

MONUMENTA IURIS CANONICI

SERIES C: SUBSIDIA

Vol. 8

Proceedings of the Seventh International Congress of Medieval Canon Law

CAMBRIDGE, 23-27 JULY 1984

Edited by
PETER LINEHAN



CITTÀ DEL VATICANO
BIBLIOTECA APOSTOLICA VATICANA
1988

The origins of bankruptcy in medieval canon and Roman law *

By WALTER PAKTER

Bankruptcy law was not introduced into England until the mid-sixteenth century. From the start it met opposition from creditors who preferred to imprison insolvents.¹ Legislation of 1543, commonly called the first English bankruptcy act, dealt with some elements found in modern bankruptcy law, including a rateable distribution of assets and penalties for preferential transfers.² Nevertheless, the discharge provisions and the 'fresh start', which are the hallmarks of modern Anglo-American bankruptcy law, were not introduced until one and a half centuries later, originally as a hardship measure to relieve thousands of debtors languishing in jails and in the prison fleet.³ The introduction of the discharge was described by Blackstone (1723-80) with undisguised contempt as a Roman invention, 'which under a false notion of humanity, seems to be fertile to perjury, injustice and absurdity'.⁴

Where did bankruptcy law begin and when were its principal elements formed? Even before the introduction of the discharge, some elements of bankruptcy, including the name, Lord Coke (1552-1634) tells us, were derived from foreign sources; legal transplants are a common occurrence in the history of law.⁵ The paths which foreign bankruptcy

* The author expresses his appreciation to Mario Ascheri, John Barton, David Daube, Charles Donahue Jr., Robert Feenstra and Elisabeth Vodola for their comments.

¹ W.J. Jones, *Foundations of English bankruptcy* (Philadelphia 1979) 11ff.; P.H. Duffy, 'English bankrupts', *American journal of legal history* 24 (1980) 283, 288.

² 34 and 35 Henry VIII, ch. 4 sec. 4 (1543); S. Riesenfeld, 'Evolution of modern bankruptcy law', *Minnesota law review* 31 (1947) 401, 422; Jones, *Foundations* 16.

³ 4 Anne c. 17 (1709) and 10 Anne c. 16 (1711); L.E. Levinthal, 'Early history of English bankruptcy', *University of Pennsylvania law review* 67 (1919) 1, 18.

⁴ Blackstone, *Commentaries* 2.473 (15th ed. London 1809, 2.472).

⁵ Coke, *Institutes of the laws of England* 4.277 (London 1797, 4.276): 'We have fetched as well the name as the wickedness of bankrupts from foreign nations'; R. Pound, *Readings in jurisprudence and legal philosophy* (Boston 1951) 101.

ideas took to England have been traced by Stefan Riesenfeld.⁶ This study will therefore concentrate on earlier developments among the civil law commentators. It will show that the emergence of bankruptcy as a debtor's prerogative, not subject to waiver, with a primitive discharge and exemptions for after-acquired assets, as well as the distribution of assets preferring secured creditors, was the creation of the fourteenth-century Italian Commentators, in reaction to the Glossators of the twelfth and thirteenth centuries. The Commentators, themselves inspired by French civilians and the canonists, later became a source for Benvenuto Stracca (1509-79) and other writers who influenced English law directly.⁷

Cessio bonorum was the Roman equivalent and historical ancestor of modern bankruptcy. The Byzantine Compilers preserved ten or eleven fragments from constitutions on *cessio bonorum* in the Codex⁸ and twelve fragments from the jurists in the Digest.⁹ These classical fragments had already been recast by the Compilers, reflecting Byzantine sympathy for debtors.¹⁰ During the twelfth and thirteenth centuries, the Glossators and French jurists were opposed to the use of *cessio bonorum* to protect debtors. It was the Commentators¹¹ who were responsible for using Roman sources to create modern bankruptcy.

1. Creditors' remedies and debtors' protection at Roman law

David Daube has observed that public officials who wish to substitute public authority for self-help have often adopted the rigorous penalties already in use among private parties. The price that officials must pay for their admittance as arbiters of what had been considered a

⁶ S. Riesenfeld, 'Bankruptcy, Laws concerning' *Encyclopedia Britannica* 2.694 (1982). For bankruptcy in ecclesiastical courts see R.H. Helmholz, 'Bankruptcy and probate jurisdiction before 1571', *Missouri law review* 48 (1983) 415.

⁷ Benvenuto Stracca. *Tractatus de conturbatoribus sive decoctoribus* [first published 1553] in Stracca, *De mercatura* (Frankfurt 1622). Stracca was a primary source for Garret de Malynes, *Lex mercatoria* (London 1686).

⁸ Cod. 2.11.22; 7.71.1-8; 7.72.2. The cryptic Cod. 8.13.1 may also have dealt with *cessio bonorum*.

⁹ Dig. 4.8.17; 42.3.3-6; 42.3.8-9 originally dealt with *cessio bonorum*. Dig. 42.3.1-2, 42.3.7 were made relevant to *cessio bonorum* by the Compilers. Dig. 16.3.7.2 and 42.7.5 were thought relevant by the civilians.

¹⁰ E.g. Cod. 7.71.7.

¹¹ P. Koschaker, *Europa und das römische Recht* (Munich 1947) 90; E.M. Meijers, *Etudes d'histoire du droit III* (Leiden 1959); P. Weimar, 'Die legistische Literatur' in Coing, *Handbuch I* 269.

private wrong was to satisfy the parties' own standards of justice or revenge.¹²

Mistreatment of debtors under the early Roman Republic, as reported in later authors, probably reflects the primitive ruthlessness of unsatisfied creditors whose standards were institutionalized in the Twelve Tables.¹³ According to Aulus Gellius (c.123-169), insolvents were once sold abroad or executed; debtors of multiple creditors were reportedly dismembered.¹⁴ Customary law later mitigated these practices.¹⁵ Execution on the person of the debtor was restricted in Rome in 326 B.C., in Ptolomaic Egypt in 118 B.C. and in Roman Egypt in A.D. 68., although personal execution survived in Rome, Egypt and elsewhere.¹⁶ Torture of debtors is even reported in Justinian's time.¹⁷

Cessio bonorum, instituted under Augustus Caesar,¹⁸ was eventually to provide some relief for hard-pressed debtors. The original law allowed for a surrender of assets, although it is unclear what the *cedens* received in return. Gaius (3.78) tells us only that his goods were sold. According to Emperor Alexander Severus (222-35), *cessio bonorum* spared the debtor personal execution (Cod. 7.71.1). The other benefit associated with *cessio bonorum* in antiquity was exemption from legal infamy (Cod. 2.11.11). But this cannot have been part of the original *lex* because even in Gaius's time, *cessio bonorum* led to *venditio bonorum* (Gai. 3.78), which in turn led to legal ignominy (ibid. 2.154).

The extent to which *cessio bonorum* was available in antiquity remains a much-mooted question. Because of the scarcity of texts, German scholars have long assumed *cessio bonorum* was not widely used.

¹² *Sons and strangers* (Boston 1984) 16.

¹³ Gellius, *Attic nights* 20.1.19; 20.1.46; 20.1.49.

¹⁴ Quintilian, *Inst.* 3.84.

¹⁵ C.G. Bruns, *Fontes iuris Romani antiqui* (7th ed. Tübingen 1909; rp. Aalen 1958) [hereinafter Bruns] 21 = S. Riccobono, ed. *Fontes iuris Romani anteiustiniani I* (Florence 1941) [hereinafter FIRA] 318.

¹⁶ Livy 8.28.8; M. Kaser, *Das römische Zivilprozessrecht* (Munich 1966) 103; A.S. Hunt and C.C. Edgar, *Select Papyri II* (London & Cambridge, Mass. 1934) 59, 73, 75; Bruns 243 = FIRA I 318; Quintilian, *Inst.* 5.10.60; Gaius 3.199; Gellius 20.1.51. Friedrich v. Woess, 'Personalexekution und cessio bonorum im römischen Reichsrecht', ZRG Rom. Abt. 43 (1922) 485, 495; Matt. 18.23. For Greece see L. Mitteis, *Reichsrecht und Volksrecht* (Leipzig 1891) 444.

