# DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY

**Volume 1**

**by**

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To:

Elizabeth
Ferdinand, John-Jacob and David



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# Preface

The present Treatise is the result of several years of research in the field of international enforcement of monetary claims through judgments, creditors' remedies, bankruptcies, and other insolvency proceedings.

The two volumes now appearing are largely based on the laws of the United States, England, France, West Germany, Italy, Belgium, Luxembourg, and the Netherlands. They constitute the general part of the series dealing with the historical and comparative aspects of the law and with the international ramifications of enforcement proceedings.

It is anticipated that over a number of years several additional volumes will appear with an in-depth discussion of the pertinent laws on a country-by-country basis. These volumes will also cover the laws of nations not so far included.

In concluding the manuscript of the present volumes, I feel greatly indebted to my secretary, Mrs. Caroline Vroom, for her painstaking care and invaluable assistance.

Without the constant support, interest and understanding of my wife and children, this work could not have been completed. I have meant it to be a tribute to them.

J.H. Dalhuisen
November 1979



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CHAPTER 1

# Roman Law of Creditors' Remedies

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## § 1.01 Introduction

To a certain extent it can be said that our modern insolvency laws have their origin in Roman law. This Roman law itself was not static, however, but evolved, as did the Roman civilization, over a period of more than a thousand years.

When at first there was not much more than a tribal community with hardly any economic activity beyond the mere exchange of goods, there was no need, nor indeed much possibility, of insolvency laws beyond incidental and probably tribal sanctions against the person of the debtor upon default. Insolvency laws proper are mainly products of a more advanced economy in which there is a fairly refined system of contract law with more elaborate and abstract



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notions of individual rights and obligations enforced, if the need arises, by a centralized power. The emergence of such a system presupposes the replacement of tribal rule by state law which in turn requires the breakdown of the tribal hierarchy in favor of the state. This is obviously the result of gradual development and was not achieved in Rome much before the time of the Emperor Augustus (63 B.C.–14 A.D.). By then, the economic activities and contractual arrangements also required a system of insolvency rules beyond mere local and incidental remedies against the defaulting debtor based on personal constraint and infliction of harm. The proceedings thus became gradually directed towards satisfaction out of debtor's estate under a uniform set of laws and private remedies against his person were abolished. Even though imprisonment for debt (now also a judicial remedy) did not cease to exist, insolvency proceedings proper increasingly prevailed. The procedure at first in use for satisfaction out of the debtor's estate (the *venditio bonorum*) was still substantially different from modern bankruptcy procedures, however. The main differences were in the applicability of this remedy—in the absence of individual remedies—to both solvent and insolvent debtors, and in the procedure: there was no proper auction, all the debtor's assets being sold to one buyer, who became the legal successor of the debtor and would pay the creditors a percentage of the debts as part of a speculation. The rules of this form of disseisure were cumbersome. Compositions did not exist and a less severe procedure, the assignment for the benefit of creditors (the *cessio bonorum*), was available in a very limited set of circumstances only, and exclusively as a favor.

Because of its shortcomings, the *venditio bonorum* became obsolete, and was replaced in postclassical times by individual remedies *(pignus in causa iudicati captum)* in the case of solvent debtors, and by a liquidation procedure *(missio in bona* followed by the *distractio bonorum)* in the case of insolvent debtors. This latter procedure was more sophisticated than the earlier *venditio bonorum* and could be initiated only by a plurality of the creditors. The rules of disseisure were more advanced: the successor was eliminated and a piecemeal sale took place, the excess of which was returned to the debtor. This procedure could be called bankruptcy, though there were still significant differences with the modern notion, such as the method of determining insolvency, the absence of a suspect period (although fraudulent conveyances could already be avoided), the limited appli-

cability of the assignment for the benefit of creditors *(cessio bonorum)* and of compositions which by then existed in two forms: a partial release, or *remissio,* and a delay in payment, or *dilatio.* These latter three relief procedures were, however, besides their inherent limitations, not directly related to the liquidation procedure proper and were not intended for the termination thereof, but rather for its prevention. As a further difference, one could add the absence of a discharge upon bankruptcy, although the discharge idea remains unfamiliar to continental thinking until this day.

Only medieval Italian law refined this procedure of the *distractio bonorum* to such an extent that the result may be called bankruptcy in the modern sense. The ground rules remain, however, unmistakably Roman in origin.

Our knowledge of the classical Roman procedure of the *venditio bonorum* is limited. Although Gaius (second century A.D.) mentions the institution, he does not give a complete picture, while in the Justinian compilation (sixth century A.D.), the *venditio bonorum,* though mentioned again, stands for the *distractio bonorum.*

Consequently, much of the knowledge of the classical Roman law on this subject is based on secondary sources and interpretation. A further consequence hereof is that when Roman law was studied and reintroduced in western Europe from the eleventh century onward, there was no reception of the *venditio bonorum,* but rather of the *distractio,* as well as of the assignment for the benefit of creditors *(cessio bonorum)* and of the compositions *(remissio* and *dilatio)* as restated by the Emperor Justinian in his Digests and Code (between 529 and 534 A.D.).

Because of the influence of Roman law on the later development of bankruptcy law, it may be of some interest to start with a more complete picture of the Roman law system of creditors' remedies. In the following paragraphs we shall deal first with the *venditio bonorum* and *distractio bonorum,* then with the *cessio bonorum* and finally with the *remissio* and *dilatio.*

## § 1.02 Liquidation

### [1]—Evolution of Credit

Before the time of the XII-Tables—a set of laws dating from around 450 B.C.—and to some extent thereafter, the debtor was liable for his debts with his life and body. If he could not pay, he was either killed, made a slave, imprisoned, or exiled.[1] Whether these measures were normal practice is disputed, but they were certainly used from time to time, the debtor having become an outcast.

To better understand this, one should obviously not think in terms of a modern society in which incurring debts is a normal day-to-day activity. In the rural community of early Rome, this was an unusual event. Presumably, a person (probably limited to the head of a clan) could become indebted only by taking out a loan,[2] which at first may have been obtainable solely by the debtor's offering a friend or more likely a clan member as hostage to the creditor. This person would become the latter's private property upon default. This at least was a practice found in other tribal communities in Europe at that time, and the preservation of one of the main contract forms, the *sponsio,* for the surety contract in later times suggests this early procedure. The hostage idea, however, must have become too impractical, for eventually the debtor himself became liable with his own life and body. At that state, there were only two ways of bringing this about: by the *nexum* (literally "fetters") and by the already mentioned *sponsio.*[3] The first was a kind of loan, under the terms of which the debtor put himself physically into the power and at the discretion of the creditor; the other was more like a modern contract (of which it is the predecessor) under which the debtor undertook orally and under oath to repay his debt. They were both very formal rituals and, upon default, led to the execution or slavery referred to above, by means of a lawsuit referred to in the XII-Tables as the *legis actio per manus iniectionem,*[4] the *nexum* directly, the *sponsio* only after the

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[1] Wenger, *Institutes of the Roman Law of Civil Procedure* (English translation by O. H. Fisk, New York, 1940), pp. 230 *et seq.*

[2] Kunkel, *Roemische Rechtsgeschichte,* (Köln, 1964), pp. 37 *et seq.;* also, Kaser, *Das roemische Privatrecht I,* (Münich, 1956), pp. 39, 166.

[3] On the procedure for *nexum,* see Gaius 3.173, 174; on the development of the *sponsio,* see Gaius 3.92 *et seq.* (*stipulatio*).

[4] Gaius 4.21.