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BANKRUPTCY AND THE *PRAETORIAN PLEDGE*: THE LAW OF THE BOOKS AND THE LAW IN ACTION IN THE EARLY MODERN NETHERLANDS[1]

VARIATIONS IN THE ROMAN TEXTS ON THE COLLECTIVIZATION OF CREDITORS

It should hardly be surprising that the narrative of the Dutch law of bankruptcy in the 16-17th centuries should start with the exposition of the history of ancient Roman legal texts. The concept of the "Roman Dutch law" did not come from nowhere. The legal scholarship of the 17th century Low Countries was one of the most Romanized in existence. According to P. Stein, Dutch students of law were "to be prepared for court practice but they should first be inducted into the principles of all law"[2], and those principles were taken from the Roman text. Moreover, the idea of "bankruptcy" itself, as will be shown further, did not appear in the Low Countries "out of nowhere" and its roots are traceable in the Roman text[3].

But which Roman text? The manuscripts of Roman law have a long and complex history. Most of what we know nowadays about Roman law comes from the single 6th century copy of Justinian's Digest, Code and Institutes, widely knows as *Littera Pisana* (due to the fact that it was "rediscovered" in Pisa in the 11th century) or *Littera Florentina* (owing to its forcible removal to Florence in 1406). This is the most precise version of the Justinianic law at our disposal. In the Middle Ages, only very seldom a direct access to it was allowed to anyone; and every

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[2] P. Stein, *Roman Law in European History*, Cambridge 1999, p. 98.

[3] J.Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, "The Yale Law Journal" 1996, Vol. 105, pp. 1841-1889.

such instance was a big event[4]. The medieval learned lawyers, on the other hand, used *Littera Bononiensis* (or *Vulgata*) as the standard text; it was probably a copy of *Pisana*, made in the 11th or 12th century[5]. However, it was not a perfect copy. It demonstrated textual variations in many fragments. The fragments dealing with collectivization and what we nowadays call "bankruptcy" were no exception. Some variations look as though they were not accidental. It could be that the divergence was facilitated by the desire to "harmonize" the text of the *Corpus juris,* to make it fit with its medieval interpretation.

First, there is a fragment in the Digest, D.42.8.9, describing a debtor who performs a disposition of property in fraud of his creditors. The remedy for the creditors was *actio Pauliana*. The original Roman text of D.42.8.9, contained in the *Littera Pisana,* spoke about a debtor whose goods were already seized by his creditors – "*cuius bona possessa sunt"*. However, the medieval manuscript of the Digest, based on the *Littera Bononiensis*, contained an additional "*non"* in the fragment ("*possessa non sunt*"), which implied that the debtor's goods were not yet seized.

The original Justinianic text assumed the need to prove fraud in order to protect the creditors against the dilapidation of the estate by the debtor. The fraudulent intentions of both the debtor and the purchaser from him were to be proved, irrespective of whether the disposition took place before or after *missio in possessionem*. The *missio in possessionem*, performed in respect of the debtor's goods, was a public act, which the public in general was expected to know about. It deprived the debtor of the right to dispose his patrimony, benefitted all creditors of the debtor (at least in certain cases, *infra*) and "made the condition of all creditors equal". Thus, a disposition by the debtor after *missio* was obviously "fraudulent", and anyone who accepted such a disposition knowingly became the participant of the fraud. Hence the text of D.42.8.9 in its original Justinianic version. However, the knowledge of the purchaser was required. It was only in the Justinianic legislation that the "praetorian pledge" (*pignus praetorium*), created by *missio in possessionem,* became an efficient device by itself, allowing the creditor to sue all third possessors of the debtor's goods[6].

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[4] One such instance, for example, was reported by Bartolus, when a textual variation was found among the manuscripts on the wording of the fragment D.20.5.7.2, where some copies read "*nullam*", while others read "*ullam*". Bartolus, in his commentary to D.20.5.7.2, claimed to have arranged access to the original Digest in Pisa and found out that "*nullam*" was the correct reading.

[5] H. Dondorp, E.J.H. Schrage, *The Sources of Medieval Learned Law,* (in:) J.W. Cairns, P.J. du Plessis (eds.), *The Creation of the Ius Cimmune: From Casus to Regula*, Edinburgh 2010, pp. 13-16.

[6] See C.8.21.2.1, which allowed the holder of the "praetorian pledge" to sue third parties, irrespective of whether he lost possession by his own fault or not.