¹⁷ Cod. 1.3.32; 7.71.8pr: 'omni corporali cruciatu semoto...'

¹⁸ P.F. Girard, 'Les leges Iuliae iudiciorum', ZRG Rom. Abt. 34 (1913) 295, 328n; L. Guenoun, *La cessio bonorum* (Paris 1913/1920) 19; J.A. Crook, *Law and life of Rome* (London 1967) 317 n. 176 for Augustus, V. Giuffrè, 'La c.d. «lex Iulia» de bonis cedendis', *Labeo* 18 (1972) 173, 178.

Woess¹⁹ assumed it was only available to debtors unable to pay through some misfortune. However, not only is the evidence for this tenuous, but it rests on the doubtful assumption that misfortune was particularly rare in antiquity. More likely, the availability of *cessio bonorum* depended on a magisterial decision, rather than on the outcome of a trial before a *iudex*, hence the small number of juristic texts.²⁰

2. *Cessio bonorum* and the medieval debtors' ban

Whatever the prevalence of *cessio bonorum* in antiquity, at the end of the middle ages it became a common remedy for urban insolvents.²¹ Between the thirteenth and fifteenth centuries, *cessio bonorum* gained acceptance in many regions as a humane alternative to the debtors' ban, then widely practised in Italy. The ban was a form of outlawry²² evidently intended to provide a substitute for the family vendettas inflicted upon insolvents.

Against this, *cessio bonorum* permitted the debtor to remain in his commune, safe from physical attack and immune from further legal procedure unless he acquired substantial assets.²³ Though *cessio bonorum* marked an improvement over banning the debtor, it was attended by bizarre rituals of its own. In medieval Italy and southern France, it was common for the *cedens* to stand nude but for his shirt and strike a stone with his posterior ('vituperii lapis') while declaring 'cedo bonis'.²⁴ The patent purpose of this ceremony was as much to satisfy the anger and frustration of creditors as to publicize the debtor's bankruptcy.

Some Italian communes resisted acceptance of *cessio bonorum*. Northern Italian towns were the most receptive. *Cessio bonorum* appears in Lombardy in 1195, in Venice in 1231 and in Piedmont in 1234.²⁵ Pisa accepted it as early as 1241, probably influenced by the possession

¹⁹ Woess, 'Personalexekution' 505.

²⁰ I will discuss Roman *cessio bonorum* in a future publication.

²¹ A. Pertile and P. del Giudice, *Storia del diritto italiano* 6.2 (Turin 1902) 389 n. 39.

²² H. Planitz, 'Das Schuldbann in Italien', ZRG Germ. Abt. 52 (1932) 134, 187.

²³ Cod. 7.71.1. Del Giudice, *Storia* 6.2 p. 384; Planitz, 'Schuldbann' 229.

²⁴ Planitz, 'Schuldbann' 233; C. Dupouy, *Le droit des faillites en France avant le Code de Commerce* (Paris 1960) 14; M. LaCave, 'Recherches sur la Cessio bonorum dans le droit méridional à la fin du moyen âge', *Recueil de mémoires et travaux* (Montpellier) 9 (1974) 443.

²⁵ Planitz, 'Schuldbann' 230.

of the first Digest manuscript in the West.²⁶ Other Tuscan towns rejected it. Even Bologna forbade *cessio bonorum* as late as 1475.²⁷ Further south, in central Italy, it was rejected by most municipal statutes.²⁸

Attitudes towards public humiliation of debtors began to improve only after the *Glossa ordinaria* of Accursius (d. 1259/63).²⁹ The first attacks on these ceremonies come from Jacques de Révigny in France and Odofredus in Italy.³⁰ The Commentators considered these practices inconsistent with the sophistication they wished to attribute to Roman law; that primitive Roman law had been 'archaic, clumsy and semi-barbarous' before it came under the influence of later hellenized lawyers³¹ was as yet unimagined. Révigny sardonically observes that dismemberment of a debtor by unsatisfied creditors may be 'Lombardian', but it was not Roman.³² It would have surprised medieval civilians to learn that harsh

²⁶ Ibid 239 n. 3; Thomas Diplovatatus, *De claris iuris consultis*, ed. F. Schulz I (Berlin/Leipzig 1919) 335 ('Justinian'); Savigny, *Geschichte des römischen Rechts* III 94.

²⁷ Planitz, 'Schuldbann' 230; Odofredus, *Lectura super codice* (Lyons 1552; rp. Bologna 1969) fol. 135rb [Cod. 7.71.1]: 'Tamen istud edictum Qui bonis cedere possunt, non habet locum in civitate ista, quia hic est lex municipalis iurata; quod si aliquis non potest solvere, est unus carcer in quod detruduntur omnes non solventes'.

²⁸ Planitz, 'Schuldbann' 230, believed *cessio bonorum* was not practised in Rome, although Cynus da Pistoia (d. 1336) reports that it was: *In codicem commentaria* (Frankfurt 1578; rp. Turin 1964) II 476vb § 5 [Cod. 7.71.1 *Qui bonis*]: 'Sed in quibusdam partibus de consuetudine vel lure Municipali percutitur in posteriori parte. Alibi cum posterioribus percutit unum lapide <m> ad hoc ordinatum, et Romae ascendit leonem marmoreum qui est in pede scalarum Capitolii, et dicit cedo bonis, ut extra de solut(ionibus) Odoardus (X 3.23.3). Sed credo quod tales consuetudines et statuta sint contra bonos mores (citations omitted [hereinafter: c.o.])'.

²⁹ Accursius never mentions these rituals.

³⁰ Jacobus de Ravanis (c.1230-post 1296), *Lectura super codice* (attributed to Petrus de Bellapertica) (Paris 1519; rp. Bologna 1967) fol. 369vb (Cod. 7.71.6 *In omni*): 'In Lombardia habent de consuetudine quod qui cedit bonis nudus est in camisia et deponit brachias et cum parte posteriori percutit ibi lapidem et dicit ibi cedo bonis. Et dicitur ille lapis vituperii lapis'; Odofredus, *Lectura super codice* fol. 135v [CJ 7.71.6]: 'Tamen Mediola(ni) non habet locum hec lex. Quia Mediolani fit quedam turpis solemnitas. ...qui vult cedere bonis ascendit locum eminentem et deponit vestes inferiores privatas. Et dicit, cedo bonis, ter. Et cum capite posteriori percutit illum lapidem. Et tunc omnes clamant contra eum'. Similarly Baldus, *Super libris codicis* in *Opera omnia* (9 vol.; Venice 1575) VIII fol. 118vb § 1 [Cod. 7.71.8 *Cum solito*]: 'In aliquibus locis est statutum quod nemo possit cedere bonis nisi percutit anum ad columnam. Cy. tamen et aliis Doct. nostris placet quod istud de columna non teneat, quia oculus videntium infestatur, et est res mali exempli (c.o.)'.

³¹ A.J. Toynbee, *Hannibal's legacy* (Oxford 1965) II 417.

