency, is more in line with English law. This explains why the Roman-Dutch aspects, identified above, are not evident in the South African law prior to introduction of the Bill of Rights.

In sum, under the Roman-Dutch law, procedural rules promoted personal service of summonses, granted more indulgence to an absent defendant before default judgment could be obtained, required a more protracted procedure for execution against immovable property, and stipulated more exacting requirements to maximise the price obtained at a judicial sale. Further, in both the individual and the collective debt enforcement processes there are indications of favouring and encouraging extra-judicial compromises being reached between parties. This may be seen as reflecting an approach that execution against immovable property should occur only as a last resort. Such an approach has been espoused, in contemporary jurisprudence, by the Constitutional Court in balancing constitutional rights applicable to execution against a debtor's home. This will be considered in the following chapter.

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<sup>284</sup>See 2.3.5.1, above.