The medieval interpretation was quite different. First of all, it was in the medieval doctrine that the anti-fraud provisions of the title D.42.8(9) were generalized under the umbrella of "*actio revocatoria*", or "*actio Pauliana*". The "fraud" to be proved was defined as any situation when the debtor, at the time of the alienation, 1) owed more than the value of his estate (insolvency), 2) knew that, and 3) the purchaser also knew that[7]. If the alienation was lucrative (i.e., gratuitous), the third element, i.e. the purchaser's knowledge, was not required[8]. In addition, various objective "presumptions" of fraud were developed by the medieval scholars, which took away the need to prove the state of one's mind. Among them were the alienation of all goods, the alienation to a blood relative, the secret alienation, the reservation of possession or a usufruct (simulated alienation), etc.[9]. *Actio Pauliana* was not applicable to a payment or a performance of the existing obligation, because the creditor was just claiming what was "his own"; but it applied to the granting of new pledges for old debts, if the signs of fraud were present[10]. The majority opinion was that *actio Pauliana* had a limitation period of one year after the fraudulent alienation, but the exact extent of the liability, both within and after the yearly term, was a confusing matter[11].

Moreover, the medieval lawyers restricted the use of *actio Pauliana* to the time before the *missio in possessionem*. *Missio in possessionem*, for medieval lawyers, was a landmark event, creating an objective legal state. The *missio* constituted a collective real right (*pignus praetorium*) in the debtor's estate. For this reason, the creditors could use the more efficient *actio hypothecaria*, which did not require a proof of fraudulent intentions. Thus, there was no point in *actio Pauliana* after the *missio* anymore, except to revoke the dispositions performed before the *missio.* So, the "knowledge" requirement, mentioned in D.42.8.9, could, from the medieval perspective, only logically apply to the time before *missio;* the

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[7] Glossa *et* Bart. *ad* D.40.9.9-10, D.42.8(9).15. Bartolus de Saxoferrato, *Commentaria in Primam Digesti Novi Partem,* Venice 1602, pp. 69v, 130v.

[8] D.42.8(9).1, D.42.8(9).6.11, C.7.75.5, *et ibi* Glossa.

[9] Bart., D.39.5.15. Bartolus de Saxoferrato, *Commentaria*..., p. 57.

[10] See Gloss to D.42.8(9).6.6-7, 13, 22.

[11] The fragments D.42.8.10.24 and C.7.75.6 seemed to contradict each other: the former suggested that *actio Pauliana* could be used even after the yearly term, in respect of the "debtor's assets that got into the defendant's possession" ("*quod ad eum pervenit*"), while the latter implied that the yearly term extinguished even that claim. It is no surprise that medieval authors diverged in their interpretation of the law. Bartolus held that onerous deeds were voidable within one year and lucrative deeds perpetually (Bart., D.42.8.10.24. *Commentaria in Primam Digesti Novi Partem,* pp. 130v-131; C.7.75.6. *Commentaria in Secundam Codicis Partem*, Lyon 1552, p. 108). According to Baldus, a *bona fide* purchaser was liable within one year, while a *mala fide* one was liable within one year *in solidum* and perpetually – for "*quod ad eum pervenit*" (Bald., C.7.75.6 *in VII, VIII, IX, X & XI Codicis Libros Commentaria,* Venice 1586, p. 128v).

change of text, in this light, could have been an intentional attempt to establish "coherence".

There is another fragment with a divergent text, D.42.8.24, although here the *ratio* behind the change is not as straightforward. In the fragment, an underage boy (with a tutor) accepted the father's inheritance. Out of the father's assets, his tutor made payment to one of the father's creditors. Afterwards (presumably, reaching majority), the boy obtained *restitutio in integrum* and rejected the inheritance. The defunct's estate was not sufficient to satisfy all his creditors. A question arose, whether the creditor who got paid by the tutor was to share the money with other creditors. The solution proposed by the Roman lawyer is that the debt must be shared if all the creditors vigilantly pursued the tutor, but the tutor paid to one of them out of "favour" ("gratification")[12]. In addition, at the end of the fragment, the question is put, whether a difference should be drawn between the situations when the debtor freely pays to one of the creditors and when one of the creditors "extorts" the due from the debtor – "(…)*An distinguendum est, is optulerit mihi an ego illi extorserim invite*(…)[*?*]". The Roman text immediately provides an answer: "extorting" or pressuring the debtor for payment is acceptable and does not by itself entail prejudice to other creditors and the obligation to share with them, because the Civil law is written for the vigilant creditors – "*Sed vigilavi, meliorem meam condicionem feci: ius civile vigilantibus scriptum est*(…)".

It should be noted that the fragment did not approve of extortion in general, let alone extortion from underage children. The "extortion" in Roman law was strongly associated with "duress" and could be voidable at the debtor's instance[13]. In this case, however, the payment was made out of the father's estate, which was afterwards renounced by the boy; the boy did not suffer any pecuniary harm, as a result. What this fragment suggests is that, in the relation of creditors *vis-à-vis* each other, an excessive pressure for payment, exerted by one of them on the debtor, is not a "dirty move" in prejudice of others, but a legitimate form of competition among creditors. In this respect, the fragment stands in line with the fragments D.42.8.6.6-7 and D.42.8.10.16, which provided that the creditor was free to pursue and obtain the due from the debtor, even when knowing about his insolvency. Only after *missio in possessionem* the creditor became restricted in that respect, because then he would violate the "equal condition" of the creditors.