³² Jacobus de Ravanis, *Lectura super codice* fol. 369va [Cod. 7.71.1 *Qui bonis*]: 'Nescio si glosa vult dicere quod ita sit in Lombardia. Ego nescio quia ego non vidi eam. Lex ista bene dicit quod si non cederet bonis debitor, quod incarcerationetur. Sed quod daretur post lx dies creditoribus lacerandus hoc non habemus'.

treatment and humiliation of debtors was practised in Rome long after the Twelve Tables.³³

3. *The right to bankruptcy*

According to Justinian, the choice between *cessio bonorum* and the allegedly more humane alternative of a moratorium was to be left to a majority of the creditors (Cod. 7.71.8). Accursius reaffirmed that the choice between *cessio bonorum* and a moratorium belonged to the creditors.³⁴ By so doing, Accursius transformed Roman *cessio bonorum* from a means of debtors' protection into a creditors' remedy, since a medieval debtor who had enjoyed a five-year moratorium was no longer eligible for *cessio*; he would be forced to go to jail.³⁵ A minority of Glossators, including Azo and Franciscus Accursius showed more sympathy for the debtor by returning the choice to him; this became the majority view under Révigny and the Commentators.³⁶ Cynus and other 'moderni' detected injustice in Accursius (senior)'s solution, which permitted creditors to defraud debtors of the benefit of *cessio bonorum*.³⁷ Similarly, as indicated, Bartolus left the choice to the debtor, to maximize these benefits. The majority view represented the modern approach to bankruptcy as a means of protecting insolvents. Bartolus's sympathy for debtors, which he makes explicit elsewhere under canonical influence, was still centuries in advance of English law, where creditor approval for bank-

³³ *Scriptores Historiae Augustae*, Hadrian 18.9 (London and Cambridge, Mass. 1921) 56.

³⁴ Accursius, *Glossa ordinaria* [Cod. 7.71.8 *Cum solito v. Inducias*]: 'Et sic est in creditorum electione...'; cf. Jacobus de Ravanis, *Lectura* fol. 370ra [Cod. 7.71.8 *Cum solito*]: 'Credo quod immo posset cedere, quia alias est in voluntate creditorum ei auferre beneficium cessionis. Quia glo. dicit quod creditores habent electionem quod admittant cessionem, vel dent ei inducias quinquennales'.

³⁵ Accursius, *Glossa ordinaria* [Cod. 7.71.8 *Cum solito v. generando*]: 'Item et si quinquennio hoc transacto velit debitor cedere bonis, an auditur? Respondeo non, sed erit incarcerandus'.

³⁶ Bartolus, *Commentaria ad libros codicis in Opera omnia* (Venice 1615) VIII fol. 88rb (Cod. 7.71.8 *Cum solito*): 'Azo videtur tenere in Summa, quod ista electio datur creditoribus ab ipso debitore si vult, non aliter. Et idem tenebat Fran. Accur. supra eo l. Legis (Cod. 7.71.4) in princ. Nam legis beneficio statutum est, quod admitteretur cessio bonorum et sic beneficium est ampliandum'.

³⁷ Cynus, *In codicem commentaria* fol. 477va [Cod. 7.71.8 *Cum solito*]: 'Videtur glos. hic dicere sit in electione creditoris. Sed si hoc esset, sequeretur iniquum; quia sic esset in potestate creditorum debitorem cessionis beneficio defraudare... [I]ntelligunt moderni Doctores. quod hoc sit in potestate debitoris...'.

ruptcy was required as late as 1705.³⁸

The Glossators believed that the right to bankruptcy could be waived; canonists led the Commentators to reverse this view. Jacobus de Arena (d. 1296) reportedly claimed that *cessio bonorum* could be renounced in advance, 'especially by oath'.³⁹ Jacobus argued that renunciation by oath was binding by natural law and hence took precedence over *cessio bonorum*, which was merely a provision of positive law. An insolvent who had been forced to waive his right to bankruptcy in advance would have been subject to the debtor's ban or imprisonment.

In order to refute this, Cynus and later Commentators relied on canonical authority, known through Dynus de Mugello (1253-98). Cynus opposed debtors' prison on humanitarian grounds. The somewhat muddled *reportatio* of Baldus's Codex lectures claims that waivers were invalid to the extent that they might lead to imprisonment of a debtor.⁴⁰

4. The medieval discharge

The discharge of debts is the earmark of modern Anglo-American bankruptcy. It is intended to provide the 'honest but unfortunate debtor' 'with a new opportunity in life and a clear field in future effort, unhampered by the pressure and discouragement of a pre-existing debt'.⁴¹ Blackstone traces the common law discharge to civil law.⁴² Although the discharge provisions of medieval civil law were considerably less generous than those afforded by American or British law, they did alleviate the im-

³⁸ Bartolus, *In primam digesti novi partem* in *Opera omnia* IV fol. 121va [Dig. 42.3.3 *Is qui bonis*]: 'Dicit Dyn. hic speciale, uel aliter cessio bonorum non fuit actus obligatorius inductus in debitoris fauorem, ideo potest poenitere, si uult'. (Thus MS Vat. lat. 2600 fol. 105vb. The Venice edition has 'obligatorius sed inductus'). Cf. Duffy, 'English bankrupts' 288 n. 32.

³⁹ Baldus, *Super libris codicis* fol. 117vb-118ra § 13 [Cod. 7.71.1 *Quis bonis*]: '...Et videtur quod utroque tempore possit renunciari, praesertim cum iuramento. Nam iuramentum est de iure naturali, quod est potentius quam ius civile, quod inducit cessionem bonorum quod est mere positivum. Item contra ius istud valet statutum civitatis. Ergo et pactum ...et istam opi. tenet Iac(obus) de Are(na)'.

⁴⁰ Ibid. 'Dyn. autem tenet contrarium, quia dicit, quod contra naturalem aequitatem est carceris squalor... Et hanc opin(ionem) tamquam humaniorem sequitur Cy(nus) et etiam Canonistae ut (X 3.23.3)... Tu concordas istas opi(niones) et dicas quod aut quaeritur quantum ad effectum carceris et non tenet renunciatio, quia non interest creditoris debitorem in carcere mori, et quia carcer non debet esse poena, sed custodia aut...'. (MS Vat. lat. 2294 fol. 158vb).

⁴¹ *Local Loan Company v. Hunt* 292 U.S. 234, 244 (1934).

⁴² See n. 4 supra.

mediate burden of debt and allowed the debtor to reestablish his credit.⁴³ To this extent we may speak of *cessio bonorum* as providing a discharge.

The Glossators noted several benefits for the *cedens*. First he had a defence against further actions unless he acquired significant assets.⁴⁴ The most important benefit was exemption from imprisonment. (Cod. 7.71.1). Accursius ignored this advantage, over-optimistically believing that debtors' prison had given way to the debtors' ban in his day.⁴⁵ Debtors' prison was more enduring than Accursius would suggest. With the growth of trade and travel in thirteenth- and fourteenth-century Italy, the ban was too lenient on debtors. Jacobus Butrigarius (c.1274-1348) and Baldus saw the debtors' ban as a preliminary to, rather than as a successor of imprisonment for debt.⁴⁶ Even private imprisonment, at least for sureties, persisted in Bologna,⁴⁷ and while Baldus objected to private imprisonment of debtors, he had to accept public imprisonment.⁴⁸ According to Baldus, *cessio bonorum* did allow debtors to escape imprisonment, unless local statutes were opposed.⁴⁹ The reference was surely to Bologna itself.⁵⁰

Canon law probably hastened acceptance of *cessio bonorum* in all courts. Pope Gregory IX mitigated the harsh effects of excommunication

⁴³ See n. 67 *infra*.

⁴⁴ Accursius, *Glossa ordinaria* Cod. 7.71.1 *Qui bonis v. In eo*.

⁴⁵ Accursius, *Glossa ordinaria* [Cod. 7.71.1 *Qui bonis v. Incarcerem*]: 'Si ergo non credit bonis, videtur in carcerem pro debito poni. Et sic videtur contra supra de act(ionibus) et oblig(ationibus) l. Ob aes (Cod. 4.10.12) in fin. Sed hoc fit auctoritate iudicis. Vel non fit hinc servus, sed nec servit. Sed loco carceris hodie ponitur in banno. Et facit *infra* de pign(oriis) l. 1 (Cod. 8.13.1)'.

⁴⁶ Jacobus Butrigarius, *Super codice* (Paris 1516; rp. Bologna 1973) fol. 60vb [Cod. 7.71.1 *Qui bonis cesserunt*]: 'Verum glo. dicit quod bannum successit loco carceris quod non est verum. Quia bannum est praeparatorium carceris, quia primo bannit, postea potest carcerari. Jaco. Butrig.'; Baldus, *Super libris codicis* fol. 117va § 8 [Cod. 7.71.1 *Qui bonis cesserint*]: 'Quaero, numquid sit vera glo. quae dicit quod loco carceris hodie debitor ponatur in banno? Et sic bannum successit loco carceris, quod non est verum secundum But. quia primo bannit postea carceratur, si personaliter invenitur. Et tamen bannum non confunditur cum carcere, si continet pecuniariam poenam: quia detinetur in carcere propter poenam et propter sortem'.

⁴⁷ Bologna, Statutes 1252: Planitz, 'Schuldbann' 251 n. 8.

⁴⁸ Baldus, *Super libris codicis* fol. 117va § 3 [Cod. 7.71.1 *Qui bonis cesserint*]: '...bene valet statutum quod in carcere publico detineatur, sed non quod detineatur in carcere privato'.

⁴⁹ *Ibid.*: 'Quaero, si statutum dicit quod instrumenta guarentigiae mandentur executioni per carcerem, et quamvis alia via quae magis placuerit creditori, numquid debitor ne carceretur, bonis cedere possit? Respondeo sic, nisi statutum nominatim aliud in contrarium disponat (c.o.)'.

⁵⁰ See n. 27 *supra*.

of debtors by allowing insolvents to post a 'suitable security' for their debts (X 3.23.3 *Odoardus*). The reasoning behind this was perhaps that a debtor excommunicated for his contumacy should not be reconciled to the Church without some token of submission. Hostiensis permitted insolvents to escape their debts through the process of *cessio bonorum* by translating Gregory's 'suitable security' into a mere promise to pay if assets should later become available after *cessio*:⁵¹

In this case I understand generally that 'suitable' (security) means an oath, since from the fact that he declares *cessio bonorum*, it is indicated that he could not offer more, and therefore he does what he can.

Hostiensis's acceptance of *cessio bonorum* comes at a time when ecclesiastical courts were increasingly being used to obtain or execute judgments against debtors.⁵² From a canonical point of view this created a problem, for excommunication imperilled a debtor's soul for failing to do something which was not after all in his power to do. By accepting a mere oath as security, Hostiensis employed a common dodge to reform the law; he preserved the form of the law while changing its substance. Insolvents in ecclesiastical courts could satisfy Gregory's requirements and still enjoy a discharge of their debts.

Strictly speaking, even token security was not an alleviation of civil law requirements, since Roman law did not require any security at all. Nevertheless civilians noted this interpretation and cited a possible Roman parallel.⁵³ At a time when *cessio bonorum* was still prohibited by some municipal law, Hostiensis provided authority for the legitimacy of the discharge.

⁵¹ Hostiensis, *Decretalium commentaria* (Venice 1581; rp. Turin 1965) fol. 76v [X 3.23.3 *Adardus* (!) v. *Idonea*]: 'i.e. fideiussoria vel pignoratitia (c.o.). Alias si nec fideiussores dare potest, sufficere debet iuratoria (c.o.). Vel faciet fidem per iuramentum quia non potest dare fideiussores (c.o.) secundum B(ernardus Parmensis) et Goff(redus). Ego intelligo in hoc casu indistincte idonea i.e. iuratoria, quia ex quo cedit bonis, satis notum est, quod non potest aliam exhibere, faciat igitur quod potest, xxii q.v. (*recte* q. 2 c. 15) Faciat'.

⁵² On the growth of ecclesiastical jurisdiction see W. Trusen, 'Die gelehrte Gerichtsbarkeit der Kirche', in Coing, *Handbuch* I 467, 472.

⁵³ Cynus, *In codicem commentaria* fol. 476vb [Cod. 7.71.1 *Qui bonis*]: 'Canonistae tamen dicunt, quod ille, qui cedit bonis, debet satisfacere de solvendo, si pervenerit ad pinguiorem fortunam. Quod intelligo, si potest. Si autem non potest, sufficeret cavere verbaliter, ut ff. de iudic. l. 2 § pen. (Dig. 5.1.2.6)'.

5. Exemptions

a) *Pre-bankruptcy assets*

Neither the Glossators nor the Commentators allowed the *cedens* to retain substantial assets from pre-*cessio* property. The Commentators began to relax the strict requirements of a total surrender advocated by the Glossators. Accursius argued that a bankrupt must surrender his last penny; after-acquired assets were perhaps another story.⁵⁴ Some *doctores* wanted to exact the last stitch of clothing off the back of the *cedens*.⁵⁵ But Cynus favored a small exemption, consisting of the barest necessities, and on this basis the first exemption was created.⁵⁶

Jacques de Révigny rejected all arguments for an exemption, favoring instead a total surrender.⁵⁷ However, Cynus and Bartolus relied on the more generous views of Dynus de Mugello and Pierre de Belleperche.⁵⁸ Cynus reports that this modest exemption should be extended to all contract debtors gone bankrupt, since these benefits were allowed 'for the sake of humanity'.

Baldus's views are again obscured by the *reportatio*.⁵⁹ This seems to

⁵⁴ Accursius, *Glossa ordinaria* [Dig. 42.3.8 *Qui cedit v. Non debet*]: 'Item no. quod omnibus debet cedere, ut etiam unum denarium non retineat; licet in postquaesitis sit secus (c.o.)'.

⁵⁵ Cynus, *In codicem commentaria* fol. 476vb § 4 [Cod. 7.71.1 *Qui bonis*]: 'Doctores dicunt quod omnibus bonis usque ad ultimum quadrantem, ita quod nudus evadat, et ita vidi fieri de facto (c.o.) Sed videtur contra ut ... (Dig. 20.1.6). Praeterea in delictis, cum aliquis condemnatur et deducitur ad supplicium, relinquunt sibi pannicularia, zonam et viles vestes. (c.o.). Ergo multo magis in contractibus (c.o.). Quid ergo dicemus? Dicunt Doctores, quod praeall. l. Obligatione (Dig. 20.1.6) non obst(et), quia ibi ex voluntate venit ad contractum faciendum, sed hinc de necessitate venit ad cessionem recipiendum, ideo etc.'.

⁵⁶ Ibid. 'Ad l. Divius (Dig. 48.20.6) dicunt quidam quod aliud in delictis, et aliud in contractibus, ut ff. de neg(otiis) gest(is) l. Divortio (Dig. 3.5.34), Ibi plene erit etc. Sed cur diversum? Non est ratio bona. Unde quidam moderni dicunt, et bene, quod humanitatis gratia aliquae vestes relinquendae sunt, sicut delinquentibus, et ductis ad supplicium, et in hac sententia fuerunt Dynus et Pet(rus de Bellepertica)'.

⁵⁷ Jacobus de Ravanis, *Lectura* fol. 369v [Cod. 7.71.1 *Qui bonis*]: 'Illa lex dicit quod vestis relinquenda est debitori. ...Dico tamen immo usque ad ultimum quadrantem excutiendus est'.

⁵⁸ See n. 56 supra. Bartolus, *In secundum infortiati partem: Opera omnia* IV fol. 121vb § 5 [Dig. 42.3.8 *Qui cedit bonis*]: 'Quaero quando aliquis cedit bonis, an debet sibi remanere aliquid? Dicit glo. quod non, imo nudus exulat. Dy(nus) et Pet(rus) reprobant istam gl. quod non debeat ire ita nudus, immo saltem pannis debeat sibi remanere'.