The medieval text of D.42.8(9).24, from the *Littera Bononiensis*, was changed in a subtle way. At the end, the fragment read: "(…)*Distinguendum est, an is optulerit mihi, an ego illi extorserim invite*(…). *Sed si vigilavi, meliorem meam condicionem feci*(…)". What was a question in the Roman text turns into a state-

[12] The negativity of "gratification" of one of the creditors by the debtor may be found in other fragments of the Digest, namely, in D.42.5.6.

[13] See title D.4.2.

ment in the medieval text. The distinction between a free payment and an "extortion" is indeed to be drawn, claims the medieval version. The following sentence instantly clarifies that the creditor can and should be "vigilant" and that "vigilance" by itself is not punishable and gives priority to the creditor, but it is implied that vigilance should never turn into "extortion" and that the "extorted" payment must be shared with all other creditors. The Gloss to D.42.8(9).24 follows exactly this interpretation: the creditor who got paid before others due to either "gratification" or "extortion" cannot get advantage before other creditors, but the creditor who was simply more "vigilant" can[14].

The divergence in the text of D.42.8.24 reflects a difference of approach between the Roman law as envisioned by the Classical Roman lawyers and its medieval interpretation. The Roman jurists did not impose strict requirements on the order of payment by the debtor to the creditors. The debtor and the creditors were free to settle the debts. The exceptions were when there was a clear fraud against other creditors (including the situation of "gratification") or when the *missio in possessionem* has been performed; but, it seems, even payments after the *missio* were invalid rather because they were seen as "fraudulent" (*supra*). Otherwise, there was no objective order of debt payment and the creditors were given a "free reign".

In contrast, both the medieval version of D.42.8(9).24 and the medieval doctrine suggested a strict and objective order of payments, even before the *missio*. One creditor could neither receive a "gratification" nor go too far by "extorting" the payment in prejudice of other creditors. He was to compete with other creditors by being more "vigilant" (e.g., faster) than them in filing and winning a lawsuit and other legal measures. The debtor could not voluntarily choose whom to pay to: he had to pay to the secured or privileged creditors first; in the case of equality, he was to pay to the "first come" creditors. Justinian's law on inventories, C.6.30.22, providing that the debtor was to pay to the "*qui primi veniant creditores*", was often cited in support of such an objective order of payments[15], as applying to all situations of insolvency[16]. Medieval authors were drawing elaborate schemes on the competition of creditors before *missio in possessionem.* For example, according to Jacobus de Arena (13th century)[17], 1) any creditor could challenge and revoke undue (*indebitum*) payments by the debtor, 2) a secured or a privileged creditor could revoke any payments to a creditor of a lower degree, 3) any creditor could revoke a payment made after *missio*, 4) a payment made

[14] D.42.8(9).24, s.v. "*Distinguendum est*", "*Extorserim*".

[15] See, e.g., Pau. Castr., C.6.30.22.10 (Paulus de Castro, *In Secundam Partem Commentaria*, Lyon 1585, p. 68v).

[16] See, e.g., the reference to C.6.30.22 in the Gloss *ad* D.42.8(9).24, s.v. "*Non revocetur*".

[17] As quoted by Bartolus (Bart., D.42.8(9).24. *Commentaria in Primam Digesti Novi Partem,* Venice 1602, pp. 130v-131).

to the creditor who obtained a court sentence could not be revoked by a simple (unsecured) creditor, 5) a payment out of "gratification" or 6) "extortion" could be revoked by any creditor[18]. Thus, the debtor was given little to no freedom in choosing whom to pay to. Only strict following of the priority (both qualitative and temporal) of the debts guaranteed the successful settlement of debts.

In general, while the Classical Roman law stressed subjective intentions of the debtor and creditor as crucial in the issue of *concursus causarum*, the medieval doctrine was much more "objectivist" in this respect. This is particularly well visible in the concept of *missio in possessionem*, which, rather than a specific procedural form of seizure, was perceived here as an abstract legal "state", affecting the debtor and the public in general, irrespective of their knowledge and intentions. In this, *missio in possessionem* was a prototype of the concept of "bankruptcy", as it was developing in the Early Modern age.

MISSIO IN POSSESSIONEM, PIGNUS PRAETORIUM AND PIGNUS JUDICIALE IN THE MEDIEVAL JURISPRUDENCE

But what was the exact legal effect of *missio in possessionem* in the *Ius Commune,* then? This was a very controversial subject, and complicated, too. The Commentators often proposed diametrically opposite solutions to this problem. The two main examples here are the accounts of the two most well-known and influential Commentators of the 14th century: Bartolus de Saxoferrato (1314-1357) and Baldus de Ubaldis (1327-1400).

The treatment of the subject by Bartolus is found in his commentaries to D.20.4.10, D.42.1.15.4 and D.42.5.12, as well as to C.7.53.9, C.7.54.2 and C.7.72.9. He draws a strong distinction between *pignus praetorium* and *pignus captum causa judicati* (often referred to as "*pignus judiciale*"). According to Bartolus, *pignus judiciale,* created during the execution of a sentence in favour of a winning creditor, follows the principle "*prior tempore potior jure*" (essentially, "first come – first served"). The first creditor to seize the debtor's assets by a court order is preferable to other creditors of the same rank in respect of those assets. In some cases, e.g., if the creditor sold the seized assets with a preliminary public proclamation, even those creditors who had hypothecs or privileges over the sold assets lost their rights and succumbed before the seller[19].

[18] See Bart., D.42.8(9).24 (*ibidem*).

[19] Bart., D.20.5.1 (*Commentaria in Secundam Digesti Veteris Partem,* Venice 1590, p. 136); D.42.8(9).9 (*Commentaria in Primam Digesti Novi Partem,* Venice 1602, p. 129v); C.8.25(26).6

Pignus praetorium, on the other hand, was a device used primarily in respect of a contumacious debtor, against whom a lawsuit was pending. The legal effect of *pignus praetorium* was very complicated. Bartolus solved this matter with a system of subtle distinctions. To put the matters simply, the most important criterion of distinction was whether the debtor's estate was sufficient to satisfy all his debts or not (the criterion of solvency). If the estate was solvent, the principle "*prior tempore potior jure*" reigned supreme, just as in the case of *pignus judiciale*. However, if the estate was insolvent, a contrary principle applied – "*uno immisso omnes immissi*" ("one seizes – everyone seizes"). If one creditor obtained a *pignus praetorium* in respect of the debtor's assets, this benefitted all other creditors existing at the time of seizure. Other creditors could come within a certain term, provide summary proofs of their claims and were treated as if they had obtained a *pignus praetorium* simultaneously with the first creditor[20]. If they were all simple creditors, they all had an equal standing and an equal and proportionate right to the debtor's assets.

Baldus de Ubaldis was dealing with the subject of the effect of *missio in possessionem* in his commentaries to C.7.53.3, C.7.72 Auth. *Et Qui* and C.7.72.10, as well as C.8.17(18).2, C.8.17(18).4(3) and C.8.22(23).1. Unlike Bartolus, he did not draw a strong distinction between *pignus praetorium* and *pignus judiciale*. Just like Bartolus, he balances between the principles of equality ("*uno immisso omnes immissi*") and temporal priority ("*prior tempore potior jure*"). However, he offers different criteria for applying them. According to him, the regime of mutual standing among the seizing creditors depends mainly on the nature of claims the creditors have against the debtor. If the creditor has an onerous (for value) debt claim against the debtor, the seizure of assets that he performs benefits not only himself, but also the creditors who have a similar "title". By "title", Baldus meant a "magisterial title of the obligation", such as "out of contract", "out of delict (tort)", etc. Thus, "*uno immisso omnes immissi*" applies in such a case. On the other hand, the creditors with a different title are not benefitted by that seizure. They were to file their own separate lawsuits against the debtor and, in case of his "contumacy" against them, obtain their own judicial decree of seizure.

Another criterion that Baldus proposes is that of a *res judicata*. If one of the creditors obtains a definitive court sentence against the debtor, or, alternatively, a "*secundum decretum*" on the sale of seized assets, the seizure performed by him only benefits himself and other creditors who have already obtained their own court sentences or "*secunda decreta*" against the debtor. The late-coming sim-

(*Commentaria in Secundam Codicis Partem*, Lyon 1552, p. 126). It was different if the imperial fisc was the creditor (C.7.73.5; D.49.14.19-21).

[20] Two years if they lived in the same province, four years if they were from another province (C.7.72.10).

ple (unsecured) creditors were "cut off", in accordance with the principle "*prior tempore potior jure*". In addition, Baldus doubted that "*pignus praetorium*" could ever be acquired in respect of completely passive creditors, who did not file any formal claims.

The distinction between the approaches of Bartolus and Baldus is hard to summarize. However, a certain pattern is still discernible. While the approach of Bartolus laid more stress on achieving collective equality of the creditors in the case insolvency, the approach of Baldus stressed encouraging and rewarding the vigilant creditors, while punishing the "passive" ones.