⁵⁹ Baldus, *Super libris codicis* fol. 118vb § 5 [Cod. 7.71.8 *Cum solito*]: 'Quaero, quid si cedens bonis reservavit sibi unum denarium? Respondeo, si creditores id misericordiae

say that strictly speaking, the *cedens* could retain nothing, even with his creditors' permission or the surrender would be incomplete. However, an abbot might allow charitable donations to a monk for the necessities of life as an act of mercy.⁶⁰ The canonical precedent, like many civilian arguments, had nothing to do with *cessio bonorum*.⁶¹ The implication, however, was that the letter of the law should not prevent creditors from showing mercy to insolvents.

b) *After-acquired assets*

Ulpian was an early proponent of exemptions for property acquired after *cessio bonorum* (Dig. 42.3.6). But even in Justinian's time this was not taken as a firm right.⁶²

Accursius limits post-bankruptcy exemptions to the necessities of life ('ne egeat').⁶³ By contrast, other debtors, who had not made *cessio*, could retain more than mere necessities; they were required to sell only those assets which they could dispose of comfortably ('commode') without losing their dignity. For example, an impecunious scholar was not expected to sell his books nor a soldier his arms. Baldus transferred these exemptions from judgment-debtors to bankrupts. By limiting new executions to what a *cedens* could comfortably sell without losing his dignity, Baldus created an exemption for after-acquired tools of trade.⁶⁴ Thus the bankrupt scholar could retain books acquired after *cessio*, or a soldier his arms or a cleric a newly-acquired breviary.⁶⁵ The *cedens* could also retain a home consistent with his feudal rank and dignity. For a peasant this

causa concesserunt, valet cessio et reservatio ut ff. eod. l. Qui bonis suis (Dig. 42.3.6). Alias non valet cessio [...] Prima vereor [?] ed. verior], quia non est integra cessio, ut not. ff. eodem l. penult. (Dig. 42.3.8)'.

⁶⁰ Ibid. 'Dicit decretalis (X 3.35.6?) quod Abbas potest aliqua reservare monacho ad suas necessitates misericordiae, non peculii causa, quia est reservatio naturali iure concessa, sicut alimentia'.

⁶¹ (Since a monk has no property of his own to surrender). Similarly in the text quoted n. 55 supra, Cynus argues that a debtor need not surrender his garments because he had not pledged them. ('Sed videtur contra ut... [Dig. 20.1.6]'). But it is irrelevant whether or not a debtor has pledged his garments, since all property, whether pledged or not, must be surrendered in *cessio bonorum*.

⁶² David Daube, 'Zur Palingenesie einiger Klassikerfragmente', ZRG Rom. Abt. 67 (1959) 149, 254 n. 350.

⁶³ Accursius, *Glossa ordinaria* [Dig. 42.3.6 *Qui bonis v. satis est*]: 'In quantum ergo facere potest deducto ne egeat condemnatur...'.

⁶⁴ Ibid.: Dig. 50.16.125 *Nepos v. alieno potero*.

⁶⁵ Baldus, *Super libris codicis* fol. 117ra [Cod. 7.71 (rubrica)].

meant a simple shack, but a noble was entitled to retain a newly-acquired tower in order to maintain his life-style after *cessio bonorum*.⁶⁶

c) *A fresh start*

The discharge and exemption provisions for the *cedens* were not the only pro-debtor innovations. The Commentators also altered the priority of debts incurred after *cessio*. According to Cynus, post-bankruptcy creditors were to be given priority over pre-bankruptcy creditors.⁶⁷ The effect of this preference was to allow the bankrupt to reestablish his credit after *cessio bonorum*, since creditors would have been more inclined to extend fresh loans. The *cedens*, like the Anglo-American bankrupt, was getting a 'fresh start'.

6. *Avoidance of specific performance contracts*

Even in cities where *cessio bonorum* was permitted, not every contract was dischargeable. Pre-bankruptcy personal service contracts had to be performed even after the discharge, according to Italian and French writers. The classic example for specific performance was the scribe who had promised to produce a book. Subsequently he made *cessio*. Did he have to perform his contract?⁶⁸ Révigny and others demanded performance, if necessary in chains.⁶⁹

French opposition to discharging specific performance contracts was only another aspect of their opposition to contract debtors in general declaring bankruptcy. Yet even Cynus, despite his plea for small exemptions for contract debtors, preserved the French bias against discharging specific performance contracts: 'Customary law agrees with our law'.⁷⁰

⁶⁶ Ibid. fol. 119ra § 6 [Cod. 7.71.8 *Cum solito*]: 'Et iniquum esset, quod unus rusticus habitaret unam turrim in damnum creditoris, quod esset aequum in nobili et ideo arbitrium (c.o.)'.

⁶⁷ Cynus. *In codicem commentaria* fol. 477vb § 3 [Cod. 7.72.3 *Ex contractu*]: 'Secundo quaero, pone quod in bonis postea quaesitis concurrat creditor, qui fuit ante cessio-nem et creditor qui fuit post, quis praefertur? Videtur quod creditor qui postea contraxit ut ... (Dig. 14.5.3)'.

⁶⁸ Guilelmus de Cugno, *Lectura super codice* (Paris 1512; rp. Bologna 1968) fol. 93r [Cod. 7.71.1 *Qui bonis*]: 'Dico quod in obligationibus faciendi in quibus requiruntur industria personae non liberatur quis cedendo extimationem'.

⁶⁹ Jacobus de Ravanis, *Lectura* fol. 369v [Cod. 7.71.1 *Qui bonis*]: 'Immo compellere-tur praecise ad factum. Et intelligo quod ponitur in compedibus'.

⁷⁰ Cynus, *In codicem commentaria* fol. 476vb § 2 [Cod. 7.71.1 *Qui bonis*]: 'At ubi est obligatus ad tale factum, tunc si cederet bonis, bona non possent facere. Unde in isto casu,

A new attitude occurs only with Bartolus. Bartolus initially accepted the ultramontane view that *cessio bonorum* did not excuse personal service obligations; his objections went deeper. What Bartolus opposed was specific performance itself. Having considered the cases in which specific performance might lie, he drew a distinction between statutory obligations ('obligatione legis') and personal ones ('obligatione hominis'). Statutory obligations, and wills and mandates, must be specifically performed. But for personal obligations such as contracts, 'the defendant is released by tendering damages, lest the plaintiff obtain more than he had suffered'.⁷¹

As far as specific performance is concerned, Bartolus saw no difference between personal service and other contracts (e.g. contracts of sale), nor any difference between the personal services of scholars and other people. By cross-referencing his comments on specific performance and *cessio bonorum*, he implied that bankruptcy dissolved personal service contracts, since such contracts were convertible into money damages, and thereby dischargeable as a debt.⁷² French civilians had known this argument and rejected it.⁷³

Baldus's views were more conservative, permitting avoidance of personal service contracts only in cases where the debtor was unable to perform. In this case the loss could be converted into damages and discharged.⁷⁴ Baldus, unlike Bartolus, seems to have placed the burden of proof on the debtor to show that he could not perform. If he could not, the contract was discharged by *cessio bonorum*.

cessio bonorum non adiuuat debitorem, imo praecise cogetur ad factum, stando in compedibus, et ideo consuetudo illa, qua scriptor cogitur scribere, et in compedibus ponitur, iuri nostro est consona (c.o.)'.

⁷¹ Bartolus, *Commentaria in secundum digesti novi* in *Opera* IV fol. 27va § 34 [Dig. 45.1.72 *Stipulationes*]: 'reus liberetur praestando interesse, ne actor consequatur plus quam intersit... et ista sit ratio in obligatione hominis. Sed in obligatione legis, ex quo lex obligat quem ad factum lex hoc inducit ex sua aequitate vel rigore, nec curat utrum interest, unde ... (Dig. 39.1.1 pr.). Ideo praecise compellitur ad factum. Ex praedictis patet quod distinctio illorum, qui dicunt aut est electa industria, vel non in obligatione hominis, male dicunt, quia ibi est eadem ratio, et scriptor non ponetur in compedibus nisi diceret speciale favore studii, et publici utilitatis, quod non videtur mente iuris'.

⁷² Bartolus, *Commentaria in digestum novum* in *Opera omnia* IV fol. 121va [Dig. 42.3.4.1 *Is qui bonis § Sabinus*]: 'sed non puto verum, quod dicunt, quod compellatur praecise, ubicumque est electa industria personae, quod plene scribo in ... (Dig. 45.1.72)'.

⁷³ See n. 68 supra.