MISSIO IN POSSESSIONEM AND COLLECTIVIZATION OF CREDITORS IN THE 16TH CENTURY LOW COUNTRIES

In the 16th century Low Countries, the legal procedure of attachment of the debtor's assets, prevalent in most of the provinces, was quite different from that of the *Ius Commune*. The debt litigation in municipal courts was usually preceded by an extra-judicial[21] seizure of the debtor's goods (*thoonpand*). Contemporary lawyers designated such a seizure with the French word *arrest*[22]. The main perceived function of the arrest was to establish the jurisdiction of the particular local court over the case, by preventing the debtor from carrying away his goods to another city. Protecting the creditor against fraudulent dispositions was a secondary consideration[23]. It seems clear that Netherlandish arrest was different from the Civil law *missio in possessionem* in terms of the function it performed. Neither the scheme of Bartolus nor that of Baldus was fully applicable here.

Yet, the local practice did not provide answers to the questions surrounding the rights of individual creditors and their relation with the collective rights of the creditors. The lawyers had no other choice but to resort to the Civil law to find those answers. For example, Brabantian lawyer Pieter Peck the Elder (1529-1589) applies the *Ius Commune* principles on *missio in possessionem* to the form of arrest used in Brabant. His account combines the approaches of Bartolus and Baldus: on the one hand, a pre-trial arrest benefits all creditors equally, but, on the other hand, the creditors who fail to join by the moment of the sale of assets are cut off from competition[24].

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[21] It was not, however, a pure form of "self-help", but always involved a local bailiff or another public official.

[22] Peck, *Tractatus de iure sistendi*, Cologne 1665, c. I, pp. 1-4.

[23] *Ibidem*, c. II, pp. 4-8.

[24] *Ibidem*, c. XL, pp. 202-207.

What about the county (and then, the province) of Holland? There are few sources from the 16th century available. However, those few sources that we have suggest that the practice in Holland was similar to that described by Peck for Brabant – a combination of collectivization and encouraging of the creditors' "vigilance"[25]. The pre-trial arrest equally benefitted both the arrestor and all other creditors, in accordance with the "*uno immisso omnes immissi*" principle; however, the creditors were to join the arrest before the sale of the debtor's assets, otherwise they were cut off.

COLLECTIVIZATION OF CREDITORS IN THE ROMAN DUTCH "ELEGANT JURISPRUDENCE" OF THE 17TH CENTURY

The late 16th century was the time when Legal Humanism was becoming the dominant method of legal scholarship and the original Roman text, based on the *Littera Pisana*, was being restored. The editions of the original version started to dominate. While in the 1560 Lyon edition of the Digest D.42.8(9).9 reads as "*possessa non sunt*", the 1581 Lyon edition by G. Rouille drops the "*non*"; the 1627 edition combines the original version with the medieval Gloss, which makes the latter look out of place. The Dutch school of "Elegant Jurisprudence" was mostly of Humanist inspiration[26]. References to the medieval *Ius Commune* were veryrare among the scholars of this school[27]. The 16th century approach, which synthesized Bartolus, Baldus, and local practice, was not justifiable in the eyes of the "Elegant School".

Another important characteristic of the Roman-Dutch jurisprudence was the stress on substantive law and a certain neglect of the law of procedure. In this, they followed the tradition of Hugo Donellus[28]. The procedural rules, divergent in various cities and communes across Holland, were only an auxiliary source of law for the Roman Dutch scholars. For this reason, the issues of collectivization of creditors and bankruptcy, despite being, strictly speaking, procedural issues, were treated by the scholars in the context of substantive *pignus praetorium* or *judiciale*: whether a scholar recognized the existence of such *pignus* in Holland or

[25] For example, the 1597 *Conrad's Case,* cited by Nieustadt *Untriusque Hollandiae, Zelandiae, Frisiaeque Curiae Decisiones,* Hague 1667, dec. 79, p. 233, and the 1590s case (or a *consilium*?), *ibidem*, dec. 26, p. 171, which both mention the principle "*uno immisso omnes immissi*".

[26] P. Stein, *Roman Law in European History,* Cambridge 1999, p. 98.

[27] A notable exception was Arnold Vinnius, who did not hesitate from referring to the *Ius Commune* sources.

[28] P. Stein, *Roman Law*...

not, the Civil law doctrine on the creditors' rights was much more important for him than the minute details of actual Dutch procedural practice.

The Dutch procedural practice also evolved in the 17th century. For example, "*judicium praelationis*" – a special solemn trial, deciding on the distribution of the sale proceeds among the creditors – becomes a commonplace, with some cities within Holland making it indispensable[29]. The "first come – first served" principle and the stress on the "fast reaction" of the creditors diminishes. This opens the way for stronger collective rights of the creditors.

The paradox of the 17th century Roman Dutch scholars was that they, on the one hand, mostly disregarded the medieval *Ius Commune*, but, on the other hand, upheld an essentially medieval interpretation of the Roman text, due to the stronger protections of the collective rights of the creditors it offered.