⁷⁴ Baldus, *Super libris codicis* fol. 117va § 5 [Cod. 7.71.1 *Qui bonis cesserint*]: 'Quaero, an obligatus praecise ad factum, liberetur cedendo bonis, exemplum in scriptore? Respondeo non, ut ... (Dig. 39.1.21.2). Quod intellige, si habet facultatem faciendi, alias propter impossibilitatem venit ad interesse, et sic habet locum cessio'.

7. *Distribution of the estate*

The discharge, exemptions and 'fresh start' reflect the debtor's interest in bankruptcy. But bankruptcy also serves the interest of creditors by dividing the debtor's insufficient assets among multiple claimants on the basis of fairness rather than diligence. In order to distribute the bankrupt's estate more fairly, Roman law, like modern American and civil law,⁷⁵ established ranks among the creditors, giving first priority to 'secured creditors', second priority to privileged creditors and third rank to others. The principal contribution of the Commentators was in establishing the priority of secured creditors.

At modern American law, a security interest represents specific property in which the creditor has a lien.⁷⁶ American secured creditors can rely on their security interest, despite a discharge in bankruptcy, provided they have 'perfected' it more than three months before filing of the bankruptcy petition either through registration under state recording acts (for real property) or, in the case of moveables, by possession or filing with the appropriate service. Only unperfected security interests or improperly recorded liens on real property may be voided by the bankruptcy trustee in favor of the bankruptcy estate.⁷⁷ By contrast, the Roman law curator mentioned in Gaius (3.79) and the Digest (42.7.5) had no choice but to ignore numerous security agreements because Roman property was inevitably overencumbered by secured creditors.

a) *Roman law*

Under Justinian, assets were distributed pro-rata among creditors (Cod. 7.72.10.1). This may also have been true in classical Roman law, although the relevant text is partially interpolated (Dig. 12.6.61 [Scaevola]). Even the Twelve Tables, as reported by Gellius, which excused creditors for taking more than their share of the debtor's body, imply a crude awareness of rateable distribution.

Rateable distribution assumes creditors of equal standing. Roman law also developed the more sophisticated notion of priorities among creditors. Reconstruction of the Roman system of priorities is difficult be-

⁷⁵ U.S. Bankruptcy Reform Act (1978) §§ 506, 507, 726; Italian Bankruptcy Code (Fallimento e procedura concorsuali) Art. 53-4.

⁷⁶ U.S. Bankruptcy Reform Act § 506.

⁷⁷ Ibid. § 544.

cause the Roman law of real security was itself confused. Over its long history, Roman law developed several forms of possessory and non-possessory security for debts.⁷⁸ The *pignus* was originally a possessory pledge (Dig. 13.7.92; Inst. 4.6.7), which became non-possessory at the creditor's sufferance or by lease after A.D. 175. The *pignus* thus became practically indistinguishable from the later non-possessory *hypothec* (Dig. 20.1.5.1; Inst. 4.6.7).

Although a Roman pledge could be 'special', that is identified with specific property or rights, usually it was 'general', in all the property or rights of the debtor.⁷⁹ Due to the fact that a creditor could not identify his security with specific property, the debtor's estate was frequently overencumbered. The danger of overencumbrance was aggravated by the absence of a recordation system for hypothecs⁸⁰ and by the multiplication of liens created by operation of law (so-called 'tacit hypothecs').

The basic priority rule for multiple pledges was 'first in time, first in right' (Dig. 20.4.11pr; Cod. 8.17.3).⁸¹ However, an express hypothec over all of the debtor's property could be subordinated to a junior lien created by a purchase money mortgage to acquire new assets (Cod. 8.17.7).

The introduction of recordation of liens gave creditors a means of ascertaining whether property was already encumbered before they extended credit on it. But this advantage was negated by the priority given to 'tacit liens' created (in Bulgarus's phrase) 'by operation of law' ('ex auctoritate legis').⁸² Tacit hypothecs did not require the express consent of the debtor; a modern example would be a mechanic's lien. The earliest Roman tacit hypothec was that given a ward over property controlled by

⁷⁸ R.J. Goebel, 'Reconstructing the Roman law of real security', *Tulane law review* 36 (1961) 29.

⁷⁹ W.W. Buckland, *Textbook of Roman law* (2nd ed. Cambridge 1932) 470; H. Wagner, *Entwicklung der Legalthypothecken* (Cologne-Vienna 1974) 173.

⁸⁰ Cod. 8.17.11.1 (472) first provided for registration of hypothecs. M. Kaser, *Das römische Privatrecht II* (2nd ed. Munich 1975) 318 n. 35.

⁸¹ Buckland, *Textbook* 479; Kaser, *Das römische Privatrecht I* (2nd ed. Munich 1971) 467 n. 45.

⁸² Azo, *Lectura super codicem* p. 634 § 6 [Cod. 8.17.12 *Adsiduis v. Contra omnes*]: 'B(ulgarus) distinxit utrum prior creditor habeat pignus ex auctoritate legis, ut pupillus in bonis tutoris et in multis aliis casibus... (Cod. 8.14) an ex conventionione. Si legis auctoritate, praefertur ei mulier, per istam legem, quia privilegium quod lex dat, a lege auferri potest. ... Si vero prior creditor habeat pignus ex conventionione, sive traditum fuerit pignus sive non, nequaquam praefertur mulier, imo ipse creditor qui prior est tempore, sicut ille qui habet expressam hypothecam priorem, praefertur fisco ut ff eo. Si pignus (Dig. 20.4.8)'.

his guardian (Dig. 20.2.10). Later, tacit hypothecs were created for rural and urban landlords over moveables brought onto property as security for unpaid rents (Dig. 20.2.3-4).⁸³

The position of the secured creditor was further undermined by the multiplication of 'privileged' creditors, including (i) the fisc (Dig. 49.14.6; Cod. 4.46.1);⁸⁴ (ii) those extending loans to repair ships (Dig. 20.4.5; 42.5.26 and 34) and buildings (Dig. 12.1.25) or to preserve and transport merchandise (Dig. 20.4.6);⁸⁵ (iii) creditors for funeral expenses (Dig. 11.17.45; 42.5.17); (iv) fiancées seeking return of their dowries (Dig. 42.5.17.1); (v) wards against unauthorized guardians (Dig. 42.5.19.1) and others.

Priority among privileged creditors was regulated in part by the Praetor's Edict.⁸⁶ Under Justinian there was a tendency to merge privileges and tacit hypothecs,⁸⁷ but no unified system of priorities emerged. Neither medieval nor modern scholars have been able to divine a coherent system of priorities ordering hypothecs and privileges.⁸⁸

In the eyes of some historians, the greatest obstacle to an equitable distribution of assets was a reform of Justinian's. In order to further his policy of protecting wives, Justinian converted the wife's personal action for her dowry into a tacit hypothec (Inst. 4.6.29). Further, he gave women with claims to dowries priority over all other creditors, even those prior in time. Cod. 8.17.12.4 *Adsiduis*.⁸⁹

Reviewing everything we have done, including two other constitutions which we have made to preserve wives' dowries, and consolidating all these things, we decree that we give an *actio ex stipulatu*, which is now to be instituted by wives for their dowry. To this we also add a tacit hypothec, with prior rights against all of the husband's creditors, even though they be supported by a privilege prior in time.

Modern historians have quipped that Justinian, having ruined the credit of married men, went on to ruin the credit of bachelors as well.⁹⁰

⁸³ B.W. Frier, *Landlords and tenants in imperial Rome* (Princeton 1980) 107.

⁸⁴ Kaser, *Zivilprozessrecht* 314 n. 10.

⁸⁵ Buckland, *Textbook* 480.

⁸⁶ O. Lenel, *Edictum Perpetuum* (3rd ed. Leipzig 1927) 429.

⁸⁷ Kaser, *Das römische Privatrecht* II 313, 316 n. 7.

⁸⁸ Kaser questions how such a 'kreditfeindliche Pfandrechtsordnung' could have survived: *ibid.* 313.