GROTIUS

One illustration of such a paradoxical approach is Hugo de Groot (Grotius, 1583-1645) and his *Introduction to the Jurisprudence of Holland* (first edition in 1620). He considers "void" all alienations made by a "bankrupt", whereby "the creditors could be in any manner defrauded"[30]; by "bankrupts", he understands "those who conceal themselves, or abscond, leaving their debts unpaid"[31]. There was a precedent for such a provision in the 1540 statute by Charles V[32]. The statute imposed death penalty on fugitive bankrupts and declared "void" all alienations, made by them. In addition, the statute imposed a harsh punishment on all those who assisted the bankrupts by concealing their assets or creating simulated, false, or exaggerated debts: such people were to incur the full burden of the bankrupt's debts, not limited to the value of the assets they have received from the bankrupt. It is probable that Grotius was referring to that statute. However, he does not mention either the death penalty for bankrupts or the liability of malicious accomplices. He treats the inalienability of the bankrupt assets as a purely private law matter. In that, Grotius seems to be identifying the "bankruptcy" with the *missio in possessionem,* in its medieval, specifically, Bartolist understanding – as one single event, collectivizing the creditors and "freezing" the estate, objectively preventing subsequent alienations by the debtor. Yet, Grotius does not sup-

[29] For example, Leyden, *Stat. Leydens.,* Art. 197, cited by Van Leeuwen, *Censura forensis*, Leiden 1662, IV.9.13, p. 482.

[30] Grotius, *Introduction to Dutch Jurisprudence,* II.5.3, London 1845, p. 86.

[31] *Ibidem*.

[32] 4 October 1540 Placaard.

port the medieval doctrine in all respects. For example, he does not mention the *pignus praetorium* or any other type of real right following from the bankruptcy.

In the next section[33], Grotius describes his understanding of the *actio Pauliana*. He starts by noting that it applies only to alienations made before the bankruptcy, which seems to be another sign of the influence of the medieval text and doctrine on him: it was the medieval interpretation that *actio Pauliana* applied to alienations made before *missio*, whereas after the *missio* it was no longer necessary. Furthermore, among the occasions when an *actio Pauliana* lies, he enumerates the knowledge by the purchaser from the debtor of the debtor's insolvency. Such a clear association of insolvency with fraud was a medieval doctrine. He also mentions the "small value" of the transaction as a ground for *actio Pauliana* – something which did not directly follow from the Roman text, but was, on the other hand, present in the writings of medieval scholars[34].

Similarly reminiscent of the medieval approach is Grotius' attitude to payments made before the bankruptcy. He claims that a debtor who owes more than he is worth is able, previous to bankruptcy, to make payment to the creditor who "presses for" (or "demands") payment[35] (*Inleidinge*, II.5.4; III.39.12). Essentially, according to Grotius, the debtor must pay first to the most "vigilant" creditor, who was the first to file a lawsuit or obtain a judgment. This was the approach of the medieval doctrine, which set up an objective order of payments before *missio* (*supra*).

GROENEWEGEN AND VAN LEEUWEN

The writings of Simon van Groenewegen (1613-1652) and Simon van Leeuwen (1626-1682) illustrate how the scholars used different or even contrary Civil law constructions in order to achieve an identical outcome – the outcome which protects the collective equality of the creditors.

Thus, Groenewegen follows the *Ius Commune* line in distinguishing between *pignus praetorium* and *pignus judiciale*. *Pignus praetorium*, created by *missio in possessionem* pending trial, does not exist in Holland[36], while *pignus judiciale*,

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[33] Grotius, *Introduction*..., II.5.4, p. 87.

[34] Bart., D.42.8(9).10.24-25. *Commentaria in Primam Digesti Novi Partem,* Venice 1602, p. 130 – where it is held that a sale for a small price is partially onerous (corresponding to the price) and partially lucrative (in respect of the value exceeding the price).

[35] The original word is "*Maners*". Grotius, *op. cit*., II.5.4, p. 87, III.39.12. p. 457.

[36] Groenewegen, *Tractatus de legibus abrogatis,* Leiden 1649, D.13.7.26.1, p. 156, D.20.4.10, p. 187, C.8.21(22), p. 674.

which is a post-trial attachment of assets, does. At the same time, he holds that the two "*pignora*" were, essentially, one and the same institution in the Civil law and obeyed the same principle: "*uno immisso omnes immissi*". They benefitted all creditors and did not distinguish between the time of seizure[37]. The same, he held, applied in Holland. Unlike his *Ius Commune* predecessors, Groenewegen does not consider it necessary for the creditors to join in the attachment to get advantage of the *pignus judiciale*. He suggests that even simple (unsecured) creditors, who did not make a protestation before the auction, could claim their share in the sale proceeds before the *apparitor* distributed the money.

While Groenewegen bestows the *pignus judiciale* on all creditors, Simon van Leeuwen rejects it altogether for Holland, although the outcome is almost identical. Neither the arrest pending trial nor the post-trial attachment create any kind of privilege in Holland; "*arresten gheeft gheen preferentie*" is quoted as an established maxim of law.[38] Until the proceeds of the sold assets are distributed, all the creditors retain their respective privileges and can forbid, by way of a judicial arrest, the money from being paid to those with inferior rights – van Leeuwen cites a 1652 case before the Court of Holland to this effect[39].

Despite that, however, Van Leeuwen demonstrates commitment to the Bartolist concept of *missio in possessionem* as a single event. He, essentially, equates *missio,* in this interpretation, with the Dutch bankruptcy. His definition of bankruptcy is much wider than that of Grotius: besides an actual fugitive debtor, it now includes those "forbidden to alienate their goods as suspected of escape" and those who declared a bankruptcy at their own initiative (*cessio bonorum*)[40]. In all these situations, Van Leeuwen holds, further alienations by the debtor are invalid.

Van Leeuwen, nevertheless, does not consistently follow the medieval tradition as regards the consequences of *missio*/bankruptcy. To the contrary, he tries to rely on the original Justinianic text and Dutch practice. For this reason, in his text, there is no notion that bankruptcy of the debtor entitles his creditors to use *actio hypothecaria* to protect their interests. He rejects *pignus praetorium*[41]. *Van Leeuwen's text suggests that actio Pauliana* is the main action to protect the collective interests of the creditors. This action, supposedly, was to be used against all acquirers who knew about the actual or upcoming bankruptcy of the debtor. Such a peculiar combination of approaches from both the original Roman text and the traditional medieval doctrine forces Van Leeuwen to draw a distinction

[37] *Ibidem*, D.20.4.10, p. 187, C.8.17.2, which seemed to contradict his position, he dismisses as "useless" in his time.

[38] Van Leeuwen, *Censura forensis*, Leiden 1662, IV.9.13, p. 482, IV.10.5, p. 484.

[39] The case was that of Albert Heerman, decided on 27 Febr 1652, Van Leeuwen, *Censura*..., IV.9.13, p. 482.

[40] *Ibidem*, II.12.9-10, pp. 157-158.

[41] *Ibidem*, IV.9.13, p. 482.

between pecuniary payments and specific performances by an insolvent debtor. On the one hand, unlike Grotius (*supra*), he affirms that a payment of a pecuniary debt, made before the bankruptcy to one of the creditors, is valid and secure, irrespective whether the creditor pressed for payment or not and whether he knew about the upcoming bankruptcy or not[42].

On the other hand, non-pecuniary performances, assignations ("*transporta*") and pledges, receive a different treatment from Van Leeuwen. He says that "*cessiones*", "*transporta*" and "*pignoris capiones*" made before the bankruptcy may be revoked by way of *actio Pauliana*. He contends that this matter was "confused" in Holland by virtue of a "custom of certain merchants"[43] and that several years previously such assignations were approved by the Court of Holland. Van Leeuwen, however, denounces this practice.

The problem with his approach is that *actio Pauliana* may be used not only against pledges and assignations granted by the debtor voluntarily, but also against "judicial pledges", captured by the creditor as part of execution proceedings. This is paradoxical, because the creditor is punished for performing a perfectly legal and natural operation – enforcing his rights. A creditor who knows or suspects of the upcoming bankruptcy, being too slow to convert his seizure into money before the bankruptcy, may be declared "fraudulent" and lose everything, as a result. It is unclear if van Leeuwen fully understood all the consequences of his interpretation. In *Censura,* IV.9.13 and IV.11.1,[44] he admits that a judge may create a *pignus judiciale* in favour of the creditor, if expressly provides so in the decision. This could be a sign that he actually recognized the importance of rewarding "vigilant" creditors, mitigating his "pro-equality" stance.

VOET

Johannes Voet (1647-1704) is an example of a legal author who does not hesitate to use, essentially, medieval legal concepts. Unlike many of his predecessors, he does not shy away from employing the terms "*pignus praetorium*", "*pignus judiciale*" and "*missio in possessionem*" and directly applying them to Holland. Yet, he disguises them as the concepts of the original "Roman" (Justinianic) text.

As to *pignus praetorium*, Voet is ambivalent. He recognizes that bankruptcy in Holland creates a *pignus praetorium*[45]. At the same time, he denies that

[42] *Ibidem*, II.12.10, § 2, p. 157.

[43] He literally says: "*impravata quasi mercatorum quorundam consuetudine*".

[44] Van Leeuwen, *Censura*..., p. 488.

[45] Voet, *Commentarius ad Pandectas*, Vol. IV, Paris 1829, D.42.8, XII, p. 218.

a pre-trial arrest or detention gives rise to the pignus praetorium[46]. On the other hand, Voet accepts *pignus judiciale* and, contrary to Groenewegen and Van Leeuwen, considers the first post-sentence seizer of the debtor's assets to be privileged before subsequent unsecured seizers[47]. In this, Voet seems to take a step back from the principle of collective equality of creditors, but in reality he is simply fixing the problem with the account of van Leeuwen, which discouraged the vigilant creditors (*supra*). The approach of Voet seems to be inspired not by the actual Dutch practice, but rather by the wish to harmonize the doctrine.