⁸⁹ The advantage of the action *ex stipulatu* was that the wife was not forced to choose between the dowry and her legacy. She could have both.

⁹⁰ B. Nicholas, *Introduction to Roman law* (Oxford 1962) 89; Goebel (n. 78 *supra*) 29.

In reality, the effects of Justinian's legislation remain unclear, since he does not address conflicts between tacit hypothecs and express ones, nor does he say whether a wife's tacit hypothec applied to a husband's pre-marital property or only to post-marital assets. These are precisely the questions which medieval Roman lawyers hoped to resolve.

b) *Medieval Roman law*

The first attempt in the West to construct a commercially viable system of priorities among lien holders can be traced to the celebrated Bolognese glossator Bulgarus (d. 1166). Bulgarus, an avowed proponent of strict construction (*ius strictum*),⁹¹ opposed the absolute priority which Justinian seemed to have allowed to wives with dowries over prior secured creditors of husbands.

Bulgarus's arch-rival in this, as in other interpretations of Roman law, was Martinus (fl. 1150). Martinus, reputed to be the greatest advocate of equity (*aequitas*) among the Glossators, lived and died scorned by Bulgarus's school for taking liberties with Justinian.⁹² It is therefore ironic that the absolute priority of dowries which modern historians have deplored in Justinian, was in fact expounded by Martinus, and that his doctrine should have been combatted by the strict constructionist Bulgarus.

Justinian had said tacit hypothecs of wives had priority over 'all the husband's creditors' (Cod. 8.17.12) and Martinus took him at his word. He favored wives over all creditors with tacit *and* express hypothecs.⁹³ This preference was scarcely conducive to the credit operations of the expanding medieval commercial economy. Perhaps Martinus, whose work betrays other traces of less developed Germanic law,⁹⁴ was out of touch with these developments. His views nevertheless held their own well into the fourteenth century. Some of his thirteenth-century followers did compromise to allow exceptions for the fisc, credits to soldiers

⁹¹ H. Kantorowicz, *Studies in the Glossators* (Cambridge 1938) 87.

⁹² Ibid. 88.

⁹³ Azo, *Lectura* p. 634 § 6 [Cod. 8.17.12 *Adsiduis v. Contra Omnes*]: 'M(artinus) indistincte intellexit quod omnibus prioribus creditoribus praeferetur, sive habentibus tacitas sive expressas hypothecas. Sed ei videtur contradicere supra de iure dot(ium) l. Ubi (Cod. 5.12.29) quia ibi distinguit'.

⁹⁴ Kantorowicz, *Studies* 88.

and to children by a previous marriage.⁹⁵ But Martinus's basic argument survived until the Commentators.

The alternative view, attributed to Bulgarus, reduced the wife's privilege to a priority among tacit hypothec holders only; she could not be placed before those with express hypothecs.⁹⁶

Among the later interpreters, the *Glossa ordinaria* is ambiguous, reflecting Accursius's bipartisan tendencies. Having faithfully recounted the biases of Martinus and Bulgarus, the *Glossa* meanders inconclusively through the conflicting arguments, suggesting first that the wife's tacit hypothec is prior and then that it is subordinate to express hypothecs.⁹⁷ The *Glossa* indicates that the wife's tacit hypothec may be only a personal privilege and consequently subordinate to express hypothecs, only to backtrack a few lines later. Clearly, scholars were still struggling to devise a coherent system during the thirteenth century for the distribution of assets after *cessio bonorum*.

Once again, the French school provides some basis for future developments, by suggesting that the former wife's rights be limited to her actual property.⁹⁸ However, this left unanswered the problem of conflicts over property which had been inseparably merged with the husband's assets. Révigny notes the law's preference for dowries, although with less enthusiasm than earlier jurists had shown.

During the late thirteenth and fourteenth centuries the privileged position of dowries remained controversial. Accursius and Dynus followed Bulgarus, Jacobus de Aregna followed Martinus.⁹⁹ Cynus's position was ambiguous, but in the end he seems to have upheld Martinus's view, preferring wives with tacit hypothecs to all creditors, including the fisc, not-

⁹⁵ Azo, *Lectura* p. 392 § 6 [Cod. 5.12.39 *Ubi adhuc* v. *Secundum*]: 'Haec est legum distinctio secundum quosdam ut praefertur omnibus excepto fisco... (Cod. 7.73.2) et exceptis filiis prioris matrimonii. Excepto etiam creditore qui mutavit ad militiam emendam... (Cod. 8.13.27)'.

⁹⁶ Azo, *Lectura* (n. 82 supra).

⁹⁷ Accursius, *Glossa ordinaria*, Cod. 8.17.12 *Assiduis* v. *Licet anterioris sint*.

⁹⁸ Jacobus de Ravanis, *Lectura super codice* fol. 231rb [Cod. 5.12.30 *In rebus dotalibus*]: 'Dicit hic quod ista mulier soluto matrimonio, praerogativam habet portionem omnibus. Mulier in dote portionem omnibus indistincte quod dos sua non potuit obligari a marito. Sed dico quod <in> rebus mariti possunt alii esse potiores muliere<s>'.

⁹⁹ Cynus, *In codicem* fol. 495rb § 7 [Cod. 8.17.12 *Assiduis*]: 'Secundo quaeritur, utrum mulier praefertur omnibus creditoribus prioribus, sive tacitam sive expressam hypothecam habentibus? Mart(inus) dicit quod sic. Et ostenditur, verum esse, rationibus et arg(umentis)' (fol. 495va). 'Item non obstat, quod privilegia debemus interpretari sine praedicio aliorum, quia verum est si possumus, alias non'.

withstanding contemporary court practice.¹⁰⁰

Cynus's remark on court practice indicates a trend in favor of express hypothec holders despite the Glossators and the French school. Bartolus himself agreed with this trend, though he could offer no reason for doing so other than the authority of customary law¹⁰¹ and the advantage of certainty obtained by following well-established practice.¹⁰² Bartolus indicated the future direction of the law. His successors accepted his policy, though not his reasoning. They ignored the authority of customary law, presumably because customary law could have easily preferred tacit hypothecs or express ones. Bartolus's argument from 'certainty of interpretation' on the basis of entrenched custom was equally unconvincing. Mere tradition carried little weight for Baldus, an outspoken opponent of many older authorities.

Credit for providing a new legal basis for preferring express hypothecs over concealed ones goes to Baldus and his school. Baldus weighed the wife's property rights against another equally important legal interest: the right to rely on agreements. In modern terms, this was the inherent antimony between security of rights and security of transactions. Baldus felt the wife's (concealed) property rights were outweighed by the creditor's rights to security of contract (*pactum*).¹⁰³ The law would not

¹⁰⁰ Ibid. fol. 495va: 'Item non obstat, quia mulier et fiscus pariter ambulant. Quia hoc non est semper verum. Quandoque enim fiscus plus habet quam mulier, sic et quandoque mulier plus quam fiscus, maxime in casu isto, ubi est tantus favor Reipublicae, ut ... (Dig. 24.3.1). Credo quod ista sententia sit vera, quicquid servetur in iudiciis'.

¹⁰¹ Bartolus, *Commentaria* fol. 103ra § 6 [Cod. 8.17.12 *Adsiduis*]: 'Quaero et modo intro gl. magnam hic positam, utrum mulier praeferatur omnibus creditoribus et hypothecis. Triplex est opi(nio). Una quod praeferatur omnibus habentibus expressam vel tacitam. Alia est, quod praeferatur omnibus habentibus tacitam hypothecam. Secus in eo qui habet pignus constitutum ex traditione. Tertii dicunt quod mulier praeferatur omnibus habentibus tacitam, secus in habentibus expressam. Et istam opi(nionem) tertiam approbat gl. nostra et communis consuetudo eam tenet. Unde iudicare contra consuetudinem et quod semper habuit certam interpretationem est malum, ut ... (Dig. 1.3.23). Dicunt tamen ultra(montani) quod i. opi(nio) de iure est verior ut... (Inst. 4.6.29) et probatur per rationes positas in hac l(ege)'.