It is in respect of the consequences of bankruptcy that Voet demonstrates the strongest influence of the medieval tradition. Even more straightforwardly than Grotius or Van Leeuwen, Voet identifies *missio in possessionem* with the appointment of a curator in Holland, while the *missio* itself is defined in the "Bartolist" way – as an objective legal state, "freezing" the debtor's assets. He directly claims that *missio* gives rise to a *pignus praetorium*, which benefits all existing creditors and makes further dispositions by the debtor invalid[48]. Such dispositions may be revoked not by an *actio Pauliana*, but by what Voet calls "*actio rescissoria*", which he considers a form of a hypothecary action, protecting *pignus praetorium*. Similarly to *actio Pauliana,* this "*actio rescissoria*" is "praetorian" and thus is available within a year (*annus utilis*) after the distraction of the estate[49]. Voet invents this new action, because there was no sufficient ground in the Digest and only an implicit indication in the Code[50] that a regular hypothecary action could be used to protect *pignus praetorium*. In order to avoid referring directly to the medieval sources, Voet has to "reinterpret" the Institutes, Inst.IV.6.6, in an original way. According to Voet, Inst.IV.6.6 "created" this new "*actio rescissoria*", serving to revoke fraudulent dispositions made by the debtor after *missio in possessionem*[51].

Unlike Van Leeuwen, Voet makes the defense of the collective rights of creditors against fraud dependent not on the subjective intentions, but on the objective criteria. He denies the distinction between money payments and in *specie* assignations, settlements and pledges. The creditor's knowledge about the debtor's insolvency does not, by itself, constitute "fraud"[52]. A payment or an assignation is only fraudulent if either made after the *missio* or made to one among several equally vigilant creditors by way of "gratification"; in this, Voet is closer to the original Roman approach, where knowledge of insolvency did not by itself consti-

[46] *Ibidem*, Vol. I, D.2.4, LXIV, p. 177.
[47] *Ibidem,* Vol. II, D.20.2, XXXII, p. 422.
[48] *Ibidem,* Vol. IV, D.42.8, XII, p. 218.
[49] *Ibidem*, Vol. IV, D.42.8, XIII, p. 218.
[50] I.e., C.8.21.2.
[51] Voet, *Commentarius...,* D.42.8, XII, p. 218.
[52] *Ibidem*, Vol. IV, D.42.8, XVIII, p. 223.

tute fraud. He probably reflected the actual Dutch practice better, too, especially in respect of validity of dispositions made in favour of one of the creditors.

CONCLUSION

The evolution of the attitude of the Dutch "Elegant School" towards the effect of arrest, bankruptcy, and collectivization demonstrates a much stronger reliance on the legal doctrine rather than the court practice. The interesting revelation, however, is that the doctrine employed by the Roman Dutch legal authors was often of the medieval origin. The influence of the medieval doctrine did not diminish, but, to the contrary, became even stronger in the works of Voet, where the objective real effect of bankruptcy/*missio* becomes most prominent. This seems to confirm the observation of P. Stein[53], that the methodology of the "Elegant School" was an amalgam of the medieval *mos italicus* and the classicist *mos gallicus.*

The practical outcome of this Dutch reliance on doctrine is very illustrative in comparison with the law of the neighbouring Province of Utrecht. In the late 17th century Utrecht, the "first come – first served" principle still reigned supreme, while the collectivizing effect of bankruptcy was limited[54]. The key difference from Holland was the lesser reliance on doctrine and the stronger attention to the court practice. In Holland, on the other hand, the dominating position of the "law of the books" over the "law in action" ensured the strong protection of the collective rights, found in the medieval doctrine.

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[53] P. Stein, *Roman Law…*, p. 98.
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Summary.

The article points out at the discrepancy between the different Mss. of the Roman Justinianic text: *Littera Pisana* and *Littera Bononiensis.* The discrepancy entailed that the doctrine of medieval *Ius Commune* offered stronger protection of the collective rights of the creditors, in comparison with the Classical Roman law. The Roman Dutch "Elegant School", despite its general reliance on the original Roman sources, already in the writings of Grotius demonstrated allegiance to the medieval doctrine on the issue of bankruptcy. The authors of the "Elegant School" continued to prefer the medieval interpretation of the creditors' rights and bankruptcy, although Dutch practice was, in many respects, drastically different from the *Ius Commune* doctrine. This ensured a strong protection of creditors in bankruptcy in Dutch law.

KEYWORDS

"*Ius Commune*", Roman Dutch Law, bankruptcy, legal history, collateral

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"*Ius Commune*", prawo rzymskie w Holandi, bankructwo, historia prawa, zastaw