¹⁰² See Dig. 1.3.23 in context.

¹⁰³ Baldus, *Super libris codicis* fol. 148rb § 8 [Cod. 8.17.12 *Adsiduis*]: 'No. bene quia hic glo. concludit quod mulier habet tacitam hypothecam, et de hac loquitur haec lex. (§ 9) Item praefertur habentibus expressam posteriorem in tempore, sed non praefertur habentibus expressam priorem. Quia lex suum auxilium negat prioribus creditoribus mulierum favore, sed tunc non tollit quod partes sibi per pactum quaesierunt, et ista est vera sententia, et istam teneas, et hanc glossam, in actione funeraria ... (Dig. 11.7.45). Idem dicit esse in actione illa, quod in actione de dote, de qua hic. Secundo conclude, quod [§ 10] fiscus habens hypothecam, paribus passibus ambulat cum dote ... (Cod. 7.73.2) praefertur etiam habentibus hypothecam tacitam ex beneficio legis. Sed non vera opin(io) ut iam dixi, licet

deny creditors who had protected themselves by contract the benefit of their diligence, according to this school.¹⁰⁴

After Baldus, the question of preferring tacit hypothecs disappears from discussion. Stracca, in his *Treatise* on bankruptcy omits privileges and dowries because Baldus had dismissed them.¹⁰⁵

8. *Aftermath*

English bankruptcy has long been recognized as a civil law transplant. This survey has traced the creation of major elements of bankruptcy: the right to bankruptcy, the discharge and exemption provisions, the rateable distribution of assets and priorities based upon secured status rather than public policy. These developments were primarily the work of the Commentators Cynus, Bartolus and Baldus, who rejected many of the anti-debtor interpretations of Glossators like Martinus, Bulgarus, and Accursius. The canonists and French jurists often provided the inspiration for these reforms.

Like other transplants, including Common Law property law in America, *cessio bonorum* thrived in its new habitat, while withering in its native soil. During the sixteenth and seventeenth centuries, England and the Continent were moving in opposite directions as far as bankruptcy was concerned. In England, the earliest legislation, the Statute of 1543, was 'quasi-criminal'.¹⁰⁶ Originally creditor-oriented, 'for the aid, help and relief of creditors', according to Lord Coke,¹⁰⁷ English bankruptcy gradually became a means of debtor protection as well. In the seventeenth century, bills to make bankruptcy a felony were repeatedly rejected.¹⁰⁸ In 1711, much to Blackstone's later disapproval, the discharge was intro-

glo. hic dicat, quod anteriores creditores habentes tacitam, praeferantur fisco similiter habenti tacitam, quod est falsum, et ibi in authen. Quod obtinet (Cod. 8.14.27 Auth. = Nov. 53.5 = 97.4)...

¹⁰⁴ Ibid. 148rb § 5: 'Tbi creditores privilegiatos hypothecam tacitam habentes ex privilegio, non autem potuit denegare beneficium quod quis sua industria acquisivit faciendo sibi caveri de hypotheca expressa'. (This text does not appear in MS Vat. lat. 2294 fol. 190va and may be a student's gloss. Vat. lat. 2293 has Baldus's *Super libris codicis* through Book VII).

¹⁰⁵ Stracca, *Tractatus* 469 § 18: 'Verum quia Baldus de privilegiariis creditoribus non disseruit, nos etiam missam hanc quaestionem faciemus, et illam de dotibus'.

¹⁰⁶ Jones, *Foundations* 16.

¹⁰⁷ Coke, *Institutes* 4.277.

¹⁰⁸ Jones, *Foundations* 19-20.

duced, directly inspired by *cessio bonorum*.¹⁰⁹

In the same period, bankruptcy was progressively criminalized in France and Italy. In 1582, Tuscany, while under French influence, promulgated imprisonment of insolvents who could not prove good faith.¹¹⁰ In 1723, the year of Blackstone's birth, the Piedmont legislature made bankruptcy a crime *per se*, even without evidence of fraud. The term 'fraudulent bankruptcy' (*bancarotta fraudolenta*), heretofore unknown in Italy, was introduced in imitation of French legislation.¹¹¹

The availability of personal bankruptcy has also been reversed. Before introduction of the discharge provisions in England, bankruptcy was restricted to persons involved in trading, although this appears to have been interpreted loosely to include artisans and shopkeepers.¹¹² With some vagaries, personal bankruptcy was expanded throughout the eighteenth and nineteenth centuries in England.¹¹³

By contrast, *cessio bonorum* was originally available to most insolvents. Perhaps the closest thing to a restriction advocated by the Commentators was Baldus's suggestion that waivers by merchants are binding because of the ease with which they might conceal assets.¹¹⁴ In France, too, personal bankruptcy was permitted prior to the Revolution.¹¹⁵ But these provisions were eliminated after 1807 on Napoleon's insistence because 'les banqueroutes servent la fortune sans faire perdre l'honneur'.¹¹⁶

In modern France and Italy, personal bankruptcy is unknown.¹¹⁷ *La faillite*, *il fallimento* are *de iure* available only to firms and enterprises. In Germany, *Konkurs* is *de facto* applicable only to businesses due to

¹⁰⁹ See nn. 3-4 *supra*.

¹¹⁰ U. Santarelli, *Per la storia del fallimento* (Padova 1964) 152.

¹¹¹ *Ibid.* 153-4; Dupouy, *Droit de faillites* 68, 187.

¹¹² Duffy, 'English bankrupts' 292; Jones, *Foundations* 18.

¹¹³ Duffy 292-305.

¹¹⁴ Baldus, *Super libris codicis* fol. 117vb § 12 [Cod. 7.71.1 *Qui bonis cesserunt*]: 'Item pone, quod contrahitur cum mercatore, qui omnia bona sua habet in rebus mobilibus, et pecuniis, quas de facili possunt occultari, et ideo ut fraudibus occurratur, apponitur pactum, ne liceat cedere bonis. Nam nemo dicet istud pactum iustum non esse'.

¹¹⁵ H. Lévy-Bruhl, 'La faillite dans notre ancien droit. S'appliquait-elle aux non commerçants?', *RHD* 18 (1939) 89, 96, 102.

¹¹⁶ J.G. Locré, *La législation civile, commerciale et criminelle de la France* (Paris 1827-31) XIX 477, quoted in A. Padoa Schioppa, 'Napoleone e il *Code de Commerce*': *Diritto e potere nella storia europea*: Atti del quarto Congresso internazionale della Società di Storia del Diritto, in onore di Bruno Paradisi (Florence 1982) 1041, 1045.

¹¹⁷ 'La faillite personnelle' in the French *Code de Commerce* (III art. 1) is a sanction against insolvents, not a protection. Italy: *La lege fallimentare* Art. 1.

high costs.¹¹⁸ The absence of personal bankruptcy in these countries is due to post-Revolution French commercial legislation which became the basis for modern civil law bankruptcy.¹¹⁹ Italy, like others, adopted French commercial laws, ignoring, in the words of one Italian bankruptcy scholar, 'the rich patrimony of our traditions'.¹²⁰ The discharge, too, having passed into English law, vanished from Italy.¹²¹ As a result, continental bankruptcy law today is intended primarily to serve the needs of creditors. Perhaps a new wave of legal transplants will return the discharge to civil law.¹²²

Berkeley, California

¹¹⁸ German Federal Republic, *Konkursordnung* § 107.

¹¹⁹ R. Provinciali, *Trattato di diritto fallimentare* (Milan 1974) 70.

¹²⁰ *Ibid.* 32.

¹²¹ Italy, *La lege fallimentare* Art. 120.

¹²² H. Hanisch, *Rechtszuständigkeit der Konkursmasse* (Frankfurt 1973) 198 suggests similar treatment for natural and legal persons including a discharge of debts for individuals in bankruptcy. Hans-Peter Ackmann, *Schuldbefreiung durch Konkurs* (Bielefeld 1983).